

Review of the Hearth Act

A Summary of Project activities, findings and recommendations

The Hearth Act

- Helping Expedite and Advance Responsible Tribal Home Ownership Act

Legislative Path

- Introduced, January 6th 2011
- Sponsored by Martin Heinrich, New Mexico (1st District)
- Co-sponsored by 14 Democrats and 6 Republicans
- Passed Congress May 15th 2012
- Passed Senate July 17th 2012
- Signed into law--July 30th 2012

Hearth—Related to Trust Land

- “amended a tribal land lease act dating back to 1955”
- aimed to “provide for Indian tribes to enter into certain leases without prior express approval from the Secretary of the Interior, and for other purposes.”

- While tribes would not have to seek prior approval from the Secretary of the Interior to enter into specific lease agreements, tribes would have to develop leasing regulations that met with the approval of the secretary, before entering into lease agreements or signing lease agreements.

Considerations for Approval of Tribal Lease Regulations

- Regulations had to be
 - consistent with any regulations issued by the Secretary (under subsection (a) U.S. Code 25 415)
 - provide for an environmental review process that includes:
 - the identification and evaluation of any significant effects of the proposed action on the environment

○ 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
- the Indian tribe provides responses to relevant and substantive public comments on any such impacts before the Indian tribe approves the lease.

Leases allowed under the law

○ religious, educational, recreational, residential, business, and other purposes

Exclusions

○ Leases for exploration, development, extraction of mineral resources

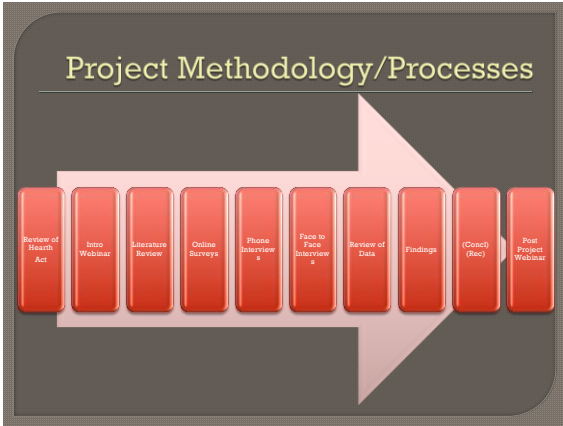
○ Individual (allotted) tribal trust land

Demographic Overview

- data on tribes within the twelve state region
 - collected from the tribal websites for 56 tribes
 - included Tribal Name, Website URL, contact information, population served and acreage

- Website information typically did not indicate the percentage or differentiate the population served that may live on trust lands
- Acreage report indicated acreage cited at the tribal website
- Generally it is believed that these are trust land acreages but in some cases they may include fee simple lands.
- Information on acreage was not available for two tribes

- total acreage reported is based on 54 tribes
- Total tribal population is 410,848 for the 56 tribes
- Total acreage for the 54 tribes in which data was available is 8,784,919



Literature Review

1. "Hearth Act of 2012" Department of the Interior: Indian Affairs. Accessed 8/19/14.
<http://www.bia.gov/WhoWeAre/BIA/OIS/HEARTH/index.htm>
2. Dreveskracht, Ryan
"Are Hopes for the HEARTH Act Too High?" 2012 Galanda Broadman: An Indian Country Law Firm. Accessed 2/16/14. <http://www.galandalawfirm.com/2012/08/are-hopes-for-the-hearth-act-too-high/>
3. Kronk-Warren, Elizabeth Ann
Tribal Renewable Energy Development under the Hearth Act: An Independently Rational, but Collectively Deficient Option. Accessed 2/12/14 <http://ssrn.com/abstract=2231755>
4. Newland, Bryan
Transforming Tribal Land Development. *The Federal Lawyer* 67(2014) p. 67-71.
5. Plata, John T.
"Why Tribes need the Hearth Act and BIA leasing regulations" October 18, 2013 *Indian Country Today Media Network, LLC*. Accessed August 14, 2014.
<http://www.indiancountrytodaymedianetwork.com/2013/10/18/>

