

TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 2 STATE TRUST LANDS
PART 22 PLANNING AND DEVELOPMENT LEASES

19.2.22.1 ISSUING AGENCY: Commissioner of Public Lands - New Mexico State Land Office - 310 Old Santa Fe Trail - P. O. Box 1148 - Santa Fe, New Mexico 87501.
[19.2.22.1 NMAC - Rp, 19.2.22.1 NMAC, 11/30/12]

19.2.22.2 SCOPE: Pursuant to Article XIII, Section 2, of the New Mexico Constitution, the commissioner has jurisdiction over all lands and related resources that the United States granted and confirmed to New Mexico under the New Mexico Enabling Act. This rule, 19.2.22 NMAC, governs the granting of planning and development leases, on those lands within the commissioner's constitutional jurisdiction.
[19.2.22.2 NMAC - Rp, 19.2.22.2 NMAC, 11/30/12]

19.2.22.3 STATUTORY AUTHORITY: N.M. Const. Art. XIII; Section 19-1-1 et seq. NMSA 1978; Section 19-7-1 et seq. NMSA 1978.
[19.2.22.3 NMAC - Rp, 19.2.22.3 NMAC, 11/30/12]

19.2.22.4 DURATION: Permanent.
[19.2.22.4 NMAC - Rp, 19.2.22.4 NMAC, 11/30/12]

19.2.22.5 EFFECTIVE DATE: November 30, 2012, unless a later date is cited at the end of a section.
[19.2.22.5 NMAC - Rp, 19.2.22.5 NMAC, 11/30/12]

19.2.22.6 OBJECTIVE: The objectives of 19.2.22 NMAC are to generate value to the trust by planning and development of trust land for future sale, lease, or exchange through the process of obtaining government approvals and the placement of infrastructure pertinent to the planning and development of the land; to assure protection and maintenance of trust assets and lands; to provide planning and development lease terms and conditions; and to provide an efficient process for such leasing.
[19.2.22.6 NMAC - Rp, 19.2.22.6 NMAC, 11/30/12]

19.2.22.7 DEFINITIONS: As used in 19.2.22 NMAC, the following terms have the meaning set forth in this section. A planning and development lease may add detail to a definition to accommodate lease specific issues.

A. “Applicant” means the person or entity first applying to nominate trust land for a planning and development lease.

B. “Approval / approved” means written approval and includes only that which has been expressly approved and nothing further which might be implied.

C. “Assignment” means any direct or indirect transfer or partial transfer of all of a lessee's interest in all or a part of a planning and development lease, including, but not limited to, any conditional transfer or transfer by operation of law, excluding subleases.

D. “Base infrastructure” means tangible improvements consisting of main distribution or arterial-level service lines, or the municipal or local equivalent, including at a minimum, all of the following: water, sanitary sewer, gas, electricity, telecommunications, and roadways or other transportation facilities.

E. “Base value” means the value that results from the base appraisal, as more specifically defined in Paragraph (1) of Subsection A of 19.2.22.17 NMAC below.

F. “Collateral assignment” or “leasehold mortgage” means the conditional assignment to a creditor as security for a debt of a lessee's personal property interest in a planning and development lease, infrastructure, governmental approvals, or improvement value credit.

G. “Commissioner” means the New Mexico commissioner of public lands. The commissioner is the executive officer of the state land office and may delegate to state land office staff the performance of duties required of the commissioner under this rule.

H. “Disposition” means a take-out sale, a take-out lease, or a take-out exchange of all or any portion of trust land subject to a planning and development lease.

I. “Disposition parcel” means the portion of the trust land under lease that is subject to disposition.

J. “Government approvals” means legal rights granted by governments or agencies that run with the leased land including but not limited to planning, zoning, water and sewer service agreements, development agreements, platting, archaeological clearances or mitigation, and such other rights as may be required for the further development, improvement or use of the trust land; any property, rights, approvals, or privileges obtained or developed for the benefit of, or made appurtenant to, trust land and any other rights, permits or privileges obtained or developed in connection with a lessee’s use of the leased trust land including, but not limited to, development rights and approvals.

K. “Governmental entity” means the state of New Mexico, its agencies or political subdivisions, Indian tribes and pueblos, or federal government agencies other than the department of interior.

L. “Infrastructure” means any improvements approved through a governmental approval process and necessary to support or enhance future planned development of all or the relevant parts of the leased premises, including but not limited to utilities, erosion control structures and flood control structures, roadways, sanitary sewers, water wells, water reservoirs, and sanitary sewage treatment facilities.

M. “Improvements” means any item of tangible property secured, developed, placed, created or constructed on the leased premises including but not limited to buildings, structures, infrastructure, permanent equipment and fixtures, and water rights developed as appurtenant to the trust land and approved by the commissioner, including any associated and required land use approvals.

N. “Improvement value (IV)” means the increased value of the leased premises attributable to improvements as established by appraisal, as more specifically defined in Subsection C of 19.2.22.17 NMAC below.

