

**THE HEARTH ACT, BIA APPROVAL
REQUIREMENTS, AND THE NEW
SURFACE LEASING REGULATIONS**

BUREAU OF INDIAN AFFAIRS

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Long-Term Leasing – The New Legal Framework

- The HEARTH Act (acronym for Helping Expedite and Advance Responsible Tribal Homeownership) was signed into law on July 30, 2012, potentially streamlining the process for tribes wishing to enter into long-term surface leases of tribal land, for community and economic development purposes.
- The HEARTH Act amends the Long-Term Leasing Act (at 25 U.S.C. § 415(h)) to allow tribes to lease tribal land without BIA approval, under BIA-approved Tribal Regulations.
- Effective on January 4, 2013, the long-term surface leasing regulations found at 25 CFR Part 162 were substantially revised, with new subparts on Residential Leases (Subpart C), Business Leases (Subpart D), and Renewable Energy Leases (Subpart E), and without any mention of the HEARTH Act, as enacted the previous year.
- Part 162 was partially revised in 2001, with the focus then being on Agricultural Leases (Subpart B); a few changes were made then in the “administration and enforcement” rules for long-term leases, but (prior to the 2013 revision) most of the other long-term lease rules dated back to the early 1960’s.
- The implementation of the HEARTH Act and the “tribal empowerment” provisions in the Part 162 Revision will be entirely dependent on tribes, to be exercised on a tribe-by-tribe, lease-by-lease basis.
- In deciding whether to adopt Tribal Regulations under the HEARTH Act, tribes may wish to consider whether their needs would be met if they leased under the streamlined provisions in the Part 162 Revision, or under some other leasing “scenario” that does not require BIA approval.

Scope of the HEARTH Act

- Tribes can enter into agricultural or business leases (including renewable energy leases, at both the community and “utility” scale) under Tribal Regulations, without BIA approval, for maximum terms of 75 years (comprised of a 25-year primary term and two option periods of no more than 25 years), even where they otherwise have 99-year authority.
- To be consistent with Part 162, as required by the HEARTH Act, Tribal Regulations should provide that agricultural leases will not exceed 10 years except where a “substantial investment” is required.
- Tribes can enter into housing/homesite leases (and leases for recreational or public purposes) under Tribal Regulations, without BIA approval, for maximum term of 75 years (without 25-year increments being required), even where they otherwise have only 50-year authority.
- The HEARTH Act does not extend to allotted land (including land in which a tribe owns a fractional interest) or unitized leases which include allotted tracts (although tribal tracts within a unit can be carved out and leased separately, under Tribal Regulations).
- The HEARTH Act does not extend to easements (even those associated with surface leases), nor does it extend to mineral leases (including those relating to sand and gravel).
- The HEARTH Act does not expressly cover tribally-owned fee land (and BIA will not approve Tribal Regulations which expressly extend to tribally-owned fee land), but such land might be considered to be “restricted” land (within the scope of Tribal Regulations), as needed to address any lender or title company concerns about the possible non-leasability of such land (without BIA approval) under the Indian Non-Intercourse Act.

Threshold “HEARTH Act”

Considerations for Tribes

- The Part 162 Revision expressly defers to tribes on rent, term and bond negotiations, and eliminates the appraisal requirement for any tribal lease, even where BIA approval is required.
- Where BIA approval is needed, the Part 162 Revision imposes strict time lines for BIA review of both leases and ancillary agreements (i.e., amendments, assignments, subleases, and leasehold financings), with a separate “preliminary review” of the negotiated terms also being available prior to NEPA documentation.
- Where a HEARTH Act lease will require an offsite access or utility easement, a BIA grant of easement (and NEPA documentation assessing the impact of the entire project) will still be needed, but a new Categorical Exclusion will allow most individual homesites (and associated easements) to be authorized with only “checklist” documentation.
- Even where BIA approval is not needed, certain federal environmental laws (e.g., the Clean Air Act, Clean Water Act, and Endangered Species Act) will still apply, along with standard title and survey requirements.
- While “tribal administrative capacity” is not an issue to be considered by BIA in its review of Tribal Regulations under the HEARTH Act (cf. the Tribal Energy Resource Agreement authority for energy-related transactions), some developers, lenders and title companies may continue to see BIA processing and approval as being needed to maximize certainty and minimize risk.
- Tribes which utilize special leasing acts with reservation-specific provisions that are key to development will need HEARTH-Act-type amendments to those authorities if they wish to enter into leases thereunder without BIA approval, and IRA tribes may wish to amend provisions in their constitutions which require BIA approval of tribal leases.

