The HEARTH Act:

President Barack Obama signed the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act into law on July 30, 2012. Although it was a relatively straightforward piece of legislation, the act has the potential to transform the use of tribal lands across Indian Country. The historical development of U.S. policies governing leasing of Indian lands, as well as the longstanding requirement that the Secretary of the Interior approve leases of Indian lands, provide the proper context to discuss the HEARTH Act, its requirements, and the manner in which it has changed federal policies affecting Indian lands. However, two unresolved questions have arisen as a result of the HEARTH Act's passage.

By Bryan Newland

Transforming Tribal Land Development

At the formation of the United States, federal policies relating to Indian lands focused on consolidating the ability to acquire them with the federal government. In one of its first enactments, Congress passed the Indian Trade and Intercourse Act of 1790.[1] Among other things, the "Non-Intercourse Act," as it has come to be called, declared, "[t]hat no sale of lands made Indians, or any nation or tribe of Indians in the United States, shall be valid to any person or persons, or to any state … unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."[2] The United States' general policy restraining the ability of Indian tribes to lawfully alienate their lands without federal approval encompassed the leasing of Indian lands and has persisted ever since.

Congress did not address Indian leasing in the century after the Non-Intercourse Act. But, in 1891, Congress passed one of the first acts relating to leases of Indian lands in an amendment to the General Allotment Act of 1887:

> That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act, or any other act or treaty can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations, and conditions as shall be prescribed by such Secretary, for a term not exceeding three years for farming or grazing, or ten years for mining purposes:
>
> Provided, That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes, in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, *subject to the approval of the Secretary of the Interior*.[3]

The act's requirement that the Secretary of the Interior approve leases remained a staple of federal laws governing the leasing of Indian lands for the next century. This is sometimes known as the "secretarial approval requirement."

Congress approved several enactments after 1891 that made minor adjustments to the permissible duration of lease terms. Ultimately, federal policies governing Indian leasing continued to favor short-term leases (primarily for agricultural and mineral purposes) for the next half-century.[4]

In 1955, Congress passed the Indian Long-Term Leasing Act,[5] which transformed the development and use of Indian lands. This relaxed federal restrictions on the ability of tribes and individual Indians to lease their lands.[6] Under that act, Indian lands could be leased for a period of up to 25 years, which could be renewed for one additional 25-year term.[7] The Long-Term Leasing Act retained the longstanding secretary approval requirement.

In 1970, Congress enacted the first statute to expressly authorize Indian leasing without the secretarial approval requirement when it restored the authority of the Tulalip Tribes of Washington to enter into leases without approval.[8] Under that statute, the tribes could enter into any lease, "except a lease for the exploitation of any natural resource," for a period of up to 15 years without secretarial approval.[9] They could execute leases for a period of up to 30 years, provided that they adopted regulations approved by the Secretary of the Interior.[10]

Notably, the Tulalip Tribes' leasing authority does not include a federally mandated requirement to conduct environmental review (which is an important distinction with the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act,[11] as discussed below).

More recently, in 2000, Congress amended the Long-Term Leasing Act again to restore the Navajo Nation's authority to lease its lands without secretarial approval.[12] Similar to the Tulalip statute, under the Navajo Nation Trust Land Leasing Act of 2000, the tribe could exercise this authority if it first adopted regulations approved by the Secretary of the Interior.[13] The act expressly stated that it did not apply to individually owned trust lands, and that the Navajo Nation's leasing regulations must provide for "an environmental review process."[14]

The Troublesome Secretarial Approval Requirement

With few exceptions,[15] tribes and individual Indians have been subject to the secretarial approval requirement when leasing their own lands since 1891. Like many Indian policy initiatives, this requirement was born out of the secretary's trust responsibility[16] and was intended to protect tribes and individual Indians. Notwithstanding this intent, the requirement has proven to be a significant obstacle to successful economic development on Indian lands.

Until very recently, there were no deadlines by which the Bureau of Indian Affairs (BIA) was required to approve or disapprove leases.[17] As a result, BIA real estate officers in field offices wielded enormous power over the development of tribal lands—sometimes withholding approval of leases for years.[18] For the vast majority of tribes, ultimate control over land development has rested with the Department of the Interior.

