

The HEARTH Act Information Series – Part 2

Tribal Business Leasing Regulations



Presented by

**Bureau of Indian Affairs
Trust Services**



Welcome to the Bureau of Indian Affairs' Information Series for the HEARTH Act.

This Series provides guidance to tribes as they prepare to submit their leasing regulations to the Bureau of Indian Affairs (BIA) for review and approval by the Secretary of the Interior (Secretary) under the HEARTH Act.

This Part of the Series (Part 2) addresses the submittal process for tribal business leasing regulations.

July 30, 2012 the **Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act** of 2012 is signed into law.





GUIDANCE FOR TRIBES SUBMITTING BUSINESS LEASING REGULATIONS UNDER THE HEARTH ACT

Under the HEARTH Act, there are three general steps leading to Secretarial approval of tribal leasing regulations. Although this presentation focuses on business leasing regulations, these same three steps apply to the other types of leasing regulations tribes can submit.

Tribal Government Drafts, Approves, and Submits its Leasing Regulations to the BIA's Central Office

- Regulations may address:
 - **Business Leasing**, and/or
 - Residential Leasing, and/or
 - Agricultural Leasing, and/or
 - Leasing for public, religious, educational, or recreational purposes.

BIA and Solicitor's Review

- Regulations are reviewed in accordance with HEARTH Act criteria.
- Consistency with 25 CFR Part 162.
- Provides an environmental review process.
- Applies only to tribal trust land.
- Discuss review with tribe's designated representative. Return regulations to tribe for any modifications.
- Submit final regulations to offices of the Assistant Secretary-Indian Affairs (AS-IA).

Final Approval

- Regulations reviewed by the AS-IA's offices
- Regulations approved by Secretary.
- Moving forward, leases executed by the Tribe under the approved regulations, **will not** require additional BIA review or Secretarial approval.



GUIDANCE FOR TRIBES SUBMITTING BUSINESS LEASING REGULATIONS UNDER THE HEARTH ACT

WHY CONSIDER TRIBAL BUSINESS LEASING REGULATIONS:

- Under the Indian Long-Term Leasing Act of 1955, 25 U.S.C. § 415, and its subsequent amendments, leases of tribal trust lands generally require review by the Bureau of Indian Affairs (BIA) and approval by the Secretary of the Interior (Secretary).
- However, in support of tribal self-determination, the HEARTH Act amended 25 U.S.C. § 415, to provide federally recognized tribes the choice to opt out of the requirements for BIA review and Secretarial approval when leasing their lands.
- Under the Hearth Act, tribes are empowered to execute and approve individual leases, without further BIA review or Secretarial approval, if those leases are executed under tribal regulations that were approved by the Secretary. This provides tribes the ability to streamline the often cumbersome BIA review process and develop regulations that address unique opportunities within their community.
- The broad scope of uses offered by business leasing can encourage investment and economic development within a tribal community. Potential business uses can include, but are not limited to, shopping malls, outlets, grocery stores, restaurants, office space, light industrial uses, hotels, and resort developments.



GUIDANCE FOR TRIBES SUBMITTING BUSINESS LEASING REGULATIONS UNDER THE HEARTH ACT

BIA GUIDANCE MATERIALS:

Tribes that decide to draft and enact business leasing regulations and submit them to the BIA for review and approval, can benefit by first reviewing BIA's suggested HEARTH Act guidance materials. By utilizing the guidance materials, a tribe can minimize or even avoid any revisions to their regulations during the BIA's review process.

The following pages provide a snapshot and link to each of the suggested materials:

- The Hearth Act, 25 U.S.C. § 415(h).
- BIA's leasing regulations, 25 CFR Part 162, Subpart D Business Leases.
- Central Office's National Policy Memorandum (NPM-TRUS-29).
- BIA's checklist utilized in its review of tribal business regulations or the condensed version prepared with tribes in mind.

