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# The Department of the Interior's Final Rule Allots American Indians More Freedom to Lease Land for Residential, Commercial, and Renewable Energy Development In Order To Improve American Indians' Economic Condition

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**THE DEPARTMENT OF THE INTERIOR'S FINAL RULE  
ALLOTS AMERICAN INDIANS MORE FREEDOM TO  
LEASE LAND FOR RESIDENTIAL, COMMERCIAL,  
AND RENEWABLE ENERGY DEVELOPMENT IN  
ORDER TO IMPROVE AMERICAN INDIANS'  
ECONOMIC CONDITION.**

Jeffrey Crockett

I. Introduction

Almost 56 million acres of land are held in federal trust for tribal and individual American Indian use<sup>1</sup> meaning that, while American Indians and American Indian tribes have exclusive use of the land, American Indians do not have the full bundle of rights as landowners would have over their land.<sup>2</sup> Incidentally, as “beneficiaries,” American Indians and American Indian tribes are not able to lease the land without the approval of the U.S. government Bureau of Indian Affairs (BIA). The prior “outdated and unworkable” regulations, established in 1961, did not require the BIA to make a decision on leases within any specific timeframe, leading to BIA decisions that often took “several years.” However, new rules now require the BIA to make decisions within 30 days for residential leases and 60 days for commercial and renewable energy development leases.<sup>3</sup>

On January 4, 2013, a Final Rule promulgated by the Department of the Interior (DOI) became effective, giving American Indian beneficiaries more control over their land and removing much of the BIA’s discretion on issues arising from the “leasing approval process of Indian land.”<sup>4</sup> The Final Rule specifically reforms the BIA’s approval of leasing efforts made on American Indian land concerning residential, commercial, and renewable energy development.<sup>5</sup> The DOI promulgated the Final Rule in order to offer American Indians and American

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1. Timothy Williams, *U.S. Will Pay a Settlement of \$1 Billion to 41 Tribes*, N.Y. TIMES (Apr. 13, 2012), [http://www.nytimes.com/2012/04/14/us/us-to-pay-1-billion-settlement-to-indian-tribes.html?\\_r=1&](http://www.nytimes.com/2012/04/14/us/us-to-pay-1-billion-settlement-to-indian-tribes.html?_r=1&).
  2. See Press Release, Department of the Interior, Salazar Finalizes Reforms to Streamline Leasing, Spur Economic Development on 56 Million Acres of American Indian Trust Land (Nov. 27, 2012), <http://www.doi.gov/news/pressreleases/salazar-finalizes-reforms-to-streamline-leasing-spur-economic-development-on-56-million-acres-of-american-indian-trust-land.cfm>.
  3. *Id.*
  4. Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2.
  5. *Id.*

Indian tribes more freedom over the land the U.S. government holds for them in trust.<sup>6</sup> The DOI hopes that the changes will lead to a more efficient leasing process because the new regulation has more specific procedures for American Indian beneficiaries and the BIA to follow.<sup>7</sup>

The Final Rule will deregulate the leasing process by providing deference to American Indian discretion over leases for Indian land otherwise held in trust, which should benefit tribal economies and promote future American Indian sovereignty over such land.<sup>8</sup>

## II. Background

Under the Code of Federal Regulations, section 162 of Title 25, the BIA has had broad discretion over the process of American Indians leasing land. In the past, the broad discretion included no specific timeframe for the BIA to make a decision,<sup>9</sup> which often deterred development on Indian land for years.<sup>10</sup> A leasing agreement would be made, but nothing would commence until the BIA gave its approval.<sup>11</sup> Furthermore, the BIA also established the fair market value for rent and reviewed the values to determine whether an adjustment was needed. There was no freedom to negotiate for American Indians in terms of leasing opportunities since the BIA had broad discretion over the leasing decisions.<sup>12</sup>