Tribes have had some options to work around problems stemming from the secretarial approval requirement. For example, 25 U.S.C. § 81 authorizes tribes to enter into agreements to encumber their lands for a period of up to seven years without approval. However, the short-term nature of these agreements has not been conducive to long-term economic development projects on tribal lands.[19]

The HEARTH Act Transforms Indian Leasing in 2012

For the first time in the history of federal Indian law, the HEARTH Act allows all tribes to opt out of the secretarial approval requirement when leasing their own lands.. In effect, the HEARTH Act restores tribes' inherent authority over the use and development of their own lands … with a catch.

To take advantage of this law, tribes must adopt their own leasing regulations (which must be approved by the Secretary of the Interior).[20] Those regulations must:

- Be consistent with the Department of the Interior's Indian leasing regulations; and,
  - Establish an environmental review process that—
  - Identifies significant environmental effects of the proposed lease;
  - Allows for public notice and comment; and
  - Requires the tribe to respond to relevant and substantive public comment.[21]

The act requires the Secretary of the Interior to approve or disapprove tribal leasing regulations within 120 days of submission.[22]

It also only applies to surface leases, not mineral leases.[23] In addition, it is expressly limited to tribal lands and does not apply to individually owned Indian lands.[24] Individual Indian landowners must continue to receive secretarial approval to lease their own lands.

To assist tribes in developing their own HEARTH Act regulations, the Department of the Interior published a guidance memorandum establishing a "checklist … to guide BIA's review of tribal leasing regulations."[25] The HEARTH guidance states, "[i]n determining whether tribal regulations are 'consistent with' BIA-leasing regulations, '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.***"[26] This statement is hugely important, because it clearly explains that federal policy does not require tribes to adopt federal leasing regulations wholesale.

The HEARTH guidance goes on to list a number of subjects that tribal leasing regulations must address. In some instances, such as the definition of key terms, it states that tribal leasing regulations must mirror those of the Department of the Interior.[27] In other instances, the HEARTH guidance requires tribes to merely address a particular subject without prescribing how they regulate it.[28]

Perhaps the most attractive feature of the HEARTH Act is its flexibility. As the law itself makes clear, tribes are not required to abandon the secretarial approval requirement for surface leasing unless they choose to opt in to the HEARTH Act.[29]

The HEARTH Act is not an "all or nothing" proposition. Tribes that opt in to the HEARTH Act can choose to reclaim authority over as much or as little surface leasing on their own lands as they determine. Nothing in the act prevents a tribe from promulgating its own leasing regulations to govern only residential leasing, or to govern all surface leasing in a defined geographic area. Moreover, tribes that have gone "all in" under the HEARTH Act may continue to submit any particular lease to the Secretary of the Interior for approval under the Department of the Interior's regulations.

The Pueblo of Sandia's leasing regulations offer an example of this point. It adopted leasing regulations in 2013 that govern business leases on its lands; those regulations do not apply to residential or agricultural leasing of the tribes lands.[30] The Secretary of the Interior approved those regulations on March 14, 2013.[31]

This flexibility allows tribes to experiment with their own land use and development policies while also looking to the Department of the Interior's regulations as a familiar backstop. Even more importantly, tribal regulations adopted under the HEARTH Act will free tribes from many of the problems and delays associated with the secretarial approval requirement, potentially spurring economic and housing development on tribal lands.

It is important to offer a reminder that every coin has two sides. While the HEARTH Act restores inherent tribal authority over land use determinations, it also relieves the federal government of liability for losses sustained as a result of leases approved under tribal leasing regulations.[32] This is a significant departure from longstanding federal policy, where the Secretary of the Interior bears a risk of liability for damages stemming from the approval of leases of Indian lands. The secretary ordinarily bears that risk as part of her fiduciary responsibilities in holding lands in trust for Indians.[33]

The HEARTH Act also vests the Secretary of the Interior with

authority to review whether a tribe has complied with its own leasing regulations—effectively granting the secretary the power to interpret tribal laws.[34] This authority includes the ability to enforce the terms of any lease approved under tribal leasing regulations, as well as the authority to rescind tribal leasing regulations.[35]

Where Do We Go from Here? Open Questions Under the HEARTH Act

As noted above, the HEARTH Act marks a transformation in federal Indian law; *all* tribes now have the ability to lease their own lands without secretarial approval of each individual lease. A shift in policy this dramatic is bound to raise some important questions. Below are two questions that have yet to be answered under the new law.

