Response to Comments Received During Tribal Consultation

Tribal consultation on the latest draft of the leasing regulations occurred during March and April of this year. We held three consultation sessions: Thursday, March 17, 2011 at the Reservation Economic Summit (RES) 2011 in Las Vegas; March 31, 2011 in Minnesota; and April 6, 2011, in Albuquerque, New Mexico. We requested that tribes submit written comments by April 18, 2011. We received written and oral comments from over 70 Indian tribes during tribal consultation. We plan to hold additional tribal consultation sessions, particularly in the geographic areas we were not able to reach prior to this proposed rule.

The following is a summary of tribal comments made during consultation and an explanation of how we addressed those comments in this proposed rule. This summary attempts to capture the major categories of comments. In many cases, tribal commenters requested specific wording changes that we incorporated into the regulation, but do not mention here.

Categories of Comments Received:

1. Overview
2. Format of Regulations
3. Definitions
4. Applicability of Laws
5. Lease Term, Holdovers, Right of First Refusal
6. Valuations and Fair Market Rental
7. Adjustments of Rent
8. Approvals and Timelines
9. Amendments, Assignments, Subleases, and Leasehold Mortgages
10. Consents
11. Permits
12. Residential Leases
13. Business Leases
14. Wind and Solar Leases
15. Mandatory Lease Provisions, Documents Required
16. Bonding & Insurance
17. Surveys
18. Enforcement
19. Due Diligence
20. Payment Provisions
21. Improvements
22. Applicability of Leasing Regulations
23. Compatible Uses
24. Appeals
25. General Provisions
26. Other Cross-Cutting Provisions

1. Overview

Many tribes stated that they supported the direction the regulations were moving, including the increase in accountability and transparency for BIA. On the other hand, tribes

opposed the perceived additional bureaucracy, as explained in more detail in the section on "Approvals and Timelines," below. We considered these general comments and revised these regulations with a view toward simplifying and reducing bureaucracy, while remaining transparent about procedures. Some tribes also stated that the draft regulations failed to strike a balance between protection of Indian land and promotion of tribal economy and self-governance. We have revised the regulations to better acknowledge tribal self-governance and control of tribal lands.

2. Format of Regulations

The consultation draft of the regulations attempted to make each subpart (residential, business, and wind and solar) as freestanding as possible for user-friendliness. The downsides to this approach are that there is some repetition among the subparts and the regulations are lengthier. We received tribal comments both in support of this format and in support of a format that would place all the common provisions in subpart A and include only those differing provisions in other subparts. To a large extent, we have retained the current format to retain the user-friendliness and minimize the need to cross reference the "General Provisions" subpart. We modified this format by moving provisions regarding how to initially obtain a lease, including landowner consent requirements, to the "General Provisions" subpart. This allows the reader of the regulation to get an overview of what is required to obtain a lease, and then delve into the specific requirements in the applicable subpart. Our revisions in response to other tribal comments resulted in more distinctions among the subparts, reducing the amount of repetition.

One tribe recommended just one section of standard provisions with the explanation that those provisions will later be added to each of the three sections to make the final rules most easily used by lay persons. For the proposed rule, we are restricted to the Federal Register's format, but we will consider this comment for future draft regulations.

Several tribes requested that tribal and individual lands be separated or treated differently. We did not find enough variance to justify entirely different subparts for tribal and individual lands; however, we have revised various provisions to clarify where the requirements for tribal and individual lands differ.

3. Definitions

We received the following comments on definitions:

- "10-day show cause letter" – In the draft regulations, the definition of 10-day show cause letter limited the letter to instances of non-payment only, but BIA has used this letter for other types of lease violations. We have revised the definition of "notice of violation" to clarify that a notice of violation may come in many forms, one of which is a 10-day show cause letter. A 10-day show cause letter may be issued for any violation, not just non-payment. We deleted the definition for "10-day show cause letter" because it is not necessary in this new context.

- "Abandonment" – Add a definition for this term to consider both the intent to abandon and the act of failing to develop the premises as planned. We did not add this definition because the meaning of "abandonment" may be negotiated by the parties and defined in the lease.

- "Assignment" – Although we did not receive any tribal comments on this definition, we revised the definition of "assignment" to reflect that partial assignments could occur; rather than having to assign all rights and obligations, the lessee could assign only some rights and obligations and retain the rest.

- "Business day" – We received several comments on whether to explicitly exclude tribal holidays. There was no consensus on this point, although there was consensus that BIA should not be provided an extra day due to observance of a tribal holiday. We retained the draft version of the term "business day," which does not mention tribal holidays. We made another change to this definition to specify that "business day" does not include days when the "applicable office" of the Federal government is closed to the public, to account for instances when weather or other circumstances prevent officials from reporting to work at a particular location.

- "Commencement date" and "effective date" – One commenter suggested adding definitions for these terms. Because this comment was aimed at addressing confusion caused by later provisions discussing when a lease is effective and when rights and obligations under the lease may be made effective, we instead clarified the later provisions.

- "Best interest" and "compelling reason" – A few commenters suggested adding definitions for these terms. Because these terms are applied on a case-by-case basis, we determined that no definition could successfully capture all appropriate circumstances.

- "Constructive notice" – Expand on what constitutes "constructive notice" to account for other tribal practices. We revised the definition to allow posting at one or more of the three locations listed, including the tribal government building, and to allow for radio announcements as an alternative or supplement to newspaper publication.

- "Court of competent jurisdiction"

    - Add a disclaimer that the definition does not affect current allocations of jurisdiction. We agree that this definition does not affect the current allocations of jurisdiction, but did not add a disclaimer because doing so could imply that any regulation not including such a disclaimer does affect the current allocations of jurisdiction.

    - Simplify the definition of "court of competent jurisdiction" to read "a tribal, Federal, or other appropriate court with jurisdiction." We addressed this comment by revising the definition to list the different types of courts that may have jurisdiction, but specified "State" rather than saying "other appropriate court with jurisdiction" to clarify that international courts do not have jurisdiction in any instance.

- "Due diligence" – One commenter asked that we use a different term because, in the commenter's view, "due diligence" refers narrowly to acts a prudent person would take in reviewing investments. We determined that by defining "due diligence" broadly here, the term is appropriate.

- "Government land"
    - One commenter asked whether "Government land" includes "Indian land." It does not.
    - Include the General Services Administration (GSA) in the definition of "Government land" because GSA administers some Government land, in addition to BIA. We addressed this comment by clarifying that the United States administers Government land, rather than just BIA.
- "Holdover" – Add a definition. We added a definition for this term.
- "Housing for public purposes" –
    - Clarify whether housing for public purposes may include housing the tribe funds and rents to non-members. Housing for public purposes may include housing for rent to non-members as long as the definition is met, so we determined that no change to the definition is necessary as a result of this comment.
    - Revise to allow not-for-profits, including Native Community Development Financial Institutions (CDFIs) to build public housing without requiring tribal sponsorship or financing. We added the requested terms "tribally sanctioned" and "not-for-profit entity."
    - Revise to replace "financed using a tribal, Federal or State assistance program" with "financed using a tribal, Federal or State public program." We did not incorporate this change because there is no apparent benefit to referring to a "public program" rather than an "assistance program."
- "Immediate family" - Several tribes commented on the definition of "immediate family" and the provision that the special relationship be recognized under tribal law. We have revised the definition of "immediate family" to delete the provision regarding a special relationship recognized by tribal law because the provisions where "immediate family" is used (determining whether a lease for nominal or less than fair market rental is in an individual's best interest) already allow for consideration of a special relationship, and do not require the relationship to be recognized under tribal law.
- "Indian" –
    - Revise to state that an Indian is an owner of "a trust or restricted interest in Indian land," rather than "a trust or restricted interest in land," because the commenter is concerned that a non-Indian could have a trust or restricted interest in "land." We did not incorporate this change because this definition is statutory. See 25 U.S.C. 2201(2)(A).
    - Revise to explicitly state that throughout the regulation, "Indian" is synonymous with "American Indian/Alaska Native." Because the definition of "Indian tribe" includes recognized American Indian and Alaskan Native groups, the definition

of “Indian” as including members of Indian tribes already includes American Indians/Alaska Natives.

