

Legal Sufficiency Checklist for Tribal Leasing Regulations Submitted under the HEARTH Act

Tribe Name: _____

Federally Recognized Tribal Name (if different from above): _____

Regulation Type: Agriculture / Business / Religious, Educational, Recreational, Cultural, or other Public Purpose/
Residential/ WEEL / WSR

Tribal Resolution: _____

All definitions and provisions are to be consistent with 25 CFR 162 but do not need to be verbatim

| Required Definitions | | | |
|-----------------------------|---|----------------|----------------|
| v | Regulation | Article | Section |
| | Agricultural Land – means Tribal Trust Land suited or used for the production of crops, livestock, or other agricultural products or a business that supports the surrounding ag community. | | |
| | 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. | | |
| | Best Interest of the Tribe – means, but is not limited to, when an outcome is most favorable based on a balancing of interests undertaken in order to attain the highest economic income, increase economic development, preserve and enhance the value of Tribal Trust Land, increase employment, and preserve the sovereignty of the Tribe. <i>**Note: this is not required but is strongly recommended to allow tribes more flexibility and preserve tribal sovereignty.</i> | | |
| | Lease – means a written contract between the Tribe as Lessor and a Lessee, whereby the Lessee is granted a right to possession of Tribal Trust Land, for a specified purpose and duration. [<i>The Lessee’s right to possess will limit the Tribe’s right to possess the Leased premises only to the extent provided in the Lease.</i>] | | |
| | 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. | | |
| | LTRO – means the Land Titles and Records Office of the BIA. | | |
| | Public, for the Purpose of Environmental Review – means any person or entity who can demonstrate that they will be directly substantially affected by the Lease or Lease activity. | | |
| | Significant Effect on the Environment – means a substantial, or potentially substantial, adverse change in the environment, including land, air, water, minerals, flora, fauna, ambient noise, cultural areas and objects of historical, cultural or aesthetic significance. | | |
| | Sublease – means 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. | | |
| | Tribal Land – means the surface estate of any tract of land held by the U.S. in trust or restricted status for the benefit of the Tribe. [<i>The term also includes lands held by the U.S. in trust for an Indian corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. § 476).</i>] | | |
| | Trust or Restricted Land – means any tract held by the U.S. in trust or restricted status for the benefit of a tribe. <i>**Note: can be combined with definition below for single definition</i> | | |
| | Trust or Restricted Status – means land the title to which is held by the Tribe and which can only be alienated or encumbered with the approval of the US because of limitations contained in the conveyance instrument pursuant to Federal law. <i>**Note: can be combined with definition above for single definition</i> | | |

Required Lease Provisions

| v | Regulation | Article | Section |
|---|--|---------|---------|
| | Identifies to what lands the tribal regulations apply. Must state that the Ordinance does not apply to fee lands, individually-owned Indian lands, fractionated interests or mineral interests. | | |
| | <p>Defines what types of Leases are covered by the regulations:</p> <ul style="list-style-type: none"> • Agricultural • Business • Religious, educational, recreational, cultural, or other public purposes • Residential • Wind Energy Evaluation Leases (WEEL) • Wind and Solar Resource (WSR) leases <p>**NOTE: may allow for permits. May not allow mineral Leases or mortgages.</p> | | |
| | <p>States all applicable laws, in addition to federal, may apply to the Leases.</p> <p>**NOTE FOR AGRICULTURE LEASES: state law may apply to ag Lease disputes, if so the Tribe must expressly agree to the application of state law. (25 C.F.R. 162.109(c))</p> | | |
| | States effective date of the regulations (date regulations are approved by Secretary) | | |
| | Includes a provision addressing the Tribe’s authority to enact laws (i.e.: Tribal Constitution, Tribal By-Laws, etc.) | | |
| | States that all major substantive amendments to the Tribal HEARTH Act regulations must be reviewed and approved by the Secretary. | | |
| | <p>Includes a severability provision.</p> <p>**NOTE: not required but strongly recommended for the Tribe’s protection.</p> | | |
| | Identifies officials/entities authorized to approve and/or execute Leases | | |
| | <p>Identify whether the Lease may be amended or whether the Lessee may assign, sublease or mortgage.</p> <p>(25 C.F.R. 162.243-244; 162.445; 162.449; 162.453; 162.457; 162.534; 162.570)</p> | | |
| | <p>Provides that any Lease, amendment, assignment, renewal or Leasehold mortgage must be recorded at LTRO.</p> <p>(25 C.F.R. 162.246; 162.343; 162.443; 162.533; 162.568)</p> | | |
| | <p>Identifies the tract or parcel of land being Leased.</p> <p>(25 C.F.R. 162.221; 162.313(a)(1); 162.413(a)(1); 162.513(a)(1); 162.542(a)(1))</p> <p>**NOTE: The Lease must describe the Leased premises sufficient for LTRO to identify the Leased premises.</p> | | |
| | <p>State the purpose of the Lease and the authorized uses of the Leased premises.</p> <p>(25 C.F.R. 162.231(a); 162.313(a)(2); 162.413(a)(2); 162.513(a)(2); 162.542(a)(2))</p> | | |
| | <p>States parties to the Lease</p> <p>(25 C.F.R. 162.220; 162.313(a)(3); 162.413(a)(3); 162.513(a)(3); 162.542(a)(3))</p> | | |
| | State effective date of the lease | | |
| | <p>Provides for a definite term, provides a definite term for the renewal period.</p> <ul style="list-style-type: none"> • Agriculture and Business Leases - 25 years with two 25-year options to renew. (25 U.S.C. 415(h)(1)(A)-(B)) (25 C.F.R. 162.229; 162.411; 162.413(a)(4)) • Residential, public, religious, educational or recreational 75 years with no options to renew further. (25 U.S.C. 415(h)(1)(B)) (25 C.F.R. 162.311; 162.313(a)(4)) • WEEL - 3 years with one 3-year option to renew. (25 C.F.R. 162.512(a); 162.513(a)(4)) • WSR – 25 years with up to two 25-year options to renew. (25 C.F.R. 162.542(a)(4); 162.540(a)) | | |

