

Leasing  
Facilities under  
Pub. L. 93-638:  
Section 105(I);  
25 CFR Part  
900; Subpart H

Presented By  
KIVA Institute, LLC  
“Building Capacity in Indian Country”  
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Gila Crossing Day School  
Gila River Indian Community



# Section 105(l) Leasing Program

## Introduction

Since 1975 Indian tribes and tribal organizations faced challenges in arranging for suitable facilities and equipment to operate programs contracted under the Indian Self-Determination Act, PL 93-638.

In response, the Indian Self-Determination Act was amended in 1988 that made significant improvements in federal statutes and regulations intended to assist tribes in the operation of their contracted programs. One significant improvement was the ability of tribes and tribal organizations to lease tribal facilities to the Secretary for the operation of programs contracted under PL 93-638.

This presentation provides information and guidance on how tribes and tribal organizations may take advantage of Section 105(l) of the Act to enter into leases for tribal facilities with the Secretary.

# Facilities Dilemma

## **The Dilemma**

Are you using tribal facilities or federal facilities to operate your PL 93-638 programs, but you are not receiving funds, or not receiving enough funds to operate, maintain, and repair the facilities?

## **The Dilemma:**

Are you using BIA, BIE, and IHS facilities that are so old and in such a poor condition that they should just be demolished and replaced?

## **The Dilemma:**

Are you having to “double up” on space because of limited, or no available tribal office space?

# Facilities Dilemma

## The Dilemma:

Do you have to lease (or rent) facilities from other entities to provide office space and shop space for your PL 93-638 programs because there no other facilities available?

## The Dilemma

Are your funds to operate, repair, and replace or improve your facilities very limited or non-existent that you have to do without repairs?

## Dilemma

If funding becomes available for repair or replacement, it usually takes a long time; and may not be sufficient to complete the project.

# Facing the Dilemma

The Indian Self-Determination Act provides that tribes, when they assume direct operation of programs under PL 93-638, they “step into the shoes” of the federal government, and rightfully have full access to federal funds, facilities, and equipment that the federal government used when it provided direct services to Indian tribes and Indian beneficiaries. But...

- Government facilities are usually old and in great need of repair or replacement; and do not meet local building codes.
- It is almost impossible to secure federal funding to build new facilities much less address existing deficiencies and repair the facilities.
- Consequently, tribal staff and clients are relegated to using old, unsafe buildings.



# What is the Solution?

## 1988 Technical Amendments to Indian Self-Determination Act

The 1988 Technical Amendments to the Act provided, for the first time, that tribes, when operating programs under the Act, may lease to the Secretary, facilities they own or lease, to operate PL 93-638 programs, including facilities to which they have:

**TITLE**

**LEASEHOLD  
INTEREST**

**TRUST  
INTEREST**

# What is the Solution?

Unfortunately, tribes did not readily take advantage of the new provision, Section 105(l), until the Gila River Indian Community did in July 2019, and built a new elementary school, Gila Crossing Day School and leased it to the Bureau of Indian Affairs & Bureau of Indian Education. Today, students are in modern school facilities that enhances their educational experience.

# Background: Section 105(l) Leasing

Gila River Indian Community, Red Lake Band of Chippewa, and Mashantucket Pequot Tribe provided the impetus for exploring the leasing opportunities that exists under the Indian Self-Determination Act statutes since the 1988 Technical Amendments.



