Tribal Land Leasing: Opportunities Presented by the HEARTH Act & the Newly Amended 162 Leasing Regulations

Presented by

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TODAY’S PANELISTS

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The Hearth Act of 2012

- Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012
- Signed into law July 30, 2012
- The HEARTH Act allows tribes to draft their own leasing regulations and upon approval by the Secretary, allows tribes to approve leases of tribal land.

New Leasing Regulations

- 25 CFR Part 162
- Includes subparts specific to residential & business leasing, and leasing for wind & solar energy
- Final rule became effective January 4, 2013
Purpose of P.L. 106-568, title XII, Sec. 1202 (Dec. 27, 2000)

“To authorize the Navajo Nation, pursuant to tribal regulations, which must be approved by the Secretary, to lease Navajo trust lands without the approval of the Secretary of the Interior for the individual leases, except leases for exploration, development or extraction of any mineral resources . . .”

- Codified at 25 U.S.C. 415(e)

Secretary approval not required for Navajo Nation leases if:

- Lease is executed under tribal regulations;
- Term of lease is 25 years except that any such lease may include an option to renew up to two additional terms each of which may not exceed 25 years (Secretary approved leases are for 99 years)
- Environmental Review is conducted
1st requirement is for tribal regulations to be established
  - Navajo Nation established a Task Force in 2000

1st draft of the Regulations was completed in 2002 and began the public comment and public hearings process across the Navajo Nation

In 2005, the Regulations were presented to the Navajo Nation Council for approval

On August 1, 2005, the Navajo Nation submitted the Navajo Nation Business Leasing Regulations of 2005 to the Secretary of the Interior for approval.
On January 5, 2006, the Bureau of Indian Affairs ("BIA") requested clarification on the Nation’s submittal. Then provided a rebuttal draft to Navajo, reinserting the BIA into the process.
There were two issues:

- The first issue was the Statute states that the tribal regulations must be “consistent” with the Code of Federal Regulations.
  - There was a disagreement in the interpretation of “consistent”.
  - The Navajo Nation took the position this was process consistent and the inclusion of the BIA contradicted the intent of the statute.

- The second issue was determining how the BIA is to maintain its trust responsibility without having some kind of oversight or monitoring.
  - The Navajo Nation took the position that the intent of Congress was to give full authority to tribes. There was no involvement, approval or monitoring permitted in the Statute.
On July 3, 2006, the Navajo Nation submitted a second draft in response to the rebuttal draft by BIA and removed all references to the BIA and Office of Special Trustee.

On July 10, 2006, the Department of the Interior agreed, the intent of the statute is to give full autonomy to tribes over leasing.

On the same day, the Navajo Nation Business Leasing Regulations of 2005 ("Tribal Regulations") was signed by the Assistant Secretary of Indian Affairs and the Navajo Nation President.
On March 1, 2007, the Navajo Nation issued its very first business site lease.

On March 1, 2007, the first BIA lease was transferred to the governing authority of the Navajo Nation.

Since then the Navajo Nation has issued over 100 leases and transferred around 200 BIA leases to the Nation.
Amended 25 U.S.C. 415(e) removing the “Navajo Nation” adding “an Indian Tribe”

On July 30, 2012, the HEARTH Act was signed into law, granting tribes the same authority the Navajo Nation currently enjoys.
HEARTH ACT

- Allows tribes to process leases on tribal land under their own regulations, as long as BIA has approved their leasing regulations
  - Navajo Nation ensured there are explicit waivers and exceptions built in to allow for the ability to establish a business friendly atmosphere (ability to waive bonding requirements, reduce insurance, postpone rental, sublease without further approval by Navajo, etc.)

- The Act is only applicable to tribal land and does not apply to lands held in trust for individual Indian landowners
Requirements for Tribal leasing regulations

- The Secretary has 120 days to either approve or disapprove the tribal regulations submitted by the tribe

- Must be consistent with the new leasing regulations under 25 CFR Part 162

- Must provide for an environmental review process that:
  - Provides for identification and evaluation of significant effects on the environment
  - Provides for public notice and comment relating to significant effects on the environment and for the tribe to respond to relevant comments prior to approving a lease
    - Tribes can define “public”
“Consistent”
- Legal Survey – conducted in accordance with the federal requirements
- Insurance requirements
- Recording
- Fair lease value
- Similar approvals for transactions such as subleases, assignment, modifications, etc.
HEARTH ACT

