

**THE BIA'S NEW LONG-TERM LEASING
REGULATIONS - 25 CFR PART 162**

BUREAU OF INDIAN AFFAIRS

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Long-Term Leasing – The New Legal Framework

- The HEARTH Act was signed into law on July 30, 2012.
- The HEARTH Act amends the Long-Term Leasing Act (at 25 U.S.C. § 415(h)) to allow tribes to lease tribal land without BIA approval, under BIA-approved Tribal Regulations.
- Effective on January 4, 2013, the long-term surface leasing regulations found at 25 CFR Part 162 were substantially revised.
- Part 162 was partially revised in 2001, but most of the long-term lease rules previously dated back to the early 1960's.
- The implementation of the HEARTH Act and the “tribal empowerment” provisions in the Part 162 Revision will be entirely dependent on tribes.
- Tribes may wish to consider whether their needs would be met if they leased under the streamlined provisions in the Part 162 Revision, or some other leasing authority that does not require BIA approval.

Part 162: New General Provisions

- In the new 25 CFR § 162.000 series, the new Subpart A purports to preempt state taxation and other fees and charges imposed on tenants, “subject only to applicable federal law.”
- The preamble cites federal cases requiring a balancing of federal, state and tribal interests, asserts that state taxation would undermine a comprehensive federal scheme supporting tribal economic development and self-determination, and expresses support for state-tribal agreements.
- With regard to allotted lands, the new Subpart A incorporates the “sliding percentage” consent requirements in the 2000 amendments to ILCA (applicable to each tract within a unitized lease), and clarifies that the consent of all owners must be sought.
- The Part 162 Revision also clarifies that remainderman consent is needed for fractional interests subject to life estates, meaning that side agreements on rent allocation will often also be needed.
- In contrast to “appeals” to BIA from lease actions taken by tribes under the HEARTH Act, the new Subpart A purports to limit appeals from BIA actions under 25 CFR Part 2, with only non-parties with an economic “injury in fact” having standing to appeal an approval decision as “interested parties.”
- Lease approval decisions are immediately effective, without an “automatic stay” in the event of an appeal, while lease cancellation decisions are stayed pending a final decision.

Part 162: Subparts Comparison

- Subpart B covers agricultural leases and (under the terms of AIARMA, enacted in 1993) certain ag-related business leases.
- Subpart B now includes its own “General Provisions,” the 25 CFR § 162.100 series being moved from the former Subpart A (with minor revisions and no numbering changes); the balance of the ag leasing regulations remain in the Subpart B § 162.200 series, and new Subpart A “General Provisions” (applicable to the new subparts that follow Subpart B) may be found in the new § 162.000 series.
- Subpart C covers residential leases, including individual homesites and Indian housing projects, but not residential development projects for the non-Indian market (which fall within the scope of Subpart D).
- In general, Subpart C imposes shorter review time lines and requires fewer supporting documents than does Subpart D.
- Subpart D ostensibly covers business leases, but is in fact also applicable to recreational and public purpose leases and all other surface leases not within the scope of Subparts B, C, or E (which applies only to wind and solar energy development projects, at either the “utility” or “community” scale); Subpart E is similar to Subpart D, but includes authorizations for short-term (maximum 6-year) wind “evaluation” leases.
- Subpart F includes provisions applicable to leases on specific reservations (generally as described in special legislation, and including Salt River and San Xavier), and the new Subpart G addresses records preservation issues.

Option Contracts, Permits and “Preliminary Review”

- Tribes may generally enter into Option Contracts to lease Tribal Land under 25 U.S.C. § 81, without BIA Approval, so long as the Option Period is less than 7 Years.
- If some type of limited, pre-lease ground disturbance is anticipated, the Part 162 Revision will allow tribes to issue permits (licenses), with BIA approval no longer being required.
- The BIA will review a proposed tribal permit within 10 days, upon request, to determine whether a lease approval is in fact needed, and the BIA may presumably continue to issue permits on fractionated allotted land.
- The Part 162 Revision provides for a “Preliminary Review” of negotiated lease terms, perhaps during an option period and typically in advance of execution by the parties or any substantial NEPA compliance work by the tenant.
- “Preliminary Review” must be completed within 10 days in the case of a residential lease or 60 days in the case of a business or renewable energy lease, and documented with either a “comment letter” or a “comfort letter.”
- By contrast, BIA approval cannot be granted “conditionally,” meaning that a “Preliminary Review” will not be binding on either the BIA or the parties.

