BIA Issues Final Regulations Governing
Residential, Business, and Wind and Solar Resource Leasing on Indian Lands

The Revised Rule: On November 27, 2012, the Bureau of Indian Affairs issued the long-awaited and substantially revised regulations[i] addressing non-agricultural surface leasing of Indian land under the Indian Long Term Leasing Act.[ii] The revised rules add new subparts to 25 CFR Part 162 specifically addressing residential leases and business leases, and for the first time specifically provide guidance for wind energy evaluation leases, and wind and solar energy development leases on Indian lands. While many of the provisions provide needed clarification to streamline business leasing, particularly for renewable energy development, other provisions create issues that may complicate economic development in Indian country.

What the New Regulations Do: The regulations are intended to streamline residential leasing, business leasing, and wind and solar resource leasing on tribal and individually owned Indian lands, breaking the regulations out for each category of leasing into separate subparts. The regulations establish specific deadlines for BIA review and action on proposed leases, lease amendments, assignments, subleases, and leasehold mortgages. The regulations may streamline leasing because they allow BIA to review a proposed lease before or during preparation of National Environmental Policy Act documentation and any evaluation to identify potential obstacles to BIA approval. The revised regulations also provide new, more detailed guidance regarding leasehold mortgages, assignments, and subleases that developers may find simplify planning for future transactions at the point of leasing.

Issues the Reg Presents: The regulations also purport to limit the scope of state law and state taxing authority over the leases and activities on such leases. Revised Section 162.014(3) declares that approved leases are not subject to state law or law of a state political subdivision unless the Indian tribe with jurisdiction, subsection (a), or Congress, subsection (b), "has made it expressly applicable" or "a federal court has expressly applied state law to a specific area or circumstance in Indian country *in the absence of federal or tribal law*." Subsection (c). Similarly, Section 162.014(c) appears to limit the ability of the parties to a Section 415 lease to contractually stipulate to application of state law: it provides that "the parties to lease may subject that lease to State or local law *in the absence of Federal or tribal law*" by including an express provision in the lease. However, the requirement that there be an "absence of Federal or tribal law" may leave few situations where the stipulation is assured to be effective and may prove a disincentive to economic development in Indian country.

The regulations further purport to limit application of state taxes to leases and activities on leases approved under the regulations. 25 CFR § 162.017 provides that, "subject only to applicable federal law," (i) permanent improvements on the leased land, (ii) activities under a lease conducted on the leased premises, and (iii) the leasehold or possessory interest are not subject to any fee, tax, assessment, levy or other charge imposed by any state or political subdivision of the state, though such property interests and activities "may be subject to

taxation by the Indian tribe with jurisdiction. The intent of the phrase "[s]ubject only to federal law," in Section 162.107 may require interpretation in light of cases such as *Cotton Petroleum v. New Mexico*[iii], which upheld state severance taxation of oil and gas under a tribal oil and gas lease.

Employment Preference: The new regulations further address a sometimes controversial issue, providing that a "lease of Indian land may include a provision, consistent with tribal law, requiring the lessee to give a preference to qualified tribal members, based on their political affiliation with the tribe." 25 C.F.R. § 162.015. The new rule sidesteps ruling of the Equal Employment Opportunity Commission and some courts that required an Indian preference to favor "local Indians," and not merely members of the lessor tribe. Instead, in the preamble to the regulations, BIA explains its view that tribe-specific employment preferences are "political preferences, not based on race or national origin. They run to members of a particular federally-recognized tribe or tribes whose trust or restricted lands are at issue and with whom the United States holds a political relationship. These preferences are rationally connected to fulfillment of the federal government's trust relationship with the tribe that holds equitable or restricted title to the land at issue."

The Technical Stuff: The new regulation replaces the existing subpart for non-agricultural leases with the more detailed provisions for specific types of leases. The new regulations do not apply to, among other things, rights of way (which are governed by 25 CFR Part 169, mineral leases, prospecting permits, or mineral development agreements (governed by 25 CFR Parts 211, 212, 213, 225, 226, and 227) or contracts or agreements that encumber tribal land under 25 USC § 81.

The revised regulations may be accessed at:

https://www.federalregister.gov/articles/2012/12/05/2012-28926/residential-business-and-wind-and-solar-resource-leases-on-indian-land

And the Bureau of Indian Affairs fact sheet on this final rule at:

www.bia.gov/cs/groups/public/documents/text/idc-037328.pdf

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i See Notice of Final Rulemaking, 77 Fed. Reg. 72,440 (Dec. 5, 2012).
ii 25 U.S.C. § 415.
Iii 490 U.S. 163, 192 (1989).