- “Indian tribe” – Revise to read as follows: "means a Tribal Government that is an American Indian or Alaska Native Tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federal Recognized Indian Tribe List Act of 1994..." Because the definition of “Indian tribe” includes recognized American Indian and Alaskan Native groups, we did not accept this change.

- “Inherently Federal function” – Add a definition to clarify which functions can be contracted and compacted by tribes. This term is a largely case-by-case determination and a definition in this regulation could create conflicting meanings, as this term is used throughout the Federal government for many purposes. For these reasons, we did not add a definition for this term.

- “Permit” – Clarify. We did not add to this definition because it is more fully explained later in the regulation.

- “Real property” and “personal property” – Add definitions. We did not add these definitions because the regulation does not use these terms.

- “Resource evaluation plan” – Add a definition for this term. We replaced this term with “equipment installation plan” in response to another comment, but added a definition.

- “Resource development plan” – Add a definition for this term. We did not define this term because it is described later in the regulation.

- “Lease” - Explain that a "right of possession" of Indian land need not be exclusive for a lease. The definition of “lease” does not indicate that the right of possession must be exclusive; therefore, we did not revise the definition.

- “Single family residence” – Revise to reflect tribal zoning laws’ definition of this term. We revised by adding “or as defined by tribal zoning law or other tribal authorization.”

- “Sublease” – Revise to avoid confusion created by phrase "right to possession no greater than that held by the lessee" because a transfer of all lessee's rights under the lease would be an assignment, not a sublease. We replaced "no greater than" with "less than" to clarify.

- “Trespass” – Revise to include Government land. We addressed this comment by adding “or Government land” to the end of the definition.

- “Tribal land” –

    - Clarify that tribal land includes land held by more than one tribe (e.g., Pueblos' collective ownership of land at Santa Fe Indian School). We addressed this comment by adding that the land may be held for “one or more tribes.”

- Revise to address fee lands owned under the Pueblo Lands Act. This change was addressed in the definition of "trust or restricted land;" no change is necessary to this definition since such lands are held "subject to Federal restrictions against alienation or encumbrance."

- Revise to include lands held by a corporation under 25 U.S.C. 450b(e). The definition of "tribal land" does not include land held by Alaskan regional and village corporations defined in the cited statutory section, because that land is not held in trust or restricted status by an Indian tribe as defined in these regulations and under 25 U.S.C. 415.

- Add language exempting from approval requirements any leases by an Indian corporation. This issue is addressed later in the regulation.

- Limit the definition to the surface estate. We incorporated this change.

- "Tribal land assignment" – Revise to read: "means privileges to use tribal land granted by Indian tribes in accordance with tribal laws and customs. They do not confer any legal interest in the land." We are retaining the current definition for consistency with 25 CFR 84.

- "Tribal law" –

  - Revise to include tribal customs and traditional law, in addition to the ordinances or other enactments of the tribe and tribal court rulings. We did not incorporate this suggested change because each tribe defines its own body of law and may incorporate tribal customs and traditional law into ordinances and enactments and tribal court rulings.

  - Revise to mean the body of non-Federal "and State law." We did not incorporate this change because it did not help clarify the definition.

- "Trust and restricted land" –

  - One commenter asked that we ensure that 25 U.S.C. 577, applicable to New Mexico Pueblos, was considered in the definition. We addressed this comment by adding "or limitations contained in Federal law" to the end of the definition.

  - One commenter stated that this definition incorrectly indicates that land can only be encumbered with the approval of the United States, while 25 U.S.C. 81 and other laws allow tribes to lease land without BIA approval. While it is true that 25 U.S.C. 81 allows encumbrances of tribal land without the United States' approval, for the purposes of the leasing activities subject to this regulation, the definition, as written, applies.

- "We/us" – One commenter stated that the use of these terms is offensive. This terminology is used to comply with the Federal Plain Language Guidelines and the question-and-answer format of the regulations.

4. Applicability of Laws

Many tribes commented on provisions that mentioned State law, because of a concern that the provisions could be interpreted to indicate that State law applies where it does not. Some suggested we delete all references to "State law" and instead say "other law." We did not accept this comment because "other" law may be interpreted to include international law. There were numerous provisions scattered throughout the draft regulations that referred to applicable law in various ways. We addressed the concern about which law applies by clarifying the general provision at section 162.013 as to what law applies, and cross-referencing back to that section in those scattered locations. Section 162.013 now clarifies the very limited applicability of State law.

At least one tribe also requested provisions for BIA to recognize and acknowledge tribal laws regulating activities on land under a residential lease, including land use, environmental protection, and historic/cultural preservation. These provisions are at section 162.014.

5. Lease Term, Holdovers, and Rights of First Refusal

Many tribes opposed the draft regulations' lease term limits. Specifically, the draft regulations stated that, unless otherwise provided by statute (as discussed further below), residential lease term and any renewals may not exceed 50 years, and a business lease term and WSR lease term may not exceed an initial term of 25 years and one renewal of 25 years. These lease terms, and the restriction to one renewal period for business and WSR leases, are established by statute (see 25 U.S.C. 415(a), 25 U.S.C. 4211); therefore, we did not make any change in response to these comments. While most commenters stated that the lease term limits were too short, one commenter stated that for, WSR leases, the 25-year initial term plus 25-year renewal may be excessive. These terms are the statutory maximum for most tribes. The parties may negotiate shorter terms.

Several tribes also stated that leases may not have a specified term or may be month-to-month. We have not made any changes to the regulations in response, but would like to clarify that leases must have a specified term; that term may be a month long or any other length of time, so long as the term is shorter than or equal to the maximum term established by statute. These tribes also noted that many residential leases may be terminated only for specific causes in the NAHASDA context. Section 162.362(d) provides that the parties may include negotiated remedies, which may provide for termination for specific causes.

Several tribes commented that the regulations should specifically state that certain tribes have statutory provisions that allow for leases of up to 99 years. We addressed this comment by incorporating the requested language. One commenter stated that a 99-year lease should not be available to lessees that are not tribally owned entities. We did not make any change as a result of this comment because Congress does not distinguish between leases to tribally owned and non-tribally owned entities for the purposes of lease term maximums.

Several tribes also commented that the prohibition on the lease term commencing more than one year after approval may affect the availability of financing and deny tribes the flexibility to arrange lease terms. We addressed this comment by deleting the prohibition on the lease term commencing more than one year after approval.

Several tribes also requested that the regulations allow holdovers or rights of first refusal. We addressed this comment by deleting the prohibition on rights of first refusal. While we retained the prohibition on holdovers, we added to enforcement provisions that we will not take action to recover possession from a lessee that remains after lease expiration or cancellation if the landowners notify us that they are in good faith negotiations with the lessee to obtain a new lease.

One commenter requested we add that, for an option to renew to be contained in the lease, the lease must state that the lessee must be in full compliance with lease terms in order to exercise the option to renew. We addressed this comment by adding a requirement for the lease to specify other conditions for renewal, such as lessee compliance.

One commenter asked what BIA would record for a renewal where the original lease contains an automatic renewal. The parties may record a letter indicating that the lease has been renewed.

6. Valuations and Fair Market Rental

We have revised provisions regarding valuations and fair market rental to clarify when each is required and under what circumstances each may be waived.

In response to comments requesting more deference to tribes and their determinations, we separated out the valuation and fair market rental requirements for tribal land versus individually-owned Indian land. For leases on tribal land, where the tribe negotiates compensation, the proposed rule provides that we will defer to the tribe and will not require a valuation or fair market rental under certain circumstances, unless the tribe requests otherwise.

Some commenters stated that the provision requiring nonconsenting owners to receive fair market rental, even where consenting owners have agreed to less than fair market rental, is untenable. We cannot make this change without statutory clarification that nonconsenting owners are bound by the consenting owners' waiver of fair market rental.

Tribes also made the following comments on valuations and fair market rental:

- Delete the requirement that the "initial" payment be not less than fair market rental. We addressed this comment by deleting the word "initial."

- Add timelines for BIA to take action on requests to waive fair market rental and the requirement for a valuation. We have added these timelines.

- Delete provisions allowing compensation at less than fair market rental and alternate forms of compensation, and instead add a general provision allowing Indian landowners to seek waivers of any regulatory requirements. We did not incorporate this change because tribes may seek waivers of any regulatory requirements under 25 CFR 1.2. The provisions in this proposed rule allowing for waivers under certain circumstances are intended to provide more flexibility to Indian landowners.

