



TRIBAL LEASING UNDER THE HEARTH ACT

Webinar Presentation - December 7, 2017



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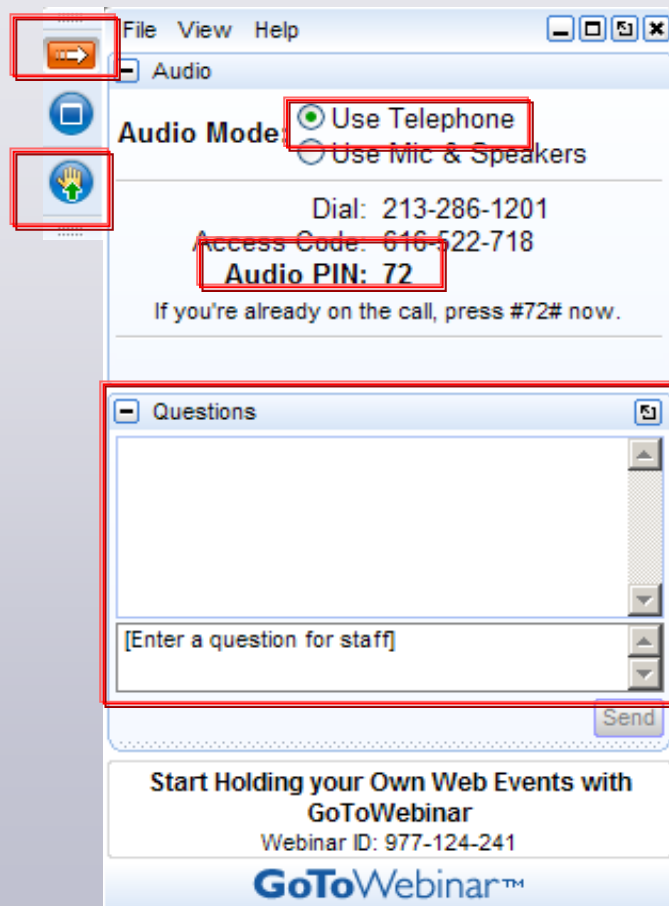
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- Q&A during latter portion of today's session
- Recorded webinar will be made available on our website: www.ncai.org

Today's Presenters

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JODY CUMMINGS

Partner, *Steptoe & Johnson*

Moderator - Jacob Schellinger, NCAI Staff Attorney & Legislative Counsel

Today's Discussion Points

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- Overview of the HEARTH Act
- BIA Review and Secretarial Approval Process
- HEARTH Act Successes and Lessons Learned
- Questions and Discussion

Overview of the HEARTH Act

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- The Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 was signed into law July 30, 2012.
- Amends the Indian Long-Term Leasing Act of 1955, 25 U.S.C. § 415, including § 415(h), Tribal Approval of Leases.
- In support of tribal self-determination, the HEARTH Act provides tribes with the option to approve and manage leases of their tribal trust and restricted lands without:
 - review by the Bureau of Indian Affairs
 - or*
 - approval by the Secretary of the Interior

BIA Review and Approval

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Post HEARTH Act, a long-term lease of Tribal Trust Land:

May be approved by tribes without BIA review or Secretarial approval

if

the lease has been executed under tribal leasing regulations
(ordinances/codes)

and,

the tribal leasing regulations were reviewed by the BIA and approved by the Secretary prior to execution of the lease.

BIA Review and Approval

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There are three general steps in the review and approval process of tribal leasing regulations.

Tribal Government
Drafts, Approves, and
Submits its Leasing
Regulations to
the BIA's Central Office

Review by
BIA Division of Real
Estate Services and
Office of the Solicitor

Final review within the
offices of the Assistant
Secretary – Indian
Affairs and Secretarial
approval.

BIA Review and Approval

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Tribal leasing regulations are eligible for Secretarial Approval if:

1. The tribe's leasing regulations are consistent with the BIA's current regulations at 25 C.F.R. Part 162; and
2. The regulations include an environmental review process that:
 - Identifies and evaluates the significant effects of the proposed lease on the environment;
 - Includes a public notice and comment period related to any significant impacts of the proposed lease on the environment; and
 - Requires the tribe to respond to relevant and substantive public comments on environmental impacts prior to tribal approval of the lease

BIA Review and Approval

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Tribal Leasing Regulations Under the HEARTH Act may only authorize the following lease types and terms:

- Business and Agricultural Leases. 25 years, but may include an option to renew for up to 2 additional terms, at no more than 25 years each (a total maximum lease term of 75 years).
- Residential, Public, Religious, Educational, or Recreational Leases: a term of 75 years.

