

# INDIAN AFFAIRS MANUAL

Part 52

Real Estate Services

Chapter 13

Approval of Tribal Leasing Regulations under the HEARTH Act

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- 1.1 Purpose.** This chapter establishes Indian Affairs (IA) policy for a consistent and objective review and approval process for Tribal leasing regulations under the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012 (HEARTH Act or Act).
- 1.2 Scope.** This policy applies to all employees of the Bureau of Indian Affairs (BIA) involved in the review and approval process for Tribal leasing regulations submitted under the Act. After a Tribe’s leasing regulations have been approved by the Secretary of the Interior (Secretary), or the Secretary’s designee, this policy and its criteria must also apply to any substantive amendments to those regulations.
- 1.3 Policy.** It is the policy of Indian Affairs (IA) to effectively provide consistent and objective review/approval of Tribal leasing regulations in compliance with all applicable Federal laws, regulations and Departmental policies and procedures. In support of Tribal sovereignty and self-determination, Secretarial approval of Tribal leasing regulations under the HEARTH Act empowers Tribal decision-making authority and management of long-term leasing on Tribal lands which, in turn, can facilitate related economic development, expansion of housing, and other services. The HEARTH Act is only applicable to the surface estate of Tribal trust and restricted land and does not apply to lands held in trust for individual Indian landowners.
- 1.4 Authority.**
- A. Statutes and Regulations.**
- 1) 25 U.S.C. § 415, Leases of Restricted Lands
  - 2) 25 U.S.C. § 415(h), Tribal approval of leases; Public Law 112-151, “Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012” or the “HEARTH Act of 2012”
  - 3) 25 CFR 162, Leases and Permits, Subparts B-Agriculture; C-Residential; D-Business; and E-Wind and Solar Resource Leases
- B. Guidance.**
- 1) 209 Department Manuals (DM), Chapter 8: Assistant Secretary-Indian Affairs
  - 2) BIA HEARTH Act Checklist is utilized in its review of Tribal leasing regulations or the condensed version prepared with Tribes in mind.
- 1.5 Responsibilities.**

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- A. Secretary, Department the Interior (DOI)** is responsible for the final round of review and approval or disapproval of any Tribal leasing regulations submitted to BIA under the HEARTH Act within 120 calendar days after the date on which the final Tribal regulations are submitted to the Secretary; Providing a written response to the Tribe on the final decisions of approval or disapproval. If the leasing regulation is determined to be disapproved the written notification must identify the basis for disapproval; Pursuant to 209 DM 8, the Secretary may delegate the responsibility to the Assistant Secretary-Indian Affairs.
- B. Assistant Secretary – Indian Affairs (AS-IA)** is responsible for the final review and approval or disapproval of any Tribal leasing regulations submitted to BIA under the HEARTH Act within 120 days of the date on which the final tribal regulations are submitted.
- C. Director, BIA (DBIA)** is responsible for developing national policy affecting Indian trust resources and ensuring a consistent and objective review process for (and the subsequent Secretarial approval of) Tribal leasing regulations submitted to the BIA under the HEARTH Act.
- D. Deputy Bureau Director (DBD), Field Operations** is responsible for executive leadership, oversight, direction, and monitoring of the Regional Directors to include periodic program reviews of field operations and provide policy and technical assistance to field offices and Tribes.
- E. Deputy Bureau Director - Office of Trust Services (DBD-TS)** is responsible for activities associated with management and protection of trust and restricted lands including providing oversight of the activities associated with Tribal leasing regulations submitted under the HEARTH Act and the receipt and acknowledgment of Tribal leasing regulations received for review under the HEARTH Act.
- F. Chief, Division of Real Estate Services (DRES)** is responsible for the protection and sound management of the resources held in trust by the United States for Indian Tribes, including the implementation of a consistent and objective review and approval process for Tribal leasing regulations submitted under the HEARTH Act.
- G. Central Office – DRES (CO-DRES)** is responsible for the review of Tribes' proposed leasing regulations to ensure procedural accuracy and sound realty principles, and for the coordination of all HEARTH Act regulations from receipt, distribution to the regions, and CO-SOL reporting, providing technical support to regions, and records management.