- Clarify the provision stating that the appraisal would consider only those improvements owned by Indian landowners. We deleted the provision because this may be discussed with appraisers on a case-by-case basis.

- Clarify that the regulations take precedence over requirements of the Interior Appraisal Policy Manual and Office of the Special Trustee for American Indians (OST) requirements. These regulations are intended to work together with such requirements, but as regulations, legally supersede policy and non-regulatory documents, other than statutory law.

- Impose timelines on receipt of valuations because of the significant delays experienced in obtaining appraisals. We did not incorporate these timelines because these regulations govern BIA, and do not govern the Office of Appraisal Services.

- Clarify when BIA will require updates to valuations. Because this is a case-by-case determination that could vary widely given market conditions in the area, we did not include this clarification.

- Allow tribes to assess and collect developer fees from developers who actually function as project ownership brokers. The regulations do not prohibit this; the tribe may negotiate such fees under tribal law.

7. Adjustments of Rent

Many tribes stated that the draft regulations' requirement for a review of the adequacy of rent every 5 years is unworkable because it could require an appraisal every 5 years and exposes the parties to uncertainty regarding future rent, which could be an unacceptable risk to a lessee and lenders. We incorporated tribes' suggestion to allow the lease to provide for an automatic adjustment of rent in lieu of a review of adequacy. Tribes also stated that Indian landowners shouldn't be required to consent to adjustments in rent, when such adjustments result from a review of adequacy. We added a provision to allow the lease to provide that landowner consent to adjustments is not required.

Some tribes stated that the periodic review should not be required if the lease provides for payment in a form or method other than the standard periodic installments (e.g., if the payment plan provides for most compensation to be paid early in the term). We revised the regulation to include such a payment plan as a basis for not requiring periodic reviews.

Two tribes commented in support of the 5-year periodic review requirement, stating that it strengthens the tribe's negotiating position. The tribe may still negotiate this requirement, and refuse to allow the lease to provide for automatic adjustments, under the proposed rule.

One tribe requested that leases for less than fair market rental be exempted from the adjustment review requirement. The proposed rule allows the tribe to negotiate automatic adjustments to exempt itself from the review requirement.

8. Approvals and Timelines

Most tribes supported the "deemed approved" provisions, which provide that amendments and subleases become effective automatically after a certain period of BIA inaction. A few tribes opposed the "deemed approved" provisions because, in their view, BIA should always be required to affirmatively take action. Because most tribes expressed their support, we have retained the "deemed approved" provisions for amendments and subleases. We deleted the "deemed approved" provisions for leasehold mortgages, however, because of lenders' reliance on affirmative BIA approval of leasehold mortgages.

Some tribes requested clarification of the deemed approved process with regard to what will be recorded at the LTRO. BIA will identify a best practice, to include a "deemed approved" stamp or other acknowledgment that a document has been deemed approved.

Several tribes stated that the grounds for BIA to disapprove an initial lease should be limited in the same way the grounds for disapproval of amendments are limited. We did not limit the grounds for disapproval where BIA reviews the original lease terms because BIA needs more flexibility in its best interest determination in these instances.

One tribe asked whether the "compelling reason" to disapprove standard fits with the "not unreasonably withhold" standard. Essentially, this means BIA must have a reasonable basis for finding that a compelling reason exists to disapprove.

We also retained provisions establishing the effective date to be 45 days following the date the parties mailed or delivered the document to BIA. The extra 15 days is intended to account for the time the document takes to reach the appropriate office of BIA.

Some tribes stated that 60 days plus a 60-day extension is too long. We note that these timelines are maximums, and BIA may act more quickly. To address this comment, we replaced the 60-day extension with a provision allowing BIA to communicate its initial concerns to the parties and invite the parties to respond, but requiring BIA to act within 30 days of notifying the parties.

One tribe requested addressing the need for immediate closing on loans by allowing for simultaneous approval of leases and leasehold mortgages. Nothing in the proposed rule precludes this.

Several tribes commented on the sections making party obligations effective prior to BIA approval at sections 162.340, 162.440, and 162.565. We revised these provisions to clarify that parties may make the agreement effective as between themselves, but if BIA has not yet approved the agreement, then any action they take in accordance with their agreement is at their own risk (i.e., they risk that BIA will not approve and may pursue the lessee for trespass or take other enforcement action).

One tribe stated that, in determining whether to approve a lease, BIA should consider not just tribal land use plans, but also community plans. The factors that BIA is required to consider include environmental and land use requirements, which would cover community land use plans. See 25 U.S.C. 415(a).

Several tribes requested clarification of the provisions stating that obligations may be made effective prior to BIA approval. We clarified these provisions – they now say that the

lease may specify a date on which the obligations between of the parties are triggered, and that such date may be different from the BIA approval date.

9. Amendments, Assignments, Subleases, and Leasehold Mortgages

In response to tribal comments, we revised the processes for obtaining approval of amendments, assignments, subleases, and leasehold mortgages, to clarify instances when BIA approval and landowner consent may not be required.

Several tribes expressed opposition to the draft regulation's requirement that assignments require consent and approval in the residential leasing context. We have revised to allow for assignments without consent and approval under certain circumstances.

One tribe stated that it would not allow a leasehold mortgagee who forecloses on a leasehold interest to assign the interest, because this tribe would want to prevent the land from falling out of trust. To clarify, this provision does not allow tribal land to fall out of trust. Only the leasehold is mortgaged, and a foreclosure thus cannot result in the sale of the land.

One tribe questioned BIA's authority to prioritize to whom a lease may be assigned. We have deleted this list, because it is redundant with a similar list in HUD's Part 184 program regulations, and tribes may not want it to apply in other contexts.

Several tribes questioned the provision that BIA will consider whether landowners may receive income derived by the lessee from an assignment. We are deleting this language. Landowners may negotiate in the lease to receive income as part of the assignment, and while BIA may consider this in its "best interest" determination, it likely will not be a compelling reason to disapprove.

Several tribes suggested incorporating the current 162.610(c), which they claim allows for BIA to approve a lease that authorizes leasehold mortgages without further BIA approval. The current 162.610(c) requires BIA approval of each leasehold mortgage. For this reason, we did not make any revision as a result of this comment.

One tribe stated that BIA approval of a leasehold mortgage may not be required if no Federal funds are involved. BIA approval of leasehold mortgages is always required, regardless of whether Federal funds are involved or not, because it is an encumbrance on the leasehold interest.

10. Consents

Tribes overwhelmingly opposed the draft regulations' "deemed consent" provisions. For this reason, we deleted these provisions, but explicitly allow for "deemed consent" should parties to a lease negotiate for such a process, as long as the lease terms describe the process and when it may be invoked.

A few tribes questioned the need for consent. One commenter stated that the consent requirements are unworkable. The consent requirements included in the draft regulations and this proposed rule have been established by statute, and we are not able to amend them by regulation.

A few tribes also asked what a "reasonable attempt" to contact landowners is and how long BIA will attempt to contact a landowner before determining that they are unreachable. Because this is a case-by-case determination, we have not added provisions to address this.

One tribe commented on the provision allowing BIA to lease land where the landowners are unable to agree within a 3-month period. This provision incorporates the statutory authority at 25 U.S.C. 380 and 415(a).

One tribe requested that we delete the provisions requiring consent of 100% of landowners in Alaska. Because this is statutory, we cannot delete this provision. The Indian Land Consolidation Act Amendments of 2000, as amended by the American Indian Probate Reform Act (ILCA/AIPRA) provides for lower consent thresholds, but ILCA/AIPRA does not apply to Alaska. See 25 U.S.C. 2219.

A few tribes noted that the terminology, stating that a tribe "consents" to a business lease of their land minimizes the role tribes play in approving and negotiating leases on tribal land. Another tribe noted that a more accurate term is "grant." We agree that the regulation's terminology is imperfect, but were unable to identify alternate terminology that would be workable in explaining the process of granting leases for individually-owned fractionated tracts.

11. Permits

Tribes nearly unanimously supported the draft regulations' removal of the requirement to obtain BIA approval of permits. Tribes retain authority to issue permits under tribal law on their land.