Such Leases:

- Must only apply to tribal trust land;
- Cannot apply to lands held in trust for individual Indian landowners; and
- Cannot authorize leases for the exploration, development, or extraction, of any mineral resources.

Ho-Chunk Nation - Pre-HEARTH 25 C.F.R. 162

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Prior to the HEARTH act, the Ho-Chunk Nation was updating its lease documents to conform with the DOI's updated 25 C.F.R. Part 162 regulations.

The updated regulations set deadlines by which the BIA is required to act. However, the deadlines are triggered only after a "completed" lease application is submitted to the Bureau. That means all applicable processes need to be complete before the BIA considers an application "completed."

NEPA review, appraisals, insurance and permits are all required before the deadlines begin to toll. This held up approval of leases for months, delaying funding for home builds and economical opportunities.

Ho-Chunk Approval Process

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Legislative and Executive staff of the Ho-Chunk Nation worked closely to draft leasing regulations under the HEARTH Act. The Nation decided to go with Agricultural, Business and Residential leasing regulations to benefit all land uses of the Nation.

The Ho-Chunk Nation Legislature submitted 3 Leasing Policies via resolutions on 9/03/2013 and received 45 public comments.

The initial set of polices were approved in December of 2013 by the Ho-Chunk Legislature. They were then forwarded to the DOI for review.

Ho-Chunk Approval Process

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Ho-Chunk Nation staff consulted with the Solicitor's office and other DOI staff to amend the submitted policies. The Legislative Branch then rescinded the original policies and reinstated them as ordinances on 11/18/2014.

The amended ordinances were then sent back to the DOI for review and final approval.

Ho-Chunk HEARTH Act Lease Approval!

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On 2/4/2015 the Assistant Secretary - Indian Affairs approved the Nation's 3 leasing ordinances.

On 2/17/2015 the Ho-Chunk Nation Legislature authorized the first batch of leases under the Nation's newly approved leasing ordinances.

3 residential leases were authorized within the first month of enactment.

Ho-Chunk Lease Approvals

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Previously under 25 C.F.R. Part 162, residential leases took between 8 and 9 months to be approved by the BIA. This does not take into account the amount of time required by the Land Title Records Office to record the leases and place them in the Title Status Report.

It now takes approximately 1 to 1 ½ months to approve leases. The Nation carries out the administration of the lease process, all the way up until it needs to be recorded by LTRO. This includes encoding and approving on the BIA's Trust Asset and Accounting Management System (TAAMS).

Ho-Chunk Nation & TAAMS

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The Nation currently has 3 certified TAAMS users. All users have the capability to encode and approve leases for inclusion in the BIA's TAAMS on-site.

This allows the entire process to be handled in-house with no approval or oversight from the BIA. Once the lease is approved on TAAMS it is sent to the LTRO for recording. The Nation has looked into contracting LTRO functions but with the current set up and connection to TAAMS (VPN) it would be difficult.

Ho-Chunk Leasing Post-HEARTH

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Since approval of the Ho-Chunk Nation's Leasing Ordinances, the Nation has executed and approved the following:

- 26 Residential Leases
- 9 Business Leases
- 4 Agricultural Leases

Why HEARTH?

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With all lease approval processes being completed in-house, the time to acquire a lease has been dramatically reduced.

Fear of federal oversight is gone, leading to more interested parties looking to use the Nation's lands.

The Nation no longer needs to ask permission to use its own lands.

“That’s sovereignty, that’s what we work for. We have drastically increased our ability to exercise our sovereignty over our own lands.”

Ho-Chunk President Jon Greendeer

Why HEARTH?

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The HEARTH Act only requires a one time approval from the DOI. No going back to get your leasing laws updated unless the tribe wants.

The tribe can only take on what they want. If the tribe is only interested in a certain type of leasing (e.g., residential, agricultural, business or wind and solar), then they can apply to only take on that type of leasing or only certain parts of the lease process.

The Act *restores* the authority of tribes to develop and implement their own laws regarding leasing on their lands.

Reduces administrative burden for the BIA and allows the Bureau to concentrate on the more time consuming allotment leases.

Ho-Chunk Properties Leased

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Here are some examples of properties the Nation has been able to lease since enactment:

- A tribal member-owned Jiu-Jitsu gym (Brazilian, cross training).
- A six-year agricultural lease to Organic Valley.
- A veterans supportive housing complex - 'Sii Wonazi Hocira' - consisting of 10 one-bedroom, ADA-accessible, 650 square-foot apartments. Amenities include laundry facilities, game and gym area, conference/classroom, and a counseling room. The complex is open to all Ho-Chunk Veterans in need of housing.

