



# United States Department of the Interior

BUREAU OF INDIAN AFFAIRS  
Washington, D.C. 20240



IN REPLY REFER TO:

## National Policy Memorandum

**Bureau of Indian Affairs  
Office of the Director**

**Effective:** JAN 16 2013  
**Expires:** 1 year from date  
of issuance

**Number:** NPM-TRUS-29

**Title:** Guidance for the Approval of Tribal Leasing Regulations under the HEARTH Act

### 1. Purpose

The purpose of this memorandum is to establish interim Indian Affairs (IA) policy for the review and approval of tribal leasing regulations under the HEARTH Act. This policy is an interim policy that will be revised and made permanent as part of the Indian Affairs Manual (IAM).

### 2. Scope

The HEARTH Act (Helping Expedite and Advance Responsible Tribal Homeownership) of 2012 makes a voluntary, alternative land leasing process available to tribes, by amending the Indian Long-Term Leasing Act of 1955, 25 U.S.C. § 415. The Act authorizes tribes to negotiate and enter into agricultural and business leases of tribal trust lands with a primary term of 25 years, and up to two renewal terms of 25 years each, without the approval of the Secretary of the Interior. The Act also authorizes tribes to enter into leases for residential, recreational, religious or educational purposes for a primary term of up to 75 years without the approval of the Secretary. The Act requires participating tribes to develop tribal leasing regulations, including an environmental review process, and to obtain the Secretary's approval of those regulations prior to entering into leases. The Act requires the Secretary to approve tribal regulations if the tribal regulations are consistent with the Department's leasing regulations at 25 CFR Part 162 and provide for an environmental review process that meets requirements set forth in the Act. No additional requirements for approval of tribal regulations may be imposed.

This policy applies to all employees of the Bureau of Indian Affairs (BIA) involved in the review and approval of tribal leasing regulations.

### 3. Policy

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To effectively provide consistent and objective review/approval of tribal leasing regulations, IA, in consultation with the Solicitor's Office, has established interim guidance for tribal leasing regulations and the tribal environmental review process. These criteria apply to all tribal leasing regulations submitted to Indian Affairs for Secretarial approval.

Once a tribe submits their leasing regulations for Secretarial approval, objective review/approval will facilitate the tribes managing their own long-term land leasing and making decisions on the expansion of housing and/or economic development on tribal lands.

#### **4. Process for Submission and Review of Tribal Regulations**

Tribal regulations should be submitted to the Deputy Bureau Director – Trust Services, BIA. On receipt of tribal regulations, the Deputy Bureau Director will notify the tribe of receipt of the regulations and of the date by which review of the regulations is expected to be completed. The Act requires that the Department complete its review and approve or disapprove the regulations within 120 days after the date on which the tribal regulations are submitted to the Secretary. Approval or disapproval decisions must be made in writing and a disapproval determination must identify the basis for the disapproval.

Upon receipt of tribal regulations, the Deputy Bureau Director and his staff shall use this guidance to conduct a preliminary review of the regulations in conjunction with the Solicitor's Office and identify any provisions that are inconsistent with BIA's leasing regulations. These provisions should be raised with the tribe as soon as possible.

#### **5. Guidance for Determining Consistency of Tribal Regulations with BIA Regulations**

The clear intent of the Act is to provide tribes with the opportunity to exercise their inherent sovereignty in drafting regulations to meet their particular needs and to expedite the leasing process. In determining whether tribal regulations are "consistent with" BIA-leasing regulations, "consistency" is to be interpreted in a manner that maximizes the deference given to the tribe. Congress expressly rejected a "meets and exceeds" standard during its final deliberations.

The following checklist is intended to guide BIA's review of tribal leasing regulations, while giving as much flexibility to tribes as possible. In general, tribal regulations should define key terms, establish the process for review/approval of tribal land lease documents, identify required lease elements, and address rental requirements. Tribal regulations should generally address the same issues as BIA's regulations, but tribes have flexibility to establish their own policies on these issues to meet their unique needs. For example, to be consistent with BIA leasing regulations, tribal leasing regulations must address whether bonding and insurance are required, but they need not actually require bonding or insurance. In interpreting this guidance, as much deference and flexibility should be given to tribes as possible.