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- H. **Regional Directors** are responsible for the protection and sound management of the resources held in trust by the United States for Indian Tribes and carrying out policy as directed, and ensuring the implementation of policy either directly or via Agency Superintendents.
- I. **HEARTH Act Coordinator (HAC)** is responsible for the review of Tribes' proposed leasing regulations to ensure procedural accuracy and sound realty principles, and for the coordination of all HEARTH Act regulations from receipt, distribution to the regions, and CO-SOL reporting, providing technical support to regions, and records management.
- J. **Central Office – Office of the Solicitor (CO-SOL)** is responsible for the review of proposed leasing regulations to ensure legal sufficiency in accordance with and pursuant to the Act.
- K. **Regional Realty Officer (RRO)** are responsible for the review of a Tribe's proposed leasing regulations to ensure procedural accuracy and sound realty principles.
- L. **BIA Personnel** are responsible for following this and any related policy.

### 1.6 Definitions.

Many terms in this manual have specific definitions. For those terms not listed herein, within Sections 1.8A(1) and 1.8A(2), additional definitions may be found at 25 CFR 162.003 and 162.101.

- A. **“Applicant”** means the Tribe seeking review and approval of Tribal leasing regulations under the HEARTH Act.
- B. **“Decision”** means a Tribe's proposed leasing regulations that have been submitted, received, reviewed, then is determined to be approved, disapproved, or incomplete.
- C. **“External (Tribal) Conference Call”** means a call with the Tribal Point of Contact that includes the HAC, CO-SOL and RRO, to discuss any requirements and recommendations of the Tribe's proposed leasing regulations.
- D. **“Executed (Final) Form”** means the Final Tribal leasing regulations package submitted for Decision as discussed in Section 1.7.E.
- E. **“Internal Conference Call”** means an internal call with the HAC, CO-SOL, and RRO, after the HAC, CO-SOL, and the RRO or Region have completed the initial

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review to reach consensus upon any required or suggested modifications to the Tribe's proposed leasing regulations.

- F. “Incomplete”** means a Tribe's proposed leasing regulations submitted to Central Office *does not* include one or more of the following: a leasing regulation certified by the appropriate tribal authority, a cover letter, and a fully executed Tribal Resolution which is dated on or after the date of the regulations.
- G. “120-Day Review Period”** means the 120-day review period of a Tribe's leasing regulation(s) to be conducted by the HAC, CO-SOL and RRO and begins when the proposed Regulations are received in the BIA's Central Office in Washington, D.C. and date stamped by the DBD-TS.
- H. “Submission”** means a Tribe's proposed Tribal Leasing Regulations submitted to the BIA's Central Office in Washington, DC, for review and approval under the HEARTH Act.
- I. “Record”** means each lease document will be encoded into the Trust Asset and Accounting Management System (TAAMS) and forwarded to the LTRO to record.
- J. “Required Comments”** means changes made to the Tribe's proposed leasing regulations, either deleted or modified, which are required in order to be in compliance with statutory provisions of the HEARTH Act.
- K. “Review Process”** means the DBD-TS notifies the HAC that a Tribe has submitted proposed leasing regulations to establish its own regulations as provided by the HEARTH Act.
- L. “Recommended Comments”** means changes recommended by Reviewers to be made to the tribe's proposed leasing regulations which are recommended for reasons of clarity and consistence with other provisions in the regulations.
- M. “Tribe's Point of Contact”** means an individual designated by the Tribe as their principle point of contact in the exchange of information between the BIA, Solicitors Office and the HAC in the review and processing of a Tribe's proposed leasing regulations.
- N. “Unofficial”** means the initial submission of the leasing regulations are in the form of a copy or unsigned.

