



### Indian Long Term Leasing Act

- Enacted in 1955 to authorize leases of Indian lands for up to 25 years
- Slowed the loss of Indian lands by making them more economically valuable
- Made long-term development projects possible
- Amended dozens of times to permit 99-year leases
- Retained Secretarial Approval Requirement

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### Secretarial Approval Requirement

- Outgrowth of trust relationship
- Intended to “protect” tribes
- Also intended to protect Secretary of the Interior
- Fee title to the land is owned by Secretary of the Interior – need approval to encumber the Secretary of the Interior’s land

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### Exceptions to Secretarial Approval Requirement

- 1970: Tulalip Tribes of Washington
  - Leases without approval of the Secretary for period of 15 years
  - Could execute leases for up to 30 years without Secretarial approval, if under approved tribal regulations
  - Excludes “lease[s] for the exploitation of any natural resource”
  - No environmental review requirement




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## Exceptions to Secretarial Approval Requirement

- 2000: Navajo Nation

- Tribal regulations must be approved by Secretary
- Leases for up to 25 years for business or agriculture without Secretarial approval (75 years for housing or public purposes)
- Doesn't include individually owned lands
- Tribal regulations must provide for environmental review
- Secretary not liable



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## HEARTH Act Enacted in 2012



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## Features of the HEARTH Act

The HEARTH Act allows all tribes to opt-out of the secretarial approval requirement when leasing their own lands for the first time in the history of federal Indian law. In effect, the HEARTH Act restores tribes' inherent authority over the use and development of their own lands.

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### Requirements of the HEARTH Act

- To opt-in, tribes must adopt their own leasing regulations
- Tribal regulations must be approved by the Secretary of the Interior
- Secretary has 120 days to review tribal regulations
- Law is limited to tribally-owned trust lands (doesn't apply to individually-owned lands)
- Law is limited to surface leasing (no oil & gas leasing)

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### Requirements of the HEARTH Act

- Tribal regulations must:
  - Be “consistent” with BIA’s leasing regulations
  - Establish an environmental review process
- Environmental review process requirements
  - Identification of significant environmental effects
  - Public notice and comment
  - Tribe must respond to substantive public comments
  - NOTE: NEPA doesn't apply > this is a tribal process

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### HEARTH Act: BIA Guidance

- Department of the Interior published a guidance memorandum establishing a “checklist...to guide BIA’s review of tribal leasing regulations.”
- Lists subjects that tribal leasing regulations must address – but doesn’t prescribe how
- Tribal regulations must include certain features to gain BIA approval (eg definition of key terms)
- Guidance found at:  
<http://www.doi.gov/cobell/commission/upload/National-Policy-Memorandum-HEARTH-Act.pdf>

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### HEARTH Act: Flexibility

- Tribal regulations don't have to be "all or nothing"
  - Can cover limited types of leases (eg housing)
  - Can designate a certain area of tribal lands as subject to HEARTH Ac
  - Tribes can still submit leases for approval by the BIA under BIA's leasing regulations

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### HEARTH Act: Limitations

- United States is not liable for losses sustained as a result of a lease approval under tribal leasing regulations
- Secretary has the authority to review whether a tribe has complied with its own leasing regulations
- Secretary may enforce the terms of any lease approved under tribal leasing regulations,
- Secretary has the authority to rescind tribal leasing regulations

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### HEARTH Act: Advice

- Prudence in establishing environmental review process
  - Law doesn't define scope of "public" entitled to notice & comment
  - Potential point of litigation
- Seek technical assistance from BIA, if needed
- Submission to BIA (central office v regional offices)

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### HEARTH Act: Benefits

- Restores tribal control over the use of tribal lands – available to all tribes for the first time in history of federal law
- Reduced costs for leasing > shorter timeframes, and federal environmental laws don't apply
- Lower transaction costs = more economic development

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### HEARTH Act: Approved Tribal Regulations

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|---|---|
| 1. Graton Rancheria (CA)                    | 7. Ewiiapaayp Band of Kumeyaay Indians (CA) |
| 2. Pueblo of Sandia (NM)                    | 8. Kaw Nation (OK)                          |
| 3. Pokagon Band of Potawatomi (MI)          | 9. Dry Creek Rancheria (CA)                 |
| 4. Ak-Chin Indian Community (AZ)            | 10. Jamestown S'Klallam (WA)                |
| 5. Santa Rosa Band of Cahuilla Indians (CA) | 11. Mohegan Tribe (CT)                      |
| 6. Citizen Potawatomi Band (OK)             | 12. Wichita and Affiliated Tribes (OK)      |

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### Other Changes: BIA Leasing Regulations

- Apply to surface leases only – no mineral leases, and no water leases
- Establishes different processes for different types of leases (housing, agriculture, business, and renewable energy)
- Rules do NOT get rid of BIA approval requirement
- Imposes time limits on the BIA for lease review
- Automatic approval of subleases if BIA doesn't complete review in time
- Re-orientes BIA staff for lease review – burden is on BIA to show why disapproval is warranted, rather than on landowners to show why approval is warranted

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### Other Changes: BIA Leasing Regulations

- Allows for BIA review of proposed lease before or during NEPA documentation and valuation
- Direct pay is permitted where there are 10 or fewer landowners (ALL must consent)
- Incorporates consent requirements of ILCA & AIPRA where land has multiple owners
- Clarifies that lease provisions may provide for tribal preference in employment (over and above Indian preference)
- Clarifies tax status of land, improvements, and certain activities under a lease
  - Improvements, activities, and possessory interests may not be taxed by state & local governments
  - Federal government has preempted state and local taxation

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### Other Changes: BIA Leasing Regulations

- **Residential subpart** applies to leases for:
  - Housing purposes; or
  - Construction of single family homes or housing for public purposes.
- **Business subpart** applies to leases for:
  - Business purposes;
  - Religious, educational, recreational, cultural, other public purposes;
  - Commercial or industrial purposes (including biomass);
  - Surface leases not covered by other subparts.
- **Wind & solar energy subpart** applies to leases for:
  - Evaluation of wind resources for electricity generation
  - Harnessing wind and/or solar energy to generate & supply electricity.

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### Conclusion

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Questions? Comments? Concerns?

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