**A.** All tribal leasing regulations addressing **agricultural leasing** must:

- Define terms used in the tribal regulations (e.g., "bond," "surety"):



- The definitions of “agricultural land,” “assignment,” “lease,” “mortgage,” “restricted land or status,” “sublease” “tribal land,” and “trust land” must be substantially the same as those in 25 CFR 162, subpart B.
- The remaining definitions may differ from those in 25 CFR 162, subpart B.
- Not all terms defined in 25 CFR Part 162 need to be defined in tribal regulations, except that terms used in tribal regulations should be defined.
- Identify to what land the regulations apply
  - The regulations may **not** apply to individually owned land
- Define what types of leases are covered by the regulations (grazing, crop, etc.)
  - The regulations may also allow for permits
  - The regulations may allow for mortgages of the leasehold interest, but may **not** allow for mortgages of tribal land
  - The regulations may **not** address mineral leases
- Identify the effective date of the regulations
- State what laws apply to leases under the regulations, in addition to federal law
- Establish the process for obtaining a lease or lease document (amendment, assignment, sublease, leasehold mortgage) including:
  - Any timelines for approval, if desired
  - Whether tribal approval of leases or lease documents is required separate from tribal execution of leases or lease documents, for example, if a different entity/person executes a lease than approves a lease
  - The identity of officials/entities authorized to approve and/or execute leases
  - Whether any lease documents (amendment, assignment, sublease, leasehold mortgage) may be completed without further tribal action (execution and/or approval)
- Require lessees to manage land in accordance with any agricultural resource management plan developed by the tribe
- Require appropriate stipulations or conservation plans to be developed and incorporated in all agricultural leases
- State what documentation is required for a lease, including:
  - Lease;
  - Any reports, surveys, and site assessments needed to facilitate compliance with applicable tribal environmental, cultural resource, and land use requirements, as appropriate
- Identify allowable lease terms, including any options to renew
  - The HEARTH Act authorizes agricultural leases for 25 years with an option to renew for up to two additional terms, each of which may not exceed 25 years
  - A tribe may choose to shorten allowable lease terms, however, a tribe may not exceed a 25 year primary term with 2 additional 25 year renewal terms.
- Require leases to:

- Describe the land being leased
- State the term of the lease
- State what uses of the leased premises are authorized
- State how much rent/compensation is due, when it is due, who receives it, and what form of payment is acceptable, and whether any late payment charges or special fees apply
- If leased land is within an irrigation district, state the following:
  - “If the leased premises are within an Indian irrigation project or drainage district, except as provided by 25 CFR 171, the lessee must pay all operation and maintenance charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district.”
- State what performance bond and insurance requirements apply, if any
- Generally describe the type and location of any improvements to be constructed by the lessee
- Address, or require leases to address:
  - Ownership and removal of improvements, if applicable
  - Whether there will be rental reviews or adjustments, how and when they will be done, when any adjustments will be effective, and how disputes regarding adjustments will be resolved
- Address whether insurance is required
- Address whether performance bonding is required
- Require all leases and lease documents (amendments, assignments, subleases, and leasehold mortgages) to state the effective date of the document
- Require the parties to provide BIA with all leases and lease documents (amendments, assignments, subleases, and leasehold mortgages) for recording in the LTRO
- Establish the process for enforcing trespass and lease violations, including:
  - Stating that BIA, may, upon reasonable notice from the tribe and at BIA’s discretion, enforce the provisions of, or cancel a lease document
  - Stating whether negotiated remedies are allowed
  - Establishing a process for any cancellation or termination and establishing when they become effective
- Tribal regulations may not allow tribes to make major substantive changes to the tribal regulations without BIA approval. Minor technical amendments may be made without BIA approval.

**B. All tribal leasing regulations addressing residential, business, wind and solar resource, and other types of leasing (educational, recreational, public, and religious) must:**



- Define terms used in the regulations:
  - The definitions of “assignment,” “lease,” “leasehold mortgage,” “LTRO,” “sublease,” “tribal land,” “trust or restricted land,” “trust or restricted status” must be substantially the same as those in 25 CFR 162, subpart A
  - The remaining definitions may differ from those in 25 CFR 162, subpart A
  - Not all terms defined in 25 CFR Part 162 need to be defined in tribal regulations, except that terms used in tribal regulations should be defined. Identify to what land the regulations apply
- Identify to what land the regulations apply
  - The regulations may **not** apply to individually owned land
- Define what types of leases are covered by the regulations
  - The regulations may also allow for permits
  - The regulations may allow for mortgages of the leasehold interest, but may **not** allow for mortgages of tribal land
  - The regulations may **not** address mineral leases
- Identify the effective date of the regulations
- State what laws apply to leases under the regulations, in addition to federal law
- Establish the process for obtaining a lease or lease document (amendment, assignment, sublease, leasehold mortgage) including:
  - Any timelines for approval, if desired
  - Whether tribal approval of leases or lease documents is required separate from tribal execution of leases or lease documents, for example, if a different entity/person executes a lease than approves a lease
  - The identity of officials/entities authorized to approve and/or execute leases
  - Whether any lease documents (amendment, assignment, sublease, leasehold mortgage) may be completed without further tribal action (execution and/or approval)
- State what documentation is required for a lease, including:
  - Lease
  - Any plans of development or construction schedules required by the tribe.
  - Any reports, surveys, and site assessments needed to facilitate compliance with applicable tribal environmental, cultural resource, and land use requirements, as appropriate
  - A restoration and reclamation plan, if required by the tribe
- Identify allowable lease terms, including any options to renew
  - Public, religious, educational, recreational, or residential: up to 75 years
    - The HEARTH Act authorizes these types of leases up to 75 years. A tribe may choose to only authorize these types of leases for up to 50 years, for example. The regulations must identify the allowable lease terms.