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6. *Id.*

7. See Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2; see also BIA, Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72440 (Dec. 5, 2012) (to be codified at scattered sections in 25 C.F.R. pt. 162) (for example, the BIA now must defer to American Indian tribal decisions for rental rates instead of the BIA making the decision on fair market values). In order to illustrate the need for reformations, a case study on *Skull Valley Band of Goshute Indians v. Davis (Skull Valley)* will demonstrate the inefficiency of the old leasing process. 728 F. Supp. 2d 1287 (D. Utah 2010).
8. See Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2.
9. Cf. 25 C.F.R. pt. 162 (2011) (giving no time frame for BIA to decide on non-agricultural lease applications).
10. See 77 Fed. Reg. at 72441 (“The current regulations provide for the approval of these instruments, but do not specify the approval procedures, leading to possible inconsistencies nationwide, to the detriment of Indian landowners, lessees and lenders.”).
11. See Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2 (the Secretary of the Interior, Ken Salazar, explaining that “this reform will expand opportunities for individual landowners and tribal governments to generate investment and create jobs in their community. . .”).
12. See *id.*

A. *The Government's Mismanagement of American Indian Land*

American Indians and American Indian tribes have recently had to deal with government mismanagement of Indian land.<sup>13</sup> For example, on April 11, 2012 the Department of Justice announced that the United States would pay 41 tribes a settlement of more than \$1 billion due to the DOI's and the Department of Treasury's failures to adequately oversee concessions on American Indian lands. The settlement came after dozens of lawsuits claiming the mismanagement of funds and natural resources that the government holds in trust, exemplifying the government's inefficient management of Indian land. Attorney General Eric Holder admitted that the land had been mismanaged, but stated that the settlement of \$1.023 billion "fairly and honorably resolve[s] historical grievances over . . . management of tribal trust funds, trust lands and other nonmonetary trust resources."<sup>14</sup> Yet compensation would not be enough, and would provide the Secretary of the Interior one reason to make changes to the relevant rules in order to empower American Indian beneficiaries so that they could make their own economic choices.<sup>15</sup>

Another case, *Skull Valley Band of Goshute Indians v. Davis*,<sup>16</sup> further exemplifies government mismanagement of Indian land. *Skull Valley* involved a company, Private Fuel Storage, LLC (PFS), whom the Band contracted with to lease land. PFS wanted to lease the land in order to build and operate a storage facility for spent nuclear fuel (SNF) because storage space was running out on the company's reactor site.<sup>17</sup> The Band leased about 820 acres of land to PFS to build an intermodal transport facility from the interstate to the reservation and awaited approval by the BIA.<sup>18</sup> DOI officials rejected the lease for reasons such as "the need to protect the reservation for future generations of the Band."<sup>19</sup> The court however held that the DOI's decision was arbitrary and capricious,<sup>20</sup> providing yet another reason for the changes to come.

B. *The Final Rule's Reforms*

The Final Rule amends the BIA's decision making power over residential, commercial, and wind and solar resource leasing.<sup>21</sup> The BIA

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13. See Williams, *supra* note 1.

14. *Id.*

15. See Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2.

16. See *Skull Valley Band of Goshute Indians v. Davis*, 728 F. Supp. 2d 1287 (D. Utah 2010).

17. See *id.* at 1292.

18. *Id.* at 1290.

19. *Id.* at 1293.

20. *Id.* at 1287.

21. See Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2.

now must make a decision within 30 days for residential leases and 60 days for business and wind and solar resource leasing.<sup>22</sup> At the end of the respective time limit, the BIA will no longer have a say on a particular leasing agreement.<sup>23</sup> At that point, the leasing application will be “approved” by default and the permit will automatically go into effect.<sup>24</sup>

To determine the term of a leasing agreement for Indian land, the BIA will defer to the tribe as to the length of the lease term and any possibility for a renewal; however, the BIA will ensure that an individual American Indian’s lease term is reasonable.<sup>25</sup> The BIA will look to see if the lease is reasonable by the purpose of the lease, type of financing, and the level of investment.<sup>26</sup>