O. “Improvement value credit (IVC)” means the lessee percentage multiplied by the improvement value.

P. “Joint planning agreement” means a written agreement or understanding entered between the commissioner and a local government designed to facilitate planned growth of trust lands for the greatest benefit to the trust and the local community.

Q. “Leased premises” means that portion of trust land which is subject to a planning and development lease.

R. “Lessee” means the party of record at the state land office, who leases trust land from the commissioner under a planning and development lease.

S. “Lessee percentage (LP)” means the percentage to be determined through negotiation or bidding, and incorporated into the lease, which sets the lessee’s proportional share of IV.

T. “Lessor” means the commissioner acting by and through the state land office.

U. “Natural appreciation (NA)” means any increase in the value of the leased premises not attributable to improvements, as determined by appraisal or by a pre-negotiated annual adjustment factor, as more specifically defined in Paragraph (3) of Subsection A of 19.2.22.17 NMAC below.

V. “Planning and development lease” means a written lease of trust land issued under this part, 19.2.22 NMAC, designed to improve the value of trust land for future sale, lease, or exchange. The commissioner, in his discretion, shall determine the development potential of trust land.

W. “Qualified bidder” means a prospective bidder that has satisfied both the qualification deposit and all other bidder qualifications as more specifically described in Subsections A and B of 19.2.22.11 NMAC.

X. “Rent” means the total of estimated rent payments, including all periodic rents with applicable rent adjustments, percentage rents, initial or periodic fees, or any other incentive payment due during the lease term, and any other payments identified as rent in a planning and development lease.

Y. “Rent adjustment” means a periodic increase of any rent amount.

Z. “Schedule of fees” means a list of fees that must be paid for performance of certain administrative functions. The schedule of fees shall be published on the state land office website and is subject to change at the discretion of the commissioner. Unless otherwise noted in the schedule of fees or in this rule, the fee shall be non-refundable.

AA. “State land office” means the New Mexico state land office.

BB. “Sublease” means a transaction or arrangement whereby a planning and development lessee transfers to another anything less than the full interest in the planning and development lease, including but not limited to the rights to use, possess, manage or control all or part of the leased premises.

CC. “Subsequent value (SV)” means the value that results from any subsequent appraisal, as more specifically defined in Paragraph (2) of Subsection A of 19.2.22.17 NMAC below.

DD. “Take-out exchange” means a relinquishment or a conditional relinquishment of all or a portion of the leased premises from the planning and development lease together with, and for the purpose of, an exchange of the same pursuant to 19.2.21 NMAC.

EE. “Take-out lease” means a relinquishment or a conditional relinquishment of all or a portion of the leased premises from a planning and development lease together with, and for the purpose of, a business lease of the same pursuant to 19.2.9 NMAC.

FF. “Take-out sale” means a relinquishment or a conditional relinquishment of all or a portion of the leased premises from a planning and development lease together with, and for the purpose of, a sale of the same pursuant to 19.2.14 NMAC.

GG. “Termination” means the end of a planning and development lease whether by cancellation, relinquishment or the expiration of the lease term.

HH. “Trust” means the land trust established by the Enabling Act (Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310), and that trust’s assets, which are administered through the state land office by the commissioner.

II. “Trust land” means all land owned by the trust.

JJ. “Unapproved infrastructure and government approvals” means infrastructure and governmental approvals that have not received the commissioner’s approval.

[19.2.22.7 NMAC - Rp, 19.2.22.7 NMAC, 11/30/12; A, 06/30/16]

19.2.22.8 LEASING STANDARDS:

A. The surface estate of any parcel or combination of parcels of trust land may be leased under a planning and development lease at the discretion of the commissioner.

B. A planning and development lease may be initiated only through public notice and a public auction in accordance with this rule and other applicable law, including but not limited to NMSA 1978 Section 19-7-9(c) (2009).

C. In making a determination as to whether to enter a planning and development lease, the commissioner will make a determination as to whether the lease is in the best interest of the trust based on specific considerations including but not limited to:

- (1) the present value and estimated future value that will be created for the trust;
- (2) the anticipated impact on trust lands adjacent to or near the proposed planning and development lease;
- (3) the proposed planning and development lease’s conformance with any joint planning agreements or existing land use plans;
- (4) the interests of the local community;
- (5) the feasibility of the proposed development project; and
- (6) the ability of a lessee to execute the proposed development project.

D. Notwithstanding any other provision of 19.2.22 NMAC, and at any time before the execution of a planning and development lease, the commissioner may, at the commissioner’s discretion, reject any application or bid submitted under 19.2.22 NMAC.

[19.2.22.8 NMAC - Rp, 19.2.22.8 NMAC, 11/30/12]

19.2.22.9 INITIATING A LEASE:

A. A planning and development lease may be initiated either by an applicant or by the commissioner.

B. Any person, corporation or other legal entity registered with the New Mexico public regulations commission, or any other legal entity authorized to do business in New Mexico, may apply to lease any trust lands under a planning and development lease by submitting an application on forms prescribed by the commissioner.