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# Learning Objectives

This training provides great opportunities for tribes to address their facilities needs. We will learn:

- ISDA Statutes & Regulations Relating to Sec. 105(I) Leasing
- Tribal Lease Proposals
- Facilities Identification
- Eligible Facilities, Proof of Ownership
- Lease, Lease Valuation, Lease Terms
- Calculating Fair Market Value
- Compensation Costs
- Operation & Maintenance Expenses
- Maintenance & Improvement Funds
- Funding Agreements



## **Solution 2 – Statutory Authority for Leasing of Tribal Facilities**

PL 93-638 was amended in 1988 to add a new provision as follow:

*Section 105(l)(1) provides that, “Upon the request of an Indian tribe or tribal organization, the Secretary shall enter into a lease with the Indian tribe or tribal organization that holds title to, a lease interest in, or a trust interest in, a facility used by the Indian tribe or tribal organization for the administration and delivery of such services under the Act”.*

## **Solution 2 – Statutory Authority for Leasing of Tribal Facilities**

PL 93-638 was amended in 1988 to add a new provision as follow:

*Section 105(l)(2) provides that “The Secretary shall compensate each tribe or tribal organization that enters into a lease under subpart (1) for the use of the facility leased for the purpose specified in such paragraph. Such compensation may include rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, and such other reasonable expenses that the Secretary determines, by regulation, to be allowable”.*

# PL 93-638 Statutes: Background

## Solution 1 – Donation of Facilities: Automatic Title

The Indian Self-Determination Act (Act), PL 93-638, contains provisions to permit tribes and tribal organizations to have access to federal funds, facilities and equipment to carry out the contracted program, as follows:

- **Section 105(f)(1)** of the Act permits tribes to use existing school facilities, hospitals, and equipment and other personal property owned by the federal government within the Secretary's jurisdiction to carry out the programs.
- **Section 105(f)(2)** of the Act requires the Secretary to “donate” to an Indian tribe or tribal organization title to any personal or real property found to be excess to the needs of the Bureau of Indian Affairs, the Indian Health Service, or the General Services Administration.

# PL 93-638 Statutes: Background

## Solution 1 – Donation of Facilities: Automatic Title (continued)

- **Section 105(f)(2)(A)**. Subject to the provisions of subparagraph (B), title to property and equipment furnished by the Federal government for use in the performance of the contract or purchased with funds under any self-determination contract or grant agreement, shall unless requested by the tribe or tribal organization, vest in the appropriate tribe or tribal organization;
- **Section 105(f)(2)(B)**. If property described in subparagraph (A) has a value in excess of \$5,000 at the time of the retrocession, rescission, or termination of the self-determination contract or grant agreement, at the option of the Secretary, upon the retrocession, rescission, or termination, title to such property and equipment shall revert to the Department of the Interior or Department of Health & Human Services, as appropriate.



## Solution 1 – Donation of Facilities: Automatic Title (continued)

- **Section 105(f)(C)**. All property referred to in subparagraph (A) shall remain eligible for replacement on the same basis as if title to such property were vested in the United States.
- **Section 105(f)(3)**. Requires the Secretary to acquire excess or surplus Government personal or real property for donation to an Indian tribe or tribal organization if the Secretary determines the property is appropriate for use by the tribe or tribal organization for a purpose for which a self-determination contract or grant agreement is authorized under the Act.

# PL 93-638 Unique Cost Principles: Background

## Solution 1 – PL 93-638 Cost Principles

**PL 93-638, in Section 106(k)**, provides unique cost principles that support the section 105(l) leasing provisions, including provisions relating to facilities costs:

- **Section 106(k)** reads, “without intending any limitation, a tribal organization may, without the approval of the Secretary, expend funds provided under a self-determination contract for the following purposes, to the extent that the expenditure of the funds is supportive of a contracted program:”
  - Depreciation and use allowances not otherwise specifically prohibited by law, including the depreciation of facilities owned by the tribe or tribal organization (continued next slide)

# PL 93-638 Unique Cost Principles: Background

## **Solution 1 – PL 93-638 Cost Principles (continued)**

- Building, realty, and facilities costs, including rental costs or mortgage expenses; and
- Interest expenses paid on capital expenditures such as buildings, building renovation, or acquisition or fabrication of capital equipment, and interest expenses on loans necessitated due to delays by the Secretary in providing funds under a contract.