The Final Rule also changes the BIA’s role in assessing the fair market value for renting and approving permits on American Indian land.<sup>27</sup> In determining how much rent will be under a residential or business lease of Indian land, the BIA will defer to the tribe’s negotiated price.<sup>28</sup> For a residential or business lease of an individual’s land, the BIA will determine if it is within the individual American Indian’s best interest.<sup>29</sup> There is a greater protection of individual American Indians as opposed to the tribe because the BIA itself will determine whether it is within the individual’s best interests while the BIA will defer to tribes only after a request that the tribe accepts the valuation.<sup>30</sup>

The BIA will also defer to American Indian beneficiaries who lease land for energy efficient programs.<sup>31</sup> Because the United States is making continuing efforts toward efficient energy,<sup>32</sup> the DOI did not want to get in the way of leases which include wind energy evaluations

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22. *Id.*

23. Sierra Crane-Murdoch, *End of an Era?*, HIGH COUNTRY NEWS GOAT BLOG (Dec. 5, 2012, 5:00 AM), <http://www.hcn.org/blogs/goat/end-of-an-era>.

24. *Id.*

25. BIA, Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72440, 72476 (Dec. 5, 2012) (to be codified at 25 C.F.R. § 162.311(b)).

26. *Id.*

27. *See id.* at 72451, 72477 (explaining that the changes, to be codified at 25 C.F.R. § 162.321, allow “for waiver of valuations and fair market rental for non-consenting landowners under certain circumstances”).

28. *See id.* at 72477, 72486 (to be codified at 25 C.F.R. §§ 162.320, .420).

29. *See id.* at 72477, 72486 (to be codified at 25 C.F.R. §§ 162.321, .421).

30. *See id.* at 72477, 72486 (to be codified at 25 C.F.R. §§ 162.322, .422).

31. *See id.* at 72498, 72504 (to be codified at 25 C.F.R. §§ 162.531(b), .566(b)).

32. ABB GROUP, COUNTRY ENERGY EFFICIENCY REPORT: UNITED STATES 2 (2011), <http://www.abb.com/energyefficiency> (follow “other country reports” hyperlink; follow “United States” hyperlink; follow “United States 2011” hyperlink) (“The energy efficiency program includes tax incentives for renewable energy, cogeneration and new technology; voluntary agreements with the business community; comprehensive transportation programs; and new efficiency standards for domestic appliances.”).

(WEEL) and wind and solar resources (WSR).<sup>33</sup> For this renewable energy development, the DOI will allow any lease as long as the lease includes certain standard provisions such as the parties, the terms, who is responsible for evaluating premises for suitability, and which also gives the BIA the right to inspect the premises to ensure compliance.<sup>34</sup>

Provisions for WEEL and WSR leases are added to the Final Rule making land leasing for energy development more efficient by specifically laying out requirements for the process.<sup>35</sup> Wind and solar energy is pollution-free and an inexhaustible source of electricity.<sup>36</sup> The new rule allows American Indians flexibility in negotiating and writing leases for the efficient energy development.<sup>37</sup> There is no model lease for American Indian beneficiaries to follow because the BIA most likely will not restrict leases with the certain standard provisions and will assist American Indian beneficiaries only upon their request.<sup>38</sup>

Unfortunately, many American Indian tribes live in poverty and “many reservations rank among the nation’s poorest places.”<sup>39</sup> The DOI made changes in order to empower American Indians and improve the economy of American Indian tribes. The DOI recognized that the old regulations were not suitable for American Indian’s economic development.<sup>40</sup>

### III. Analysis

#### A. *Best Interest Case Study*: Skull Valley Band of Goshute Indians v. Davis

The United States is the trustee of Indian lands and has made American Indians the beneficiaries.<sup>41</sup> Under this scheme, the DOI is responsible for protecting Indian land in the best interest of American Indian tribes.<sup>42</sup> With this responsibility, it seems contradictory that the BIA has had discretion to deny leasing projects that were “approved” by an American Indian tribe or an individual American Indian who is the benefactor of that land. Thus, the Final Rule attempts to reduce the DOI’s discretion because it is clear—as exemplified by

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33. 77 Fed. Reg. at 72495 (to be codified at 25 C.F.R. § 162.501).

