

**AIARMA and the BIA's**  
**Agricultural Leasing and**  
**Permitting Regulations**

**Bureau of Indian Affairs**  
**Western Regional Office**  
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# The New Statutory Framework

- The general authorities primarily relied upon for the ag leasing of tribal and allotted land are still the Long-Term Leasing Act of 1955 (codified at 25 U.S.C. § 415 et seq.) and the 1940 Act codified at 25 U.S.C. § 380, respectively, but more recent enactments created new standards and exceptions relating to the exercise of those authorities.
- The American Indian Agricultural Resource Management Act (“AIARMA”) was enacted in December 1993 and amended in November 1994, with several provisions modifying the pre-existing standard rules, and a requirement that implementing regulations be promulgated by December 1995 “with the participation of affected tribes.”
- A provision in the ILCA Amendments of 2004 authorized “owner-managed” leases of allotted land, whereby one or more owners – acting unanimously – could lease their land (for up to 10 years) without BIA approval, so long as their application for “owner-managed” status has been approved in advance; by contrast, the 2012 HEARTH Act allows tribes to enter into ag leases without BIA approval, under BIA-approved Tribal Regulations which are consistent with the otherwise-applicable federal rules (now found at 25 CFR Part 162, Subpart B).

# The New Regulatory Framework

- Consultation with tribes and inter-tribal groups on the implementation of AIARMA began in 1994, but a 1996 Proposed Rule (which would have integrated the range permitting rules in Part 166 into Part 162) was scrapped in response to widespread objections from the “user” community; Final (separate) Rules for ag leasing and range permitting were not promulgated until 2001, during the first phase of the Trust Management Improvement Project arising out of the Cobell litigation, and following the issuance of a Secretarial Order on “trust principles” which emphasized accountability and enforcement, as well as (AIARMA-like) deference to both landowners’ wishes and tribal governing authority.
- In 2001, new ag leasing regulations were set apart from the non-ag leasing regulations at Part 162, Subpart B, with Subparts C and D being reserved for the later publication of new regulations on residential and business leases (which were ultimately finalized in 2013, along with Subpart E regulations on renewable energy leases, to collectively take the place of the non-ag, catch-all Subpart F that had been created in 2001).
- In the 2013 partial revision of Part 162, the General Provisions formerly found in Subpart A (in the 162.100 series) were moved to Subpart B, with minimal conforming amendments (including the removal of three sections) and without a numbering change, and new General Provisions applicable only to non-ag leases were published at Subpart A (in a new 162.000 series); at the same time, a new Subpart G on Records was published at Subpart G, and made applicable to ag as well as non-ag leases, except where in conflict with Subpart B.

# Tribal Regulatory Authority

- AIARMA requires that all “land management activities” (defined to include the administration and supervision of ag leasing and permitting generally (and appraisal, advertisement, negotiation, contract preparation, recording, and collection/distribution specifically) conform to tribal management plans and ordinances.
- AIARMA also requires that BIA recognize and enforce all tribal laws and ordinances that regulate land use or pertain to Indian ag land, and provide notice of such laws and ordinances to any parties “undertaking activities” on such land.
- AIARMA authorizes – but does not require – waivers of federal regulations or policies which conflict with a tribal plan or ordinance, while expressly requiring recognition of only those laws or ordinances that do not conflict with federal law or the trust responsibility.

# Rent, Term and Financial Assurance

- AIARMA establishes a standard maximum term of 10 years (for both irrigable and non-irrigable land), with rent adjustments required at least every fifth year by Subpart B, and the pre-existing 25-year authority for farming leases requiring a “substantial investment” is extended to grazing leases which meet the same standard.
- AIARMA confirms BIA’s authority to grant or approve a lease or permit at less than the appraised rental value (even as to allotted land), when the land has been advertised and it has been determined that lease or permit would serve the owners’ best interests; as amended, AIARMA also confirms that tribes may negotiate the rents to be paid under leases or permits of tribal land.
- In conjunction with AIARMA’s delegation of authority to tribes to set minimum bonding requirements on a reservation-wide basis (as well as case-by-case, on tribal land), Subpart B limits the BIA’s discretion to waive its basic payment/performance bonding requirements.