# Section 105(I) Leasing: Mandate to Consult

Fiscal Year 2021 Omnibus appropriations included language in the General Provisions for Department of Interior and Department of Health & Human Services regarding Section 105(I) leases. Both Departments were directed to consult with tribes and tribal organizations, as follows:

## **SEC. 431**

- (a) Notwithstanding any other provision of law, in the case of any leases under section 105(I) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5324(I)), the initial lease term shall commence no earlier than the date of receipt of the lease proposal.*
- (b) The Secretaries of the Interior and Health and Human Services shall, jointly or separately, during fiscal year 2021 consult with tribes and tribal organizations through public solicitation and other means regarding the requirements for leases under section 105(I) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. §5324(I) on how to implement a consistent and transparent process for the payment of such lease”.*

# TRIBAL ELIGIBLE FACILITIES





# Eligible Tribal Facilities

## Eligible Tribal Facilities

Eligible tribal facilities are those facilities to which the tribe or tribal organization has:

1. Title
2. Leasehold Interest
3. Trust Interest

Note: A tribe or tribal organization may negotiate to construct a new facility that will be used to carry out PL 93-638 programs.

Tribes and tribal organizations must prove interest in a facility by:

1. Trust Title
2. Quitclaim Deed or Warranty Deed
3. Lease or Rental Agreement

# Eligible Tribal Facilities

Keep in mind, tribal facilities that are subject of the lease provisions in the PL 93-638 statutes and regulations, may be:

- Newly constructed facilities, built specifically for the Pub. L. 93-638 programs.
- Existing tribal facilities that are used, or intended to be used, to carry out PL 93-638 programs. In these instances, necessary costs for alteration or modifications, modernization, and provisions for utilities, etc. are necessary costs that should be included in the lease negotiations.

See Section 106(k) of the Act.

- Note also that tribal facilities are excluded from reversion to the federal government in instances of contract rescission (i. e. program Reassumption, or program Retrocession).



WHAT IS A  
SECTION  
105(L)  
LEASE?

# Section 105(l) Lease – General Provisions

Section 105(l) Leases are not traditional leases but are more like “Facility Cost Agreements” between the BIA, BIE, or IHS and Indian tribes and tribal organizations to compensate tribes and tribal organizations for facility operational expenses.

## Rules for Section 105(I) Leases:

- PL 93-638 Section 105(I) pertains to PL 93-638 agreements with the Bureau of Indian Affairs, Bureau of Indian Education, and Indian Health Service.
- The facility must be used by the Indian tribe or tribal organization in carrying out programs (PFSAs) contracted under the Indian Self-Determination Act.
- A tribe or tribal organization may also enter into an agreement with the BIA, BIE, or IHS to construct a new facility to carry out PL 93-638 programs.



# Section 105(I) Leases

## Rules for Section 105(I) Leases:

- The PFSAs must be in an approved PL 93-638 Agreement or a PL 100-297 Grant.
- Tribe must demonstrate Proof of Ownership through: (a) Proof of Mortgage; (b) Quitclaim or Warranty Deed; (c) Lease Agreement if Sub-Leasing to the BIA/BIE/IHS.
- Regulations require establishment of, and contributions into a “Special Reserve Fund” (25 CFR §900.71) to provide for a Capital Replacement Fund.
- A Special Reserve Fund is established for a tribe to receive compensation for a replacement of a roof, HVAC, boiler, etc.
- The “Guardian” of such fund will be the Indian tribe or tribal organization.

## Rules for Section 105(I) Leases:

- Funds may be invested in accordance with the laws, regulations and policies of the tribe, subject to the terms of the lease or the self-determination agreement; and keeping in mind PL 93-638 statutes at 25 U.S.C. §5310 regarding investment of advanced funds.
- A Section 105(I) Lease is terminated in instances of a PL 93-638 Contract Rescission (Reassumption, Retrocession, Termination).