C. The application for a planning and development lease must, at a minimum, be made under oath and include the applicant’s full name and contact information, a general description of the trust land proposed for leasing including its present use and general location, a general description of the proposed planning and development activities and a statement describing the anticipated benefits to the trust.

D. The application must include a nonrefundable application fee and advertising deposit in the amount established by the commissioner.

E. If, after an initial evaluation of an application, the commissioner determines that proceeding with the proposed planning and development lease may be in the best interest of the trust:

- (1) the commissioner shall require that a base appraisal be performed consistent with Paragraph (1) of Subsection A of 19.2.22.17 NMAC below;
- (2) the commissioner may also require a survey plat and legal description of the trust lands performed by a licensed professional surveyor in the state of New Mexico; and

(3) the commissioner may require any other supplemental information from the applicant deemed appropriate under the circumstances.

F. An applicant may withdraw an application for a planning and development lease at any time.

G. If the applicant is not the successful bidder and the lease is awarded to another party, the successful bidder shall reimburse the applicant for the cost of the appraisal, survey and additional costs incurred by the applicant related to the auction required by the commissioner and born by the applicant.

[19.2.22.9 NMAC - Rp, 19.2.22.9 NMAC, 11/30/12]

19.2.22.10 PUBLIC NOTICE OF A PROPOSED PLANNING AND DEVELOPMENT LEASE:

A. **Advertisement.** A notice of public auction must be published once each week for not less than 10 consecutive weeks in a newspaper of general circulation published in Santa Fe, and in a newspaper of general circulation published nearest the offered land. The notice of lease sale must contain:

(1) the date, time and place of the auction;

(2) a description of the trust land offered for lease and any limitations on the uses of the land including any local land use restrictions, covenants, master plans, joint planning agreements or any restrictions established by the commissioner;

(3) a statement as to whether the lease may be reasonably amended after its execution; and

(4) the name of the person to contact at the state land office for additional information on the auction and the trust land being offered for lease.

B. **Notice at the property.** The applicant for the lease shall post notices of the proposed lease on the boundaries of the proposed leased premises adjacent or nearest to public rights of ways, in a similar manner as required by the local government through its land use approval process. Such notice shall be posted and maintained by the applicant for the 10 week public notice period so as to be visible from the public right of way. Notices shall be in the form of a sign identifying that a lease is being requested from the New Mexico state land office, the size of the proposed lease in terms of acreage, the name and contact information of the applicant, and purpose of the lease.

C. **Bid information packet.** Anyone requesting information on the auction will be provided with a bid information packet which, at a minimum, will include:

(1) a form planning and development lease;

(2) a bid proposal form;

(3) the amount of the qualification deposit;

(4) a description of the public auction process;

(5) the base value of the land together with a statement as to whether the commissioner's portion of the IV, if any, will be rolled over into the subsequent lease; and

(6) a list of qualifications and statement of the criteria established by the commissioner for determining the highest and best bid.

[19.2.22.10 NMAC - N, 11/30/12]

19.2.22.11 PUBLIC AUCTION: The commissioner may, under the following procedures, offer a planning and development lease to the highest and best bidder after public notice and a public auction. In order to qualify to bid at a public auction, each prospective bidder must satisfy both a qualification deposit and the bidder qualifications prescribed by the commissioner in accordance with the following.

A. **Qualification deposit.** Each prospective bidder must deposit with the commissioner the following amounts which are to be specifically described in the public notice:

(1) the costs of the auction, whether incurred by the state land office or the applicant; such costs and expenses may include, but are not limited to, the costs of appraisals, surveys, advertising, land use planning, and brokerage or other real estate fees;

(2) the first rental payment under the planning and development lease; and

(3) if the trust land offered for lease has IV or improvements from a previous lease, all prospective bidders must deposit:

(a) a sum equal to the value of the IV, the improvements, or both, or a bond or letter of credit sufficient to cover the value of these (the holder of IVC or the owner of improvements need not make this deposit); or

(b) if the commissioner has agreed that its portion of the IV will be rolled over into the subsequent lease all bidders except for the holder of IVC must deposit:

(i) a sum equal to the IVC or a bond or letter of credit sufficient to cover the IVC;

- (ii) a bill of sale for the IVC executed by the holder of the IVC; or
- (iii) a waiver of payment signed by the holder of the IVC.

B. Bidder qualifications. In order to ensure the greatest return for the trust, the commissioner will establish the minimum objective criteria that must be satisfied by each prospective bidder in order to qualify to bid based on the nature of the lease and the proposed uses of the trust land. Such requirements may include but are not limited to:

- (1) a preliminary, non-binding pro-forma or similar documentation that identifies a minimum anticipated return rate to the trust and demonstrates that a bid proposal is realistic and achievable;
- (2) a financial statement that demonstrates solvency and resources sufficient to accomplish the proposed development project; and
- (3) some minimum level of experience in land use planning and development.