- Business, wind resource, or solar resource: 25 years with an option to renew for up to two additional terms, each of which may not exceed 25 years
  - A tribe may shorten this lease term.
- Require leases to:
  - Describe the land being leased
  - State the term of the lease
  - State the purpose of the lease and authorized uses of the leased premises
  - State the parties to the lease
  - State how much rent/compensation is due, when it is due, who receives it, what form of payment is acceptable, and whether any late payment charges or special fees apply
  - If the leased premises are within an Indian irrigation project or drainage district, state the following: “If the leased premises are within an Indian irrigation project or drainage district, except as provided by 25 CFR 171, the lessee must pay all operation and maintenance charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district.”
  - State what due diligence requirements apply, if any
  - State what performance bond and insurance requirements apply, if any
- Address, or require leases to address:
  - Whether permanent improvements may be constructed, ownership of improvements, responsibility for constructing, operating, maintaining, and managing improvements, and removal of improvements, if applicable
  - Whether there will be rental reviews or adjustments, how and when they will be done, when any adjustments will be effective, and how disputes regarding adjustments will be resolved
- Address whether insurance is required
- Address whether performance bonding is required
- Address whether due diligence requirements apply
- Require all leases and lease documents (amendments, assignments, subleases, and leasehold mortgages) to state the effective date of the document
- Require the parties to provide BIA with all leases and lease documents, except residential subleases, for recording in the LTRO
- Establish the process for enforcing trespass and lease violations, including:
  - Stating that BIA, may, upon reasonable notice from the tribe and at BIA’s discretion, enforce the provisions of, or cancel a lease document
  - Stating whether negotiated remedies are allowed
  - Establishing a process for any cancellation or termination and establishing when they become effective



Tribal regulations may not allow tribes to make major substantive changes to the tribal regulations without BIA approval. Minor technical amendments may be made without BIA approval.

## **6. Guidance for Tribal Environmental Review Process**

The tribe's regulations must provide for an environmental review process that includes:

- The identification and evaluation of any significant effects of the proposed action on the environment, and
- A process for ensuring that—
  - The public is informed of, and has a reasonable opportunity to comment on, any significant environmental impacts of the proposed action identified by the Indian tribe; and
  - The Indian tribe provides responses to relevant and substantive public comments on any such impacts before the tribe approves the lease.

The regulations should also identify the program and individuals involved in the environmental review process. Although not required by the statute, and thus we will not disapprove tribal regulations on this basis, we also suggest that tribes consider:

- Defining key terms, such as “public” and “significant effect,”
- Identifying elements of the environment to be evaluated (Air, water, cultural resources, socio-economics, etc.)
- Describing how the review will be documented (memo, report, checklist)
- Describing how the public will be notified
- Identifying a time frame for comments
- Identifying the process for addressing comments
- Describing any appeal process
- Identifying any time frames for review, if desired.

## **7. Authorities and Limitations**

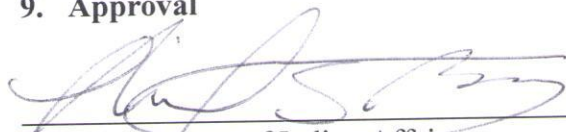
Pursuant to the authority of the Secretary to fulfill the trust obligation of the United States to the applicable Indian tribe under federal law (including regulations), the Secretary may, upon reasonable notice from the applicable Indian tribe and at the discretion of the Secretary, enforce the provisions of, or cancel, any lease executed by the Indian tribe. The United States shall not be liable for losses sustained by any party to a lease executed pursuant to tribal regulations.

## **8. Roles and Responsibilities**

- A. Director, Bureau of Indian Affairs is responsible for the development of National Policy affecting Indian trust resources.

- B. Deputy Bureau Director, Field Operation is responsible for executive leadership and oversight of the Regional Directors and disseminating policy to them.
- C. Deputy Bureau Director - Office of Trust Services is responsible for reviewing and approving or returning the tribal leasing regulations package.
- D. Regional Directors are responsible for the protection and sound management of the resources held in trust by the United States for Indian tribes. Consistent and objective review and approval of tribal leasing regulations will facilitate the tribes managing their own long-term land leasing, and make decisions on expansion of housing and economic development on tribal lands.

**9. Approval**

  
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Director, Bureau of Indian Affairs

1/16/2013

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Date