

Tribal Consultation Supplement

Proposed Residential, Business, and Wind & Solar Leasing Regulations



25 CFR 162 – Leases & Permits (Residential, Business, and Wind & Solar Resource)

The Bureau of Indian Affairs (BIA) is proposing to revise 25 CFR 162, Leases and Permits, to add provisions specific to residential leasing, business leasing, and wind and solar resource leasing.

Subparts Affected

This proposed rule would replace *Subpart F, Non-agricultural leases*, with the following:

- A new *Subpart C, Residential Leases*
- A new *Subpart D, Business Leases*
- A new *Subpart E, Wind and Solar Resource (WSR) Leases*

The proposed rule would also update other subparts to:

- Revise *Subpart A, General Provisions*
- Move existing *Subpart E, Special Requirements for Certain Indian Reservations*, to Subpart F
- Create a new *Subpart G, Records*.

The proposed rule does not affect *Subpart B, Agricultural Leases*. Subpart B may be revised at a later time. In addition, to ensure that changes to *Subpart A, General Provisions*, do not affect agricultural lease regulations, some of the current *Subpart A, General Provisions* sections are being moved to Subpart B, where they apply only to agricultural leases. Minor edits were made to these General Provisions to delete redundancies and clarify that they now apply only to agricultural leases.

The table below shows where current sections of the regulation are in the proposed rule.

Table 1. Location of Current Sections in Proposed Rule

| Current | | | Proposed | | |
|-----------|----------------------|--|-----------|----------------------|---|
| -- | -- | -- | Subpart A | §§ 162.001 – 162.024 | General Provisions |
| Subpart A | §§ 162.100 - 162.113 | General Provisions | Subpart B | §§ 162.101 – 162.113 | Agricultural Leases (With edits and deletions as required) |
| Subpart B | §§ 162.200 - 162.256 | Agricultural Leases | Subpart B | §§ 162.200 – 162.256 | Agricultural Leases |
| Subpart C | -- | Residential Leases [Reserved] | Subpart C | §§ 162.301 – 162.371 | Residential Leases |
| Subpart D | -- | Business Leases [Reserved] | Subpart D | §§ 162.401 – 162.471 | Business Leases |
| -- | -- | -- | Subpart E | §§ 162.501 – 162.596 | Wind and Solar Resource Leases |
| Subpart E | §§ 162.500 - 162.503 | Special Requirements for Certain Indian Reservations | Subpart F | §§ 162.600 – 162.603 | Special Requirements for Certain Indian Reservations |
| Subpart F | §§ 162.600 - 162.623 | Non-Agricultural Leases | -- | -- | (Deleted) |
| --- | --- | --- | Subpart G | §§ 162.701 – 162.703 | Records |

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Overview of the Proposed Rule

The proposed rule increases the efficiency and transparency of the BIA approval process for leasing of trust or restricted land (“Indian land”) and Government land, increases flexibility in compensation and valuations, and facilitates management of direct pay.

BIA Approval Process

- Adds provisions specific to residential, business, and wind and solar resource leasing
- Eliminates the requirement for BIA approval of permits for use of Indian land
- Imposes time limits on BIA to act on submitted lease documents, summarized in Table 2.

Table 2. BIA Approval Timelines

| Type | Action | Deadline for BIA decision: | If BIA fails to meet the deadline, then: | Section |
|---------------|--------------------|--|--|-------------------------------|
| Residential | Lease | 30 days + additional 30 days if needed | Parties may take appropriate action under 25 CFR 2 | 162.339 |
| Business, WSR | Lease | 60 days +additional 30 days if needed | Parties may take appropriate action under 25 CFR 2 | 162.439 162.565 |
| WEEL* | Lease | 20 days +additional 30 days if needed | Parties may take appropriate action under 25 CFR 2 | 162.529 |
| All types | Amendment | 30 days + additional 30 days if needed | Amendment is deemed approved | 162.345 162.445 162.570 |
| | Assignment | 30 days | Parties may take appropriate action under 25 CFR 2 | 162.349 162.449 162.574 |
| | Sublease | 30 days + additional 30 days if needed | Sublease is deemed approved | 162.353 162.453 162.578 |
| | Leasehold mortgage | 30 days | Parties may take appropriate action under 25 CFR 2 | 162.358 162.458 162.582 |

*Wind Energy Evaluation Lease (WEEL)

- Establishes that BIA must approve amendments, assignments, leasehold mortgages, and subleases unless it finds a compelling reason not to, based on certain specified findings

Compensation and Valuations

- Clarifies that, where individually owned land is leased for less than fair market value, landowners that did not consent will still receive fair market value
- Allows alternative forms of rental (other than monetary compensation) under certain circumstances
- Restricts the need for reviews of the lease compensation (to determine if an adjustment is needed) to certain situations

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Overview of Proposed Rule, Compensation and Valuations (continued)

- Allows leasing of tribal land for less than fair market rental where the tribe negotiates the value and provides a tribal certification (for residential leasing) or authorization document (for business and wind or solar resource leasing), summarized in Table 3.