C. Refunds. Upon completion of the lease auction, the commissioner shall return any deposits to the unsuccessful bidders.

D. Due diligence. All bidders must undertake their own due diligence, including but not limited to, inspecting the offered trust land and reviewing pertinent records and files of the state land office and other public agencies. A prospective bidder must obtain the approval of the commissioner before entering upon trust land.

E. Auction. The auction may be conducted by the acceptance of oral or sealed bids. If awarded at all, the planning and development lease will be awarded to the qualified bidder offering the highest bid as determined by the following: For each auction, the commissioner shall set a specific non-negotiable base rent. The commissioner may accept bids based on the lessee percentage, or set a specific non-negotiable lessee percentage and allow bidding in the form of a cash bonus pursuant to the following:

- (1) if the commissioner sets only a specific non-negotiable base rent, the highest bid will be the bid offering the lowest lessee percentage; or
- (2) if the commissioner sets both a specific non-negotiable base rent and lessee percentage, the highest bid will be the bid offering the highest cash bonus.

F. Bidding IVC. A lessee may bid its accrued IVC attributable to the portion of the leased premises subject to disposition at any public bid for the same disposition parcel.

[19.2.22.11 NMAC - Rp, 19.2.22.11 NMAC, 11/30/12]

19.2.22.12 PLANNING AND DEVELOPMENT LEASE:

A. Execution of lease. The successful bidder must deposit with the commissioner all amounts due for the lease sale, including any bonus bid, no later than five business days after the auction, and shall, within 30 days after the auction, enter into the lease. The commissioner may extend the period for entering into a lease to no greater than 180 days after the auction. If the successful bidder does not deposit with the commissioner any amounts due, or enter into the lease offered by the commissioner, within the prescribed time periods, the commissioner may reject the bid and either declare another bidder to be the winner, or terminate the lease.

B. Lease terms. All planning and development leases will contain, at a minimum, such provisions as may be prescribed by the commissioner and must comply with all applicable laws in effect at the time of lease execution.

C. Conditions. The commissioner shall establish conditions in a planning and development lease necessary for providing a secure return to the trust, managing the trust land in an economically reasonable manner and protecting the trust land and any natural and cultural resources on the trust land from waste. Each lessee under a planning and development lease shall have an affirmative duty to diligently prevent and protect against trespass and waste on trust land.

D. Uses. A planning and development lease must designate the allowable uses of the leased trust land. The commissioner may establish restrictions on the uses of the trust land, including but not limited to restrictions contained in local land use rules, covenants, or land use plans.

E. Rent. Unless otherwise provided in a lease, rent will be paid in advance in annual installments.

F. Mineral reservation. Each planning and development lease will reserve the mineral estate, geothermal resources, water, and pore spaces for exploration, development, conservation and production and all related rights of access over, through or across trust land. The commissioner may, in a planning and development lease, agree, upon payment of a negotiated fee sufficient to compensate the trust based on the commissioner's evaluation of the potential value of the reserved rights, not to exercise these reserved rights during the term of the lease.

G. Easements and rights of way reservations. Each planning and development lease will reserve to the commissioner the right to grant easements and rights-of-way across trust land for any legal purpose. A

planning and development lease may provide that any easements or rights-of-way so granted across leased trust land must be located to avoid, to the extent practicable, unreasonable interference with the uses allowed under the lease and to be consistent with land use and development plans approved by the commissioner.

H. Fish and game easement; recreational access permit. Unless specifically stated otherwise, a planning and development lease will be withdrawn by the commissioner from public use under a fish and game easement or under recreational access permit.

I. Water rights. Water rights developed on trust land under a planning and development lease must be developed pursuant to a separate agreement with the commissioner.

J. Other terms, rents, fees. The commissioner may require such other terms, rents, or fees not otherwise disallowed by this rule or other applicable law.

[19.2.22.12 NMAC - Rp, 19.2.22.12 NMAC, 11/30/12]

19.2.22.13 SUBLEASE; ASSIGNMENT OR PARTIAL ASSIGNMENT:

A. Any sublease, assignment or partial assignment for use of trust land is void without the approval of the commissioner. The commissioner's approval may be conditioned upon such terms or requirements as are deemed to be in the best interests of the trust including but not limited to:

- (1) additional consideration to the commissioner;
- (2) disclosure of the value paid to the lessee in consideration of the assignment or

sublease; and

(3) that the sublessee, assignee or partial assignee meets the same or substantially similar minimum qualifications that were required of the lessee at the time of bidder qualification.

B. The commissioner may, in a lease, pre-approve certain assignments or subleases that he deems to be in the best interests of the trust.

(1) No assignment or sublease of trust land under a planning and development lease will be approved unless the lessee is in compliance with the terms of the lease.

(2) The commissioner's approval of a sublease or assignment does not relieve the lessee from any liability that may have arisen before the sublease or assignment. The commissioner's approval of a sublease does not release the lessee from its continuing and primary liability for performance of all terms and obligations under the lease.