### 1.7 Process of Approving and Denying Tribal Leasing Regulations.

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### **A. Submission**

- 1) The Tribe must submit a complete HEARTH Act Leasing Regulation package to the BIA Central Office, Office of Trust Services, DBD-TS. If determined to be a complete package, then CO-DRES will proceed with Steps 1.7 A. through 1.7 E. of the HEARTH Act Process in this manual. The Tribe should not submit to the Agency or Region.
  - a. An original cover letter that includes: 1) A request for review and approval of the regulations under the HEARTH Act; 2) Contact information for parties, with decision-making authority regarding the regulations, i.e., Tribal officers, legal counsel; and 3) Any special circumstances regarding submission of the regulations (an urgent need for approval; a unique provision included in the regulations, etc.).
  - b. Two originals of the regulations, approved by the Tribe and signed by the authorized Tribal parties, and a Tribal Resolution authorizing the regulation must be an original and not a copy. If the Tribe submits a copy or the submission is incomplete, it will be considered as unofficial and not be reviewed or forwarded for Decision until an original fully executed regulation and Tribal Resolution is received.
  - c. Mailed to: Department of the Interior, Bureau of Indian Affairs, Office of Trust Services, Deputy Bureau Director–Trust Services, Attention: Division of Real Estate Services, 1849 C Street, NW, MS 4620-MIB, Washington, D.C. 20240.
  - d. Concurrently, the HAC will request the Tribe to email a PDF and Word version of the submission to the HAC.
- 2) The Initial Submission should not be emailed, mailed, or hand delivered to the Bureau's Regional Office or Agency. If this should occur, the Region or Agency must immediately advise the Tribe to resubmit to DBD-TS. This is critical as the 120-Day Review Period begins only when the Central Office-Office of Trust Services is in receipt.
- 3) Upon receipt of a Tribe's Initial Submission, the DBD-TS will date stamp the original hard copy of the tribal leasing regulations and provide to the HAC which begins the official 120-Day Review Period to approve.
  - a. DBD-TS will immediately mail the Tribal submission via FedEx to the HAC in Albuquerque.

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- b. DBD-TS will create a Data Tracking System (DTS) case for the submission and assign the case to DRES. A scanned copy of the Tribal leasing regulations will be uploaded to DTS.
- c. If the leasing regulations are in final form, the HAC will do the following:
  - i. Scan and upload the initial regulations to the Central Office Realty network drive;
  - ii. Create an electronic folder (e-folder) and place originals in a physical file labeled with the record series, description, and opening date (date received);
  - iii. Notify the Tribe of receipt of its Initial Submission and the 120-day Review Period. If the Tribe's Initial Submission is not in an acceptable form for review or does not contain the required documents in the Initial Submission, the HAC will request the Tribe to resubmit a complete, approved document;
  - iv. Place the Tribe's submission on the HEARTH Tracking Log;
  - v. Send an email notification to the BIA Region and CO-SOL with the Tribe's initial leasing regulations package with instructions to begin their initial 30-day review; and
  - vi. Draft and formally acknowledge written receipt of the Tribe's Initial Submission to the applicant within three (3) calendar days. The acknowledgement must include the date DBD-TS received the Tribe's initial leasing regulations, the initial due date of the 120-Day Review Period, and the next steps. The acknowledgement letter will be uploaded to the already created DTS record and will be signed by the DBD-TS and provided to HAC for date stamp. Letter will be mailed to the Tribe's Point of Contact, with a copy to the Regional Director, an email copy to the RRO, and a copy filed in the Region's designated file folder in the network shared drive HEARTH Act folder.

### **B. Central Office Initial Review**

- 1) The HAC, CO-SOL, and RRO's review and comments should be conducted in Word and saved in the designated network shared drive folder. A number of draft versions can be expected and, to avoid confusion, the HAC, CO-SOL, and RRO must indicate in the footer of the leasing regulations document the reviewer's initials, date the review is completed, Region, Name of Tribe, Lease Type, and draft version.

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- 2) The HAC, in conjunction with the CO-SOL, will complete the initial review **within 30 days after the date stamped receipt by DBD-TS**. The BIA Regional Office having jurisdiction over the applicant Tribe will be invited (by email) to provide comments directly to the HAC for consideration in the review process. However, if the comments are not provided by the date specified by the HAC, the process will not be delayed.
- 3) If there are documents required from DOI staff, the HAC will contact the responsible office **in writing** within seven (7) calendar days to request that the responsive information be provided within 21 days.
- 4) After the HAC, CO-SOL, and RRO have completed their initial review, the HAC will schedule an internal conference call **within 15 days**. The joint discussion is in preparation of consolidating comments on any requirements and/or recommended modifications to the Tribe's proposed leasing regulations. If all parties are in agreement, the required and/or recommended comments will be consolidated by the HAC. A redline version will then be provided to the Tribal Point of Contact **within five (5) days** of the internal conference call, in advance of a joint conference call with HAC, CO-SOL, RRO and the Tribal Point of Contact. If the HAC, CO-SOL, and the RRO determine that no further changes are required, or the leasing regulations do not require any modification, the leasing regulations will be forwarded and accompanied by a recommendation for surnaming and approval. If it is determined that the leasing regulations require modifications, the Tribe will be advised to address the required changes and consider the recommended changes.
- 5) The HAC will schedule the external (Tribal) conference call **within 10 days** of providing the consolidated comments to discuss the required and recommended modifications with the Tribe. A calendar invitation will be sent by the HAC to CO-SOL, RRO, and the Tribal Point of Contact. The HAC will lead the working session and all participants are encouraged to an open discussion on the required and/or recommended modifications. At the conclusion of the external conference call, the Tribe will be advised to address the required changes and consider the recommended changes.