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| | **NOTE: a business lease <u>DOES NOT</u> include public, religious, educational or recreational uses. | | |
| | If a Lease provides for an option to renew, it must specify: <ul style="list-style-type: none"> the time and manner the option must be exercised or is automatically effective; any additional consideration that will be due upon exercise of option; and any other conditions for renewal (25 C.F.R. 162.312; 162.412; 162.512(b); 162.541) | | |
| Required Payment Provisions | | | |
| √ | Regulation | Article | Section |
| | Provides for the payment of rent. (25 CFR 162.222; 162.313(a)(6); 162.413(a)(6); 162.513(a)(6); 162.542(a)(7)) **NOTE: may be waived if in the Best Interest of the Tribe, as defined in Tribe's HA Code. Tribe can determine any amount that is in its Best Interest. | | |
| | States the dates on which all rental payments are due. (25 CFR 162.224; 162.323; 162.423; 162.523; 162.552) ** NOTE: rent payments may not be accepted more than 1 yr in advance of the due date. | | |
| | Specifies the acceptable form of payment. The Lease may provide for alternative forms of compensation, including in-kind consideration & payments based on percentage of income. (25 C.F.R. 162.227; 162.325; 162.426; 162.554(a)). | | |
| | Specifies who the Lease payments will be made to. (25 C.F.R. 162.226(a); 162.324; 162.424; 162.553(a)) | | |
| | If a Lease allows for Lease payments to be made directly to the Tribe, the Tribe must maintain documentation of the Lease payments that are sufficient to enable the Secretary to discharge the trust responsibility of the US. (25 USC 415(h)(6)(B)) | | |
| | States whether rental reviews/adjustments are permitted. If so, the Lease must specify: <ul style="list-style-type: none"> How adjustments are made; Who makes the adjustments; When the adjustments are effective; and How disputes about the adjustments are resolved. (25 C.F.R. 162.223; 162.328; 162.428; 162.557) **NOTE: may be waived if in the Best Interest of the Tribe, as defined in Tribe's HA Code. | | |
| | States the rate at which interest will accrue on any late rent payment as well as the amount of any additional late payment penalties. (25 C.F.R. 162.225; 162.368; 162.468; 162.593) | | |
| | States whether Lessee is required to pay additional fees, taxes and assessments associated with the use of the Leased premises. (25 C.F.R. 162.228(a); 162.241; 162.329(a); 162.429(a); 162.558(a)) | | |
| | For Agriculture Leases: The Lease must state that if the Lessee is a corporation or other legal entity, it must provide organizational and financial documents, to show the Lease will be enforceable against the Lessee and the Lessee can perform all of its Lease obligations. (25 C.F.R. 162.213) | | |
| Required Lease Enforcement Provisions | | | |
| | States that there must not be any unlawful conduct or illegal activity on the leased premises and the Lessee must comply with all applicable laws, ordinances, and other legal requirements. (25 C.F.R. 162.219(c)-(d); 162.313(c)(2)-(3); 162.413(c)(2)-(3); 162.513(c)(2)-(3); 162.542(c)(2)-(3)) | | |
| | States that the Secretary may, upon his discretion, enter the Leased premises to enforce any Lease executed by the tribe. (25 U.S.C. 415(h)(7)(B)) (25 C.F.R. 162.250; 162.313(c)(5); 162.364; 162.413(c)(5); 162.513(c)(5)-(6); 162.542(c)(5)-(6); 162.589) | | |