34. *Id.* at 72499 (to be codified at 25 C.F.R. § 162.542).

35. See Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2.

36. Natural Resources Defense Council, *Renewable Energy for America*, NRDC.ORG, <http://www.nrdc.org/energy/renewables/technologies.asp> (last visited Apr. 4, 2013).

37. 77 Fed. Reg. at 72495-96 (to be codified at 25 C.F.R. § 162.503).

38. *Id.*

39. Williams, *supra* note 1.

40. *Id.*

41. *Id.* (“As trustee, [the Department of the] Interior manages about 56 million surface acres in Indian Country.”).

42. See 77 Fed. Reg. at 72442.

decisions such as *Skull Valley*—that the DOI sometimes abuses its discretion.<sup>43</sup> That is, before the Final Rule, the DOI made arbitrary and capricious decisions because it did not have any rules which directed it to make logical and predictable decisions.<sup>44</sup> The decision in *Skull Valley* thus demonstrates how the DOI's decisions had been illogical and unpredictable without rules to guide their decisions otherwise.

In July 2010, the U.S. District Court for the District of Utah found the DOI's determination—that it was not in the best interest of the tribe to lease to a company—was arbitrary and capricious; further, it was not in accordance with the law.<sup>45</sup> The Final Rule targets scenarios like this case by making the DOI, and more specifically the BIA, less influential over land lease decisions.<sup>46</sup> *Skull Valley* exemplifies how the DOI would deny an American Indian tribe's business lease decision even though there is no rational basis for not approving the lease.<sup>47</sup> The DOI's rationale behind its decision leading to *Skull Valley* will no longer be tolerable now that the Final Rule has taken effect.<sup>48</sup> The Final Rule protects American Indians and American Indian tribes by allowing them more freedom to make their own decisions for "future generations" of their respective tribes.<sup>49</sup>

Inspired by decisions such as *Skull Valley*, the Final Rule will change the outdated decision making process, or lack thereof, into a comprehensive decision making process.<sup>50</sup> Therefore, American Indians will not have to fight for their right to use their allotted land against arbitrary and capricious decisions.<sup>51</sup> The Final Rule reforms the general language from the old regulation, so that the DOI will not make decisions without deferring to American Indians to determine what the beneficiaries prefer.<sup>52</sup>

The land belongs to the U.S. government and the DOI must protect the land for American Indians,<sup>53</sup> however, American Indians making decisions about the land held in trust for them should be able to decide what is best for the land.<sup>54</sup> The DOI in *Skull Valley* took for

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43. See, e.g., *Skull Valley Band of Goshute Indians v. Davis*, 728 F. Supp. 2d 1287, 1294-305 (D. Utah 2010).

44. Cf. 25 C.F.R. pt. 162 (2011).

45. See 728 F. Supp. 2d at 1299-303.

46. See Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2.

47. See *Skull Valley*, 728 F. Supp. 2d at 1294.

48. See Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2.

49. See *id.*

50. See BIA, Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72440 (Dec. 5, 2012) (to be codified at scattered subparts in 25 C.F.R. pt. 162).

51. See *Skull Valley*, 728 F. Supp. 2d 1287.

52. See 77 Fed. Reg. at 72442 ("We have reviewed the regulation to ensure that the final rule requires BIA to defer to tribes in all possible cases. . . .").