The BIA provides additional materials on the BIA's website dedicated to HEARTH Act matters:

<http://www.indianaffairs.gov/WhoWeAre/BIA/OTS/HEARTH/index.htm>



GUIDANCE FOR TRIBES SUBMITTING BUSINESS LEASING REGULATIONS UNDER THE HEARTH ACT

THE HEARTH ACT

The Indian Long-Term Leasing Act of 1955, 25 U.S.C. § 415 including the HEARTH Act at §415(h) can be found at:

<http://www.gpo.gov/fdsys/pkg/USCODE-2012-title25/pdf/USCODE-2012-title25-chap12-sec415.pdf>

However, tribes are encouraged to utilize this with the additional guidance materials provided on the BIA's HEARTH Act website:

<http://www.indianaffairs.gov/WhoWeAre/BIA/OTS/HEARTH/index.htm>

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by the Secretary after consultation with the Navajo Nation.

(4) If the Navajo Nation has enacted a lease pursuant to tribal regulations under paragraph (1), the Navajo Nation shall provide the Secretary with—

(A) a copy of the lease and all amendments and renewals thereof; and

(B) in the case of regulations or a lease that permits payment to be made directly to the Navajo Nation, documentation of the lease payments sufficient to enable the Secretary to discharge the trust responsibility of the United States under paragraph (5).

(5) The United States shall not be liable for losses sustained by any party to a lease enacted pursuant to tribal regulations under paragraph (1), including the Navajo Nation. Nothing in this paragraph shall be construed to diminish the authority of the Secretary to take appropriate actions, including the cancellation of a lease, in furtherance of the trust obligation of the United States to the Navajo Nation.

(6)(A) An interested party may, after exhaustion of tribal remedies, submit, in a timely manner, a petition to the Secretary to review the compliance of the Navajo Nation with any regulations approved under this subsection. If upon such review the Secretary determines that the regulations were violated, the Secretary may take such action as may be necessary to remedy the violation, including rescinding the approval of the tribal regulations and reassuming responsibility for the approval of leases for Navajo Nation tribal trust lands.

(B) If the Secretary seeks to remedy a violation described in subparagraph (A), the Secretary shall—

(i) make a written determination with respect to the regulations that have been violated;

(ii) provide the Navajo Nation with a written notice of the alleged violation together with such written determination; and

(iii) prior to the exercise of any remedy or the rescission of the approval of the regulation involved and the reassignment of the lease approval responsibility, provide the Navajo Nation with a hearing on the record and a reasonable opportunity to cure the alleged violation.

(f) **Leases involving Gila River Indian Community Reservations; arbitration of disputes.**

Any contract, including a lease or construction contract, affecting land within the Gila River Indian Community Reservation may contain a provision for the binding arbitration of disputes arising out of such contract. Such contracts shall be considered within the meaning of "commerce" as defined and subject to the provisions of section 1 of title 2. Any refusal to submit to arbitration pursuant to a binding agreement for arbitration or the exercise of any right conferred by title 2 to abide by the outcome of arbitration pursuant to the provisions of chapter 1 of title 2, sections 1 through 14, shall be deemed to be a civil action arising under the Constitution, laws or treaties of the United States within the meaning of section 1331 of title 28.

(g) **Lease of tribally-owned land by Apsinboine and Sioux Tribes of the Fort Peck Reservation.**

(1) **In general.**

Notwithstanding subsection (a) of this section and any regulations under part 162 of title 28, Code of Federal Regulations (or any successor regulation), subject to paragraph (2), the Apsinboine and Sioux Tribes of the Fort Peck Reservation may lease to the Northern Border Pipeline Company tribally-owned land on the Fort Peck Indian Reservation for 1 or more interstate gas pipelines.

(2) **Conditions.**

A lease entered into under paragraph (1)—

(A) shall commence during fiscal year 2011 for an initial term of 25 years;

(B) may be renewed for an additional term of 25 years; and

(C) shall specify in the terms of the lease an annual rental rate—

(i) which rate shall be increased by 3 percent per year on a cumulative basis for each 5-year period; and

(ii) the adjustment of which in accordance with clause (i) shall be considered to satisfy any review requirement under part 162 of title 28, Code of Federal Regulations (or any successor regulation).

