

Leases on Tribal Trust Lands: How New BIA Leasing Regulations Affect Tax Policy on Tribal Lands

CLE Webinar/Teleconference sponsored by the
ABA Tax Section Indian and Tribal Tax Committee and the
National Congress of American Indians

Wednesday, August 14, 2013, 1:00 – 2:30 pm Eastern

Today's Presenters

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Today's Roadmap

- Introduction
- Background / Context of Leasing Regulations
- Regulatory Tax Provisions
- Strategy Discussion
- Question & Answer

ABA Tax Section: Indian and Tribal Tax Committee

- The Tax Section's Newest Committee
- Intended to:
 - Provide a forum to discuss and debate good policy in tribal tax law
 - Work nationally with stakeholders and practitioners to help develop and influence tax policy, tax administration and tax law affecting Indian tribes and their citizens
 - Provide learning opportunities for practitioners, as well as opportunities to interact with other practitioners, and exchange ideas, strategies and experiences

OVERVIEW – New 162 Leasing Regulations

1. Highlights of the new regulations
2. Sub-Part A: General Provisions
3. Sub-Part C: Residential Leasing
4. Sub-Part D: Business Leasing
5. Sub-Part E: Wind & Solar Leasing
6. Questions & Comments

Final Rule - Policy

- Rule is deregulatory to encourage industry to partner with tribes and facilitate more leasing of Indian lands
- Rule promotes economic development
- Rule critical to successful implementation of the HEARTH Act because it provides a model for tribal leasing laws and establishes a baseline for DOI review of tribal laws
- Resolves local tax question in favor of tribal self-determination

HIGHLIGHTS: What do the rules do?

- They apply to surface leases only – no mineral leases, and no water leases
- The rules for Agricultural leasing remain the same
- Rules do NOT get rid of BIA approval requirement (but HEARTH Act does – if tribes want it)
- Re-orientes BIA staff for lease review – burden is on BIA to show why disapproval is warranted, rather than on landowners to show why approval is warranted
- Imposes time limits on the BIA for lease review

HIGHLIGHTS: What do the rules do?

- Allows for BIA review of proposed lease before or during NEPA documentation and valuation
- Direct pay is permitted where there are 10 or fewer landowners (ALL must consent)
- Incorporates consent requirements of ILCA & AIPRA
- Clarifies that lease provisions may provide for tribal preference in employment (over and above Indian preference)
- Clarifies tax status of land, improvements, and certain activities under a lease

HIGHLIGHTS: What's so different?

Old Rule	New Rule
Two categories of surface leases: <ol style="list-style-type: none">1. Agricultural2. Non-Agricultural	Four categories of surface leases: <ol style="list-style-type: none">1. Residential2. Business3. Wind & Solar Energy4. Agricultural*

Source: Table of Contents at 25 C.F.R. Part 162

Note: Some leases still do not fit neatly into any of these categories & will be discussed later

* Agricultural leasing regulations remain the same

HIGHLIGHTS: What's so different?

- **Residential subpart** applies to leases for:
 - Housing purposes; or
 - Construction of single family homes or housing for public purposes.
- **Business subpart** applies to leases for:
 - Business purposes;
 - Religious, educational, recreational, cultural, other public purposes;
 - Commercial or industrial purposes (including biomass);
 - Surface leases not covered by other subparts.
- **Wind & solar energy subpart** applies to leases for:
 - Evaluation of wind resources for electricity generation
 - Harnessing wind and/or solar energy to generate & supply electricity.

HIGHLIGHTS: What's so different?

Old Rule	New Rule
No specified process for BIA review of leases.	Clarifies what documents are needed for a complete lease application, and provides steps for BIA review and approval of each document

HIGHLIGHTS: What's so different?

Old Rule	New Rule
Did not contain any timelines for BIA review of lease applications	Establishes timelines for BIA to complete review of lease applications – based upon type of lease (e.g. residential, business, or wind/solar)

HIGHLIGHTS: What's so different?

Old Rule	New Rule
Burden of proof was on the landowner to show why leases should be approved	Burden of proof is on BIA to show why lease should not be approved (i.e. limits BIA discretion to disapprove)

HIGHLIGHTS: What's so different?

Old Rule	New Rule
Required landowners to obtain BIA approval for “permits”	BIA approval for permits is no longer required

Note: Permits will be addressed later in the discussion

Highlights: What Now?

- These new regulations are now in effect
- HEARTH Act is also in effect
- New Categorical Exclusion for residential leasing (single family homes “and any associated facilities” and rights of way on sites smaller than 5 acres)

Sub-Part A: General Provisions

162.015 – Employment preference

- Leases may include provisions consistent with tribal law requiring the lessee to give preference to qualified tribal members
- Note: Will apply to business leases, but helps resolve a longstanding issue regarding whether tribes can require entities doing business on the reservation to give preference to tribal members over non-member Indians

Sub-Part A: General Provisions

162.017 – Taxes

- Permanent improvements on leased lands “are not subject to any fee, tax, assessment, levy, or other charge imposed by” states and local governments
- Activities under a lease, conducted on the leased premises, “are not subject to any fee, tax, assessment, levy, or other charge imposed by” states and local governments
- Leasehold possessory interest “is not subject to any fee, tax, assessment, levy, or other charge imposed by” states and local governments”
- Note: This is subject to “applicable Federal law”

162.017: What taxes apply to leases approved under this part?

- (a) Subject only to applicable federal law, permanent improvements on the leased land, without regard to ownership of these improvements, are not subject to any fee, tax, assessment, levy or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.
- (b) Subject only to applicable federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.

162.017: What taxes apply to leases approved under this part?

- (c) Subject only to applicable federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interested may be subject to taxation by the Indian tribe with jurisdiction.

Current state of play

- Desert Water Agency v. US (C.D. Cal.) - California state agency challenging the new regulations as applied to improvements to leases on Agua Caliente reservation
- What options does this present Tribes and their lessees?
 - Go forward in reliance on new regulations (either through litigation or taking a position); or
 - Take the “wait and see” approach (must pay applicable taxes while you wait)

Other Considerations

- Mixed Activities – on and off leasehold, or even on and off the reservation
- Classification of property – “permanent improvement” v. “personal property”
- Migration toward commercial leasing
- Monitor legislative initiatives at both the state and federal level

Question & Answer

To ask a question, you may:

- “raise your hand” using the hand icon in the upper right hand corner of your screen; or
- You can type your question into the question box

Questions will be answered in the order they are received

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