

SOLAR ENERGY LEASES ON TRIBAL LAND –
PROJECT REGULATORY CONSIDERATIONS

BUREAU OF INDIAN AFFAIRS

WESTERN REGIONAL OFFICE

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Long-Term Leasing – The New Legal Framework

- The HEARTH Act was signed into law on July 30, 2012, potentially streamlining the process for tribes wishing to enter into long-term surface leases of tribal land, for all types of community and economic development purposes.
- 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, with new subparts on Residential Leases (Subpart C), Business Leases (Subpart D), and Renewable Energy Leases (Subpart E).
- Subpart E is similar to Subpart D, but applies only to wind and solar energy development projects (at either the “utility” or “community” scale) and includes authorizations for short-term (maximum 6-year) wind “evaluation” leases.
- The implementation of the HEARTH Act and the “tribal empowerment” provisions in the Part 162 Revision will be entirely dependent on tribes, to be exercised on a tribe-by-tribe, lease-by-lease basis.
- In deciding whether to adopt Tribal Regulations under the HEARTH Act, 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.

Threshold “HEARTH Act”

Considerations for Tribes

- The Part 162 Revision expressly defers to tribes on rent, term and bond negotiations, and eliminates the appraisal requirement for any tribal lease, even where BIA approval is required.
- Where BIA approval is needed, the Part 162 Revision now imposes strict time lines for BIA review of both leases and ancillary agreements (i.e., amendments, assignments, subleases, and leasehold financings), with a separate “preliminary review” of proposed forms/terms also being available at the parties’ request.
- Where a HEARTH Act lease will require an access or utility easement, a BIA grant of easement (and NEPA documentation assessing the impact of the entire project) will still be needed.
- Even where BIA approval is not needed, certain federal environmental laws (e.g., the Clean Air Act, Clean Water Act, and Endangered Species Act) will still apply, along with standard title and survey requirements.
- While “tribal administrative capacity” is not an issue to be considered by BIA in its review of Tribal Regulations under the HEARTH Act, some developers, lenders and title companies may continue to see BIA processing and approval as being needed to maximize certainty and minimize risk.
- Tribes which utilize special leasing acts with reservation-specific provisions that are key to development will need HEARTH-Act-type amendments if they wish to enter into leases without BIA approval, and IRA tribes may need to amend provisions in their constitutions which require BIA approval of tribal leases.

Standard of Review – HEARTH Act Regulations

- The standard of review for Tribal Regulations is twofold: (1) the Regulations must be consistent with the otherwise-applicable federal leasing regulations in Part 162; and (2) the Regulations must provide for a tribal “environmental review” process which ensures the identification, evaluation and mitigation of significant impacts.
- Under Interim National Guidance issued on January 16, 2013 (and still being applied, despite a 2014 expiration date), the BIA’s Central Office has retained the authority to approve Tribal Regulations (at least until a greater level of standardization is achieved), with a 120-day review period mandated by the HEARTH Act; to date, 29 sets of Tribal Regulations have been approved for 25 tribes, with 18 more in the pipeline (none being specifically identified for renewable energy lease purposes, but with the Central Office advising that approved “Business Lease” regulations may be relied on to support renewable energy leases).
- The Interim Guidance addresses the “environmental review” requirement by mandating that “significant effects on the environment” be made subject to public notice and comment and tribal response and evaluation, while “suggesting” that Tribal Regulations also:
 - (1) define “significant effects,” “affected environment,” and “public” (presumably including BIA and other public agencies that should receive actual notice of certain types of actions);
 - (2) specify the time, manner, and circumstances in which notice and opportunity to comment on proposed lease actions would be afforded to the “public,” and the time, manner, and circumstances in which notice of final lease actions and right to appeal (both within the tribal government structure, and then to BIA) would be afforded to commenting/objecting parties; and
 - (3) describe the time and manner in which the tribal environmental review process will be documented and such documentation made available for public and agency review.

Other “No Approval” Scenarios

- Section 17 of the IRA (as amended in 1990) allows tribal corporations with BIA-approved charters to enter into leases with third parties for up to 25 years, without any tribal “environmental review” being required.
- Tribal land may generally be developed by tribally-owned enterprises without leases (including rooftop installations of solar equipment), where leasehold financing is not required, but where all or part of a facility is to be leased to a third party a ground lease will be needed to support the space sublease; under the Part 162 Revision, subleases will not require BIA approval unless the underlying ground lease so requires, but commercial subleases must still be recorded in TAAMS.
- In 2005, Congress amended earlier Indian energy laws to (among other things) allow tribes to grant surface leases (for power generation purposes) for terms up to 30 years, under BIA-approved Tribal Energy Resource Agreements (TERA’s).
- No TERA has yet been approved, in part due to strict requirements relating to tribal “administrative capacity” and “front end” NEPA requirements, and for now it may be assumed that renewable energy leases will be processed under the HEARTH Act (where the BIA approval process is much less burdensome, and the maximum term is much longer) if the parties wish to avoid the BIA approval process and the strict application of NEPA at the project level.
- The Part 162 Revision expressly provides that (revocable, non-assignable) “permits” involving tribal land (which may authorize pre-lease, low-impact “right of entry” activities such as geotechnical work, land survey, or appraisal, without any rights of possession) are not subject to BIA approval.
- Options to lease and other “encumbrances” of tribal land (that do not require approval under Part 162 or some other more specific statute or regulation) may also be entered into without BIA approval, under 25 U.S.C. § 81, unless the term could run for seven or more years.

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” participation, or tribal ownership options may be agreed upon as additional/alternative consideration.
- 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 generally permitted by law, within that maximum term; cf. “HEARTH Act” leases, which may run for a maximum of 75 years, with multiple option periods.
- The Part 162 Revision defers to tribal negotiations, but the BLM’s standard 30-year term for solar leases may generally be seen to define a “reasonable” primary term for such leases on Indian land.

Supporting Documentation Requirements

- A plan of development or resource development plan will be required in support of lease proposals made under Subparts D-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, BLM's programmatic approach not having been extended to tribal lands.
- To support a "best interest" determination by BIA, 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 and holding periods, 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, and/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.

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 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.
- 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 or monitor 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 financing instruments) 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), with the effective date of the "deemed approved" amendment being 45 days from the date of BIA's receipt.
- Landowner representatives or agents may not be delegated the power to consent to changes in the rent, term, site description, or remedies provisions in a lease, without a specific authorization in the lease, a power of attorney, or court document.
- 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 the "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.
- Other "definitional" exceptions (to the consent and approval requirement for assignments) 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 by agreement.
- 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.

The New Part 162: Top Ten Takeaways

- Part 162 covers only surface (and not mineral) leases.
- Part 162 does not mention the HEARTH Act, but Tribal Regulations under that Act must be consistent.
- Leases may be enforced by BIA on behalf of (but not against) Indian owners, with deference to negotiated lease remedies.
- Deference is also required on jurisdictional issues, with tribal laws and taxes being made broadly applicable in the absence of explicit lease provisions to the contrary.
- 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, and 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, and tribal permits (licenses) need not be approved under any circumstances.
- Subleases must be approved only if the lease so provides, and assignments not requiring BIA approval are generally limited to those made to named “Qualified Transferees” and wholly-owned subsidiaries.
- Statutory rules on the “five factors” to be considered, and the ILCA consent requirements, are incorporated in Part 162 for the first time.
- New “default rules,” and other issues and provisions that must be expressly addressed/included in the lease document, are identified.