(3) The commissioner's approval of a sublease or assignment will not constitute approval of any subsequent sublease or assignment.

C. Applications to sublease or assign must be made by the current lessee under oath, on forms prescribed by the commissioner, and must be accompanied by the fees shown on the schedule of fees.

D. No assignment or sublease will extend the term of a planning and development lease and the lessee shall inform its sublessee or assignee of the terms and conditions of the lessee's planning and development lease.

E. The termination of a planning and development lease will automatically, and without notice, terminate any sublease, unless otherwise agreed to in writing by the commissioner through an attornment or a similar agreement.

F. A lessee or sublessee may not transfer, change the purpose or use, or move the point of diversion of any water rights that are appurtenant to trust land without the prior approval of the commissioner.

[19.2.22.13 NMAC - Rp, 19.2.22.13 NMAC, 11/30/12]

19.2.22.14 COLLATERAL ASSIGNMENTS; LEASEHOLD MORTGAGES:

A. Unless otherwise provided in a planning and development lease, and subject to the prior approval of the commissioner, a lessee's interest in a planning and development lease or infrastructure, inclusive of accrued IVC, may be collaterally assigned or mortgaged by the lessee. An approved collateral assignee or mortgagee shall not have a lien on the commissioner's interest in the trust land, the lease, any infrastructure, or the commissioner's reversionary interest in the real and personal property subject to the lease. Any attempt to collaterally assign or mortgage a lessee's interest in a planning and development lease, or in any infrastructure, without the approval of the commissioner, will be void and will not vest the purported collateral assignee or mortgagee with any right, title, interest, claim or privilege with respect to such lease or infrastructure.

(1) Prior to making any collateral assignment a lessee shall apply to the commissioner, under oath, and on such form as may be prescribed by the commissioner. The lessee shall include a copy of the proposed collateral assignment or leasehold mortgage and pay any applicable fees set out in the schedule of fees.

(2) The commissioner may approve the collateral assignment or leasehold mortgage subject to such terms and conditions that he deems to be in the best interests of the trust, and may agree to such reasonable amendments to the planning and development lease as may be necessary for the collateral assignment or leasehold mortgage.

B. If the commissioner gives written notice to a planning and development lessee of a breach of the lease by the lessee, the commissioner shall also give written notice of the breach to an approved collateral assignee or mortgagee of the development planning lessee. Such notice will be sent by certified mail to the most current name and address of the collateral assignee or mortgagee in the official lease file of the commissioner and no proof of receipt of such notice by the collateral assignee or mortgagee will be required.

C. An approved collateral assignee or mortgagee may cure a lessee's breach within the time periods provided to the lessee under the lease. A planning and development lease may provide that a collateral assignee or mortgagee may succeed to the rights and duties of the lessee of the planning and development lease under such conditions as are provided in the lease. The commissioner's approval of a collateral assignment of infrastructure does not change the status of any infrastructure as approved, unapproved, removable or permanent infrastructure.

D. A collateral assignee or mortgagee shall take its interest subject to the following terms and conditions, and the lessee is required to give notice of such terms and conditions to its collateral assignee or mortgagee upon making a collateral assignment or leasehold mortgage.

(1) The commissioner is entitled to notice of all proceedings, judicial or non-judicial, to enforce or foreclose the collateral assignment or leasehold mortgage.

(2) Any successor in interest to a lessee's interest in a planning and development lease, or in any infrastructure, that acquires an interest in such property as the result of the enforcement or foreclosure of a collateral assignment or leasehold mortgage, or an assignment or conveyance in lieu of such enforcement or foreclosure, will be deemed to be an assignee under 19.2.22.13 NMAC, and will be subject to the approval of the commissioner. Such approval will not be unreasonably withheld; but no successor in interest will be approved by the commissioner unless all sums due under the terms of the lease have been paid in full, and all other pending duties discharged, or unless arrangements satisfactory to the commissioner are made to fully pay such sums or discharge such duties.

[19.2.22.14 NMAC - Rp, 19.2.22.14 NMAC, 11/30/12]

19.2.22.15 APPROVAL OF GOVERNMENT APPROVALS AND INFRASTRUCTURE: No government approvals may be secured, or infrastructure placed, developed, created or constructed on trust land, or obtained or developed for the benefit of trust land, or made appurtenant to trust land without prior approval by the commissioner. Such approval will not be unreasonably withheld and may be conditioned upon certain requirements imposed by the commissioner which may include, without limitation, consistency with previous government approvals, and the provision of a bond or other adequate security to assure proper removal of infrastructure (when appropriate) from trust land and the restoration of trust land. Unless otherwise required by the terms of a lease, all government approvals and infrastructure will remain on the trust land even after cancellation or termination of a lease.

A. A request for the commissioner's approval of improvements, governmental approvals or infrastructure must be made in writing on such forms and in such manner as may be required by the commissioner, and must be accompanied by the fee set forth in the schedule of fees, if any. Once received, the commissioner shall act to approve or reject the proposed improvements or infrastructure within 30 days from the date of receipt. However, the commissioner is not obligated to approve any infrastructure, improvements or government approvals, and failure by the commissioner to act upon such requests within 30 days deems the request denied.

