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Insuring Native American Land: Special Issues and Considerations Part II - Leasing

Webinar Series II of IV

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Speakers

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Agenda

Long Term Leasing Act of 1955

Leases and Permits

Surface Leasing Regulations

HEARTH Act



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LONG TERM LEASING ACT OF 1955 -25 U.S.C § 415



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STATEMENT ON LEASING TRIBAL LANDS

“Some form of land leasing has been practiced virtually from the beginnings of civilization. Although leasing Indian lands involves several unique features, the basic essentials have come down from the legal systems developed by the European colonizers of the North American continent, most notably the English. The authorities for Indian leases have evolved with the development of Federal Indian policy and the pressures generated by Indian and non-Indian interests. Leasing has become a major activity in the performance of Federal trust responsibilities by the Bureau of Indian Affairs.”

From BIA's Branch of Real Estate Services Leasing Manual (1984)



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TRIBAL AND FEDERAL RELATIONSHIP

COMMERCE CLAUSE (ARTICLE 1, SECTION 8, CLAUSE 3)

Marshall
Trilogy

Federal Trust
Responsibilities

Tribal
Sovereignty



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INDIAN COUNTRY DEFINED 18 U.S.C. § 1151

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”

ORGANIZATION OF TRIBAL LAND

- **56.2 Million Acres of Land held in Trust by Federal Government**
 - **Method of Ownership**
 - Trust
 - Restricted Fee
 - Fee Simple

FEDERAL OVERSIGHT

BUREAU OF INDIAN AFFAIRS

Administers and Manages Lands held in Trust

Invested \$5B in
Trust Fund Assets in
2017

\$1.4B into Tribal
and individual
Indian beneficiary
accounts in 2017

Disbursed \$1.36B in
2017

STATUTES AUTHORIZING LEASING

EARLY STATUTORY AUTHORITY

- 5 Year maximum term
 - Required BIA approval
 - Increased transaction costs
 - Reduced incentives for outside investors

25 U.S.C. § 5124

- Gave Tribes authority to petition Secretary of Interior for Charter of Incorporation.
- Authority to Lease up to twenty-five years
- ❖ See 25 U.S.C. Ch. 12 for complete list of statutes

25 U.S.C. § 415 LONG-TERM LEASING ACT OF 1955

Native American lands (tribal or individually owned) may be leased with Secretary of Interior approval for the following:

- Public
- Religious
- Educational
- Recreational
- Residential
- Business

25 U.S.C. § 415 LONG-TERM LEASING ACT OF 1955

SUBJECT TO APPROVAL BY SECRETARY OF INTERIOR:

- Lease term extended to 25 years with one 25 year renewal
- Process to approve leases, set lease terms and forms, and control cancellation
- Amendments confer 99-year leasing on more than 50 named tribes
- Help to spur economic development

TULALIP TRIBAL LEASING – 25 U.S.C. § 415(b)

Approval of Secretary of Interior not required:

- If the term of the lease does not exceed 15 years, with no option to renew
- If the term of the lease does not exceed 30 years with no option to renew, and the lease is executed pursuant to tribal regulations previously approved by the SOI
- If the term does not exceed 75 years (including options to renew) and the lease is executed pursuant to tribal regulations previously approved by the SOI

NAVAJO LEASING REGULATIONS-25 U.S.C. § 415(e)

Secretary of Interior approval not required if:

Lease executed
under ***tribal
regulations***

Lease term 25
years with option
to renew up to
two additional
terms of 25 years

***Environmental
Review
Conducted***

25 CFR § 162 – LEASES AND PERMITS SURFACE LEASING REGULATIONS



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25 CFR § 162 – Leasing Regulations

- **Residential, Business, and Wind and Solar Resource Leases on Indian Land**
 - *25 USC § 415 is the Act that allows leases of Indian land, subject to Secretarial approval*
 - *25 CFR § 162 is the rule establishing the procedures for obtaining that Secretarial approval of Leases as well as the administration and enforcement of surface leases. Most current revision effective on January 4, 2013*

25 CFR § 162 – Leasing Regulations

What type of land is affected by these regulations

Part 162 applies to the surface estate owned by:

- A Federally Recognized Indian Tribe or Individual Native American in “trust or restricted status”;
- The United States in trust for an Indian corporation chartered under section 17 of the Indian Reorganization Act of June 18, 1934 (Section 17 Corporations); and
- Land reserved for BIA administrative purposes.
- This part does **not** apply to land held in unrestricted fee interest

25 CFR § 162 – Leasing Regulations

General Provisions for Residential, Business, Wind and Solar Energy leases regarding:

- Access of the leased premises
- Approvals Required
- Consent Requirements
- Lease Term
- Recording of “Lease Documents”
- Jurisdiction (what laws apply to leases - tribal, federal or state)
- Sovereign Immunity

25 CFR § 162 – Leasing Regulations

Approval required

Federal statutes require the Secretary to approve all leases of Indian land Except:

- A lease of tribal land by a Section 17 Corporation to a third party for a period not to exceed 25 years
- A lease of Indian land under a special act of Congress authorizing leasing without BIA approval

25 CFR § 162 – Leasing Regulations

Approvals required on “lease documents

- 25 CFR § 162 defines “Lease document” as a lease, amendment, assignment, sublease, or leasehold mortgage
- Provides for certain amendments & subleases to be “deemed approved” if not acted on in time frame allowed, subject to certain conditions
- Assignments not requiring BIA approval are limited to those made to named “qualified transferees” and wholly-owned subsidiaries and the lessee must notify the BIA of the assignment within 30 days of its execution

25 CFR § 162 – Leasing Regulations

Approvals required on “lease documents”

- Leasehold Mortgage requires BIA approval
- The BIA has 20 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to approve or disapprove the leasehold mortgage. If the BIA does not meet the deadline in this section, the lessee may take appropriate action, but it is **not** deemed approved
- Unless the lease or sublease provides otherwise, Subleasehold Mortgage do not require approval.

25 CFR § 162 – Leasing Regulations

Consent Requirements

- Tribal landowner must consent
- Individual landowners must consent
- For fractionated tracts, except in Alaska, a percentage of the owners must consent
- Leases in Alaska require consent of all Indian landowners in the tract
- Tribal land subject to a tribal land assignment may only be leased with the consent of the tribe

25 CFR § 162 – Leasing Regulations

Jurisdiction – What Laws Apply to Leases

- Applicable Federal laws and Tribal law
- With limited exceptions, leases entered into under Part 162 are not subject to state law
- Unless prohibited by Federal law, the parties to a lease may subject that lease to state or local law in the absence of Federal or tribal law, under certain circumstances

25 CFR § 162 – Leasing Regulations

Sovereign Immunity

- Tribes are “dependent sovereign nations,” distinct self-governing political entities.
- Tribe is immune from suit absent an enforceable waiver by Congress or the tribe.
- To waive sovereign immunity, the tribe must expressly state its intention to do so in the lease document (162.014)



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25 CFR § 162 – Leasing Regulations

Access

- A lease may address access to the leased premises
- Access TO the leased premises must be verified. Don't rely solely upon a road or highway designated as county or state

25 CFR § 162 – Leasing Regulations

Lease Term

- Regulations set forth allowed lease terms
- Verify the term of the lease is consistent with the applicable regulations
- Lease agreement exceeding the statutory term allowed or lacking required approval is invalid

BIA Land Title Records Office (“LTRO”)

- An LTRO is a federal records office for all documents affecting title to lands held in trust or restricted status
 - Similar to county records offices in that they have a geographic scope
 - LTROs are part of the Division of Land Titles and Records, which is responsible for reporting the status of title to Indian Trust and restricted lands
- Cannot be searched. Instead a Certified Title Status Report must be requested
- Not a speedy process

25 CFR § 162 – Leasing Regulations

Recording

- All “lease documents” must be recorded in the LTRO with jurisdiction over the leased land EXCEPT
 - A residential sublease
- The BIA should record the lease or other documents in the LTRO immediately following their approval
- Record documents in the county where land is located

25 CFR § 162 – Leasing Regulations

Recording

- The tribe must record lease documents for the following types of leases in the LTRO with jurisdiction over the leased lands, even though BIA approval is not required
- A lease of tribal land by a Section 17 Corporation (not exceeding 25 years)
- A lease of Indian land under a special act of Congress authorizing leasing without BIA approval. (such as leases authorized under the HEARTH Act)