53. See *id.*

54. See 728 F. Supp. 2d at 1299.

granted that it knew what was best for the Band, but the court found the DOI's decision was an abuse of discretion.<sup>55</sup> In order to limit the government's mistakes, the new regulation "supports self-determination for Indian Nations."<sup>56</sup> The "freedom to decide for oneself" is an American Indian's true best interest.<sup>57</sup> The Band decided their best interest was to allow PFS to lease the land.<sup>58</sup>

*B. Clearing Up the Past: Giving American Indians More Freedom By Making A Comprehensive Process*

The Final Rule still restricts American Indians' ability to manage Indian land without government approval. Although the DOI has placed a restriction on the BIA's involvement with leases, American Indians and American Indian Tribes must still await approval or wait for the time limitation to expire.<sup>59</sup> Perhaps the DOI does not truly trust American Indians to protect their land. No matter, the next step in the future may be to restrict the BIA further from leasing decisions.

Despite its limitations, American Indian reactions to the new regulations have been mostly positive.<sup>60</sup> The three important broad changes to take away from the Final Rule are the waiver of appraisals, the deadlines for BIA approval, and the BIA's deference to American Indian beneficiaries.<sup>61</sup>

The Final Rule allows American Indians more freedom to lease their land in the realm of commercial, business, and renewable energy development.<sup>62</sup> Permitting American Indians more sovereignty over the use of their allotted land will "generate investment and create jobs" in American Indian tribes because the Final Rule promotes a self-sustaining community by relieving the BIA of some discretionary powers.<sup>63</sup> American Indians will no longer have to wait an extensive period of time for approval of their leasing efforts, and American Indians can be creative in their leasing contracts because the BIA must give deference to American Indian and tribal decisions.<sup>64</sup> Creativity

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55. *See id.* at 1299.

56. *See* Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2.

57. Crane-Murdoch, *supra* note 23.

58. *See* 728 F. Supp. 2d at 1292.

59. *Id.*

60. *See* BIA, Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72440, 72442 (Dec. 5, 2012).

61. *See id.*

62. Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2.

63. Although the BIA still can overrule a lease agreement, a decision must be made within a specified time period of 30 days for residential leases and 60 days for commercial or renewable energy leases. The BIA must also give discretion to American Indians' lease agreements to decide what is best for the Indian land. *See id.*

64. *See id.*; *see also* 77 Fed. Reg. at 72442.

could lead to leasing ingenuity and give American Indians a sense of accomplishment.

The Final Rule is about “supporting self-determination for Indian Nations.”<sup>65</sup> The new regulation will sustain sovereignty because it is “comprehensive,” which was missing from the “outdated and unworkable” regulation. The Final Rule provides the clarity which will aid American Indian nations in stabilizing their economies and empowers tribes to make decisions in their own best interests.<sup>66</sup> The DOI included American Indian tribes’ suggestions for numerous provisions in the Final Rule which “support[s] tribes’ sovereign rights.”<sup>67</sup> The Final Rule reflects that these suggestions were seriously considered because it states that the BIA now has a limited role in leasing decisions and there are less regulatory provisions.<sup>68</sup>

### C. *Future of Leasing Indian Land Under the Final Rule*

#### i. Third Party Interest in the Final Rule

These changes will help American Indians increase business with third parties. Third party leasees will not have to wait long on the BIA’s decision on lease transactions in order to develop Indian land.<sup>69</sup> This is attractive to any third party who wants to contract with American Indians because the project will not be delayed by the BIA’s inactions, creating faster results for the parties involved in the lease. Additionally, American Indian tribes are able to waive the fair market value, allowing flexibility in fair market value determinations of rental rates.<sup>70</sup> Third parties will be able to negotiate with American Indians to reach an agreement without the BIA’s interference.<sup>71</sup> These changes will likely appeal to third parties who want to conduct business with American Indians because the BIA is less intrusive now on market rates and overall leasing decisions.

#### ii. Ambiguities in the Final Rule

There are still ambiguities within the Final Rule that may be a problem in the future. Most provisions in the Final Rule include language stating that there is “no model” lease agreement for American Indians to follow, or that the model is “not mandatory” in order to lease their

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65. Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2.

66. *Id.*

67. 77 Fed. Reg. at 72442.

