

Client Alert

Interior Department Proposes Rule to Spur Renewable Energy Development on Tribal Lands

December 1, 2011

On November 28, 2011, the Department of the Interior (DOI) issued a proposed rule aimed at spurring and streamlining the development of solar and wind energy projects on tribal lands. The proposed rule, titled “Residential, Business, and Wind and Solar Resource Leases on Indian Land,” would modify the Bureau of Indian Affairs’ (BIA) process for approving tribal leases, in order to accelerate the leasing process and remove uncertainties associated with entering into leases with tribes. DOI is accepting comments on the proposed rule for a period of 60 days. The proposed rule can be accessed at http://www.ofr.gov/OFRUpload/OFRData/2011-29991_PI.pdf.

Impediments to Developing Wind and Solar Projects on Tribal Lands

DOI holds approximately 56 million acres of land in trust for Indian tribes and individual Indians. Pursuant to federal law, as trustee of these lands, DOI must generally approve leases of tribal lands. Due in part to leasing regulations that are outdated, have not been consistently applied and do not include mandated timeframes, securing approval for commercial leases of tribal lands is a slow process that has acted to deter development and commercial investment in Indian country. Indeed, it can take BIA up to several years to approve the types of complex commercial leases needed for renewable energy projects.

Efforts to Streamline and Spur Development of Renewable Energy Projects

DOI’s proposed rule seeks to address the process delays and uncertainties associated with leasing tribal lands for renewable energy projects. Subsection E of the proposed rule establishes a new, streamlined process in an effort to remove significant obstacles to wind and solar energy development on Indian lands. For wind projects, the proposed rule establishes a two-step process with less-onerous leasing requirements for the installation and operation of wind evaluation equipment (e.g., meteorological towers) and then a follow-on process to extend the lease for full development of the wind project. (Solar projects do not require this two-step process because a shorter-term lease is not needed to evaluate solar energy potential.)

One of the most significant streamlining efforts is the requirement that BIA must issue decisions on wind and solar project leases within 60 days of receiving all required documentation. The proposed rule sets similar timeframes for BIA decisions on lease amendments, lease assignments, subleases and leasehold mortgages; in the case of lease amendments and subleases, these documents will be deemed approved if BIA fails to act within the set timeframes.



Providing Certainty

In an effort to ease the burden of negotiating and executing tribal leases, the proposed rule also seeks to bring some certainty to the leasing process. DOI has abandoned its “one-size-fits-all” leasing approach in favor of specific rules for the different types of tribal leases (i.e., residential, business, or wind and solar energy development). The proposed rule identifies terms that must be included in wind and solar leases and the documents that must be submitted to BIA to support a lease approval. The proposed rule also limits the grounds under which BIA can disapprove certain lease documents. Finally, the proposed rule clarifies that permanent improvements on the leased lands are not subject to state or local taxation.

Mandated Lease Terms

DOI also has proposed substantive requirements—some of which allow for flexibility in negotiations—that would apply to or govern wind and solar leases, including maximum lease terms for wind and solar leases (i.e., a maximum initial term of 25 years with the option of one 25-year extension); performance bond and insurance requirements; methodologies for establishing valuation and compensation; removal requirements for improvements on leased lands; indemnification requirements; and enforcement and remedy mechanisms.

CONTACT INFORMATION

Akin Gump’s project development and American Indian law attorneys have significant experience with tribal leasing issues and the development of commercial projects on tribal lands. Clients contemplating or currently undertaking renewable projects on tribal lands or that have questions about, or wish to submit comments on, DOI’s proposed rule should feel free to contact the attorneys listed below—

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