Rent and Term Requirements

- The Part 162 Revision defers to tribal negotiations, but otherwise a non-public-purpose lease must generally provide a minimum rent, to be adjusted at least every fifth year, by re-appraisal, fixed increase, or reference to an outside index.
- Additional consideration will typically be required for an amendment that would extend the original term (or a renewal beyond a “reasonable” primary term), and holdovers will generally be treated as “trespasses.”
- For certain types of business leases, an additional/participation rent may be required, but a BLM-type rent and capacity fee schedule has not been established for renewable energy leases.
- Water charges and tribal taxes or PILTS will generally not be recognized as rent substitutes, but bonus/advance payments, in-kind contributions, “due on sale” consideration, or tribal ownership considerations may be considered as such if agreed upon.
- Business leases may run longer than 50 years (if the reservation has statutory 99-year leasing authority), but only one renewal option (of no more than 25 years) is permitted by law, within that maximum term.
- The Part 162 Revision defers to tribal negotiations, but the standard/maximum terms for ag and residential leases on Indian land are 10 years (AIARMA) and 50 years (NAHASDA), respectively, and the BLM’s standard 30-year term for solar leases may be seen to define a “reasonable” primary term for such leases on Indian land.

Supporting Documentation Requirements

- A site plan, plan of development, or resource development plan will be required in support of lease proposals made under Subparts C-E, respectively.
- A project EIS will generally be required for renewable energy leases (cf. an EA for short-term wind evaluation leases), based on the significant acreage requirements.
- To support a “best interest” determination by BIA (and any negotiated rent participation), the proponent of a business or renewable energy lease may be required to provide project documents showing debt and equity financing requirements, anticipated buildout dates, costs/expenses and revenues, and the developer’s projected/required rate of return.
- Under the Part 162 Revision, the tenant may also be required to provide organizational and authorization documents, business and financial references, third-party agreements, and other assurances of its ability to perform.
- The tenant will also be required to provide a survey describing the land to be leased and (unless waived by the tribe as landowner) an appraisal, market study, or economic analysis.
- Notably, the Part 162 Revision also requires that the “lease package” document the parties’ consideration of the “five factors” listed in the 1970 amendment to the Long-Term Leasing Act (which was enacted at about the same time as NEPA and had been thought to have been subsumed by the NEPA process).

Lease Review and Approval

- BIA's standard of review for a negotiated lease is: (1) assurance of technical compliance with all legal requirements; and (2) a discretionary determination that the terms of the lease are in the Indian owner's best interest.
- The Part 162 Revision authorizes BIA deference to a tribe's determination with respect to its own economic "best interest" (rent, term, financial assurance).
- The Part 162 Revision imposes strict time lines on BIA review, beginning with a "Documentation Review" of any lease submitted for approval, to be followed by an "Acknowledgment Letter" establishing the date of receipt or a "Deficiency Letter" identifying any missing documents.
- No regulatory time line is specified for this "Documentation Review," but current BIA policy (as defined in the BIA's new "Realty Tracking" tool) requires that it be completed within 10 days of the date of receipt.
- Once receipt of a "complete package" has been acknowledged, a residential lease must be approved or disapproved within 30 days of the date of receipt, and a business or renewable energy lease must be approved or disapproved within 60 days.
- Leases which are not acted on within these time lines will not be "deemed approved," but expedited (15-day) appeals based on inaction may be made to the BIA's Regional Office and the BIA Director in Washington, D.C., if necessary.

Post-Approval Documentation Requirements

- The Part 162 Revision defers to tribal negotiations, but otherwise property insurance and financial assurance of performance are required for non-residential leases.
- Guaranties are not strictly required, but upon approval of a business or renewable energy lease a rental bond will be required (unless waived by the owners) until project revenues have stabilized, and a performance bond to secure demolition and remediation upon termination may also be required.
- Payment bond requirements in construction contracts are generally sufficient to secure construction obligations.
- With regard to renewable energy leases, copies of interconnection and power purchase agreements need not generally be provided to BIA, but tribes may wish to participate in those negotiations.
- Owner consent to easements essential to the project may be incorporated in the lease and lease authorization, if located within the leased premises (or on other tribal land, where tribal land is being leased).
- Project-related easements must be separately documented/compensated if they are located off-premises, and may be separately documented even if located on-premises (especially if they are intended to survive the termination of the lease).

Ancillary Agreements

- Under the Part 162 Revision, the owner consent requirement for ancillary agreements (i.e., amendments, assignments, subleases, and leasehold financings) is generally delegable/negotiable, but actual BIA approval is still generally required for all but subleases.
- BIA's standard of review for all types of ancillary agreements requires a "compelling reason" to disapprove.
- Amendments (presumably not including "replacement" leases or termination agreements) will be "deemed approved" if not acted on by BIA within 30 days (or within a 30-day extension period, if requested), with the effective date of the "deemed approved" amendment being 45 days from the date of BIA's receipt.
- Landowner representatives or agents may generally not be authorized to consent to changes in the rent, term, site description, or remedies provisions.
- All types of subleases may be made exempt from approval by the underlying lease, and sublease transactions made under business or renewable energy leases that require their approval will be "deemed approved" if the BIA fails to act within a "30+30" day time frame.
- The terms of the sublease will dictate whether sublease amendments, subleasehold assignments or financing instruments secured by the sublease will require BIA approval.

Ancillary Agreements Contd.