Several tribes noted the difficulty with recording permits; given that they are often short-term, many will expire before the LTRO records them. We have addressed this comment by requiring that the permit be filed with the local BIA agency, rather than in the official record of the LTRO, to put BIA on notice for reviews of leases that may conflict with a permitted land use.

One tribe stated that the after-the-fact BIA review of permits (when the Indian landowner presents the permit for filing) to determine whether the agreement is actually a lease, contradicts the purpose of eliminating BIA approval of permits. This review is intended to be merely a confirmation of prior discussions with the Indian landowner concerning the categorization of the document, as Indian landowners are encouraged to contact their local BIA office if there is any question as to whether a permit is actually a lease.

Several tribes requested explanation on how leasing under part 162 relates to land use agreements entered into pursuant to 25 U.S.C. 81 ("Section 81 agreements"). Section 81 allows tribes, but not individual Indian landowners, to enter into agreements encumbering the land for not more than 7 years without BIA approval. Section 81 agreements encumbering tribal land for longer than 7 years require BIA approval under 25 CFR 84, unless they would be approved under these regulations or would be exempted from BIA approval by these regulations. 25 C.F.R. § 84.004(a). Thus, any lease or other agreement under part 162 does not require approval under Section 81.

A few tribes requested more specifics in the section providing characteristics of permits versus leases. Because the determination as to whether a given agreement is a permit or a lease is

so case-specific, we were unable to provide additional specifics; however, we refined the characteristics to include only those that relate to the legal definition of "permit" versus "lease." A few tribes also requested a list of activities that would be appropriate for a permit rather than a lease, assuming DOI will not require approval of grazing permits in the future. Because grazing permits are governed by a different set of regulations (25 CFR 166), these regulations do not affect those permits. The key item is whether the agreement grants a legal interest in the land, rather than what activities occur on the land.

12. Residential Leases

Several tribes expressed significant concerns with regard to the residential leasing subpart and its effect on the ability of tribes and tribally designated housing entities (TDHEs) to provide affordable housing to low-income tribal members. These commenters urged coordination with the Department of Housing and Urban Development (HUD) and requested incorporation of provisions included in the proposed 2004 regulations. HUD funds many projects where the tribe uses the structure of a master lease to the housing entity, which in turn issues subleases to tenants. The commenting tribes stated that the draft regulations included a considerable amount of BIA approval requirements that had not previously been in place and would delay leasing for housing for low-income Indian families receiving assistance under the Native American Housing Assistance and Self-Determination Act (NAHASDA). Of particular concern was the apparent requirement for BIA to approve every single new sublease that a TDHE or tribe enters into for assisted housing, and the resulting delay in the occupancy of units. Another concern was that the standard residential leases for low-income housing do not contemplate landowners' consent to leasehold mortgages.

In response, we have coordinated with HUD and revised the residential leasing provisions to allow for assignments, subleases, and leasehold mortgages without landowner consent in certain circumstances. Additionally, the updated provisions allow for assignments and subleases without our approval in certain circumstances. BIA approval of leasehold mortgages is required in all circumstances. Below is a chart summarizing the revised consent and approval requirements.

Residential Leasing Approval Requirements		
Document	**Landowner consent required?**	**BIA approval required?**
Initial lease	Always.	Always.
Amendment	Yes, unless one of the following conditions exists: • Lease provides for deemed consent; or • Lease provides authorization for representatives to consent on behalf of all Indian landowners.	Always.
Assignment	Yes, unless one of the following	Yes, unless all of the following conditions

	conditions exists: • Assignee agrees to assume obligations, including bonding requirements, and: o Lease provides for assignments without further consent; or o Assignee is a leasehold mortgagee acquiring the lease through foreclosure or conveyance; or o As specified in the lease; or • Lease provides for deemed consent; or • Lease provides authorization for representatives to consent on behalf of all Indian landowners.	exist: • Assignee is a leasehold mortgagee acquiring the lease either through foreclosure or conveyance; • Assignee agrees in writing to assume all of the obligations of the lease; and • Assignee agrees in writing that any transfer of the lease will be in accordance with applicable law.
Sublease	Yes, unless: • All these conditions are met: o Lease provides for subleasing without meeting consent requirements or obtaining BIA approval; o BIA has approved a general plan for the development; and o BIA has approved a sublease form and general rent schedule for use in the project; or • Lease provides for deemed consent; or • Lease provides authorization for representatives to consent on	Yes, unless: • All these conditions are met: o Lease provides for subleasing without meeting consent requirements or obtaining BIA approval; o BIA has approved a general plan for the development; and o BIA has approved a sublease form and general rent schedule for use in the project;

	behalf of all Indian landowners.	
Leasehold mortgages	Yes, unless: • Lease contains a general authorization for leasehold mortgages and states what law would apply in case of foreclosure; or • Lease provides for deemed consent; or • Lease provides authorization for representatives to consent on behalf of all Indian landowners.	Always.

Several tribes also had questions about when a lease is required from a tribe to a housing entity. If the housing entity is a separate entity from the tribal government, the housing entity will need to obtain a lease from the tribe under these regulations. If the tribe enters into a master lease with a housing entity, and that housing entity then subleases to individuals, the entity may sublet without consent or BIA approval under certain circumstances explained in the regulations.

If the housing entity is part of the tribal government (i.e., is not a separate entity from the tribe), then the housing entity does not need to obtain a lease from the tribe, but may either directly lease to individuals, under these regulations, or assign land, through tribal land assignments in accordance with tribal law, without being subject to these regulations. If the tribe leases directly to individuals, then each individual lease would require approval under these regulations.

In addition, tribes had the following comments:

- *Lease forms –*
    - Use tribes' residential lease forms. We clarified that tribal forms may be used. A tribe may use its own model lease forms as long as the requirements of this regulation are met.
    - Mention the One-Stop Leasehold document that BIA developed with HUD, USDA, and VA, which is a standardized mortgage leasehold format flexible enough to allow tribes to customize terminology without compromising protective language. We addressed this comment by adding a reference to the model lease developed jointly by these agencies.
- *Required documents –*
    - One commenter requested we add a requirement to submit information to facilitate BIA's analysis under applicable environmental and cultural resources requirements.

This requirement was already stated in the business and WSR leasing subparts of the draft regulations. Because this is requirement also applies to residential leases, we added it to § 162.338.

- Eliminate the requirement for TDHEs to submit detailed development plans prior to lease approval, as TDHEs need the land base in order to justify spending funds to put together the plans. In response to this comment, we deleted the requirement to include a construction schedule, to emphasize that only a preliminary development plan is required.

- *Deemed approval* – The draft regulations provided that if BIA failed to act on a leasehold mortgage after a certain period of time, the leasehold mortgage would be "deemed approved." Several commenters stated that without adequate legal review, most mortgage documents will attempt to encumber more than the leasehold estate. In addition, as mentioned earlier, some commenters believe the lender requires affirmative BIA approval. We removed the deemed approved provisions for leasehold mortgages in response.

- *Enforcement of lease terms* –

  - Several tribes also commented that BIA should defer to tribes' enforcement of their own housing and landlord-tenant laws and should enforce residential lease terms only at the request of the tribe. We clarified that BIA will consult with the tribe prior to taking enforcement action. Additionally, the parties to the lease may require compliance with the tribe's housing code and/or landlord tenant code, and subject disputes to tribal court jurisdiction, by including these requirements in the lease.

  - One tribe stated that the fees established in sections 162.365, 162.465, and 162.590 should be a negotiated term in a lease. The fees provided in this section are U.S. Government fees, which apply in addition to any late payment penalty fees negotiated in the lease.

- *Miscellaneous* –

  - Revise the mandatory lease provision regarding indemnification of the United States to include any tribe acting on behalf of BIA. We did not include this change because where the Tribe is acting on behalf of the United States in carrying out program functions pursuant to a compact or contract, the compact or contract may provide this protection; furthermore, the definition of "BIA" in these regulations includes any such tribe.

  - Eliminate requirements for appraisals, bonds, insurance or other approvals where a tribal member wants to lease a home. We have deleted the requirement for an appraisal of tribal land. The regulations allow for BIA to waive the bond requirement under the circumstances in 162.334(f). We did not make any change to insurance requirements because we could identify no reason why there would be a reduced need for insurance in the requested instance, where a tribal member wants to lease a home.