Table 3. Lease Compensation Requirements

| Type | Tribal land | Individually owned land | Section |
|-------------|---|--|---------|
| Residential | Any amount negotiated by tribe (with certification) | FMR unless written waiver & best interest determination | 162.320 |
| Business | Any amount negotiated by tribe (with authorization) | FMR unless waiver & best interest determination or pre-development or construction | 162.420 |
| WEEL | Any amount negotiated by tribe. | Any amount negotiated by individual landowners | 162.523 |
| WSR | Any amount negotiated by tribe (with authorization) | FMR unless waiver & best interest determination or pre-development or construction | 162.546 |

- Provides that BIA will not conduct a fair market value review or require a valuation for tribal land unless requested by the tribe, and will waive the valuation requirement for individually owned land under certain circumstances, summarized in Table 4.

Table 4. Valuation Requirements

| Type | Tribal land | Individually owned land | Section |
|-------------|--|---|---------|
| Residential | No valuation required, if tribe submits certification | Required, unless BIA waives based on: 100% request and BIA determination that waiver is in landowners' best interest (BIA has 30 days) | 162.321 |
| Business | No valuation required, if tribe submits authorization. | Required, unless BIA waives based on: lease is for religious, educational, recreational, cultural, or other public purpose; and 100% request; and BIA determines it is in landowners' best interest (BIA has 30 days) | 162.421 |
| WEEL | No valuation required. | No valuation required. | 162.524 |
| WSR | No valuation required, if tribe submits authorization. | Required, unless landowners request economic analysis, IEED prepares, and BIA determines it is in landowners' best interest | 162.547 |

Direct Pay

- Allows for direct pay only where there are 10 or fewer landowners, and all landowners consent to direct pay.
- Continues direct pay unless and until 100% of the owners agree to discontinue direct pay or certain circumstances occur allowing discontinuation with regard to one specific landowner

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Summary of Major Changes from February 2011 Draft Regulations

Subpart A

- Reorganized several provisions
- Definitions
 - Added definitions for: “equipment installation plan,” “holdover,” and “restoration and reclamation plan”
 - Deleted definition for “10-day show cause letter” and instead noted that it is one type of a notice of violation
 - Revised several definitions
- Permit v. Lease
 - Moved to § 162.004.
 - Deleted characteristics regarding surface disturbance and temporary or permanent improvements.
 - Added that permits must comply with applicable environmental and cultural resource laws.
- Revised provisions regarding leasing of land subject to life estates
- Moved consent requirements from individual subparts to subpart A (§§ 162.009 – 162.012)
 - Note - for agricultural leases, the specific consent provisions in subpart B still govern
- Revised provision regarding what laws apply to this part to specify that State law applies only in the specific areas and circumstances in Indian country where Congress or a Federal court has made it expressly applicable

Cross-Cutting Changes (Subparts C, D, E)

- Added explicit reference to statutory authority for longer lease terms
- Deleted prohibitions on:
 - Rights of first refusal
 - Lease term commencing more than one year after date of approval
- Payments
 - Revised valuation requirements, providing that BIA will defer to tribe’s negotiated compensation for tribal land when tribe provides certification or authorization
 - Revised fair market value requirements, providing that BIA will not require valuations for leases of tribal land, or under other specified circumstances
 - Added that direct pay for an individual Indian landowner’s payment may be suspended if that individual Indian landowner dies, is declared non compos mentis, becomes whereabouts unknown, or owes a debt resulting in a trust
 - Added that BIA may accept third-party checks from financial institutions or Federal agencies
 - Added that, for tribal land, BIA will defer to the tribe’s determination that alternative forms of rental are in its best interest, if the tribe submits a certification.
 - Added that a review of the adequacy of rent is not required if the lease provides for automatic adjustments, and that neither a review of the adequacy of rent or automatic adjustment is required under certain circumstances
 - Moved provisions governing late payments and special fees for delinquent payments to be with the other “Effectiveness, Compliance, and Enforcement” sections