Choka U Gym (Business Lease)

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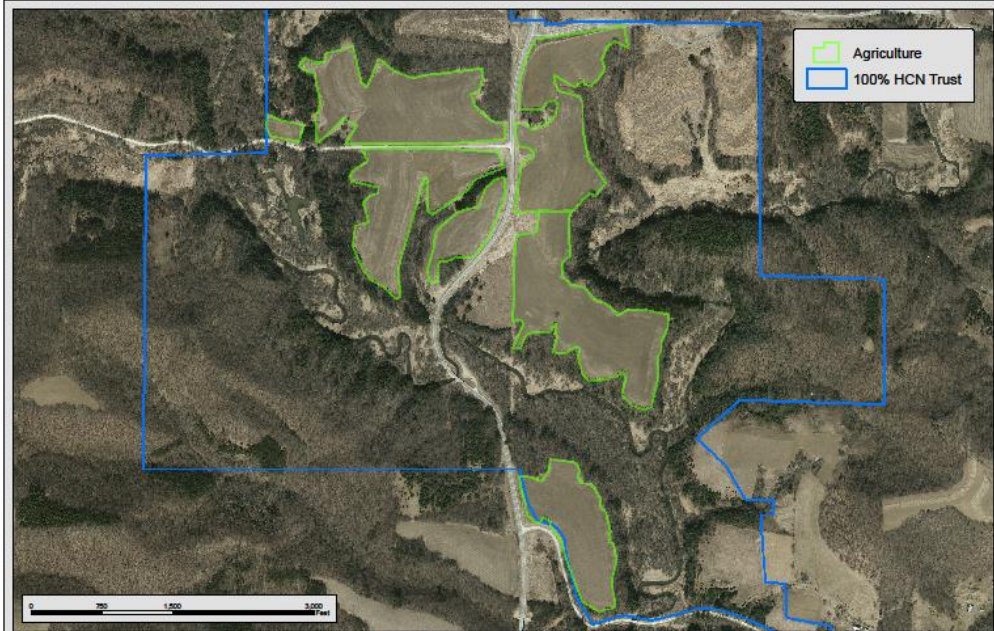
Choka U Gym (Business Lease)

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Organic Valley (Agricultural Lease)

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KVR North Ag Lease
Vernon County



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KVR South Ag Lease
Vernon County



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Organic Valley (Agricultural Lease)

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Organic Valley (Agricultural Lease)

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Veterans Supportive Housing (Residential Lease)

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VETERANS SUPPORTIVE HOUSING
Sii woonązi Herušga

**RIBBON CUTTING
CEREMONY**

Thursday June 18, 2015
Program at 11:00 AM
Refreshments to follow

W8699 Sandpillow Road, Black River Falls, WI



Veterans Supportive Housing (Residential Lease)

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Agua Caliente Band of Cahuilla Indians



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- The Reservation boundaries of the Agua Caliente Band of Cahuilla Indians (ACBCI) encompass approximately 31,500 acres and span over three California cities (Palm Springs, Rancho Mirage, Cathedral City) and unincorporated areas of Riverside County.
 - An 1876 Executive Order established the ACBCI Reservation from a portion of the Tribe's traditional lands; subsequent legislation expanded the Reservation.
 - The ACBCI Reservation is comprised of tribal trust lands and tribal member trust allotments.
 - The federal government deeded every other Section of land to the railroad, creating a checkerboard pattern of trust and fee lands within the Reservation.

Agua Caliente Band of Cahuilla Indians - Economic Development Through Leasing



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- Despite the checkerboard nature of the Reservation lands, “. . . on a combined basis, the Tribe and its members currently represent the largest single land owner in the desert resort area of Palm Springs . . .”
(<http://www.aguacaliente.org/content/History%20&%20Culture/>).
- ACBCI and its members have used the BIA’s leasing provisions under 25 C.F.R. Part 162 to engage in numerous economic opportunities within the Reservation.
- Within the ACBCI Reservation, there is a combined total of approximately 20,600 active business leases, subleases, and timeshares upon tribal and individual trust lands.

Agua Caliente Band of Cahuilla Indians - Economic Development Through Leasing



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**Vallera at Village Traditions
52 single family homes**

Agua Caliente Band of Cahuilla Indians - Economic Development Through Leasing



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18@Twin Palms
18 Single Family Homes

Agua Caliente Band of Cahuilla Indians - Economic Development Through Leasing



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Heritage Plaza
Commercial Office Building

Agua Caliente Band of Cahuilla Indians - Leasing Decisions Post HEARTH Act



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- In 2014, ACBCI submitted its Tribal Business Leasing Ordinance to the BIA for review and approval under the HEARTH Act.
- The ACBCI Ordinance was approved by the Assistant Secretary - Indian Affairs on September 23, 2014.
- With approval of the Tribal Business Leasing Ordinance, ACBCI has the flexibility to use either the Ordinance or 25 C.F.R. Part 162 for individual leases.