B. The commissioner may preapprove existing and proposed infrastructure or government approvals with the lease when the commissioner determines it is in the best interests of the trust.

C. If the lessee fails to obtain the commissioner's prior approval for infrastructure or government approvals, the commissioner may, for an additional fee, approve such items after they have been placed, developed, created or constructed on, obtained or developed for the benefit of, or made appurtenant to trust land if the commissioner determines that it is in the best interest of the trust to do so.

[19.2.22.15 NMAC - Rp, 19.2.22.15 NMAC, 11/30/12]

19.2.22.16 REMOVAL OF PROPERTY:

A. Upon the termination of a planning and development lease, all unapproved infrastructure must be removed from the trust land unless otherwise provided in the lease or in writing by the commissioner.

(1) No item of infrastructure may be removed without the commissioner's approval if a lessee owes rent or any other sums to the commissioner or if any material duties required under the lease remain unperformed.

(2) The commissioner may require, in writing, that designated unapproved infrastructure be left in place. Such infrastructure will become the property of the commissioner and no person will be entitled to any IVC for such infrastructure, and the lessee will be deemed to have waived any claim of government taking or other damages.

(3) Any unapproved infrastructure left on trust land without the commissioner's approval will remain the liability of the lessee. The commissioner may elect to take any necessary action to remove such infrastructure and all costs and fees incurred will constitute additional rent due from the lessee under the lease. Alternatively, the commissioner may declare the property abandoned and ownership transferred to the commissioner and the lessee will be deemed to have waived any claim of government taking or other damages.

B. In all cases where infrastructure is removed from trust land, the lessee is solely liable for the restoration of the trust land to its condition prior to the placement of such infrastructure. The lessee's obligation to remove infrastructure and to restore the trust land survives the termination of the lease.

C. All costs, fines and fees incurred by the commissioner as a result of infrastructure left on trust land without the commissioner's approval, and all costs, fines and fees incurred as a result of damage or waste to trust land during the term of the lease, or arising from or in connection with the lessee's use and occupancy of the trust land, remains the sole liability of the lessee and will be deemed additional rent due at the time incurred.

[19.2.22.16 NMAC - Rp, 19.2.22.16 NMAC, 11/30/12]

19.2.22.17 IMPROVEMENT VALUE; IMPROVEMENT VALUE CREDIT:

A. IV, when calculated. Improvement value (IV) must be calculated when a planning and development lease terminates, upon a disposition or partial disposition, or at lessor's discretion including but not limited to at the time of a sublease or assignment. IV is generally determined through appraisal by comparing the subsequent value of the leased premises to the base value of the leased premises with an adjustment for natural appreciation pursuant to the following and as described in Paragraph (1) of Subsection C of 19.2.22.17 NMAC below:

(1) **Base appraisal.** Prior to the effective date of the planning and development lease, the applicant, at the applicant's expense, shall cause an appraisal of the trust land to be performed by a qualified appraiser conforming to the uniform standards of professional appraisal practice (USPAP) to establish the base value (BV). The commissioner may require specific appraisal instructions and require that the appraiser be approved in advance. The state land office staff appraiser shall review the base appraisal pursuant to the USPAP Standard 3, and make a recommendation to the commissioner that the base appraisal be accepted, rejected, or accepted with adjustments. The commissioner may approve a BV consistent with the staff appraiser's recommendation or make deviations therefrom if appropriate based on the commissioner's exercise of reasonable judgment, documented in writing. The commissioner reserves the right to reject any base appraisal.

(2) **Subsequent appraisal.** A subsequent appraisal is required in order to update the current value of the leased premises for purposes of identifying IV, if any. At least 60 but not more than 90 days prior to the expiration of a lease, disposition or partial disposition, or at lessor's discretion including but not limited to at the time of a sublease or assignment, lessee at lessee's expense shall cause an appraisal of the trust land to be performed by a qualified appraiser and conforming to USPAP to establish the subsequent value of the leased premises (SV). The commissioner may require specific appraisal instructions, including but not limited to those described in Subparagraph (a) of Paragraph (3) below, and require that the appraiser be approved in advance. The state land office staff appraiser shall review the subsequent appraisal pursuant to USPAP Standard 3, and make a recommendation to the commissioner that the subsequent appraisal be accepted, rejected, or accepted with adjustments. The commissioner may set the SV consistent with the staff appraiser's recommendation or make deviations therefrom if appropriate based on the commissioner's exercise of reasonable judgment, documented in writing. The commissioner reserves the right to reject any subsequent appraisal.