The HAC will provide the Tribal Point of Contact with a summary of the conclusions of the external conference call. The Tribe will be advised they have 30 days to modify and resubmit to the HAC or to withdraw their submission. The HAC should follow up with the Tribal Point of Contact, if the Tribe does not resubmit leasing regulations **within 30 days**. At the end of the 30 days, the HAC will provide a recommendation to AS-IA, via DTS, to approve or disapprove the Tribe's submission. If the Tribe re-submits their regulations within the 30 days, the Tribe

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must add the reviewer's initials, date of review, description of the leasing regulations, and draft number.

### **C. Modified Submission of Leasing Regulations**

- 1) The Tribe's modified leasing regulations must be submitted in electronic format (redlined version) word document and a clean version to the HAC.
- 2) Upon receipt, the HAC must date stamp the modified Tribal leasing regulations and upload the modified submission into designated network shared drive HEARTH Act folder.
- 3) The HAC will notify CO-SOL by email of the modified submission of the Tribe's leasing regulations.
- 4) The HAC will begin the review of the modifications to verify that the required changes are incorporated and that no new additions are included in the Tribe's leasing regulations. When completed, the HAC will prepare the regulations and supporting documents for upload to DTS for the AS-IA's decision.

### **D. Failure to Resubmit Modified Leasing Regulations**

- 1) If there are expired or missing documents in applications received after the date of this policy that are required from the applicant, HAC will contact the applicant in writing. This written correspondence is the "original notice," and will also advise the applicant that the requested responsive information should be received within 30 calendar days.
- 2) If the requested information is not received within 30 calendar days after the original notice, BIA staff will send the applicant a "final notice" that their application will be returned to them after 45 days of the date of the original notice and removed from the active caseload unless the responsive information is received from them. The HAC is responsible for returning the application to the applicant and for updating the system of record to reflect that the application has been returned within five (5) days of that action
- 3) If the submission is not legally sufficient, the Tribe will be given an opportunity to formally withdraw their submission. Withdrawal must be made in writing. If a Tribe has not withdrawn its submission by the 90th day, CO-DRES and CO-SOL will move forward with a recommendation to the AS-IA to approve or disapprove the submission. Withdrawn submissions will be subject to the full 120-day review period when they are resubmitted by the tribe.



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### **E. Final Submission**

- 1) If the regulations are modified, the HAC will request the Tribe to submit two (2) originals of Final Regulations and Tribal Resolution to the HAC. Leasing regulations submitted for review and approval should be in final form and approved by the appropriate Tribal authority.
- 2) Upon receipt, the HAC will prepare the modified regulations for final submission to AS-IA.
- 3) A decision (approve or disapprove) must be made no later than 120 days after the Tribal leasing regulations were initially received and date-stamped by DBD-TS. Therefore, the HAC must promptly and timely prepare the documents for DTS.
- 4) An extension may be granted after consultation with the Tribe.

### **F. Approval**

- 1) HAC will review final regulations for completion and prepare the Approval Page for AS-IA, HEARTH Act Checklist, Cover Sheet, Federal Register Briefing and Communication Plan, Federal Register Notice, and D-BIA Recommendation Memo to ASIA and save in the network shared drive HEARTH Act Tribal folder.
- 2) HAC loads final documents in DTS for Surname and Approval.
- 3) DBD-TS provides original Federal Register Notice (three (3) copies) and Approval Page (two (2) copies) to Executive Secretariat upon request.

All decisions will be made in writing. Approval determinations will be published in the Federal Register. Disapproval determinations must identify the basis for the disapproval. An incomplete determination must identify the required documents not included in Tribal submission.

Once the Tribe's leasing regulations are approved, the Tribe is no longer required to obtain Secretarial approval for leases executed under the HEARTH Act. However, the Tribe must provide their servicing BIA Agency or Regional Office with a copy of each lease document (leases, assignments, leasehold mortgages, etc.). Each lease document will be encoded into the Trust Asset and Accounting Management System (TAAMS) and forwarded to the Land Titles and Records Office (LTRO) for recording and issuance of a certified Title Status Report (TSR) to the BIA. The lease must not be reviewed for quality assurance or defect by the LTRO. When the certified TSR is provided to the BIA, the BIA must forward it to the Tribe.