- Assignments will generally require BIA approval unless made to a lender or purchaser acquiring via foreclosure or trustee's sale, or where made to a named "Qualified Transferee" or to a wholly-owned subsidiary of the tenant.
- Negotiated exceptions for "no change in control" transfers, or transfers to other affiliates or parties meeting certain capital requirements or other specific qualifications, are not expressly permitted under the Part 162 Revision but may presumably be authorized where the lease is specific.
- Assignments and leasehold financing (cf. subleasehold financing) transactions will never be "deemed approved," but must be acted on by BIA within 30 and 20 days, respectively.
- Amendments and sublease transactions that are "deemed approved" or made exempt from BIA approval must still be recorded at the LTRO, with BIA documentation of the effective date.
- Leasehold financing instruments can now clearly be used to secure construction, permanent, or purchase financing or re-financing.
- BIA "underwriting" is not required for leasehold financing, equity financing instruments/agreements need not generally be reviewed, and separate, limited recourse financing instruments may be used for phased developments.

Lease Enforcement and Administration

- Leases may be enforced by BIA on behalf of (but not against) Indian owners, but since 2001 Part 162 has also required BIA deference to negotiated lease remedies.
- The Part 162 Revision continues to defer to the parties on jurisdictional issues, but the broad applicability of tribal law in the absence of explicit lease provisions is now recognized in the new Subpart A General Provisions.
- Older leases may still require cancellation by BIA, in the absence of any negotiated/self-help remedies for tribes, but the standard 10-day cure period may be modified by approved lease terms.
- While a BIA cancellation action is still subject to an “automatic stay” upon appeal, IBIA case law now makes it clear that unpaid/accruing rent must be paid by tenants (with any disputed amount being paid into escrow) as a condition on the right to appeal.
- Rents may be paid directly to tribes (rather than to BIA) under tribal leases, but the Part 162 Revision differs somewhat from the BIA’s 2008 Direct Pay Policy in requiring proof of payment only upon BIA’s request.
- For leases of allotted land, the Part 162 Revision limits future “direct pay” arrangements to leases involving ten or fewer (unanimous) owners.

Other Business and Energy Lease Issues

- The Part 162 Revision expressly requires that all subleases entered into under business leases be recorded in the LTRO, even where sublease approval is not required.
- The Part 162 Revision strictly requires that leases address the issue of ownership of permanent improvements during the lease term, and the issue of whether such improvements may/must remain or be removed upon expiration or early termination.
- The Part 162 Revision provides for any condemnation award, insurance proceeds, or trespass damages to be paid solely to the Indian landowners, in the absence of an agreement to the contrary.
- Subpart A of the Part 162 Revision includes a provision which allows the lease to require employment preference in favor of tribal members.
- More complex projects may require agreed-upon (and tenant-funded) compliance monitoring and multiple exhibits including, forms, schedules, separate tribal agreements, etc.
- The Part 162 Revision does not allow Memorandums of Lease to be recorded in the LTRO as lease substitutes, and it also provides that data obtained under a wind evaluation lease will belong to the Indian owners, in the absence of an agreement to the contrary.

Other Residential Lease Issues

- The HEARTH Act requires that BIA report to Congress on the possibility of more contracting and compacting of the LTRO function (or the establishment of tribal recorder offices, perhaps in partnership with title companies).
- With the elimination of the LTRO recording requirement for residential subleases and subleasehold financings in the revised Part 162, HEARTH Act and non-HEARTH-Act tribes alike may want to consider a county recording/title insurance model for Indian housing projects.
- The Part 162 Revision attempts to streamline the homesite leasing process for allotted land, by creating two exceptions under which rent waivers may be imputed to non-consenting/non-waiving owners from the consent/waiver of the requisite “ILCA” percentage.
- The first homesite “rent exception” allowed certain (7-year occupancy) leases to be “grandfathered,” but that exception was time-limited and is no longer available.
- The second homesite “rent exception” suggests that some consideration may be given to “offsetting benefits” created by the extension of access or utilities to the allotment, to serve the homesite.
- In 2012, BIA adopted a new Categorical Exclusion that will allow most individual homesites (and small projects comprising no more than four housing units or five acres, including associated easements) to be made NEPA-compliant with only checklist documentation.

The New Part 162: Top Ten Takeaways

- Part 162 covers only surface (and not mineral) leases, and the Revision does not modify the ag lease rules.
- Part 162 does not mention the HEARTH Act, but Tribal Regulations under that Act must be consistent.
- Part 162 defers to tribal negotiations on economic terms (rent, term, financial assurance).
- Part 162 imposes mandatory time frames for BIA review and approval of leases and ancillary agreements.
- Part 162 provides for Preliminary Review of negotiated terms, prior to submittal for approval.
- Part 162 provides for certain amendments and subleases to be “deemed approved” if not acted on.
- Tribal permits (licenses) need not be approved; subleases must be approved only if the lease so provides.
- Assignments not requiring BIA approval are limited to those made to named “Qualified Transferees” and wholly-owned subsidiaries, with other negotiated, “definitional” exceptions presumably still permitted.
- Statutory rules on the “five factors” to be considered, and the ILCA consent requirements, are incorporated in the regulations for the first time.
- Default rules, and other issues and provisions that must be expressly addressed/included, are identified.