  - One commenter stated that tribes previously used 25 CFR 103 as authority to lease tribal land to tribal members without requiring BIA-approved lease and that BIA's

attempt to regulate will create conflicting requirements. Part 103 does not provide authority to lease, but BIA is coordinating with HUD to ensure these regulations do not establish conflicting requirements.

- One commenter stated that most residential leases in their community are between Indian co-owners and their immediate family members and, as such, do not seem to fit within the scope of the regulations. Section 162.008(a)(2) allows Indian co-owners to give permission to each other to use their land without undergoing the leasing procedures in these regulations. In instances when a lease is needed, such as to grant possession to a family member who is not a co-owner, there are provisions to allow for leasing at a less than fair market rental.

- One commenter stated that lenders are going to be concerned about the legal remedies of non-consenting landowners who want to challenge the lease. We did not make any change as a result of this comment because we believe lenders will rely on the fact that the lease is immediately effective in its funding decisions.

- One commenter suggested that approval of residential leases and mortgages be delegated to tribes because BIA is not equipped to deal with the process fast enough. Approval of these lease actions is an inherently Federal function that cannot be delegated to tribes under existing statutory law.

- One commenter asked to exempt recordation of subleases made by tribal housing entities. We did not add an exemption because recordation is necessary for title purposes.

- One commenter asked that we add "if applicable" at the end of the sentence requiring BIA to consider the factors in 25 U.S.C. 415(a) in deciding whether to approve a lease. We did not accept this change because this provision is statutorily required for all leases, so it will always be applicable.

13. Business Leases

One commenter noted that a tribe may want the flexibility to offer a series of short-term leases without having to go back through the lease process each time the renewal period expires. By statute, only one renewal period is allowed. An alternative to a series of short-term leases may be a lease that includes an option to terminate every couple of years.

One commenter stated that the regulations should allow for an option to lease tribal land that includes a BIA-approved lease that would take immediate effect if the option were exercised. This commenter also stated that the regulations should allow for a tribe to enter into an option period for which the tribe would be paid, so the tribe benefits even if development does not occur. BIA cannot pre-approve a lease, because such pre-approval would equate to an advisory opinion, which we are not authorized to provide. These regulations do not preclude a tribe from entering into a separate agreement committing to a lease, providing for graduated payments, or otherwise structuring a deal.

A number of tribes commented on the fact that recreational leases are covered in the business leasing subpart. Recreational leases generally have been treated as business leases in

the past, and the proposed rule continues this practice. Some tribes expressed confusion as to whether a seasonal home would be treated as a recreational lease under the business leasing subpart; likely, a seasonal home would instead fall within the residential leasing subpart. We reviewed the provisions of this subpart to ensure that the requirements are not overly burdensome for recreational leases. In particular, we added "if appropriate" to a number of requirements (e.g., the requirement for restoration and reclamation plan).

A number of commenters stated that tribes should be able to lease space in a building, granting use and occupancy rights, rather than a ground lease, without obtaining BIA approval. We have added a process to allow lessees to sublease without obtaining landowner consent or BIA approval where the original lease allows for subleases without consent and approval and BIA has approved a general development plan, sublease form, and rent schedule.

14. Wind and Solar Resource Leases

Most tribes opposed the draft regulations' requirement for BIA approval of WSR permits as inconsistent with the elimination of the general requirement for approval of permits. The proposed rule clarifies that such "permits" are actually short-term Wind Energy Evaluation Leases (WEELs) that grant possession of Indian land for meteorological towers or other wind resource evaluation equipment. Because solar evaluation does not require possession of the land (e.g., through the installation of equipment), no short-term lease is required. Tribes may issue permits to allow solar resource evaluation on tribal lands without obtaining a short-term lease.

Some supported the two-part process, while others stated that it requires added expense and additional time without evidence that a more limited environmental review would be required. As mentioned above, we have narrowed the circumstances in which the first part of the process is necessary. While it is true that overall, the same level of environmental review will be required whether or not a WEEL is first obtained, by performing part of the environmental review during the WEEL stage, the level of review necessary at the WSR lease will be less, allowing for an expedited approval process at the WSR lease stage.

Tribes also commented on the provision regarding the area covered by the environmental review at the first stage. Some commented that the environmental review should be limited to the actual site locations where the testing and monitoring equipment are installed. The impact analysis for the WEEL will focus on distinct locations. Because the turbines will be located in at least one or more areas where the testing equipment was installed pursuant to the WEEL, the environmental review for the WEEL may be incorporated into the environmental review for the WSR lease. We have retained the requirement that the lease area be limited to the area covered by the WEEL or portion thereof where the WEEL provides an option to enter into a WSR lease. This requirement prevents a lessee from parlaying wind evaluation activity on one tract or area of the tract into a long-term commitment with the Indian landowner on areas it has not yet even evaluated.

One tribe commented that the regulation's requirement that the National Environmental Policy Act (NEPA) work be completed with the WEEL and WSR lease applications could cause issues if a developer does not want to spend money on environmental evaluation prior to having a basic understanding of the resource. We are bound by the statutory requirements in NEPA to require these environmental reviews before Federal action (i.e., BIA determination whether to

approve the WEEL and WSR lease). The separation of the two processes will, however, allow the environmental review for the evaluation stage to focus on the installation of evaluation equipment, rather than the unknown locations of wind turbines.

A WSR lease is necessary when the Indian landowner grants some right of possession to the developer. A WSR lease would not be necessary if the tribe itself is installing wind or solar equipment on its own land.

Some tribes commented on the lease option period. The WEEL may include an option to enter into a WSR lease. The tribe may enter into other types of option agreements with the developer that are not within the scope of these regulations. Such agreements may, however, require BIA approval under 25 C.F.R. part 84.

One tribe stated that there is no reason to limit the evaluation period to 3 years plus a 3-year extension. The intent of including this term limit is to ensure that the evaluation process is expedited and does not tie up the land. The term and its extension period should allow sufficient time to gather the necessary wind resource information and enter into a WSR lease if the developer acts expeditiously.

We also deleted the prohibition on assigning, subleasing, and mortgaging a WEEL in response to comments.

Although a few tribes supported establishing a schedule of WEEL rent, most opposed it. One reason for the opposition was a concern that the per-acre fee would set a bad precedent for negotiations by establishing a baseline lower than what would be obtained if based on commercial value of the resources. Another reason was that the established fee would interfere with tribes' ability to negotiate on factors other than total acreage of land. In response to these comments, we have deleted the provision requiring BIA to establish WEEL rent..

One commenter stated that the provision requiring the lessee to submit resource development plan revisions causing a 30-day delay or longer is too onerous and will encourage lessees to negotiate for unnecessary flexibility in their resource development plans. In response, we changed the requirement from 30 days to 90 days.

A few tribes commented that BIA should not request financial information of lessees. We deleted this provision from both the WEEL and WSR leasing provisions.

15. Mandatory Lease Provisions, Documents Required

Many tribes commented on the sections establishing leases' mandatory provisions and what documents BIA will require for approval, including the following.

- Clarify whether archaeological surveys must be conducted on all leases. The regulations provide that these are conducted on an "as needed" basis since they will not always be needed, for example, where there is no ground disturbance.

- Require the landowner's BIA number to ensure that the title report lists the lease. The Trust Asset Accounting Management System (TAAMS) already includes identification numbers and leases.

- Require identification of the party responsible for maintaining improvements. We incorporated this change.

- Add a definition for "nuisance" as it relates to the mandatory provision that there must not be any creation of nuisance. Because this is a legal term that has been subject to much case law, we decline to define it in this regulation, deferring instead to the generally accepted legal definitions.

- Revise the mandatory provision requiring the lessee to indemnify the United States even where the liability is the result of the United States' actions. This is a standard provision that applies to actions occurring during the lease term, as the lessee has control over the leased premises at this time.

- Delete the mandatory provision, "nothing in the lease would prevent or delay termination of Federal trust responsibilities for the land during the lease's term," because it is a vestigial provision retained from the termination era. While we agree this is a vestigial provision, it remains statutory law. See 25 U.S.C. 415c.