Standard of Review – Tribal Regulations

- The standard of review for Tribal Regulations is twofold: (1) the Regulations must be consistent with the otherwise-applicable federal leasing regulations in Part 162; and (2) the Regulations must provide for a tribal “environmental review” process which ensures the identification, evaluation and mitigation of significant impacts.
- Under Interim National Guidance which was issued on January 16, 2013 (and is still being followed, despite a one-year “expiration date”), the BIA’s Central Office retained the authority to approve Tribal Regulations (at least until some level of standardization is achieved), with a 120-day initial review period mandated by the HEARTH Act in any event; by memo dated October 20, 2016, Washington delegated the review function (but not the approval authority) for Tribal Regulations to the BIA’s Regional Offices.
- Despite language in the House Report calling for “baseline” environmental standards that would balance the need for “adequate, responsible and flexible” environmental review with the tribes’ need for economic development, the Interim Guidance does not define any minimum standards or variables which would ensure greater scrutiny and public involvement for more complex or impactful projects (including those that might otherwise require an EIS).
- While not required (or suggested) by the Interim Guidance, the Tribal Regulations should also describe the time and manner in which:
 - (1) tribal applications for amendments to (or waivers of) Tribal Regulations will be reviewed and approved by BIA (the Interim Guidance, perhaps problematically, allows for undefined “minor technical amendments” to be made without BIA review or approval); and
 - (2) Tribal Regulations may be revoked by the tribe or rescinded by BIA (the latter being authorized by Congress if the Tribal Regulations are “violated” and the tribe fails to cure).

The Interim National Guidance

- The Interim Guidance addresses the “consistency” requirement in the HEARTH Act via a “laundry list” approach, with two lists, one for agricultural leases (based on the uniqueness of most of the Subpart B provisions) and the other for all types of non-agricultural leases (based on the similarities between the Subpart C, D and E provisions).
- The Interim Guidance indicates that the Tribal Regulations should be comprehensive in scope (to be consistent with Part 162), but that tribes can set their own standards (procedural and substantive) in accordance with the new “empowerment” provisions in Part 162, while also indicating that BIA will record the unapproved lease documents in TAAMS (effective as of the dates provided in those documents).
- The Interim Guidance addresses the “environmental review” requirement by mandating that “significant effects on the environment” be made subject to public notice and comment and tribal response and evaluation, but merely “suggesting” that Tribal Regulations also:
 - (1) define “significant effects,” “affected environment,” and “public” (presumably including BIA and other public agencies that should receive actual notice of certain types of actions);
 - (2) specify the time, manner, and circumstances in which notice and opportunity to comment on proposed lease actions would be afforded to the “public,” and the time, manner, and circumstances in which notice of final lease actions and right to appeal (both within the tribal government structure, and then to BIA) would be afforded to commenting/objecting parties; and
 - (3) describe the time and manner in which the tribal environmental review process will be documented, and how and when such documentation will be made available for public and agency review.

HEARTH Act Leases: The BIA's Role

- The HEARTH Act provides for “appeals” of tribal lease actions to BIA, but the only issue on appeal is whether the lease action complied with the Tribal Regulations.
- Presumably, the tribal lease action would not be stayed pending a BIA decision on any such appeal, but further appeals (by “interested parties,” broadly defined at 25 U.S.C. § 415(d) to include Indian/non-Indian individuals, entities, and governments that “could be adversely affected”; cf. the Part 162 Revision, which requires that appellants suffer an “economic injury in fact”) would be permitted under 25 CFR Part 2.
- Tribal Regulations should outline any tribal remedies to be exhausted prior to any “appeal” to BIA, and such Tribal Regulations might also define how a “non-compliance” decision by BIA would be made/enforced (e.g., whether prior consultation or “cure” rights would be afforded to the tribe).
- Tribal Regulations should also clarify that there is no right to “appeal” to BIA from any tribal administrative or enforcement actions arising under HEARTH Act leases, even if those actions allegedly violate the Tribal Regulations or other applicable tribal law.
- The HEARTH Act requires that BIA be provided with proof of every rent payment made under a HEARTH Act lease, but Tribal Regulations may presumably follow the Part 162 Revision, which requires proof of payment (under standard, BIA-approved leases) only upon request by BIA; the IRS is currently consulting with tribes on the issue of whether direct rent payments made under unapproved HEARTH Act leases will be tax-exempt..
- The HEARTH Act and the Interim Guidance also provide for discretionary BIA enforcement of HEARTH Act leases, but such leases should always include negotiated tribal remedies which obviate the need for BIA enforcement.

HEARTH Act Leases: Documentation Issues

- The HEARTH Act requires that each lease entered into under Tribal Regulations be submitted to BIA (presumably for recording), and it is assumed that ancillary agreements (i.e., amendments, assignments, subleases, and leasehold financings) arising under a HEARTH Act lease will similarly not need approval (but will also need to be filed with BIA and recorded in TAAMS, if recording would otherwise be required under the Part 162 Revision).
- Since the responsibility for encoding lease documents rests at the local BIA field office, Tribal Regulations should specify the time and manner in which these documents will be entered in TAAMS (including, wherever feasible, the identification of responsible tribal employees, agents, or contractors, who will need TAAMS access authorizations).
- Tribal Regulations presumably do not need to adopt the public disclosure standards applicable to federal records, but any applicable tribal standards should be specified (and the BIA should be provided with access to all supporting documents, including those generated in the environmental review process).
- A lease previously approved by BIA can presumably be converted to “HEARTH Act” status, allowing future ancillary agreements to be processed without BIA approval, so long as:
 - (1) the term provisions are modified, as needed, to conform to HEARTH Act restrictions; and
 - (2) BIA is released from any liability under the “old” lease.
- Conversely, a request to convert a HEARTH Act lease and make it subject to BIA administration and oversight should not generally be approved, even if the Tribal Regulations under which the lease was made are subsequently revoked or rescinded.