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## 1.8 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 (at 25 CFR 162), “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 regarding the HEARTH Act.

Although Tribal regulations should generally address the same issues as BIA’s regulations, Tribes have the flexibility to establish their own policies on 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.

In general, to ensure consistency with the BIA’s leasing regulations, Tribal regulations must: 1) define key terms, 2) establish the process for review and approval of Tribal land lease documents, 3) include an Environmental Review Process that provides the affected public an opportunity to comment and receive a response from the Tribe, 4) identify required lease elements, 5) address rental requirements, and 6) provide mechanisms for addressing lease violations (enforcement and cancellation).

Sections 1.8 A through 1.8 D of this manual provide a detailed list of items to be used as guidance by the BIA to determine whether the regulations are consistent with BIA’s leasing regulations at 25 CFR Part 162 and the environmental review process required by the Act. Section A provides elements that are required to be addressed and are applicable to all Tribal leasing regulations submitted for review and approval under the Act. Section B contains provisions that must be included within individual leases for all lease types. Section C includes required and suggested provisions specific to the required environmental review process. Section D contains elements that are strongly recommended to support basic leasing functions the Tribe will be responsible for upon approval of its regulations. However, it is anticipated that each Tribe will draft regulations in accordance with their individual circumstances and needs. Therefore, in applying this guidance, as much deference and flexibility will be given to Tribes as possible.

### A. Required – All Tribal Leasing Regulations Must:

- 1) **Define Key Terms:** If any of the following **key terms** are used, they must be defined *substantially the same* as 25 CFR 162, Subpart A. A Tribe must also provide definitions for all other specific terms used within its regulations (i.e., bond, surety), but the definitions for those terms may differ from those in 25 CFR 162.

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*(See Section 1.8A(2) for additional Key Terms applicable only to agricultural regulations)*

- a. **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.
  - b. **Lease** – means a written contract between a Tribe 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 Tribes' right to possess the leased premises only to the extent provided in the lease.
  - c. **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.
  - d. **LTRO** – means the BIA Land Titles and Records Office.
  - e. **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.
  - f. **Tribal Land** – any tract in which the surface estate is owned by the Tribe 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. § 5124).
  - g. **Trust or Restricted Land** – any tract held in trust or restricted status.
  - h. **Trust or Restricted Status** – means 1) That the United States holds title to the tract in trust for the benefit of a Tribe, or 2) that a Tribe holds title to the tract but can alienate or encumber it only with the approval of the United States because of limitations in the conveyance instrument under Federal law or limitations in Federal law.
- 2) **Additional Key Terms for Agricultural Regulations:** For those regulations governing agricultural land, in addition to those terms listed within Section 1.8 A. 1), if any of the following key terms are used, they must be defined substantially the same as 25 CFR 162, Subpart B (provided below for reference). A Tribe must also provide definitions for all other specific terms used within its regulations (i.e., bond, surety), but the definitions for those terms may differ from those in 25 CFR 162.

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- a. **Agricultural Land** – means Indian land or Government land suited or used for the production of crops, livestock, or other agricultural products, or Indian land suited or used for a business that supports the surrounding agricultural community.
- b. **Agricultural Lease** – means a lease of agricultural land for farming and/or grazing purposes.
- c. **Assignment** - means an agreement between a tenant and an assignee, whereby the assignee acquires all or some of the tenant’s rights, and assumes all of the tenant’s obligations, under a lease.
- d. **Leasehold Mortgage** - means a mortgage, deed of trust, or other instrument that pledges a tenant's leasehold interest as security for a debt or other obligation owed by the tenant to a lender or other mortgagee.
- e. **Sublease** – a written agreement by which the tenant grants to an individual or entity a right to possession no greater than that held by the tenant under the lease.