(h) **Tribal approval of leases.**

(1) **In general.**

At the discretion of any Indian tribe, any lease by the Indian tribe for the purposes authorized under subsection (a) (including any amendments to subsection (a)), except a lease for the exploration, development, or extraction of any mineral resources, shall not require the approval of the Secretary, if the lease is executed under the tribal regulations approved by the Secretary under this subsection and the term of the lease does not exceed—

(A) in the case of a business or agricultural lease, 25 years, except that any such lease may include an option to renew for up to 2 additional terms, each of which may not exceed 25 years; and

(B) in the case of a lease for public, religious, educational, recreational, or residential purposes, 75 years, if such a term is provided for by the regulations issued by the Indian tribe.

(2) **Allotted land.**

Paragraph (1) shall not apply to any lease of individually owned Indian allotted land.

(3) **Authority of Secretary over tribal regulations.**

(A) **In general.**

The Secretary shall have the authority to approve or disapprove any tribal regulations issued in accordance with paragraph (1).

(B) **Consideration for approval.**

The Secretary shall approve any tribal regulation issued in accordance with paragraph (1), if the tribal regulations—

(i) are consistent with any regulations issued by the Secretary under subsection



US Department Of The Interior
Indian Affairs

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Part II

Department of the Interior

Bureau of Indian Affairs
25 CFR Part 162
Residential, Business, and Wind and Solar Resource Leases on Indian
Land, Final Rule

BIA's LEASING REGULATIONS

The Final Rule, 25 CFR Part 162, Subpart D Business Leases, published in the Federal Register December 5, 2012 and effective January 4, 2013 can be found at:

<http://www.gpo.gov/fdsys/pkg/FR-2012-12-05/pdf/2012-28926.pdf>

or on the BIA's website dedicated to the HEARTH Act:

<http://www.indianaffairs.gov/WhoWeAre/BIA/OTS/HEARTH/index.htm>

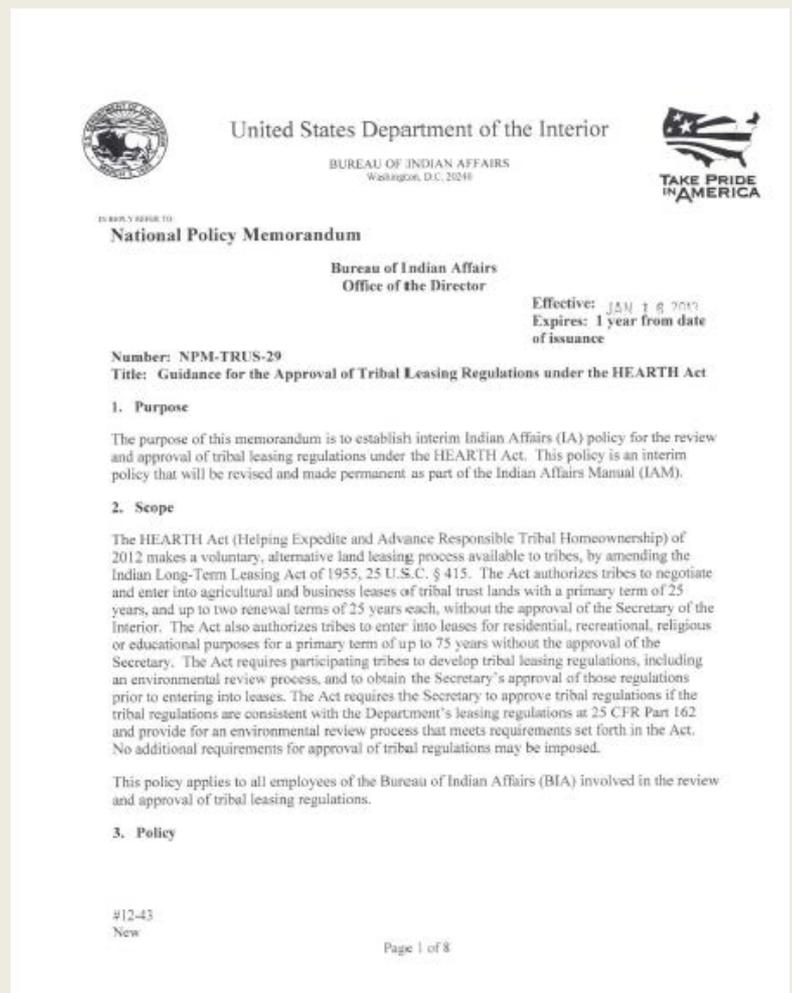


GUIDANCE FOR TRIBES SUBMITTING BUSINESS LEASING REGULATIONS UNDER THE HEARTH ACT

NATIONAL POLICY MEMORANDUM
Central Office’s National Policy Memorandum (NPM-TRUS-29) can be found with other guidance materials on the HEARTH website:

<http://www.indianaffairs.gov/WhoWeAre/BIA/OTS/HEARTH/index.htm>

The NPM is currently being revised. However, it is still valuable step-by-step guidance to determine whether completed tribal regulations are “consistent with” 25 CFR 162, as required by the HEARTH Act.





GUIDANCE FOR TRIBES SUBMITTING BUSINESS LEASING REGULATIONS UNDER THE HEARTH ACT

**CONDENSED CHECKLIST FOR REGULATIONS SUBMITTED UNDER THE HEARTH ACT
BUSINESS, RESIDENTIAL, WIND AND SOLAR RESOURCE, AND OTHER TYPES OF LEASING
(EDUCATIONAL, RECREATIONAL, PUBLIC, AND RELIGIOUS)**

✓	DESCRIPTION	COMMENTS:
	Checklist Initiated by:	
	Tribal Name: Federally Recognized Tribal Name, If Differs from Above: Federal Register Confirming Recognized Tribal Name:	FR Dated: _____
	Scope - Business, Ag, Residential, Recreational, Religious, Edu., Etc.:	
	Tribal Cover Letter - Addressed to BIA indicating name, title, and contact information for individuals the BIA may consult with regarding the proposed regulations.	Yes / No
	Finalized Regulations - No blanks, dates and signatures included.	Yes / No
	Tribal Resolutions(s) - Any supporting Resolutions to the proposed regulations are provided to BIA with all necessary signatures.	Yes / No
	REVIEW OF REGULATIONS If Tribal regulations are consistent with 25 CFR Part 162 and provide for an environmental review process that meets requirements set forth in the Health Act (25 U.S.C. § 415(h)), no additional requirements (also see National Policy Memo (NPM) dated Jan 18, 2013 and Mandatory Provisions 25 CFR 162.413)	
	Defines the general terms used in the Regulations	YES / NO
	If the following key terms are used, the regulation defines each term substantially the same as 25 CFR 162, Subpart A (Subpart A definitions are noted in following):	
	Assignment - "means an agreement between a lessee and an assignee, whereby the assignee acquires all or some of the lessee's rights, and assumes all or some of the lessee's obligations, under a lease."	Art./Sec. ____ Pg. ____
	Lease - "means a written contract between Indian landowners and a lessee, whereby the lessee is granted a right to possess Indian land, for a specified purpose and duration. The lessee's right to possess will limit the Indian landowners' right to possess the leased premises only to the extent provided in the lease."	Art./Sec. ____ Pg. ____
	Leasehold Mortgage - means a mortgage, deed of trust, or other instrument that pledges a lessee's leasehold interest as security for a debt or other obligation owed by the lessee to a lender or other mortgagee."	Art./Sec. ____ Pg. ____
	LTRO - "means the Land Titles and Records Office of the BIA."	Art./Sec. ____ Pg. ____
	Sublease - "a written agreement by which the lessee grants to an individual or entity a right to possession no greater than that held by the lessee under the lease."	Art./Sec. ____ Pg. ____
	Tribal Land - "any tract, or interest therein, in which the surface estate is owned by one or more tribes in trust or restricted status, and includes such lands reserved for BIA administrative purposes. The term also includes the surface estate of lands held by the United States in trust for an Indian corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988, 25 U.S.C. 477)."	Art./Sec. ____ Pg. ____
	Trust or Restricted Land - "any tract, or interest therein, held in trust or restricted status."	Art./Sec. ____ Pg. ____