- Environmental Review
  - No Federal Action
  - NEPA does not apply

- The Navajo Nation created an internal environmental review. FONSI’s are no longer issued, this is replaced by the Navajo Nation Environmental Summary
Environmental Clearances are conducted by three offices:
- Navajo Historic Preservation Department
- Navajo EPA
- Navajo Fish and Wildlife Department

Upon completion of the clearances, an environmental summary is issued indicating the environmental review is complete.
Other features of the HEARTH Act

- BIA will provide technical assistance to tribes in developing an environmental review process
- Allows for lease terms up to 75 years in certain instances
  - Term of leases under 25 U.S.C. 415(e) can only be issued for 25 years with two options to renew of 25 years.
  - Term of leases under 25 U.S.C. 415(a) can be up to 99 years.
  - When transferring a BIA lease to the tribe’s authority, this will be an issue.
Trust Asset Accounting Management System (TAAMS)
- This system inputs all leases, encumbrances, etc. on all tribal trust land across the United States.

The Navajo Nation entered into an agreement with BIA for continued encoding and recording of leases.

In addition, the Nation is pursuing certification to the TAAMS system so Navajo can encode the Leases of Navajo. This certification process takes approximately 2 years.
HEARTH ACT

RECORDING

- The only step the tribes cannot control is the recording at the Land Title and Records Office, Department of the Interior (LTRO).

- The LTRO will continue to record and is necessary for businesses to be able to obtain financing.

- The only stepping stone here will be the required encoding into the TAAMS system. Each tribe will need to work with their regional BIA office, until and if the tribe can achieve certification.
For now, review of tribal leasing regulations will occur at BIA’s Central Office

- Central Office has published a National Policy Memorandum with a list of criteria for use in determining whether tribal regulations are “consistent with” 25 CFR 162

- Ultimately, this review may occur at the Regional level
WHO DO TRIBES CONTACT

• Contact your Regional Realty Officer or BIA’s Central Office realty staff for questions

  Matthew C. Kirkland, Senior Realty Specialist
  Phone: 202.208.3615
  E-mail: matthew.kirkland@bia.gov

- Staff Recommendations
  - When defining terms be consistent with Part 162
  - Consider collaborating with BIA Realty to review in draft
  - Do not include Tribal approval of individually allotted lands
Submit Leasing Regulations to:

Mr. Bryan Rice, Deputy Bureau Director
BIA-Office of Trust Services
1849 C Street, NW, MS 4639-MIB
Washington, D.C. 20240
Final Rule
Published December 5, 2012
Effective January 4, 2013
Replaces Subpart F, Non-agricultural Leases, with:

- Subpart C, Residential Leases
- Subpart D, Business Leases
- Subpart E, Wind & Solar Resource (WSR) Leases
  - Includes short-term Wind Energy Evaluation Leases (WEELs)
- Subpart G, Records

Subpart B, Agricultural Leases does not change
Subpart E does not change but is now Subpart F, which is the special requirements for Certain Indian Reservations
- Residential leasing applies to leases for:
  - Housing purposes; or
  - Construction of single family homes or housing for public purposes.

- Business subpart applies to:
  - Business leasing
  - Leases for religious, educational, recreational, cultural, other public purposes;
  - Leases for commercial or industrial purposes
  - Surface leases not covered by other subparts.

- Wind & solar energy subpart applies to leases for:
  - Wind energy evaluation leases (WEELs);
  - Harnessing wind and/or solar energy to generate & supply electricity (WSR Leases).
Permits

- Landowners may issue permits for use of Indian land without BIA approval

- BIA no longer enforces or administers permits on Indian land (exception for agriculture)

- Permitted activities must comply with all applicable environmental and cultural resource laws
When New Regulations Apply

- If lease document was submitted for approval after January 4, 2013, the new regulations apply

- If lease document was submitted before January 4, 2013 and BIA approved it before January 4, 2013, then the prior regulations apply to that lease.
Taxation

- Permanent improvements on leased land, activities conducted under a lease, and the leasehold or possessory interest may not be taxed by State/local governments (but may be taxed by tribes)

Employment Preferences

- Leases may require lessee to give a preference to qualified tribal members, based on their political affiliation with the tribe

- Does not have to be general “Indian” preference
Who must obtain a residential lease?

- Anyone who is not the landowner

- A tribal housing authority if it is a legal entity independent from the tribe, regardless of whether it is owned and operated by the tribe.

- A tribal housing authority does not need an approved residential lease if the tribe has authorized the tribal housing authority’s possession through a tribal land assignment.
# BIA Lease Document Approval Deadlines

Clock for BIA review only starts when package is complete (including NEPA & any valuation).

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<th>TYPE</th>
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Thank you

- Questions and answers