### **B. All lease types must include the following provisions:**

- 1) Identify to what land the Tribe’s leasing regulations applies.
  - a. Regulations may only address leases of Tribal land (held in trust or restricted status for the Tribe by the United States).
  - b. Regulations cannot apply to individually owned land, fee simple title, and allotted lands.
  - c. Regulations cannot apply to land that is fractionated and undivided interests in the land are owned by the Tribe and individual Indians.
- 2) Definitions for the type(s) of lease(s) covered by the regulations (i.e., agricultural, grazing, crop, business, residential, wind resource, solar resource, public, religious, etc.).
  - a. Regulations may allow for permits (i.e., a non-possessory right of access for hunting privileges, cultural and spiritual use access and easements).
  - b. Regulations may allow for mortgages of the leasehold interest.
  - c. Regulations may **not** allow for mortgages of Tribal land.

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- d. Regulations may **not** address leases for the exploration, development, or extraction of any mineral resource.
  - e. Regulations may **not** allow easements and rights-of-way.
- 3) State effective date of the regulations (date approved by the Secretary).
  - 4) State what laws, in addition to Federal law, may apply to leases.
  - 5) State that substantive changes to the regulations require BIA review and Secretarial approval. Minor technical amendments may be made without BIA review or Secretarial approval.
  - 6) Identify lease terms allowed, including any option(s) to renew (a Tribe may choose to shorten the following allowable lease terms, but a Tribe may not exceed those terms):
    - a. Agricultural and business leases - up to 25 years with an option to renew for up to two additional terms (each of which may not exceed 25 years), 25 U.S.C. § 415 (h)(1)(A).
    - b. Wind Resource and Solar Resource leases - WEEL's can only be for a term of 3 years with one 3 year option to renew. (See 25 CFR 162.512(a); 162.513(a)(4).) WSR's can only be for a term of 25 years with one 25 year option to renew. (See 25 CFR 162.540(a); 162.542(a)(4).)
    - c. Public, religious educational, recreational, or residential leases - up to 75 years, 25 U.S.C. § 415 (h)(1)(B).
  - 7) Include a statement that the Tribe will provide the BIA office having jurisdiction of the Tribe's leasing activities, with copies of all leases and lease documents, except permits and residential subleases, for encoding into TAAMS and recording in the LTRO.

*Under the HEARTH Act, Tribes must provide a copy of each lease document to the BIA. These should be provided directly to the Tribe's servicing BIA Region or Agency for encoding into TAAMS by the BIA's Realty staff. The BIA will then submit the document to LTRO for recording and request a TSR to ensure that title accurately reflects the current land transactions. After BIA reviews the TSR, to verify the transaction has been recorded, the BIA will forward the TSR to the Tribe.*

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*If the Tribe has contracted or compacted the Realty or LTRO function, then the Tribe should encode the lease documents and submit them to their servicing BIA Region or Agency for scanning, imaging and recording.*

- 8) Identify the steps and procedures within the leasing process for obtaining a lease or lease document (amendment, assignment, renewals, sublease, leasehold mortgage) including:
  - a. Whether Tribal approval of a lease is required separate from Tribal execution of a lease, for example, if a different entity/person executes a lease than approves a lease.
  - b. The identity of Tribal officials/entities authorized to approve and/or execute a lease.
  - c. If any lease documents (amendment, assignment, renewals, sublease, leasehold mortgage) require further Tribal action (execution and/or approval) and the officials/entities authorized to approve and/or execute the lease documents.
  - d. If any lease documents (amendment, assignment, renewals, sublease, leasehold mortgage) may be completed without further Tribal action (execution and/or approval).
  - e. Identify which Tribal department/agency must be contacted to initiate a lease.
  - f. State the supporting documentation required for a lease.
  - g. Specify if there is a timeline for lease approval or other actions.
- 9) Require each lease (or lease document, as applicable) to identify and or address:
  - a. parties to the lease;
  - b. term of the lease;
  - c. effective date of the document;
  - d. purpose of the lease;
  - e. authorized use(s) of the leased premises;

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- f. description of the land being leased that is of sufficient detail to meet recording requirements for BIA's LTRO (see 25 CFR 150, Land Records and Title Documents);
- g. amount of rent/compensation due;
- h. date rent/compensation due;
- i. who receives rent/compensation;
- j. what form(s) of payment is/are acceptable;
- k. whether charges and/or fees will be assessed for late payments and, if so, what are the charges and/or fees;
- l. whether there will be rental adjustments; if so, the following must be provided:
  - i. when rental adjustments will be completed;
  - ii. when rental adjustments become effective;
  - iii. how rental adjustments will be calculated; and
  - iv. how disputes about rental adjustments will be resolved
- m. state whether a performance bond is required; if so, performance bond requirements must be included;
- n. state any insurance requirements;
- o. the lessee must hold the U.S. and the tribe harmless from any loss, liability or damages resulting from the lessee's use or occupation of the leased premises; the obligations of the lessee and its sureties to the tribe will be enforceable by the U.S. so long as the land remains in trust or restricted status;
- p. whether permanent improvements may be constructed, if so, the following must be provided:
  - i. a general description of the type and location of any improvements;
  - ii. a statement indicating ownership of the improvements;
  - iii. the party responsible for constructing, operating, maintaining, and managing improvements;