- Delete the provision requiring the lessee to account to owners of fee interests because it is outside the Secretary's authority. While it is true that the Secretary has no authority over fee interests, we have retained this provision to emphasize the distinction and clarify that such accounting is not the Secretary's responsibility.

- Identify NEPA requirements in the mandatory provisions sections. NEPA requirements are instead addressed in the sections listing what documentation is required for lease approval.

- Delete the requirement for a tribe to provide a statement that the proposed use conforms with tribal laws because BIA must ensure compliance. We retained this provision because BIA will not substitute its interpretation of tribal laws for the tribe's interpretation, so we have retained this requirement.

- Exempt leasing of already built homes from NEPA. There is a categorical exclusion that allows for a change of title without a change in use that may apply.

Several tribes asked about the provision stating that BIA may treat any provision of a lease that is in violation of Federal law as a violation of the lease. One tribe stated this should be deleted because BIA should always determine whether the lease is in violation of Federal law at approval. This provision provides a safeguard, especially for situations where a provision is deemed approved.

A few tribes asked what BIA's legal basis for requiring a restoration and reclamation plan is, and suggested deleting the requirement. This requirement is intended to protect the trust asset. We are not deleting it, but provide for flexibility with the understanding it is not necessary for all instances by stating it is required "if appropriate."

16. Bonding & Insurance

One tribe stated that it should be up to the tribe whether to impose an insurance requirement for tribal housing projects. We added that the insurance requirement may be waived.

A few tribes stated that the requirement for bonding and insurance will discourage residential leasing of Indian land. We have deleted the requirement for bonding of housing developments for public purposes and allow for a waiver of bonding on a case-by-case basis in other instances.

Some tribes requested that a waiver of the bond requirement be automatic for business leases between the tribe and a tribal entity. A waiver may be appropriate in some of these instances; therefore, we have retained the provision allowing for a waiver on a case-by-case basis.

A few tribes suggested the regulations allow for alternates to bonding, such as escrow arrangements or assignments of per-capita income. We have not listed alternatives in the regulations, but BIA may consider them in determining whether a waiver is appropriate.

One tribe requested approvals of bonds at rates authorized by the tribe, even if the rates are less than fair market rental. We have added a provision establishing that BIA will consult with the tribe on this matter. This same tribe requested that BIA confirm with the landowners before releasing a bond. We incorporated this change.

A few tribes suggested that, instead of requiring a restoration and reclamation bond at the beginning of the lease term, it be required within 3 years of the end of the lease term or upon demand, to ensure it is in the correct amount. Because it may become necessary to cancel the lease at any point during the term, or the lessee may become bankrupt at any point during the term, we have retained the requirement for the bond at the BIA approval stage.

One tribe stated that for tribally owned and run housing projects, the requirements are burdensome, for example where the tribe grants a tribal member only the occupancy rights to a home. If the tribe has only granted occupancy rights, then it has not granted a legal interest, and no lease is required.

A number of tribes noted the difficulty in obtaining bonding in Indian country and requested a list of bonding companies. The regulations currently in effect already require bonding; unfortunately, we cannot provide a list of bonding companies because we cannot appear to endorse any one company over another.

17. Surveys

Several tribes commented on the requirement for a certified or official survey. A few tribes requested allowance for alternative methods of survey and noted that the requirement for a certified or Certified Federal Surveyor (CFEDS) survey is expensive, time consuming, and excessive for some transactions. We revised the requirement for surveys in the residential context to allow for reference to a public or private survey that has already been completed. For business leases, WEELs, and WSR leases, the requirement for certification may be met by an engineer's certification or by a surveyor. This does not require a cadastral survey; the survey may be in aliquot parts. At this time, we are unable to accept GPS coordinates because they

cannot be recorded in the LTRO. An "official" survey is intended to mean a survey sponsored by a government agency.

18. Enforcement

Tribes had the following comments on enforcement provisions.

- Delete the mandatory provision allowing BIA the right to enter without notice in the residential context. We addressed this comment by requiring advance notice.

- Clearly and unequivocally recognize the authority of Indian landowners to enforce the terms of a lease or cancel a lease. To address this comment, we added a sentence in 162.019 regarding the tribes' ability to pursue available remedies under tribal law.

- Clarify that tribes and TDHEs have independent authority to administer and enforce leases. We have strengthened provisions requiring BIA to consult with the tribe prior to taking enforcement action.

- Modify residential lease provisions to allow for incorporation of specific terms regarding enforcement and termination that can be enforced by tribes, TDHEs, or others without BIA approval. Tribes may include such specific terms in their negotiated remedies.

- Enforce residential leases only in instances where the tribe does not have housing or landlord-tenant laws. BIA enforces only the master lease, while the lessee, whether it is a tribal housing authority or other lessee, is responsible for enforcing the sublease, including evictions.

- Revise 162.020, which currently states "takes possession of or uses Indian land without a lease where a lease is required," to specify "uses upon expiration of a lease." We did not incorporate this change because remaining in possession upon the expiration of a lease is covered by "uses Indian land without a lease" and the provisions at 162.368, 162.468 and 162.593 address this issue in detail.

- Make 162.020 consistent with the agricultural leasing provision that provides that BIA "will" take action to recover possession. While the American Indian Agricultural Resource Management Act (AIARMA) provides statutory authority for such a provision in agricultural leasing, there is no parallel statutory authority for other types of leasing; therefore, we did not incorporate this suggested change.

- Add a new, explicit requirement for BIA to take prompt action to evict lessees upon the expiration of the lease. Because there may be circumstances in which the Indian landowners do not want BIA to take prompt action, or BIA is unable to take prompt action, the proposed rule provides that BIA "may" take action.

- Add specific eviction regulations and other specific trespass regulations. Currently, there are trespass provisions in part 166, applicable to grazing permits, and in part 163, applicable to forestry.

- Change the timeline for the lessee to act upon receipt of a notice of violation from 10 days to 30 days. We declined to incorporate this change because the commenter did not provide justification for changing this longstanding practice.

- Delete the requirement for BIA approval for a lease termination to take effect. We have revised this section to clarify that for individually-owned Indian land, BIA concurrence is required to ensure that all the consents have been obtained. For termination of leases on tribal land, BIA concurrence is not required.

- Make the cancellation notice effective within 34 days of mailing, with the extra 3 days, rather than 10 days, to account for receipt by mail. We are allowing 10 days in this instance to account for lessees and agencies that are in remote locations.

- Delete the provision stating that BIA may not be bound by decisions in forums designated by the lease. We did not make this revision because BIA is not bound as a matter of law by tribal courts or other non-Federal forums, but BIA will defer to ongoing proceedings in such forums.

- Revise the provision stating that the cancellation will be stayed to make cancellation immediately effective where the lease is cancelled for nonpayment. We agree that often, if the cancellation is the result of the lessee's nonpayment, then it may be appropriate to make the cancellation immediately effective, but this is not always the case. We retained the provision because, where the lease is cancelled for a reason other than nonpayment, this provision allows the Indian landowners to continue to receive rental payments during the appeal. If the lease is cancelled for nonpayment, then the Indian landowners may seek to make the cancellation immediately effective under 25 CFR 2.

- Add a definite time period for the parties to notify BIA of the lease termination. Because it is in the Indian landowner's interest to expeditiously notify BIA, we determined that it is not necessary to specify a time period.

- Delete the requirement for the landowner to give notice of nonpayment where direct pay is in effect. The regulations include this provision because the lessee could indicate to BIA they paid, while the funds never reach the landowner.

- Simplify cancellation procedures. BIA has reviewed the procedures and determined that they are necessary to afford due process.

19. Due Diligence

Tribes had the following comments on due diligence provisions:

- Delete requirements in the business and WSR leasing subparts regarding due diligence because they require unnecessary BIA involvement in lease terms. BIA will only require that the lease address due diligence, and the waiver of these provisions will allow flexibility.

- Ensure that due diligence provisions allow for a development period for phased projects. The regulations allow the parties to negotiate the time periods, stating "or other period designated in the lease."

- Add a "go dark" provision, allowing the tribe to cancel if the lessee is not operating at full capacity. Provisions on due diligence are intended to address this issue, but the Indian landowners may also include provisions in their negotiated remedies.