# Lease Compensation & Negotiation



# The Lease Framework

In defining an internal framework for accepting and reviewing lease requests, be mindful of:

- Funding Agreement Vehicle on which the Lease is Based.
- Method for Calculation of Lease Compensation.
- Description of the Facility.
- Scope and Purpose (and Length) of the Lease.
- Review of Materials.
- Legal Sufficiency Review (Federal and Tribal).
- Lease Execution.

# Compensation & Cost Elements

- Lease terms and provisions are subject to negotiations between the Secretary and Indian tribes or tribal organizations.
- Certain requirements and compensation elements must be included:
  - A Section 105(l) lease must include compensation, as provided in Section 105(l)(2) of the Act and other reasonable expenses as may be determined, to be allowable. See 25 CFR §900.69 – §900.73.
  - Lease compensation must be reasonable and not be duplicative with other funding, such as indirect costs or direct program funds.



# Compensation & Cost Elements

- Regulations at 25 C.F.R. §900.69 - 25 CFR §900.70 provide guidance for assessing and determination for the compensation components proposed by an Indian tribe or tribal organization
- Use of Microsoft Excel spreadsheets with built-in formulae for calculating compensation would assist in determining the following factors:
  - Rent (SubLease)
  - Depreciation and Use Allowance based on the Useful Life of the Facility Based on Acquisition Costs not Financed with Federal funds
  - Contributions to a Reserve for Replacement of Facilities
  - Principal and Interest Paid or Accrued
  - Operation and Maintenance Expenses
  - Repairs to Buildings and Equipment
  - Alterations Needed to Meet
  - Fair Market Rental

# Calculating Lease Compensation

## Lease Cost Elements - 25 CFR §900.70

To the extent that no cost element is duplicative, following cost elements may be included in the lease compensation

- (a) Rent (Sublease)
- (b) Depreciation and Use Allowance Based on the Useful Life of the Facility Based on Acquisition Cost Not Financed with Federal Funds.
- (c) Contributions to a Reserve or Replacement of Facilities
- (d) Principal & Interest (Paid or Accrued)
- (e) Operation and Maintenance Expenses, to the Extent Not Otherwise Included in Rent or Use Allowances (see following slide for detail)
- (f) Repairs to buildings & Equipment
- (g) Alterations to meet contract requirements
- (h) Other Reasonable Costs
- (i) Fair Market Value

# Calculating Lease Compensation

## 25 CFR §900.70(e) - Operation & Maintenance Expenses

- |   |  |
|---|--|
| 1) Water, Sewage  | 11) Monitoring & Preventative Maintenance of Building Structures & Systems |
| 2) Utilities  | • Heating/Ventilation/air conditioning                                     |
| 3) Fuel   | • Plumbing   |
| 4) Insurance  | • Electrical   |
| 5) Building Management Supervision & Custodial Services | • Elevators  |
| 6) Custodial & Maintenance Supplies                     | • Boilers  |
| 7) Pest Control   | • Fire Safety System   |
| 8) Site Maintenance (Snow & Mud Removal)                | • Security Systems   |
| 9) Trash & Waste Removal & Disposal                     | • Roof, Foundation, Walls, Floors  |
| 10) Fire Protection/Fire Fighting Services & Equipment  | (12) Scheduled & Unscheduled Maintenance                                   |
|   | (13) Management Fees   |

## Facility Description

An important and critical part of the lease proposal is a description of the facility(ies), including:

- Location and address
- Architectural floorplan showing gross square footage for all floors
- In-Service date of the facility (i. e. certificate of occupancy date)
- Identification of all programs & departments on the floor plan; and if more than one tenant occupies the facility, identification of square footage used in the performance of the PL 93-638 or PL 100-297 agreement
- A certified copy of loan agreement and P&I payment schedule for the duration of the loan if requesting: (1) depreciation, and/or (2) P&I.