- ### Surveys
- Online Surveys
 - Phone Interviews
 - Face-to-Face Interviews
 - Review of Data

Face to Face Interviews—First Interview

- Was familiar with the Hearsh Act
- Tribe had not yet used the Hearsh Act
- He and other land policy staff were looking into ways to use Hearsh
- Planned on having discussions with tribal council about potential use of the Hearsh Act
- Wasn't sure about how much need tribe had for the Hearsh Act, given past successes with development without Hearsh
- Had experienced significantly slow response on development projects in the past based of BIA oversight of public utility access, related to tribal development
- At the same time did mention that of late tribe had developed good relationships with local governments, so concerns about how public utilities and infrastructure were melded into lease agreements were no longer problems

Face to Face Interviews—Second Interview

- Showed us a map of tribal trust lands
- Spoke to larger issues about tribal sovereignty
- Was familiar with the Hearsh Act
- Had major concerns about whether the tribe had the resources— primarily human/land office—to implement Hearsh
- Wondered about using the Hearsh Act in view of the tribe's membership in a "consortium" of tribes
- Had hoped the tribes would be given more assistance with drafting of Hearsh regulations
- More specifically, had hoped to receive templates

Face to Face Interviews—Third Interview

- An interview with three tribal attorneys
- Were familiar with Hearsh Act
- Recognized potential benefits of creating regulations based on Hearsh
 - Particularly for tribal housing
 - Yet, also saw potential for economic development
- All non-housing tribal leases, to date, for recreational and business purposes involved leases with tribal members
- Voiced concerns about past interactions with BIA when it came to leasing land to tribal members, or entities within the tribe
 - Felt it was wrong that BIA required approval to "lease land to ourselves"
- Hearsh Act might offer means to get around those kind of requirements
- Hearsh Act could open up projects based on lease agreements with outside, non tribal interests.
- Use of Hearsh Act would involve broad sweeping evaluation of how Hearsh regulations would work with current tribal codes, policies and community practices

Quote from Third Interview

- "one area where it could become pretty useful and where the Hearth Act would be helpful and where the environmental review sections of it would be useful is some new energy projects that we have looked at that have not actually gone anywhere. We have one that actually looks like it might go somewhere and if we had the Hearth Act in place it would speed that up. Right now we are pretty happy with the land assignment system because we are only leasing to band members. But it would make sense to get the Hearth Act in place to speed that thing up and that particular project."

Findings

- almost every tribe has heard of the Hearth Act
- there remains varying degrees of knowledge and concern about what the act might entail for each tribe.
- Relatively, few tribes have used Hearth to develop leasing regulations/agreements

Findings

- 566 federally recognized tribes in the United States
- Nationwide 14 have had leasing regulations approved under the Hearth Act
- Eight more tribes have submitted eleven more leasing regulation applications to the BIA for review.
- One tribe in the NCRCRD area of study has had regulations approved via the Hearth Act.
- Yet, almost every one in every tribe surveyed or interviewed recognized the potential in the Hearth Act

Findings

- Too early to tell how the Hearsh Act has impacted, or will impact, tribes
 - On one hand numbers of Hearsh regulations adopted and number of regulations under review show modest, if not insignificant impact
 - On the other hand the act has only been in place for two years, so numbers may reflect the relative newness of the Hearsh Act
- Tribes we surveyed/interviewed recognize the potential of Hearsh

Recommendations

- Greater, more comprehensive awareness, must be created about the Hearsh Act, the procedures for using it and the potential benefits of using Hearsh to lease trust land.
 - The BIA website on the Hearsh Act will go a long way toward addressing this recommendation, but more must be done.
 - <http://www.bia.gov/WhoWeAre/BIA/OTS/HEARSH/index.htm>

Recommendations

- The Bureau of Indian Affairs should assist tribes with initial transitions to the Hearsh Act, by providing assistance with development of regulations, per the needs and resources of each tribe
 - *The BIA and the Indian Land Tenure Foundation have provided assistance in regards to this recommendation, but more needs to be done*
 - *Other institutions, public and private might play a role*
 - *Consulting firms, university law schools and institutes dedicated to American Indian issues could be of assistance*
 - *A more community based tribally rooted approach might be necessary in many cases. (That is Hearsh training must be, as much as possible, community specific.)*