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Cross-Cutting Changes (Subparts C, D, E) *continued*

- Bonding & Insurance
 - Added a requirement that, before BIA releases a bond, BIA must confirm with the tribe/individual Indian landowners that the lessee complied with all lease obligations
 - Added provisions for a waiver of the insurance requirement under certain circumstances
- Lease Approval
 - Changed timeline for BIA review of the lease to eliminate the indefinite extension
 - Added provisions regarding making the lease available to the tribe or individual Indian landowner
 - Clarified effective date of leases
 - Deleted provisions allowing BIA official to issue a short-term lease where a lease decision is appealed
- Amendments, Assignments, Subleases, Leasehold Mortgages
 - Added that parties are responsible for providing lease assignments and subleases for file even where BIA approval is not required
 - Revised sections outlining process for approval of amendments, assignments, leasehold mortgages, and subleases to separate consent from approval
 - Deleted provisions establishing that landowners are deemed to have consented, and instead provided that a lease may allow for “deemed consent” of amendments, assignments, subleases, and leasehold mortgages
 - Added that no consent to leasehold mortgages is required if the lease contains an authorization for the leasehold mortgage and states what law will apply in case of foreclosure
 - Deleted provisions allowing BIA to request time to review leasehold mortgages beyond 30 days
- Effectiveness, Compliance and Enforcement
 - Added that an assignment or sublease that does not require landowner consent or BIA approval is effective upon execution
 - Added additional options for BIA action if a lessee does not cure a violation on time
 - Added requirement for BIA to notify the tribe or individual landowners of a lease cancellation
 - Added that the Indian landowner may notify BIA of good faith negotiations with a holdover lessee so BIA does not take enforcement action (e.g., to recover possession)
- Improvements
 - Clarified that ownership of permanent improvements on leased Indian land does not affect whether a State or political subdivision of State can tax the improvements, and that the tribe with jurisdiction may tax improvements
 - Added requirement for BIA to consult with the tribe/Indian landowner before taking certain actions, including removal of improvements

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Subpart C (Residential Leasing)

- Added explicit reference to model tribal lease form developed by HUD, VA, USDA, and BIA
- Added an exemption from the bond requirement for leases for public purposes
- Mandatory documents
 - Deleted requirement for a construction schedule
 - Deleted requirement for an official or certified survey, instead allowing a public or private survey or legal description
- Clarified that both the tribe and BIA must approve leases issued under the Native American Housing and Self-Determination Act (NAHASDA), regardless of whether the lease is for tribal or individually-owned land
- Assignments
 - Added that assignments may be made without further consent or BIA approval under certain circumstances if the assignee is a leasehold mortgagee or its designee acquiring the lease either through foreclosure or by conveyance.
- Subleases
 - Added that where a sublease is for housing for public purposes, the lessee may sublease without meeting consent requirements or obtaining BIA approval, where the lease provides and BIA has approved a general plan of development, a sublease form, and rent schedule

Subpart D (Business Leasing)

- Added that due diligence requirements do not apply to leases for religious, educational, recreational, cultural, or other public purposes.
- Added that BIA may waive the bond requirement where the lease is for religious, educational, recreational, cultural or other public purposes.
- Assignments
 - Shortened the time period in which the lessee must notify BIA of an assignment to certain parties
- Subleases
 - Added that where the proposed sublease is part of a commercial development or residential development, the lessee may sublease without meeting consent requirements or obtaining BIA approval of the sublease, where the lease provides and BIA has approved a general plan, rent schedule and sublease form, and the parties provide BIA with a copy of the executed sublease within 30 days

Subpart E (Wind and Solar Leasing)

- Replaced the provision for a WSR permit with a provision for a short-term lease for wind energy evaluation (wind energy evaluation lease or WEEL)
- Clarified that tribes seeking to conduct wind or solar resource activities on their own tribal land do not need to obtain BIA approval
- Deleted requirement to provide BIA with energy resource information upon request
- Deleted restrictions on who may negotiate with whom during option period
- Deleted provisions that would require WEEL compensation based on acreage and established by Federal Register notice, instead providing that the WEEL will state the compensation
- Deleted requirement for a performance bond for a WEEL
- Deleted requirement for documents showing lessee's financial capability
- Deleted prohibition on amending, assigning, mortgaging, or subleasing a WEEL