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| | States that if the Leased premises are within an irrigation project or drainage district, the Lessee must pay all operation and maintenance charges that accrue during the Lease term. (25 C.F.R. 162.228(b); 162.329(b); 162.429(b); 162.558(b)) | | |
| | Identifies a process for enforcing Lease violations and trespass. (25 U.S.C. 415(h)(8)(B)) (25 C.F.R. 162.251; 162.366; 162.466; 162.591) | | |
| √ | Regulation | Article | Section |
| | Identifies provisions that provide for cancellation or termination of the Lease. (25 CFR 162.253; 162.370; 162.470; 162.536; 162.595) | | |
| | Identifies provisions to allow Lessee to cure lease violations. (25 C.F.R. 162.252; 162.367; 162.467; 162.592) ** NOTE: Not required. | | |
| | Identifies provisions that provide for a process for Lessee holdover. (25 C.F.R. 162.256; 162.371; 162.471) ** NOTE: Not required. | | |
| | Identifies provisions for negotiated remedies, if any. (25 U.S.C 415(h)(8)(C)) (25 C.F.R. 162.240; 162.365; 162.465; 162.590) **NOTE: Not required. | | |
| | Identifies whether the Lease provides for disputes to be resolved in tribal court, any court of competent jurisdiction, arbitration or dispute resolution. (25 C.F.R. 162.240(c); 162.365(e); 162.465(e); 162.590(e)) **NOTE: Not required. Also Note: the U.S. is not bound by the decisions. | | |
| | Identifies appeals process for lessee. | | |
| Required Indemnity Provision | | | |
| | States that the Lessee holds 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. Including against all liabilities or costs relating to use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or release or discharge of hazardous material from the Leased premises that occurs during the Lease term, regardless of fault, with exception that the Lessee is not required to indemnify the tribe for liability or cost arising from the tribes' negligence or willful misconduct. (25 C.F.R. 162.313(d)(1)-(2); 162.413(d)(1)-(2); 162.513(d)(1)-(2); 162.542(d)(1)-(2)) | | |
| Required Insurance Provision | | | |
| | States that the Lessee provide insurance in an amount sufficient to protect all insurable permanent improvements on the Leased premises and the interests of the tribe, including property, crop, liability and/or casualty insurance. The insurance must identify both the tribe and the U.S. as insured parties. (25 C.F.R. 162.237; 162.413(a)(8); 162.437; 162.527; 162.562) ** RESIDENTIAL LEASE NOTE: Lessee is not required to provide insurance. (25 C.F.R. 162.335) **NOTE: may be waived if in the Best Interest of the Tribe, as defined in Tribe's HA Code. | | |
| Required Performance Bond Provisions | | | |
| | The Lessee must provide for a performance bond or alternative form of security. The performance bond must be: <ul style="list-style-type: none"> • an amount equal to one year's rental; • the construction of any required permanent improvements; • the operation and maintenance charges for any land within an irrigation project; or • the restoration and reclamation of the Leased premises. ** RESIDENTIAL LEASE / WEEL's & WSR LEASES: Not required. (25 C.F.R. 162.234; 162.434; 162.559) **NOTE: may be waived if in the Best Interest of the Tribe, as defined in Tribe's HA Code. | | |