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- iv. the party responsible for removal of improvements, if applicable; and
- v. plans of development or construction schedules required by the Tribe;
- q. reports, surveys, and/or site assessments needed to facilitate compliance with applicable Tribal environmental, cultural resource, and land use requirements as appropriate;
- r. Lessee will cease all activity in the immediate vicinity of the leased premises and notify the Tribe if historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered;
- s. a restoration and reclamation plan, if required by the Tribe;
- t. if leasehold mortgages are permitted, the lease must include language to ensure that a copy of any notice of default, issued by the Tribe to the lessee, is also provided to the approved mortgagee and any surety by certified mail, return receipt requested; the lessee must obtain the consent of the surety for any legal instrument that directly affects their obligations and liabilities, if required by Tribe;
- u. if an agricultural lease, require lessees to manage land in accordance with any agricultural resource management plan developed by the Tribe;
- v. if an agricultural lease, require appropriate stipulations or conservation plans to be developed and incorporated into the lease;
- w. if an agricultural lease, require the tenant corporation, partnership or other legal entity, to provide organizational and financial documents as needed to show the lease will be enforceable against the tenant and the tenant will be able to perform the lease obligations, if required by the Tribe;
- x. if the leased premises are within an Indian irrigation project or drainage district, lease must 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.”*
- y. the process for enforcing trespass and lease violations, including:



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- i. stating that BIA, may, upon reasonable notice from the Tribe and at BIA's discretion, enter the leased premises for inspection and to enforce the provisions of, or cancel a lease document;
- ii. there must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises. The lessee must comply with all applicable laws, ordinances, rules, regulations and other legal requirements;
- iii. stating whether negotiated remedies are allowed; and
- iv. identifying a process for any cancellation or termination and establishing when they become effective.

### **C. All Tribal Leasing Regulations Must Include An Environmental Review Process That:**

- 1) Provides for identification and evaluation of any significant effects of the proposed action on the environment (it is strongly recommended that the term “significant effects on the environment” is defined by the Tribe);
- 2) Ensures the public is provided notice and reasonable opportunity to comment relating to any significant environmental impacts of the proposed action as identified by the Tribe (it is strongly recommended that the term “Public for Purposes of the Environmental Process” is defined by the Tribe as broadly or narrowly as will serve the best interests of the Tribe and assure a meaningful environmental review process);
- 3) Provides the process the Tribe will use to respond to relevant and substantive public comments on any such impacts, prior to approving a lease.
- 4) Although not required, it is strongly recommended that the Tribe support the environmental review process by:
  - a. identifying the Tribal program that administers environmental review;
  - b. defining elements to be evaluated (i.e., air, water, cultural resources, socio-economics, etc.);
  - c. including a time frame for public comments;
  - d. describing how the review, public comments, and the Tribe’s responses will be documented (memo, report, etc.);

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- e. ensuring key terms are defined (i.e. public & significant effect);
- f. identifying a time frame for the review; and
- g. describing any applicable appeal process.

## **D. Recommended - Provisions Within All Regulations or Within Each Lease:**

- 1) State whether any due diligence requirements apply.
- 2) Describe any appeal processes.
- 3) State whether a specific type or types of valuation will be required to determine rent (i.e., appraisal, bidding, market survey, etc.).
- 4) If Tribal regulations allow for lease payments to be made directly to the Indian tribe, state that documentation of the lease payments must be sufficient to enable the Secretary to fulfill the trust obligation of the United States to the Tribe under Federal law.

## **1.9 Secretarial Authority.**

25 U.S.C. § 415(h). 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 will not be liable for losses sustained by any party to a lease executed pursuant to tribal regulations.

## **Approval**

Darryl LaCounte

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Date: 2020.07.08 09:32:13 -04'00'

Darryl LaCounte  
Director, Bureau of Indian Affairs

\_\_\_\_\_ Date