20. Payment Provisions

A. Payment Methods & Timing

Several tribes stated that the prohibition on accepting cash imposes a hardship on tribal members who must travel to obtain a cashier's check. This prohibition applies only to payments made to the United States as trustee. If the landowner tribe agrees to direct pay, it may accept payments in any form it wants. For residential leasing, a few tribes suggested accepting online bill pay to ease the burden of not accepting cash. Electronic funds transfer (ETF) is the preferred method of payment. Because of these mitigating factors, we did not eliminate the prohibition on cash payments.

A few tribes stated that the prohibition on personal checks for business and WSR leases should be deleted, while others stated that the prohibition does not pose an issue. We did not make a change to this prohibition as a result.

In response to several requests, we added provisions allowing acceptance of third-party checks from financial institutions.

Several tribes requested that we delete the provision prohibiting advance payments made more than one year in advance of the due date. This requirement is statutory, but both the statute and proposed rule provides that this prohibition applies "unless otherwise provided in the lease," so the parties may adjust or eliminate this provision in the lease.

B. Direct Pay

Several tribes requested that the residential leasing subpart clarify that where the tribe is the lessor, payments should go directly to the tribe unless the lease specifies otherwise, and to the TDHE as the sublessor unless the sublease specifies otherwise. The regulations provide that the lease must specify to whom payments will be made to allow for all residential leasing scenarios.

One tribe stated that requiring lessees who have made direct payments to the tribe to provide proof of payment to BIA is burdensome. The regulations provide that the lease must include provisions for proof of payment; this may include a procedure other than providing proof of each payment to BIA.

Several tribes questioned the policy change reflected in the draft regulations that provided that direct pay may only be suspended upon unanimous consent of the landowners. We have revised this provision to allow for direct pay to be suspended in certain circumstances (upon death of landowner, declaration of a landowner as non compos mentis, when the landowner's

whereabouts are unknown, or when their trust accounts are encumbered) for that individual landowner only, rather than for all landowners in the tract.

Several tribes suggested adding "unless otherwise provided in these regulations" to the provision stating that rental payments may not be made payable directly to anyone other than the Indian landowners unless otherwise provided in the lease. Because these regulations do not state that rental payments may be made payable directly to others, we did not make this revision.

One tribe requested clarification that the 100% consent requirement for direct pay does not affect crop share leases. The provisions allowing for non-monetary compensation allow for crop-sharing.

C. Other

Several tribes suggested revising the regulations to authorize BIA to issue invoices to a lessee upon request by the Indian landowner. We have incorporated this revision.

Several tribes stated that the fee assessments should not apply to tribally-administered housing programs because such assessments may be difficult to collect from an indigent lessee. We have not made any revision in response to this comment because the regulation states that assessments "may" be made, providing for discretion in cases where not appropriate.

In provisions regarding "other types of payment" that may be required under leases, one tribe suggested clarifying that the lessee may be required to pay additional "tribal or Federal" fees. There may be instances where the lessee is required to pay other fees, however, so we did not incorporate this change.

Several tribes stated that a lessee should be entitled to payment for loss or damage of personal property and that the landowners shouldn't receive payment just because the lease fails to specify how it will be distributed. In response to this comment, we added that the default rule will apply only if the insurance policy, order, award, judgment, or other document including the lease, does not specify an allocation.

21. Improvements

Tribes overwhelmingly supported the provisions at 162.315(c), 162.415(c), and 162.515(c) clarifying the fact that improvements on trust or restricted land are not taxable by non-tribal entities. These regulatory provisions represent strong Federal interests—in tribal economic development, self-sufficiency and self-government. These interests are protected if improvements on Indian land are subject only to tribal taxation and fees, to the exclusion of other jurisdictions. These regulations are intended to preempt the field of leasing of Indian land, including improvements on that land. One tribe requested adding "leasehold interest" to this provision; we did not incorporate this change because it is not possible to have an improvement on a leasehold interest.

We also received a number of comments requesting that the regulations state definitively that the improvements become the landowners'. We instead retained the regulatory provisions requiring the lease to establish ownership to offer maximum flexibility to Indian landowners in their negotiations. Several tribes also noted that parties may not be able to identify all

improvements to be constructed during the lease term, and therefore could not contemplate their ownership in the original lease terms. These tribes suggested adding a blanket statement providing for Indian landowners' ownership of any improvements constructed during the lease. Again, we have retained the current requirement for the lease to establish ownership; the lease need only generally describe improvements to be constructed. The parties may determine the level of detail appropriate in their descriptions on a case-by-case basis and in accordance with tribal law

One tribe asked how much notice is necessary for construction of major improvements, and in what manner. The regulations provide that "reasonable" notice is required – this will vary in time and manner according to the circumstances.

A few tribes stated that the requirement that the lease specify a construction schedule is unworkable. We revised the regulation to state that the lease must provide for development of a schedule, rather than providing the schedule itself.

One tribe asked why the regulations address who owns improvements. The regulations do not address who owns improvements, but requires that the lease establish who owns improvements.

One tribe stated that improvements should be removed prior to expiration of the lease, on the lessee's time, not the landowners' time. The regulations provide that we may enforce removal of improvements after expiration or termination of the lease because at that time, the lessee is no longer legally in possession of the premises. A few tribes suggested adding that improvements may only remain on the leased premises if they are in a condition meeting minimum building requirements. We did not incorporate this revision because the section addressing mandatory provisions in a lease now requires the lease to establish who is responsible for maintaining improvements.

22. Applicability of Leasing Regulations

One commenter stated that a tribe using its own land, regardless of the entity using the land, should be exempt from the leasing regulations and should be able to proceed under tribal law. A tribe using its own land can proceed in accordance with tribal law, without being subject to these regulations; however, if the tribe grants possession to another entity that is legally distinct and separate from the tribe for use of the land, a lease is required.

A number of tribes requested that the regulations recognize the continued ability of tribes to use different land use agreements (permits, short-term leases, use agreements) than those set out in Part 162 as long as those agreements do not conflict with Section 81. Tribes may continue to use other types of land use agreements. Section 162.007 lists other land use agreements that are not subject to these regulations. There are separate statutory authorities for leases versus other agreements, such as rights-of-way. The Department plans to revise the rights-of-way regulations in the near future.

One tribe requested that we exempt tribal entities if they control a certain percentage of the trust or restricted interests. We did not incorporate this requested change because a lease to any legal entity separate from the tribe will require Secretarial approval, regardless of how much of the trust or restricted land it owns or controls.

A few tribes asked that we exempt leases by tribes to tribal members from the requirement for BIA approval. Under 25 U.S.C. 415, Secretarial approval of leases by Indian landowners is required; this is true even if the lessees are tribal members.

23. Compatible Uses

Tribes had the following comments on provisions regarding compatible uses.

- Clarify that leases may provide for third parties to use the leased premises for compatible uses. We accepted this comment by editing the provision to account for third parties' use of the leased premises.

- Clarify that if the lease is silent on whether third parties may use the leased premises then the landowner may authorize others to use the property for purposes that do not interfere with the lessee's use. We did not incorporate this change because it could create a presumption that the lessee does not have exclusive possession.

- Clarify whether the provision on compatible uses means that a landowner could enter a lease for one purpose but continue to use the property while it is being developed, which could cause concern for bankers reviewing the leasehold mortgage. This provision does mean the landowner could enter into a lease for one purpose and continue to use the land while it is being developed. We do not believe this provision will cause concern because the uses must be compatible (e.g., grazing and wind turbines).

- Clarify that leases for agricultural, residential, or business purposes may be subject to subsequent leases to take advantage of wind or solar resources for the same tract. The provisions addressing compatible uses require the lessee to agree to the compatible use.

24. Appeals

Several tribes requested a more precise definition of "interested party" for the purposes of appeals of leasing decisions, rather than relying on the general definition provided in 25 CFR 2. We added a definition at § 162.022.

One tribe requested a new provision allowing for tribes to get a waiver of the part 2 appeal process where the tribe can prove it has a tribal court with a fair and impartial judge and the lessee will be afforded due process. We did not include the requested provision because part 2 applies to appeals of BIA actions. Subjecting BIA to tribal court would require a waiver of the United States' sovereign immunity, which can only be granted by Congress.