Tribal Regulations: Precursors and Templates

- In 2000, the Long-Term Leasing Act was amended to give the Navajo Nation the power to enter into leases for up to 75 years under BIA-approved Tribal Regulations, and the Nation subsequently adopted Business Site Leasing Regulations (since expanded to cover other types of surface leases, under amendments approved by BIA in 2014); the Navajo Regulations should not necessarily be viewed as a HEARTH Act template, in part because the Navajo Act was less specific than the HEARTH Act in defining tribal “environmental review” requirements.
- In a series of enactments beginning in 1970 and culminating in 2010, the Long-Term Leasing Act was amended to give the Tulalip Tribe and three other Washington tribes the authority to enter into leases either without any approval or (for longer terms) pursuant to BIA-approved Tribal Regulations; the Tulalip Regulations should not be viewed as a HEARTH Act template, in part because the authorizing acts do not require any tribal “environmental review” at all.
- From February 2013 through October 2016, HEARTH Act Regulations were approved for Graton Rancheria, Sandia Pueblo, Pokagon Band, Ak Chin, Citizens Band, Santa Rosa Band, Wwiiapaay Band, Kaw, Jamestown S’klallam, Dry Creek Rancheria, Mohegan, Wichita, Agua Caliente, Seminole (Florida), Cowlitz, Oneida, Ho-Chunk, Absentee Shawnee, Rincon Band, Makah and Squaxin Island, Gila River, San Juan Pueblo, Shakopee, 29 Palms, and Chemehuevi, with the majority being for Business Leases only.
- As of November 2016, about 21 sets of Tribal Regulations are in process, including submissions made by the Ute, San Carlos, Pascua Yaqui, and Yavapai-Prescott tribes; tribes wishing to consider this option may go to the BIA’s public website for the HEARTH Act, but it provides access only to samples and not to the approved Tribal Regulations themselves.
- In general, the approved Regulations (while compliant with the minimal standards in the HEARTH Act and the Interim Guidance) narrowly define the “affected environment” to include only tribal resources, and fail to require Categorical-Exclusion-type checklists to support “threshold determinations” in support of “exemptions”; notice requirements are generally left to case-by-case discretion, and standing to appeal a tribal decision is generally not extended to public interest groups (with the rules applicable to further “appeals” to BIA largely being undefined).
- In general, the approved Regulations do not establish variable environmental review procedures for more complex and impactful projects; the evaluation of alternatives is not required, and substantive NEPA-type guidelines on “significance” determinations and mitigation measures are generally lacking.

Compare Other “No Approval” Scenarios

- Section 17 of the IRA (as amended in 1990) allows tribal corporations with BIA-approved charters to lease tribal land to third parties for up to 25 years, without any tribal “environmental review” being required.
- Tribal land may generally be developed by tribally-owned enterprises without leases, where leasehold financing is not required, but where all or part of the completed project is to be leased to a third party a ground lease will generally be needed to support the third-party sublease; under the Part 162 Revision, neither commercial nor residential (ground or “space”) subleases will require BIA approval if they are made exempt by the underlying ground lease, but commercial subleases must still be recorded in TAAMS.
- In 2005, Congress amended earlier Indian energy laws to (among other things) allow tribes to grant surface leases (for power generation purposes) for terms up to 30 years, under BIA-approved Tribal Energy Resource Agreements (TERA’s).
- No TERA has yet been approved, in part due to strict requirements relating to tribal “administrative capacity,” and for now it may be assumed that renewable energy leases will be processed under the HEARTH Act (where the BIA approval process is much less burdensome, and the maximum term is much longer) if the parties wish to avoid the BIA approval process and the strict application of NEPA; however, the 114th Congress considered amendments that would create presumptions of sufficient TERA capacity based on past performance unrelated to energy development.
- The Part 162 Revision has clarified that (revocable, non-assignable) “permits” involving tribal land (which may authorize pre-lease, low-impact “right of entry” activities such as geotechnical work, land survey, or appraisal, without any rights of possession) will not be subject to BIA approval.
- Options to lease, restrictive covenants, and other “encumbrances” of tribal land (that do not require approval under Part 162 or some other more specific statute or regulation) may also be entered into without BIA approval, under 25 U.S.C. § 81, unless the term could run for seven or more years (in which case BIA approval is needed, but only as a formality (although NEPA would be triggered)).