Summary – Things to Consider

- Who owns the underlying fee interest in the land?
- Under what regulation or authority was the lease entered in to?
- What is the term of the lease? Does it comply with the governing regulations or authority?
- Is current approval of the lease by the Secretary required?
- Has a current TSR been ordered from the LTRO?
- Have you established access to the leased portion of the land?
- Did the Tribe or Tribal entity expressly state its intention to waive its sovereign immunity in the lease document and did they consent to jurisdiction and venue in the US courts or state court?

3. HEARTH ACT



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HEARTH Act (2012)

- **Helping Expedite and Advance Responsible Tribal Homeownership**
 - 25 USC § 415(h)
 - A specialized tribal leasing program available through BIA

The Best Part

- Once the HEARTH tribal leasing ordinance is approved, the BIA does not need to approve each lease.

What is the Purpose?

- Tribal self-determination
 - A mechanism to “opt out” of BIA Secretary approval requirements for certain leases
 - Allows tribes to exercise their sovereignty to develop and implement their own leasing regulations

Leases Allowed Where?

- Must be on tribal trust land
- NOT allowed under HEARTH
 - Mineral Leases -- exploration, development, extraction (not allowed)
 - Leases on land held by individual tribal members (not allowed)

Types of Leases Allowed

- Business and Agricultural Leases
- Residential Leases
- Wind and Solar Resource Leases (WEEL/WSR)
- Public, Religious, Educational and Recreational Purposes

Business and Agricultural Leases

- 25 year term, up to two additional term renewals

Residential Leases

- Up to 75 years

Wind and Solar Resource Leases (WEEL/WSR)

- Not described in § 415(h) but it is referenced in the Indian Affairs Manual (IAM, Part 52, Chapter 13) and in CFR Part 162.
- WEEL – 3 year term with one 3 year option to renew
- WSR – 25 year term with one 25 year option to renew

Leases for Public, Religious, Educational and Recreational Purposes

- Up to 75 years

Secretary of Interior Approval Process

- Tribal Regulation submitted to BIA for Review
 - Must be “consistent with” regulations under 25 CFR Pt. 162.
 - Must provide for an environmental review process

“Consistent With” Standard

- Define key terms
- Establish a process for review and approval of lease documents
- Include an Environmental Review Process that provides the public an opportunity for comment and Tribal response
- Identify required lease elements
- Address rental requirements
- Provide mechanisms for addressing lease violations (enforcement and cancellation)

What Else?

- Tribal regulation may allow for mortgages on the Leasehold (NOT on the Tribal trust land itself)
- Tribal regulation (under HEARTH) may NOT allow easements and ROW (addressed through 25 CFR Part 169 or other statute/reg)
- Substantive changes to the regulations trigger further BIA review and approval (not for minor technical amendments)

Approval Process (Cont.)

- Not later than 120 days, the Secretary of Interior to review and approve/disapprove of the application
 - Written documents to support disapproval as applicable
 - Deadline can be extended with tribal consultation

Recording

- Copies of all leases and lease documents (except Permits and residential subleases) go to BIA for encoding into TAAMS and recording with the LTRO

Trust Responsibility of the U.S?

- Monitoring. Tribe to provide copies of executed leases and documentation of lease payments made to the tribes. Per IAM, BIA to record with the LTRO.
- Enforcement. Can enforce or cancel a lease upon tribal notice
- Compliance. An interested party can petition the Secretary to review compliance of the tribe with its regulations (tribal remedies to be exhausted first). Secretary has authority to take any action it determines to be necessary.

Resources

- 25 USC § 415 and § 415(h)
- 25 CFR Part 162
- Indian Affairs Manual (IAM, Part 52, Chapter 13)

Attachments

- List of HEARTH Act Regulations Approved by Tribe and Date
- Pueblo of Isleta Leasing Law (approved by BIA)
- IAM, Part 52, Chapter 13
- Sample Checklist for Regulations Submitted Under HEARTH Act

QUESTIONS?



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