68. *Id.*

69. See Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2.

70. See 77 Fed. Reg. at 72447 (to be codified at 25 C.F.R. § 162.321).

71. See *id.* (to be codified at 25 C.F.R. § 162.320).

land.<sup>72</sup> However, provisions within the same Final Rule state that the BIA can “withhold [its] approval in order to protect the best interests of the Indian landowners.”<sup>73</sup> Still, the BIA needs a compelling reason to withhold their approval.<sup>74</sup>

Such discrepancies in the Final Rule’s language may give the BIA more influence than it ought to have over decisions. If the BIA puts forth too much influence in lease agreements, there will be more litigation between the DOI and American Indians and American Indian tribes claiming the BIA abused its discretion, such as in *Skull Valley*.<sup>75</sup> For example, some Final Rule provisions include that the BIA will defer to American Indian beneficiaries’ determinations to the “maximum extent possible.”<sup>76</sup> The Final Rule does not state exactly what is the “maximum extent possible,”<sup>77</sup> so it still seems the BIA has the power to decide how much deference it wants to give to the beneficiaries’ determinations. This could lead to decisions by the DOI which arbitrarily deny a lease agreement because the BIA claims it needs to protect the best interests of the landowner.

### iii. More Discretion for American Indians

Despite the minor ambiguities in the Final Rule, the new regulation should increase business for American Indians and American Indian tribes.<sup>78</sup> Faster decisions and less government intervention are attractive qualities for communities trying to sustain economic growth.<sup>79</sup> As discussed before, the Final Rule made three broad changes in which American Indian tribes were particularly supportive.<sup>80</sup> The Final Rule creates deadlines for BIA decisions, allows “tribal waiver of appraisals,” and requires that the BIA give deference to American Indians “that the lease is in their best interest.”<sup>81</sup> Instead of disordered government influence, American Indians will be able to create inventive contracts working directly with the leasee creating more flexibility. American Indians can use this flexibility to create a contract based on the individual leasee’s needs. Term provisions such as duration of lease, payments, and other agreements may have to be adjusted depending on

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72. See, e.g., *id.* at 72476, 72495 (to be codified at 25 C.F.R. §§ 162.302(a), .503).

73. *Id.* at 72481, 72506 (to be codified at 25 C.F.R. §§ 162.352(a)(6), .585(a)(4)).

74. *Id.*

75. See, e.g., *Skull Valley Band of Goshute Indians v. Davis*, 728 F. Supp. 2d 1287 (D. Utah 2010).

76. E.g., 77 Fed. Reg. at 72498 (to be codified at 25 C.F.R. § 162.531(b)).

77. *Cf. id.*

78. See *id.* at 72498.

79. See Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2. President Obama wants to “strengthen [tribal] economies” by regulating government and deregulating American Indians. See *id.*

80. See 77 Fed. Reg. at 72442.

81. *Id.*

the situation between the beneficiary and the leasee. The BIA, under the Final Rule, will give American Indians deference to approve such provisions in specific contracts to lease land.<sup>82</sup>

#### IV. Conclusion

The DOI is hopeful that the deregulation embodied by the Final Rule will lead to an increase of homeownership, promote private investment in businesses, and remove obstacles to wind and solar energy development.<sup>83</sup> The Final Rule makes drastic changes to older “outdated” regulations in order to strengthen American Indian tribe economies.<sup>84</sup> This strengthens the relationship between the U.S. government and the tribes.<sup>85</sup> Once the Final Rule’s outcome is clear and comes into fruition, hopefully more changes will be made to improve American Indian economies. If the Final Rule’s leasing provisions have positive effects, then the future could even hold in store a return to American Indians more control over the land they use, suggesting that the BIA would have even more limited—or no—influence over American Indian land.<sup>86</sup>

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82. See Press Release, Salazar Finalizes Reforms to Streamline Leasing, *supra* note 2.

83. See *id.*

84. *Id.*

85. See Williams, *supra* note 1.

86. See 77 Fed. Reg. at 72442.