(3) **Adjustment for NA.** Only the beneficiaries of the land trust are entitled to increased value resulting from NA. Accordingly, every planning and development lease must provide for one of the following methodologies designed to adjust for NA when determining IV:

(a) **Appraisal instructions method.** In addition to any other specific appraisal instructions required by the commissioner, each subsequent appraisal must be performed pursuant to the following specific instructions requiring two iterations of the appraisal:

(i) first iteration - the appraiser shall first appraise the disposition parcel for its present value considering only those improvements, if any, that were in place at the time that the base appraisal was performed; if the value that results from this first iteration exceeds BV as established by the base appraisal, this first iteration value becomes the BV of the disposition parcel for purposes of calculating IV; and

(ii) second iteration - the appraiser shall next appraise the disposition parcel at its full present value considering all present improvements; the value that results from this second iteration becomes the SV of the disposition parcel for purposes of calculating IV.

(b) **Predetermined adjustment factor or other alternative method.** Any methodology determined by the commissioner to protect the trust's interest in the value created by NA as opposed to the value created by lessee's improvements may be used, including but not limited to a pre-negotiated periodic adjustment factor included in the lease to be applied to the BV to account for the anticipated NA at the time of disposition.

B. IVC accrual; when payable. IVC accrues only upon completion of base infrastructure at least up to the boundary of the leased premises, or in the case of a partial disposition, sublease or partial assignment, at least to the present boundary of the disposition parcel, sublease or partial assignment. Alternatively, pursuant to the terms of a lease, IVC may accrue when the lessee has contractually obligated itself to construct such base infrastructure and where the contractual obligation is adequately secured by a transferable bond or letter of credit or other acceptable security. The commissioner may require that base infrastructure be extended or guaranteed through a given parcel prior to allowing a disposition, partial disposition, sublease or assignment. Upon disposition to any person or entity other than the holder of the IVC, the purchaser or new lessee shall satisfy payment for the IVC pursuant to the following:

(1) in the case of a sale or exchange, the commissioner shall convey payment of the IVC, if any, to the holder thereof from the sale or exchange proceeds; or

(2) in the case of a lease, the commissioner shall convey payment of the IVC, if any, to the holder thereof from the deposit described in Paragraph (3) of Subsection A of 19.2.22.11 NMAC above less any rent, costs, or damages owed to the commissioner; however, no payment of the IVC will be made if a bill of sale or waiver of payment signed by the holder of the IVC is filed with the commissioner.

C. IVC, how calculated. Subject to the conditions and restrictions set forth in this provision, a lessee may be entitled to IVC as determined by the following procedures and calculations and pursuant to the terms of the lease:

(1) Step 1: The base value is subtracted from the subsequent value, as adjusted for NA through one of the methodologies described in Paragraph (3) of Subsection A of 19.2.22.17 NMAC above, to determine the improvement value [SV – BV = IV].

(2) Step 2: The improvement value is multiplied by the lessee percentage to determine improvement value credit [IV x LP = IVC].

EXAMPLE WHERE: SV (adjusted for NA) = 200, BV = 100, and LP = 60%

$$200 - 100 = 100: \mathbf{IV = 100}$$

$$100 \times .60 = 60: \mathbf{IVC = 60}$$

(3) A lessee will not be liable for any negative IVC.

(4) Any bonus offered at a lease auction, or any value bid at a sale or exchange auction in excess of SV as set by Paragraph (2) of Subsection A of 19.2.22.17 NMAC above, will be payable solely to the commissioner and will not be considered for purposes of IVC.

D. Depreciation of IVC. A planning and development lease may provide that IVC may be lost or depreciated over a stated time if, after termination of the planning and development lease, there is no successor in interest other than the commissioner.

E. Commissioner not liable for IVC. Except for the transfer of funds for IVC deposited by a lessee or to be paid from the proceeds of a sale, the commissioner is not liable for the payment of any IVC. The commissioner may require a release or indemnity from the party receiving payment of the IVC.

F. IVC holder must be identifiable. The holder of the IVC must be identified in the records of the state land office. Unless otherwise provided in a lease, leasehold mortgage or collateral assignment of IVC or infrastructure approved by the commissioner and filed with the state land office, the commissioner shall treat the lessee, not the collateral assignee or mortgagee, as the holder of the IVC and the party entitled to payment

[19.2.22.17 NMAC - Rp, 19.2.22.17 NMAC, 11/30/12]

19.2.22.18 TAKE-OUT LEASES; TAKE-OUT SALES OR EXCHANGES AUTHORIZED: During the term of a planning and development lease, a lessee may from time to time apply for a take-out lease or take-out sale or exchange. Take-out sales will be considered most appropriate where the final land use proposal is owner-occupied residential, otherwise take-out leases in the form of long term business leases will be considered most appropriate.

[19.2.22.18 NMAC - N, 11/30/12]

19.2.22.19 ACQUISITION OF RIGHTS-OF-WAY BY LESSEE FOR DEDICATION TO A GOVERNMENTAL ENTITY: Trust lands within a planning and development lease may, from time to time, be purchased by a lessee for dedication to a governmental entity as rights-of-way pursuant to the following:

A. Dedications through long term lease, sale, or exchange. A lessee may acquire rights-of-way by lease, sale, or exchange only after 10 weeks public notice and a public auction as required by applicable state land office rules and other applicable law.