Recommendations

- Innovative approaches to development of trust lands might also be considered.
 - *sponsored conferences or networking events on the mutually beneficial potential of tribal trust land investment*
 - With outside government contractors, capital investment interests, small business interests, international investment interests

Recommendations

- The Hearth Act calls for a report on LTROs and tribal land leases and real estate activities of LTROs, to be delivered to the Congressional Natural Resources Committee and the Senate Committee on Indian Affairs
 - Along with that reporting requirement (which has yet to be produced)
 - The BIA and other public institutions and economists should monitor the impact of the Hearth Act, annually, if possible.
 - To Report on how the the Hearth Act is used, its economic impacts, types of leases applied for and approved, etc . . .
 - Develop other ways of assessing the impact of Hearth—to be made public, as a way of offering a "performance" record of the Heath Act.

Moving Forward-Key Questions

- Where and how will the potential economic benefits of the Hearth Act play out and for whom?
- Will income from lease agreements provide significant economic benefits for tribes?
- Will economic activities from lease agreements significantly change tribal economic dynamics?
- Tribes must ensure leasing of trust lands provides for return on cultural capital, of sovereign ownership, of tribal land?
- And how will activities and leases from Hearth impact or influence legal, political considerations of tribal sovereignty?

A Final Consideration

- The provisions and passage of the Hearth Act dovetail with changes in leasing regulations on tribal land under CFR 25.162. (501 – 599).
 - These changes were adopted to streamline tribal land leasing procedures, as well
 - as a way of moving forward on wind, solar and other renewable energy development on tribal land

- In 2010, in an article related to energy development on tribal land, Pillsbury, Shaw, Pittman, LLP offered this perspective.

• Blaine I. Green, Matthew W. Hallinan, Michael S. Hindus, Robert A. James, Benjamin R. Uy. March 21, 2011. "Federal Regulations Proposed To Streamline Renewable Energy Projects On Tribal Land."

- "Tribal lands have many inherent advantages for renewable energy development. Significantly, large swaths of land—more than 55 million acres in the lower 48 states—are owned by the federal government in trust for Native American tribes. Though it represents only 5% of the land area of the United States, Indian country contains 10% of all renewable energy resources. The National Renewable Energy Laboratory (NREL) estimates that there is the potential for approximately 535 billion kWh/year of wind energy alone on tribal land, equivalent to 14% of the United States' current annual energy generation. For solar resources, NREL estimates that tribal land has 17,600 kWh/year of solar energy potential in the lower 48 states, which is 4.5 times the current U.S. annual energy generation."

A Final Note of Caution

- In a recent critique of “Rights of Way” on Indian Land and on the proposed period of the quickly closing, small window allowed for commentary on CFR 25 169, relating to rights of way on tribal land, Joseph Sexton, of Galanda Broadman, PLLC, writes as follows:

- “To those who may not be familiar with federal policy over Indian lands, Tribal Governments and Americans Indian individuals can do very little with their lands without the approval of the BIA’s suffocating bureaucracy. Ironically, these are the same lands that were often promised to Tribes and their people by the federal government for their “exclusive use and benefit” in perpetuity.
- For anyone who has a basic knowledge of this area of law, the regulatory revisions may seem to be an effort to streamline the mind- numbing bureaucratic processes Tribes and individual Indians must navigate to make even the most basic decisions regarding their lands. But to those who has seen the absolute ineffective and often times arbitrary nature of the BIA’s bureaucracy when it comes to governing Indian lands, these regulatory revisions do nothing more than perpetuate a resilient legacy of harm to Indian Country through laws, regulations, and executive actions emanating from Washington D.C.”

Further Sexton contends

- “Indeed, it is not hyperbole to contend that these regulations—combined with the ineffective regulatory regime that presently has a stranglehold on Tribes and individual Indians’ right to make use of their lands—will result in a continued diminishment of Tribal sovereignty and individual Indian landowner rights, which will, in turn, continue the slow but steady federal government’s suffocation of Indian Country.”

• Our full report on this presentation is available through the NCCRD.