THE BIA CHECKLIST

The BIA has prepared a modified version of its review checklist for use by tribes. This four-page "condensed" version can be found with other guidance materials on the HEARTH website:

<http://www.indianaffairs.gov/WhoWeAre/BIA/OTS/HEARTH/index.htm>

The full version used by the BIA is also posted on the website for informational purposes. However, it also contains items specific to the in-house processing at the BIA that will likely not be useful to tribes.



GUIDANCE FOR TRIBES SUBMITTING BUSINESS LEASING REGULATIONS UNDER THE HEARTH ACT

SUBMITTING THE REGULATIONS TO THE BIA

- Once the tribe prepares its proposed leasing regulations, they should be submitted to BIA's Central Office in Washington, DC for review and Secretarial approval (the address and other contact information are provided at the end of this presentation).
- The package submitted to the BIA should contain:
 - A cover letter that includes:
 - A request for review and approval of the regulations under the HEARTH Act;
 - Contact information for parties, with decision-making authority regarding the regulations, that the BIA is authorized to contact (i.e., tribal officers, legal counsel);
 - Any special circumstances (an urgent need for approval; a unique provision included in the regulations, etc.).
 - The regulations, approved by the tribe and signed by the authorized tribal parties.
 - If the tribe submits an unsigned copy, it will be reviewed, but it will not be forwarded for approval until a fully executed regulation is received.
 - If applicable, a tribal resolution authorizing the regulation.



BIA AND SOLICITOR REVIEW OF REGULATIONS SUBMITTED UNDER THE HEARTH ACT

Tribal leasing regulations are submitted to the BIA's Deputy Bureau Director and the BIA review process begins.

Tribal Government Drafts, Approves, and Submits its Leasing Regulations to the BIA's Central Office

- Regulations may address:
 - **Business Leasing**, and/or
 - Residential Leasing, and/or
 - Agricultural Leasing, and/or
 - Leasing for public, religious, educational, or recreational purposes.

BIA and Solicitor's Review

- Regulations are reviewed in accordance with HEARTH Act criteria.
- Consistency with 25 CFR Part 162.
- Provides an environmental review process.
- Applies only to tribal trust land.
- Discuss review with tribe's designated representative. Return to tribe for any modifications.
- Submit final regulations to offices of the Assistant Secretary-Indian Affairs (AS-IA).

Final Approval

- Regulations reviewed by the AS-IA's offices
- Regulations approved by Secretary.
- Moving forward, leases executed by the Tribe under the approved regulations, **will not** require additional BIA review or Secretarial approval.





BIA AND SOLICITOR REVIEW OF REGULATIONS SUBMITTED UNDER THE HEARTH ACT

CRITERIA FOR REVIEW OF TRIBAL BUSINESS LEASING REGULATIONS:

- Tribal leasing regulations received by the BIA's Deputy Director of Trust Services for approval under the HEARTH Act, are concurrently reviewed by the BIA's Realty Specialist-Hearth Act Coordinator and the Office of the Solicitor.
- Utilizing the same guidance materials provided to tribes herein, the reviewers determine if the tribal regulations meet the criteria for Secretarial approval required by the HEARTH Act:
 - Initial terms for business leases do not exceed 25 years, but may include an option to renew for up to 2 additional terms, at no more than 25 years each (a total maximum lease term of 75 years).
 - Tribal regulations apply only to tribal trust lands and not to lands held in trust for individual Indian landowners.
 - Tribal regulations do not authorize leases for the exploration, development, or extraction, of any mineral resources