Agua Caliente Band of Cahuilla Indians - Leasing Decisions Post HEARTH Act



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For certain leases executed since approval of the Tribal Business Leasing Ordinance, ACBCI has used the regulations at 25 C.F.R. Part 162 in place of its Leasing Ordinance. Factors considered include:

- **The prior successes of ACBCI using the C.F.R.'s leasing regulations for the benefit of the Tribe.**
- **Whether the projects were better suited to a 99-year lease term (usually a 65-year term and 34-year option) rather than a 75-year term under the HEARTH Act**
 - Note: The 99-year term is not available to all tribes. (see 25 U.S.C. § 415(a)). However, under the HEARTH Act, all tribes do have the option to offer up to 75-year terms (25-years with two, 25-year options).
- **The comfort level of developers familiar with the leasing processes under the C.F.R.**
 - Required documents (i.e., surveys, insurance, consents) are obtained early in the process.
 - Developers know they can rely on ACBCI's expertise and guidance to facilitate the process with the BIA.
 - The timely manner in which BIA's Pacific Regional Office and the Palm Springs Agency have been able to complete document reviews and obtain approval.

Consider the Leasing Options - Post HEARTH Act

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With approval of the 2012 HEARTH Act, tribes now have leasing options:

- Under the HEARTH Act, tribes have a mechanism to enact their own leasing laws to approve and manage leases of their tribal trust and restricted lands without additional BIA review or Secretarial approvals;

Or

- With a tribal leasing law in place under the HEARTH Act, tribes may still elect to submit leases, on a lease-by-lease basis, to the BIA for review and approval under 25 C.F.R. Part 162;

Or

- Tribes may elect to execute leases solely under the C.F.R.

Tribal Leasing Post HEARTH Act - Potential Benefits

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Economic Development

- A streamlined leasing process that may reduce the time to execute and approve leases.
- Timely execution of leases may encourage potential lessees to invest and develop in tribal communities.

Tribal Land Management - Focused on Greatest Need.

- Tribes may enact regulations only for the area(s) of leasing that will be of the greatest benefit, or address the greatest need, for the tribal community (e.g., housing, business).
 - Tribes may submit additional regulations under the HEARTH Act later for remaining areas.

Access to 25 C.F.R. Part 162 -

- If a tribe with HEARTH Act leasing regulations believes a particular lease would be better supported under 25 C.F.R. Part 162, the lease may be submitted for BIA review and Secretarial approval under the C.F.R.
- Leases approved under Part 162, and any amendments, assignments, etc., will remain subject to Part 162 until lease termination or expiration.

Tribal Leasing Post HEARTH Act - Consider the Potential Challenges

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- Funding
- The Environmental Review Process
- In-House Resources - Processing Time
- Existing Leases (not under the HEARTH Act)
- Lease Enforcement (responsibilities for Violations/Cancellation)

Tribal Leasing Post HEARTH Act - Consider the Responsibilities

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- Tribe's are required to provide BIA with a copy of all lease documents (lease, amendment, assignment, or leasehold mortgage).
- The BIA (or tribe if it has contracted or compacted the related leasing authority) is responsible for encoding lease documents.
 - If lease payments are to be made directly to the tribe (direct pay), the Tribe must provide documentation to the BIA "sufficient to enable the Secretary to discharge the trust responsibility of the United States . . ." (25 U.S.C. 415(h)(6)).
- **Lease Enforcement (Violations/Cancellation)**
 - It is anticipated that tribes will manage all aspects of those leases approved under their tribal regulations.
 - Upon reasonable notice from the Tribe, the Secretary may enforce provisions of or cancel a lease.
 - Situations may arise that are outside of the approved regulations (e.g., trespass resulting from an unapproved right-of-way) where it may still be under BIA's jurisdiction to act.

Drafting Tools for Interested Tribes

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By referencing the following materials during the drafting process a tribe can minimize the likelihood that required revisions will be found during the BIA's review process.

Suggested materials include:

- The Hearth Act, 25 U.S.C. § 415(h).
- BIA's leasing regulations, 25 C.F.R. Part 162 (i.e., Subpart D Business Leases or other appropriate Subpart).
- Central Office's National Policy Memorandum, NPM-TRUS-29, (expired but used as reference until an update to the Indian Affairs Manual is released).
- BIA's checklist used in its review of tribal leasing regulations.

A sample of these materials follows and they are also provided on the BIA's website dedicated to HEARTH Act matters: <https://www.indianaffairs.gov/bia/ots/hearth>

Questions & Comments!

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Contact Information

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THANK YOU!