## Facility Description

An important and critical part of the lease proposal is a description of the facility(ies), including (continued):

- Recent photos of facility interior and exterior
- Recent inspection report of the condition of the facility
- Tribal information regarding contract support costs considerations for the building identified in the lease to ensure no duplication of costs are claimed
- Proof of ownership: mortgage, title, or loan, quitclaim or warranty deed, or lease agreement if subleasing to the federal agency

## Basis for Lease Compensation

1. Fair Market Rental as documented by prevailing rental prices in the geographic area with a comparison of similar structures or similarly located structures if the facility is unique to the location.
  - Fair Market Rental for buildings or portions of buildings and land, exclusive of the federal share of building construction or acquisition costs, or the federal market rental for buildings constructed with federal funds exclusive of fee or profit, and for land. See 25 CFR §900.70(i).
  - Documentation in support of a Fair Market Rental proposal shall include the prevailing rental prices in the geographic area with a comparison of similar structures or similarly located structures if the facility is unique to the location.



## Basis for Lease Compensation

Fair Market Value as documented by prevailing rental prices in the geographic area with a comparison of similar structures or similarly located structures if the facility is unique to the location:

1. Fair Market Value and Regulatory Cost Elements. A combination of Fair Market Rental and cost elements at paragraphs (a) through (h) of 25 CFR §900.70, or
2. Fair Market Value Only. Paragraphs (a) through (h) of 25 CFR §900.70 only, documented by evidence of such costs and a certification from the tribe's authorized representative as identified in the tribe's authorizing council resolution.

## Basis for Lease Compensation

A tribe or tribal organization must disclose any federal funds it received previously and any federal funds it is currently receiving for the requested facility, including the “Secretarial Funding” or Section 106(a) Funds, Contract Support Costs (CSC), CSC Start-Up Costs, Operations and Maintenance, and Indirect Cost Pool.

- This disclosure must include any supporting federal funding (grants, loans, or any other funds provided by the tribal government) received to fund construction of the facility.

## Signing Lease Agreement



# Execution of the Lease


- Upon completion of the lease proposal, legal reviews, and upon conclusion of lease negotiations, the lease(s) is signed between the tribe's designated representative (tribal chairman); and the appropriate federal line officer.
- The provisions for the lease agreement is contained in the PL 93-638 statutes and regulations; and become an integral part of the PL 93-638 agreement and Annual Funding Agreement.
- It is important to note that the cost of the lease should not be borne out of PL 93-638 program operating funds (i.e. Section 106(a)(1) or 106(a)(2), but from the same funding appropriations for facilities operation, maintenance, replacement, and repairs fund.

# Execution of the Lease

- A tribal or tribal organization should plan to complete the lease negotiations within 90 days providing there are no pending questions and issues.
  - A critical part of the lease proposal is an authorizing tribal council resolution.
  - Federal agencies (BIA, BIE, IHS) have drafted Section 105(I) Lease templates for use. It is a good idea to get a copy for use.
  - Remember that federal agencies will require their Office of the Solicitor to provide legal review of the lease proposal for legal sufficiency.
  - Remember decision to decline the lease proposal is subject to the Declination criteria in Section 102(a)(2). 25 U.S.C. §5321(a)(2).

# Execution of the Lease

- A tribal or tribal organization should plan to complete the lease negotiations within 90 days providing there are no pending questions and issues.
- Section 105(l) Leases are negotiated for 12-month periods and may be based on a calendar year basis, or a fiscal year basis.
- Lease payments are normally lump sum for the calendar year or fiscal year, which a tribe or tribal organization may investment account in accordance with 25 U.S.C. §5310.
- Leases may be renewed for the subsequent year with at a 3-month advance notice from the tribe or tribal organization. The Federal agency will also send a notification of renewal.