# Allotted Land

- AIARMA allows tribes to supersede standard federal rules which prohibit lessee preferences (so long as a market rent is obtained), establish minimum bonding/security requirements, or require minimum 90-day notice to the landowners prior to the BIA's grant of a lease under the 1940 Act, all subject to the owners' right to "opt out" upon written objection by at least 50% of the ownership; to date, CRIT and Gila River have adopted ordinances to alter some/all of these standard rules.
- AIARMA authorizes "majority consent" leases on allotted land, and Subpart B purports to allow BIA approval of majority-negotiated leases without evidence of prior notice to the non-consenting owners; this authority differs from that found in ILCA 2000 (which is broadly applicable to long-term leases and mineral leases, but expressly inapplicable to ag leases), in that BIA may not join the owners (except where acting under a Power of Attorney) to reach "majority," and the consent of the tribe (even if just a minority owner) will always be needed.
- Subpart B attempts to balance the rights of an owner in possession against the rights of his/her co-owners, by effectively providing the possessory owner with a Right of First Refusal in the event of a negotiated lease or upon issuance of a notice preceding advertisement and the anticipated grant of a lease under the 1940 Act.

# Standards of Review

- AIARMA adopted the “best interest” and “market rent” standards long found in Part 162 but not in the authorizing statutes, with appraisals no longer setting the minimum acceptable rent/bid for tribally-negotiated and post-advertisement leases; while requiring rent adjustments at least every fifth year, Subpart B does not require a re-appraisal, leaving both the time and manner of adjustment to be specified in each lease.
- Subpart B confirms that under the 1970 amendment to the Long-Term Leasing Act, the BIA must satisfy itself that the parties have adequately considered the five “factors” enumerated in the amendment (even though those factors are generally irrelevant to ag leasing); Subpart B also expressly requires NEPA compliance and any other supporting documents that may be needed to show that the lease will be enforceable and the lessee will be able to perform.
- Subpart B was ground-breaking in its requirement that fully-documented “form” leases be processed by BIA within 30 days of receipt, and that any decision to grant or approve an ag lease will be immediately effective (and not subject to an “automatic stay”) in the event of an appeal.

# Lease Administration and Enforcement

- Subpart B clearly requires that all ag leases be recorded, regardless of their duration (short-term leases having been made exempt as recently as the 1980's); the fourth subheading under Subpart B (re Lease Administration) primarily relates to the approval of assignments, subleases, and leasehold financing instruments, even though such transactions are generally not even authorized in short-term ag leases.
- Under Subpart B, the BIA is required to respond to non-payment violations within five days of the payment due date (or 5 days from the date of notice, in the case of payments to be made directly to the owners or non-monetary defaults); the standard cure period is 10 days, unless the lease provides otherwise, and BIA is also authorized to assess late payment fees and pursue pre-cancellation collection remedies.
- Subpart B also authorizes emergency actions as needed to protect the ag resource, and “trespass” enforcement actions (including the assessment of treble damages) under AIARMA and the implementing regulations found at Subpart I of Part 166, as needed to address holdover, unauthorized use, resource damages, etc.



# Potential Problem Areas

- AIARMA-based provisions extending Subpart B to ag-related business leases creates case-by-case uncertainty as to which subpart applies, and the continuing absence of regulations (or other implementation instructions) on “owner-managed” leases has limited the utility of that authority for allotted landowners.
- The Subpart B provision authorizing the grant of ag permits on allotted land without prior notice to the landowners appears to be inconsistent with the 1940 Act and without any other supporting statutory authority, and the General Provisions in the 162.100 series suggest that “owner’s use” rights will be recognized (as a restraint on BIA’s leasing authority under the 1940 Act) where there is some evidence of co-owners’ permission, but does not impose an accounting obligation or any other remedy against an owner in possession without permission.
- The bonding requirements in Subpart B may be too strict when applied to allotted land (in that the BIA’s former discretion in that area has been eliminated rather than defined), and the authorization of referrals of unpaid rents to Treasury for collection on behalf of the landowners appears to go beyond the scope of the Treasury Offset Program designed to collect debts owed directly to the Government.

# Compare the New Long-Term Leasing Regulations

- The General Provisions now applicable to non-ag leases are much more expansive and clearer in their intended preemption of state taxation/jurisdiction than those found in Subpart B, which nonetheless do suggest that state law may apply only to lease enforcement or remedies (and then only when the parties agree).
- The “enforcement” provision in Subpart B authorizing an appeal bond process separate from that in 25 CFR Part 2, to protect the Indian owners from losses resulting from delays caused by an appeal, is not found in 2013 revision of the non-ag lease regulations, but as a practical matter an appeal bond should not be needed given the IBIA’s strict enforcement of another Subpart B provision conditioning the right to appeal on the continued payment of rent.
- Subpart B provides for a flat 3% administrative fee on all approval actions, up to a maximum of \$500, but no counterpart cost recovery authorizations are found in the non-ag leasing regulations, perhaps based on tribal objections or an erroneous determination that the statutory authority for such provisions (which date back to the 1961 leasing regulations, pre-dating the clarifying legislation that was enacted in 1990) is lacking.