One tribe noted that the dispute resolution process under 25 CFR 2 does not provide a mechanism to quickly address BIA actions. Appellants may request expedited review by the Interior Board of Indian Appeals (IBIA) on a case-by-case basis.

25. General Provisions

Tribal commenters had the following comments on subpart A provisions.

- Expressly state that the technical common law rules classifying interests in land do not apply to leases of Indian land because leases are of Indian land can exist only pursuant to

statutory authority, and are not created under common law of real property. Leasing of Indian land is governed by statute, rather than common law; however, we do not believe a regulatory provision stating this is appropriate.

- Clarify that this subpart will not apply to tribes who have entered into a TERA. Section 162.008(b)(4) clarifies that no BIA approval is needed under part 162 where the lease is entered into under a special act of Congress authorizing leasing without BIA approval.

- Apply the conflict provision at 162.002(c) (if there is any conflict between these general provisions and specific provisions applicable to agricultural leases under subpart B, subpart B governs) to the specific provisions under subparts C and D as well. This provision was included because subpart B, regarding agricultural leases, will be updated at a separate time. There should be no conflicts between the general provisions in subpart A and the other subparts.

- Eliminate the differentiation between a lease that predates the life estate and one subsequent. We have revised the provisions regarding life estates and have deleted the distinction between a lease that predates the life estate and one subsequent.

- Revise 162.005(f) (now 162.008(a)(3)) because the draft regulations suggest that status as a Section 17 corporation is sufficient to exclude application of part 162, even if it holds a lease under 25 U.S.C. 415. We addressed this comment by revising this provision to clarify that the land must be held under its Federal charter.

- Clarify that the leasing statutes do not apply to tribal land assignments authorizing temporary uses by non-tribal members, not just by tribal members. We addressed this comment by incorporating the suggested edit.

- Make the waiver of regulations in section 162.013(b) mandatory in cases where BIA determines that no Federal law is implicated. We did not accept this suggested edit because providing for a mandatory waiver renders the regulatory requirement meaningless.

- Provide more information on whether section 162.008(a)(2) requires all fractional owners to give permission to possess without a lease. All co-owners must give their permission. The co-owners' agreement governs how long the permission lasts and how it can be revoked. The interest may be capable of being passed on, depending on the tribal probate code. This provision is in place at section 162.104(b) of the current regulations. The proposed rule includes a provision suggesting that the parties memorialize their agreement.

- In 162.008(b)(1), stating that the individual owning 100% of the interests in a tract may take possession without a lease or other BIA authorization, add that the individual may use that tract himself/herself. We did not incorporate the suggested change because "possession" includes "use."

- Clarify whether co-owners must consent to permits on Government land and how payment is made. We clarified that BIA may grant permits on Government land.

Because the Government owns this land, there is no need for landowner consent or collection on behalf of Indian landowners. Tribes may grant permits of Indian land in accordance with Tribal law.

- Clarify that submission of a document for recordation does not constitute a federal action triggering NEPA. Recordation in the LTRO is an administrative action that is categorically excluded from NEPA under 516 DM 10.5.D; however, we did not revise the regulation to state this because it is beyond this regulation's scope.

- Address how value is to be attributed when a lease combines both trust and fee lands. We did not add this to the regulation because this regulation addresses only trust and restricted lands; any lease for such lands would address the amount fee interest owners get paid.

- For unitization provisions, allow rent to be distributed based on land value, rather than acreage. We added that the lease can provide that rent should be distributed based on something other than acreage.

- Require BIA to notify tribes of leases on individually-owned land within its jurisdiction. We did not incorporate this change because the tribe and the landowner may agree to some notification requirements, but BIA does not have a duty to notify in this instance.

- Clarify procedures for getting BIA to respond to landowner concerns. We did not make any changes to the regulations as a result of this comment because these procedures are better suited to an internal handbook.

- Add examples of types of information BIA might require parties to a lease to disclose, so parties know what to include in nondisclosure agreements. We did not add examples to the regulations because the types of records depend upon the specific circumstances of the lease.

- Require BIA to immediately return all documentation to Indian landowners upon approval where documentation is deemed proprietary or otherwise confidential, without retaining copies. We understand the need to maintain confidentiality. Once BIA has the documents, it becomes a Federal record, so BIA may not return them; however, BIA will minimize duplication of the documents.

- Require BIA to provide Indian landowners with notice when a public records request is made in relation to any documents that person/entity has submitted, in order to give them an opportunity to challenge the request to turn over the documents. In accordance with Freedom of Information Act (FOIA) exemption number 4, we will consult the submitters of the information before disclosing information.

- Add provisions allowing Indian landowners to redact certain information from documents submitted to BIA to protect proprietary and confidential information from potential public disclosure. We addressed this comment by replacing "financial records" with the more specific "lease payment records." In accordance with FOIA exemption number 4, we will consult with the submitters of the information before disclosing information.

- Allow BIA to accept environmental assessments performed by other agencies. We have addressed this comment by incorporating the requested change at section 162.024.

26. Other Cross-Cutting Changes

Several tribes questioned the meaning of the provision stating that the lease will be binding on the non-consenting tribe and that the tribe will not be a party to the lease. This provision originated from the ILCA Amendments of 2000 (see 25 U.S.C. 2213(c)). We have revised the regulatory provision to clarify our interpretation that this statutory provision is intended to protect the tribe's sovereign immunity in those instances where the tribe owns an undivided fractionated interest in a tract but does not consent to a lease. The tribe would receive rent and participate as any other trust or restricted landowner in that lease. The phrase "to the extent of their fractional interest" is intended to distinguish the binding effect of the tribe's consent from other tribal land.

Several tribes commented on the provisions stating that where tribal land is subject to a tribal land assignment, both the tribe and assignee must consent to the lease. Their concern was that this regulatory provision appeared to grant assignees new rights over their tribal assignments, and the power to hold a tribal decision hostage. Our intent was the reverse (to require the tribe's consent), and we have revised it to clarify that intent.

In addition, tribes commented on several other provisions that affected residential, business, and wind and solar leasing, as follows.

- Require prospective lessees to contact the Indian landowner, rather than BIA. The regulations state that BIA will assist the prospective lessee in contacting the Indian landowner – this section is offering BIA assistance but does not authorize BIA to act on behalf of the Indian landowner or otherwise exclude the landowner from the process.

- A few commenters asked why leases can't be advertised. Leases may be advertised. The proposed rule states that "generally" they will not be advertised, but this is not a prohibition on advertising.

- Allow for lease documents without sensitive information to be maintained in the files, and require sensitive information only with adequate reason and under confidential seal. Part 150 requires recording of originals of documents; however, sensitive provisions would be protected under FOIA.

- Expand the provision, stating a lease may not exceed two years if all the interests in the land are owned by a deceased with undetermined heirs, to apply if a majority of the trust or restricted interests are owned by deceased with undetermined heirs. We did not incorporate this change because the current provision is a long-standing interpretation of 25 U.S.C. 380.

- Add a provision requiring BIA to provide tribes with reports of how many leases are in existence and the amounts, if any that are overdue, because this information is critical for forecasting tribal revenue and budget. BIA did not incorporate this requested change because such requests are appropriately handled as FOIA requests.

- Adopt regulations consistent with the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2011 (HEARTH Act). These regulations are consistent with the legislation known as the HEARTH Act. While this legislation has not been enacted to date, if it is enacted in the future, leasing activities under the Act would fall under section 162.008(b)(4), regarding special acts of Congress.

- Approve older homesites where homes exist but there is no formal homesite lease approved (due to BIA and HUD policies at the time) in accordance with regulations in effect at time they were approved for development. We did not address this issue in the proposed regulations; landowners may want to consider entering into a new lease under these revised regulations.

- Clarify whether these regulations have any bearing on abolishing a tribe and transferring their lands to each of the bands. These regulations do not have any bearing on abolishing a tribe or transferring lands.

- Allow each BIA office and tribal agency to develop its own leasing regulations to address the uniqueness of their reservations. Part 162 regulations are intended to establish baseline, uniform, nationwide procedures.

- Clarify how these regulations apply to transmitter sites. These regulations apply to leases for transmitter sites, while the rights-of-way regulations would generally apply to agreements for use of land for fiber optic lines.