

American Indian Law and Policy Alert

New Tribal Leasing Regulation and HEARTH Act of 2012 to Spur Renewable Energy Development on Tribal Lands

November 28, 2012

The Department of the Interior (DOI) holds approximately 56 million acres of land in trust for Indian tribes and individual Indians. Pursuant to federal law and as trustee of these lands, the DOI must generally approve leases of tribal lands. Securing approval for commercial leases of tribal lands is a slow process that has deterred development and commercial investment in Indian country.

On November 27, 2012, the DOI issued a final rule aimed at spurring and streamlining the development of solar and wind energy projects on tribal lands. The final rule, titled “Residential, Business, and Wind and Solar Resource Leases on Indian Land,” would modify the Bureau of Indian Affairs (BIA) process for approving tribal leases in order to accelerate the leasing process and remove uncertainties associated with entering into leases with tribes. In addition, on July 30, 2012, the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012 (“HEARTH Act”) was signed into law to establish a process by which Indian tribes can approve their own surface land leases without needing BIA to approve each lease.

New Leasing Regulation

The new regulation addresses the process delays and uncertainties associated with leasing tribal lands for renewable energy projects. Subsection E of the new regulation establishes a new, streamlined process in an effort to remove significant obstacles to wind and solar energy development on Indian lands. For wind projects, there is now a two-step process with less onerous leasing requirements for the installation and operation of wind evaluation equipment (e.g., meteorological towers) and then a follow-on process to extend the lease for full development of the wind project. (Solar projects do not require this two-step process because a shorter-term lease is not needed to evaluate solar energy potential.)

One of the most significant streamlining efforts is the requirement that the BIA issue decisions on wind and solar project leases within 60 days of receiving all required documentation. The new regulation sets similar timeframes for BIA decisions on lease amendments, lease assignments, subleases and leasehold mortgages; in the case of lease amendments and subleases, these documents will be deemed approved if the BIA fails to act within the set timeframes.

In an effort to ease the burden of negotiating and executing tribal leases, the new regulation also seeks to bring some certainty to the leasing process. The DOI has abandoned its “one-size-fits-all” leasing approach in favor of specific rules for the different types of tribal leases (i.e., residential, business or wind and solar energy development). The new regulation identifies terms that must be included in wind and solar leases and the documents that must be submitted to the BIA to support a lease approval. By limiting the grounds under which it can disapprove such lease documents, the BIA has limited the broad discretion that it once had under the previous regulations to reject certain lease documents. Finally, the new regulation clarifies that permanent improvements on the leased lands are not subject to state or local taxation.



www.twitter.com/akin_gump

HEARTH Act of 2012

The HEARTH Act amends the Indian Long-Term Leasing Act of 1955 to provide tribes with more control over surface leasing of Indian lands for a variety of residential, governmental and business purposes. The HEARTH Act grants tribes the authority to approve surface leases of tribal trust lands pursuant to tribal regulations approved by the Secretary of Interior.

Under the HEARTH Act, tribes, at their discretion, may assume control over leasing tribal trust lands upon the Secretary's approval of tribal regulations that "are consistent with any regulation issued by the Secretary under [25 U.S.C. § 415(a)]." If a tribe opts to assume control of lease approvals, this authority is limited to tribal trust lands and does not extend to lands held in trust for individual allottees. Lease approval for allotted lands remains with the BIA.

Under the HEARTH Act, business leases approved pursuant to tribal regulations may have a term of 25 years, with an option to renew for up to two additional terms (each may not exceed 25 years).

In order for tribal leasing regulations to be approved they must also provide for an internal environmental assessment process as part of the leasing regulations. Although tribes seeking to utilize the HEARTH Act's revamped regulatory structure will first need to submit land leasing regulations to the BIA for approval, once they are approved the tribal process should allow surface land leases and subleases to be approved expeditiously.

It is anticipated that tribes that opt to assume lease approval under the HEARTH Act will tailor their regulations to suit their needs. It remains to be seen how much latitude the BIA will have in interpreting what it means for tribal regulations to be "consistent with" BIA regulations. However, the BIA's new business leasing regulations are a better baseline to work from and should allow tribes greater flexibility in developing their internal leasing regulations.

CONTACT INFORMATION

Akin Gump's project development and American Indian law attorneys have significant experience with tribal leasing issues and the development of commercial projects on tribal lands. Clients contemplating or currently undertaking renewable projects on tribal lands, or tribal clients contemplating developing leasing regulations should feel free to contact the attorneys below:

Global Project Finance

Edward W. Zaelke
ezaelke@akingump.com
213.254.1234
Los Angeles

Elliot Hinds
ehinds@akingump.com
310.229.1035
Los Angeles

Adam S. Umanoff
aumanoff@akingump.com
213.254.1300
Los Angeles

Ian A. Shavitz
ishavitz@akingump.com
202.887.4590
Washington, D.C.

American Indian Law and Policy

Donald R. Pongrace
dpong race@akingump.com
202.887.4466
Washington, D.C.

James T. Meggesto
jmeggesto@akingump.com
202.887.4153
Washington, D.C.

Jason T. Hauter
jhauter@akingump.com
202.887.4153
Washington, D.C.