# General Lease Provisions

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# Section 105(I) Leases: General Provisions

## **General Provisions for section 105(I) Leases:**

- Tribes and tribal organizations still have an option to recover facilities costs through direct costs or indirect costs, but costs cannot be duplicated.
- BIA/BIE/IHS are treating lease agreements separately as Title I Self-Determination Contracts, Title IV Self-Governance Compacts (DOI), and Title V Self-Governance Compacts (DHHS).
- Tribal Section 105(I) lease proposals are subject to PL 93-638 declination criteria and process; and must be reviewed, negotiated, and approved within 90 days of receipt, or the proposal is deemed approved.
- The 90-day timeline may only be extended with written tribal approval.

# Section 105(l) Lease: General Provisions

## **General Provisions for section 105(l) Leases:**

- Tribal lease proposals can only be declined for 1 of or a combination of 5 declination criteria at Section 102(a)(2) and 25 CFR Part 900, Subpart E – Declination Criteria.
- Lack of funding is not a reason to decline or reject a Section 105(l) Lease proposal.
- Tribes and tribal organizations have a right to appeal (or dispute) a decision of the Secretary to decline the Section 105(l) Lease proposal.

# Section 105(I) Lease General Provisions

## **General Provisions for section 105(I) Leases:**

- Lease proposals must be based on Fair Market Value or 25 CFR §900.70(a)-(h) and Fair Market Rental; or based on 25 CFR §900.70(a)-(h) only.
- Lease terms are generally for the entire fiscal year or calendar year regardless of when the proposal is received. IHS requires its lease periods to be October 1 through September 30.
- Depreciation is calculated on a straight-line 39-year period unless a tribe can document use of a different depreciation period.
- Costs in the Reserved Fund are only eligible for major fixed equipment and building services equipment (boilers, pumps, air handlers).

# Section 105(l) Leasing Tribal Facilities

- The BIA & IHS have not treated leases under Section 105(l) of Pub. L. 93-638 as true commercial leases. Instead, the agreements the BIA and IHS as used are considered as “Facility Cost Agreements” that compensate the owner for facility operational expenses:
  - Section 105(l) requires lease proposals to be:
    - Based on Fair Market Rental Value
    - Based on Combination of Cost Elements listed in 25 CFR §900.70 and Fair Market Rental Value, or
    - Based on the Cost Elements listed in 25 CFR §900.70

# Section 105(l) Leasing Tribal Facilities

- 25 CFR §900.70 (a) through (h) requires leases to include:
  - Rent (sublease)
  - Depreciation and Use Allowance
  - Contributions to a Reserve for Replacement of Facilities
  - Principal and Interest Paid or Accrued
  - Operation and Maintenance Expenses
  - Repairs to Buildings and Equipment (Unscheduled and Scheduled Maintenance)
  - Alterations Needed to Meet Contract Requirements
  - Other Reasonable Expenses (Security Services, Management Fees)
  - Fair Market Rental Value for Buildings or Portions of Buildings, and Land (exclusive of the federal share of building construction or acquisition costs; or Fair Market Value Rental for Buildings Constructed with Federal Funds Exclusive of Fee or Profit; and for Land); and
  - Other reasonable expenses

# Section 105(l) Leasing Tribal Facilities

- Regulations require establishment of, and contributions into a Special Reserve Fund (25 CFR §900.71) to provide for a capital replacement fund.
- The tribe or tribal organization serve as Guardian of such fund will be the Indian tribe.
- Funds may be invested in accordance with the laws, regulations and policies of the tribe, subject to the terms of the lease or the self-determination agreement; and keeping in mind Pub. L. 93-638 statutes at 25 U.S.C. §5310 regarding investment of advanced funds.

The targeted federal agencies (BIA, BIE, and IHS) have all identified the responsible officials and offices at all levels of the organization that are assigned to work with tribes and tribal organizations to carry out the statutory leasing provisions.

## **KIVA's Services**

Section 105(I) is a powerful financing tool for tribes and tribal organizations to receive recurring annual payments for facilities they use to carry out PL 93-638 programs. Should you have questions or need assistance to take advantage of these opportunities, please contact us. We have the team and the expertise to help you.

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# What Are Our Take Aways?

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