BIA AND SOLICITOR REVIEW OF REGULATIONS SUBMITTED UNDER THE HEARTH ACT

CRITERIA FOR REVIEW OF TRIBAL BUSINESS LEASING REGULATIONS (cont.):

- Must provide for an environmental review process that includes:
 - Identification and evaluation of significant effects of the proposed lease on the environment
 - A period for public notice and comment related to any significant impacts of the proposed lease on the environment
 - The tribe's response to relevant and substantive public comments on environmental impacts prior to tribal approval of the lease
- The tribal regulations must be *consistent* with 25 CFR Part 162, effective January 4, 2013
 - The term "consistent" is interpreted in a manner that maximizes the deference given to the tribe.
 - Congress expressly rejected a "meets and exceeds" standard during its final deliberations. Consistency with 25 CFR Part 162.



BIA AND SOLICITOR REVIEW OF REGULATIONS SUBMITTED UNDER THE HEARTH ACT

CRITERIA FOR REVIEW OF TRIBAL REGULATIONS (cont.):

- Referring to the previously referenced guidance materials (the National Policy Memo and BIA Checklist), the regulations are reviewed for additional details such as required definitions; specifics for identifying the land to be leased; whether prohibited provisions are included, etc.

FINALIZING THE INITIAL REVIEW:

- When the BIA's Realty Specialist-Hearth Act Coordinator and the Office of the Solicitor have completed their respective reviews, they meet to reach consensus upon any required or suggested modifications to the proposed regulations.
- Absent any required or suggested modifications, the regulations are forwarded to the offices of the Assistant Secretary-Indian Affairs (AS-IA).
- If modifications are suggested or required, Tribal representatives are contacted and the those modifications are discussed. If needed, the document is referred back to the tribe, otherwise, the document is moved forward for the AS-IA's offices.



APPROVAL OF REGULATIONS SUBMITTED UNDER THE HEARTH ACT

THE FINAL STEP OF THE PROCESS

Tribal Government Drafts, Approves, and Submits its Leasing Regulations to the BIA's Central Office

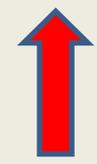
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APPROVAL OF REGULATIONS SUBMITTED UNDER THE HEARTH ACT

APPROVAL

- When the final regulations are received at the AS-IA's offices, they undergo a brief, final round of review in preparation for approval.
- The Assistant Secretary-Indian Affairs approves the regulations.
- With approval of the tribe's leasing regulations, no further BIA reviews or Secretarial approvals are necessary for leases executed under those tribal regulations.



US Department Of The Interior
Indian Affairs

THE HEARTH ACT WHERE TO SUBMIT TRIBAL LEASING REGULATIONS

Questions? Contact your Regional Realty Officer, or the following BIA Central Office staff:

Cynthia Morales, Realty Specialist and HEARTH Coordinator
760.416.2133, ext. 228
E-mail: cynthia.morales@bia.gov

or

Robin White, Acting Chief, Division of Real Estate Services
1849 C Street, NW, MS 4642-MIB
Washington, D.C. 20240
Phone: 202.208.1110
E-mail: robin.white@bia.gov



US Department Of The Interior
Indian Affairs

THE HEARTH ACT WHERE TO SUBMIT TRIBAL LEASING REGULATIONS

Submit tribal leasing regulations with a cover letter, required tribal signatures, and any applicable authorizing resolutions to:

Ms. Helen Riggs,
Acting Deputy Bureau Director
BIA-Office of Trust Services
1849 C Street, NW, MS 4639-MIB
Washington, D.C. 20240

Concurrently, please forward a PDF or Word version of the regulations electronically to the BIA's HEARTH Coordinator at: cynthia.morales@bia.gov



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*Thank you,
You Have Completed*
The HEARTH Act
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provided in conjunction with the Bureau of Indian Affairs'
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