

Tribal Consultation Supplement Draft Leasing Regulations



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

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What subparts of 25 CFR 162, Leases & Permits, do these draft regulations affect?

These draft regulations:

- Revise Subpart A, General Provisions*
- Create a new Subpart C, Residential Leases
- Create a new Subpart D, Business Leases
- Create a new Subpart E, Wind and Solar Resource (WSR) Permits and Leases
- Delete Subpart F, Non-agricultural Leases**
- Move the current Subpart E, Special Requirements for Certain Indian Reservations, to Subpart F
- Create a new Subpart G, Records.

*These draft regulations do not affect Subpart B, Agricultural Leases. Subpart B may be revised at a later time. In addition, to ensure that changes to the General Provisions do not affect agricultural lease regulations, the current 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 draft regulations delete Subpart F, Non-agricultural Leases, because that subpart was intended to address residential and business leasing, for which the draft regulations provide specific provisions in Subparts C and D.

The table below shows where current sections of the regulation would be moved to in the draft.

Current			Draft		
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Subpart A	§§ 162.100 – 162.113	General Provisions	Subpart B	§§ 162.100 – 162.113	Agricultural Leases (With edits 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 – 162.372	Residential Leases
Subpart D	--	Business Leases [Reserved]	Subpart D	§§ 162.401 – 162.472	Business Leases
--	--	--	Subpart E	§§ 162.501 – 162.597	Wind and Solar Resource Permits and Leases
Subpart F	§§ 162.600 – 162.623	Non-Agricultural Leases	--	--	(Deleted)
Subpart E	§§ 162.500 – 162.503	Special Requirements for Certain Indian Reservations	Subpart F	§§ 162.600 – 162.603	Special Requirements for Certain Indian Reservations
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Draft Leasing Regulations

What policy changes do these draft regulations implement?

The draft regulations incorporate several policy changes to increase the efficiency and transparency of the BIA approval process for leasing of trust or restricted land (“Indian land”) and Government land, increase flexibility in compensation and valuations, and facilitate management of direct pay. Summaries of some of these policy changes are provided here.

BIA Approval Process

- Eliminating the requirement for BIA approval of permits of Indian land (with the exception of *WSR Permits*)
- Imposing time limits on BIA to act on requests to approve leases, lease amendments, lease assignments, leasehold mortgages and subleases.
- Requiring BIA to notify parties of delays in its review of leases and to request the parties to take an additional extension in certain circumstances.
- Establishing that landowners that do not object to a sublease, amendment, assignment or leasehold mortgage within 30 days will be deemed to have consented.
- Establishing that BIA has 30 days to act on a request to approve a lease amendment or leasehold mortgage, or the document will be deemed approved.
- Establishing that BIA must approve leases, amendments, assignments, leasehold mortgages, and subleases unless it finds a compelling reason not to, based on certain specified findings.

Compensation and Valuations

- Allowing leasing of tribal land for less than fair market value where the tribe negotiates the value and provides a tribal authorization document saying why the valuation is in the tribe’s best interest.
- Allowing leasing of individual land for less than fair market value where the landowners execute a waiver of fair market value, and BIA finds that leasing for less than fair market value is in the best interest of the landowners.
- Providing that, where individually owned land is leased for less than fair market value, landowners that did not consent to leasing for less than fair market value will still receive fair market value.
- Allowing alternative forms of rental (other than funds) if BIA determines it is in the best interest of the Indian landowners.
- Allowing other types of valuation (other than appraisals) for business, residential, or WSR leasing of tribal land where the tribe provides a tribal authorization document in support of the other type of valuation.
- Allowing other types of valuation (other than appraisals) for business, residential, or WSR leasing of individually owned land in certain circumstances.
- Allowing for waivers of valuation for residential leasing of tribally owned land if the tribe provides a tribal authorization document and of individually owned land if the individual landowners provide 100% consent* and a waiver and BIA determines it is in the best interest of the landowners (100% consent is necessary because non-consenting owners receive fair market value, so a valuation will be necessary if any individual does not consent).
- Restricting the need for reviews of the lease compensation (to determine if an adjustment is needed) to those leases with a term of more than 5 years. No review is necessary if the lease is for less than fair market value and BIA determines that eliminating reviews is in the best interest of the landowners.

Direct Pay

- Allowing for direct pay only where there are 10 or fewer landowners, and all landowners consent to direct pay.
- Continuing direct pay unless and until 100% of the owners agree to discontinue direct pay.

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Questions for Tribes

We are interested in hearing all your comments on these draft regulations and the following specific questions:

1. Do you agree with the policy changes made in these draft regulations?
2. Do you agree with the two-part WSR permit and leasing process as established by these draft regulations?
 - *Having a permit cover the 3-year evaluation period allows for more limited environmental reviews (examining only the effects of resource evaluation, rather than all possibilities for resource development). Those environmental reviews can then be incorporated into the leasing documentation at the development stage.*
3. Do you agree with basing WSR permit fees on the total acreage of land included in the permit, regardless of location? Do you agree with establishing the per-acre and minimum total fees for WSR permits at least every 3 years by Federal Register notice?
4. Do you agree with having a document (amendment/sublease/leasehold mortgage) be “deemed approved” after BIA fails to act for a certain period of time?
 - *This provision poses a practical issue – when is a deemed approved document effective? The document is deemed approved on the 30th day after BIA receives the document. How do the parties know when BIA received the document, and therefore, when the 30 days has expired? The draft regulations address this by having the document deemed approved after 30 days, with the approval effective on the 45th day. Other options include requiring BIA to promptly notify parties of its receipt of the document, or that the document has been deemed approved, or requiring the parties to notify BIA that they believe the document has been deemed approved.*
 - *If a document is deemed approved, an argument may be made that an interested party may not appeal the approval because there is no BIA approval/disapproval decision as a final agency action, and no standard by which to judge BIA’s failure to act.*
5. Does BIA not accepting rent in the form of cash under residential leases impose a hardship? If so, is there another way to relieve the hardship without accepting cash? Does it impose a hardship not to allow personal checks for business and WSR leasing payments?
 - *The draft does not include cash as an acceptable payment form for rent because the official lockbox does not accept cash payments.*
6. Do you prefer placing all common provisions in Subpart A, General Provisions, and placing only the text that differs among residential, business, and WSR in their respective subparts?
 - *The draft has considerable repetition among the subparts because each subpart has been written to be as freestanding as possible. The intent is to increase user friendliness, to reduce the need to flip back and forth to generally applicable sections.*
7. Do you agree with defining “business day” to include tribally recognized holidays?
 - *The regulations impose deadlines on BIA and the lessee to act in most cases. Recognizing tribal holidays (excluding them from the term “business day”) would lengthen the amount of time provided to BIA and lessees. For this reason, “business day” does not exclude tribally recognized holidays in the draft regulations.*
8. Are there other edits you would like?

Timing: Our current goal is to have regulations for residential leasing, business leasing, and WSR permitting and leasing proposed in the Federal Register by late summer 2011, and finalized and effective by early 2012. This goal is subject to change, based on your input as to the need for, timing, and content of such regulations.

Thank you for taking the time to review these regulations and provide your input. We look forward to continuing to work with you to provide user-friendly, workable leasing regulations.