B. Dedications through easement with right of reversion. A lessee may acquire rights-of-way in the form of an easement where the easement is simultaneously dedicated to a governmental entity for a term of “for so long as it used for a public purpose.”

C. Pricing of the easement. Rights-of-way acquired by a lessee on behalf of a governmental entity and simultaneously dedicated to the governmental entity will, at the sole discretion of the commissioner, be priced either on a per rod basis pursuant to the commissioner’s standard price schedule, or at the per acre value as extrapolated from BV without adjustment for NA or SVA. In determining the proper pricing for the right-of-way, the commissioner shall consider the immediate and certain economic impacts to adjacent trust lands, if any, that may reasonably result from the right-of-way and associated infrastructure.

D. Effect on IV. The acquisition or dedication of a right-of-way pursuant to this section is not a disposition for purposes of IV, and such dedications will in no way impact a lessee’s right or interest in IVC. A lessee may claim IVC relating to infrastructure on portions of the leased premises dedicated as rights-of-way at the time of a subsequent disposition.

[19.2.22.19 NMAC - N, 11/30/12; A, 06/30/16]

19.2.22.20 RELINQUISHMENT:

A. A lessee may, with the approval of the commissioner, relinquish to the commissioner the lessee’s interest in a planning and development lease. The commissioner may establish in the terms of a lease conditions pursuant to which the lessee may, at prescribed times, relinquish all or portions of the lease.

B. A lessee may request relinquishment of the lease on forms prescribed by the commissioner and upon payment of a relinquishment fee, provided that:

(1) the lessee is in compliance with the terms of the lease; and

(2) all improvements made pursuant to the lease on, for, or appurtenant to the lands leased have been approved by the commissioner and arrangements satisfactory to the commissioner have been made for either the removal or the retention of the improvements.

C. A lessee shall not, by relinquishment, avoid or be released from any liability for known or unknown waste or damage to trust lands, including but not limited to environmental damage, arising from or connected with lessee’s use or occupancy of trust lands.

D. A relinquishment shall not be valid or effective until approved by the commissioner. Any attempted relinquishment of the lease, without the commissioner’s approval, shall be a breach of the lease.

E. Upon relinquishment, a lessee shall not be entitled to the refund of any rent previously paid; however, a lessee seeking relinquishment in response to a request by the commissioner shall not be charged a fee, and shall be entitled to a pro-rata refund of prepaid rent to be paid only by the successor lessee, purchaser or other successor in interest, if any.

[19.2.22.20 NMAC - N, 11/30/12]

19.2.22.21 DEFAULT; REMEDIES: Unless otherwise provided in a planning and development lease, a lessee shall be in default under a planning and development lease if a breach of the lease is not cured within 30 days after the commissioner gives written notice of the breach to the lessee. A breach of the lease may include, without limitation, a failure to pay any rent or other monetary obligation due under the lease, or a violation of any term,

condition, or covenant of the lease, or the failure to perform or observe any other obligation of the lessee under the lease.

A. Notice. Written notice of a breach shall be sent to the lessee, and to the holder of any collateral assignment or leasehold mortgage, at their addresses of record at the state land office, by certified mail. The commissioner need only provide proof of mailing to establish satisfactory compliance with this notice requirement.

B. Remedies. On the default of a lessee, the commissioner shall have all the remedies available to the commissioner at law or in equity in New Mexico, and as provided in the planning and development lease, including, without limitation, terminating the lease, retaking possession of the leased trust land with or without termination of the lease, and proceeding to recover any damages, including damages for any unpaid or unperformed obligations of the lessee.

[19.2.22.21 NMAC - N, 11/30/12]

19.2.22.22 EXISTING LEASES: Except as provided in this section, the commissioner may not lease under a planning and development lease any trust land currently leased under an existing surface lease unless the existing lessee relinquishes his interest in the trust land or the commissioner exercises any right of withdrawal of land which the commissioner may have. Notwithstanding the foregoing, the commissioner may determine that a proposed planning and development lease will not unreasonably interfere with the authorized uses under an existing lease, and may allow a new planning and development lease in compliance with the following requirements.

A. The new planning and development lease shall identify the existing lease, shall state that the new planning and development lessee's rights and privileges are subject to the existing lessee's rights and privileges under the existing lease, unless waived or amended, and shall provide that the new planning and development lessee will not interfere with the uses permitted under the existing lease.

B. The existing lessee must consent in writing to the new planning and development lease unless the commissioner previously reserved the right to execute such a lease under the terms of the existing lease.

[19.2.22.22 NMAC - Rp, 19.2.22.18, 11/30/12]

HISTORY of 19.2.22 NMAC:

History of Repealed Material:

19.2.22 NMAC, Planning and Development Leases filed 10/15/09 repealed effective, 11/30/12 and replaced with 19.2.22 NMAC, Planning and Development Leases effective, 11/30/12