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| <p>States that 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. (25 C.F.R. 162.219(a); 162.313(c)(1); 162.413(c)(1); 162.513(c)(1); 162.542(c)(1))</p> | | |
| <p>The performance bond must require the surety provides advance notice to the tribe before cancellation of the bond. (25 C.F.R. 162.434(e)) **NOTE: <i>Not required; may be waived if in the Best Interest of the Tribe, as defined in Tribe's HA Code.</i></p> | | |
| Required Permanent Improvement Provisions | | |
| <p>States whether permanent improvements may be constructed, identify the ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing permanent improvements. (25 C.F.R. 162.313(a)(5); 162.413(a)(5); 162.513(a)(5); 162.542(a)(5)) ** For Agriculture Leases: <i>Not required.</i></p> | | |
| <p>If permanent improvements are authorized, the Lease must include a construction plan that describes:</p> <ul style="list-style-type: none"> • the type and location of any permanent improvements; • a general schedule for construction of the permanent improvements and • a process for changing the schedule by mutual consent of the parties. <p>(25 C.F.R. 162.232; 162.314; 162.414; 162.417; 162.514; 162.543) **NOTE: <i>may be waived if in the Best Interest of the Tribe, as defined in Tribe's HA Code.</i></p> | | |
| <p>If permanent improvements are authorized, the Lease must specify if the permanent improvement will:</p> <ul style="list-style-type: none"> • Remain on the Leased premises upon expiration, termination or cancellation of the Lease, in a condition satisfactory to the tribe and become the property of the tribe; • Be removed within a time period specified in the Lease, at the Lessee's expense; or • Be disposed of by other specified means. <p>(25 C.F.R. 162.233(a); 162.315; 162.415; 162.544)</p> | | |
| <p>If the Lease provides for the Lessee to remove the improvements, it must also provide the tribe with an option to waive the removal requirement and take possession of the improvements if they are not removed within the specified time period. (25 C.F.R. 162.233(b); 162.315; 162.415) ** For WEEL's & WSR Leases: <i>Not required.</i></p> | | |
| <p>For WEEL's: States that the Lease must require:</p> <ul style="list-style-type: none"> • the Lessee to install testing and monitoring facilities within 12 months after the effective date the Lease; and • Lessee must provide an explanation of good cause if installation does not occur. <p>(25 C.F.R. 162.513(a)(7); 162.517)</p> | | |
| <p>For WEEL's: States that the Lease must specify the ownership of any energy resource information the Lessee obtains during the Lease term. (25 C.F.R. 162.520) **NOTE: <i>unless otherwise specified in the Lease, the energy resource information becomes the property of the tribe at the expiration of the Lease.</i></p> | | |
| <p>For WSR's: States that the Lease must indicate who is responsible for evaluating the Leased premises for suitability; purchasing, installing, operating and maintaining the WSR equipment. (25 C.F.R. 162.542(a)(6))</p> | | |
| <p>For WSR's: States that the Lessee must:</p> | | |

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| | <ul style="list-style-type: none"> • Commence installation of energy facilities within 2 years after the Lease effective date or a timeframe in the resource development plan; • Lessee must provide an explanation of good cause if installation does not occur; • Maintain all on-site electrical generation equipment & related infrastructure; and • Repair, place into service, or remove from the site within a time period specified in the Lease, any idle, improperly functioning, or abandoned equipment. <p>(25 C.F.R. 162.542(a)(8); 162.546)</p> | | |
| Required Environmental Provisions | | | |
| √ | Regulation | Article | Section |
| | Provides an environmental review process that includes the Identification and evaluation of any significant effects of the proposed action on the environment. (25 U.S.C. 415(h)(3)(B)(a)(ii)(I)) | | |
| | States that if historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with the Lease, all activity in the immediate vicinity of the Leased premises, resources, remains or items will cease and the Lessee will contact the tribe and BIA. (25 C.F.R. 162.313(c)(4); (162.413(c)(4); 162.513(c)(4); 162.542(c)(4)) ** NOTE: <i>Not required for agricultural leases; Not required if cultural items are included in environmental provisions.</i> | | |
| | Identifies 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. Identifies a time frame for environmental review. (25 U.S.C. 415(h)(3)(B)(a)(ii)(II)(aa)) | | |
| | States that the Tribe will provide responses to relevant and substantive public comments on any such impacts before the tribe approves the Lease. (25 U.S.C. 415(h)(3)(B)(a)(ii)(II)(bb)) | | |
| | Identifies the tribal program/position/department administering the environmental review. | | |
| | For Agriculture Leases: The Lease must require that agricultural operations be conducted pursuant to a 10-year agricultural resource management plan. Lessee must also provide environmental and archaeological reports, surveys and site assessments, as needed to document compliance with NEPA and other applicable federal and tribal laws. (25 C.F.R. 162.213) | | |