What is the scope of the environmental review process mandated under the HEARTH Act?

The HEARTH Act requires that tribal leasing regulations "provide for an environmental review process" that identifies significant environmental effects.[36] That environmental review process must also ensure that:

> (aa) 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; and
> (bb) the Indian tribe provides responses to relevant and substantive public comments on any such impacts before the Indian tribe approves the lease.[37]

The HEARTH Act does not define any of the operative terms in these provisions, including "significant environmental impacts" and "public." The HEARTH guidance published by the Bureau of Indian Affairs in 2013 does not clarify these questions, instead recommending that tribes themselves define the terms in their own regulations.[38]

During HEARTH Act discussions, some members of Congress and officials from several federal agencies considered modifying the language to make the National Environmental Policy Act (NEPA)[39] applicable to tribal lease approvals.[40] That idea was ultimately rejected in favor of the language that was signed into law.

The HEARTH Act's environmental review provisions resemble some of the principles found in both NEPA and its implementing regulations at Title 40 of the Code of Federal Regulations. Nevertheless, the language in the HEARTH Act is far less comprehensive than NEPA and its implementing regulations. NEPA governs the conduct of federal decision-makers, whereas the HEARTH Act establishes minimum criteria for tribal policy makers when enacting tribal laws. Thus, NEPA-associated case law should not serve as a binding precedent on the scope of tribal environmental review processes under the HEARTH Act.

The question of the scope of the HEARTH Act's environmental review provisions will likely arise in a case where a tribe leases its land for a controversial commercial development. If tribal leasing regulations define the term "public" narrowly, for purposes of notice and comment—such as to only include tribal members or people living within the boundaries of a reservation—it is possible that a non-Indian resident of a neighboring community could challenge the process as insufficient under the HEARTH Act.[41] Similarly, tribes may receive challenges to their leasing regulations where aggrieved individuals disagree over whether a tribal lease approval will have "any significant effects" on the environment.

These questions should caution tribes to be clear when establishing an environmental review process under the HEARTH Act.

What effects will tribal leasing regulations have on taxation of improvements and activities on tribal trust lands?

Disputes over state and local government taxation of activities on Indian lands have shaped the contours of federal Indian law for the past century. While state and local governments cannot levy taxes directly upon tribal trust lands, they may tax activities that occur on those lands in certain instances.[42]

The Department of the Interior addressed state and local taxation of Indian lands in 2012, when it published revised regulations governing leasing of Indian lands.[43] Those new regulations state:

> **§ 162.017 What taxes apply to leases approved under this part?**
> (a) Subject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.
> (b) Subject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.
> (c) Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.[44]

The HEARTH Act is not an "all or nothing" proposition. Tribes that opt in to the HEARTH Act can choose to reclaim authority over as much or as little surface leasing on their own lands as they determine.

The preamble to the revised leasing regulations contained a discussion of the taxation provisions. That set forth several justifications for the tax provisions, including a statement that both federal and tribal interests in leasing on Indian lands "are very strong" when considered under the balancing test the Supreme Court endorsed in *White Mountain Apache Tribe v. Bracker*.[45] The preamble also stated that taxation is an "important aspect of tribal sovereignty and

self-governance," citing *Merrion v. Jicarilla Apache Tribe*.[46] At the same time, the preamble also cites the doctrine of federal pre-emption as a justification for the taxation provisions.[47]

The HEARTH Act requires tribal leasing regulations to be "consistent with regulations issued by the Secretary under [25 U.S.C. § 415(a)]."[48] It is unclear whether the Department of the Interior would approve tribal leasing regulations that attempt to foreclose state and local government taxation in a manner similar to 25 C.F.R. § 162.017.

The department's *Bracker*-based and *Merrion*-based justifications for the tax language in the federal leasing regulations suggest that tribes could adopt similar regulations that would satisfy the HEARTH Act's "consistent with" requirement. It is less clear, however, that the department's pre-emption-based justification for the taxation provisions in its leasing regulations would support a conclusion that tribes can cloak themselves in the federal government's power to pre-empt state laws.

Even if the Department of the Interior did approve tribal leasing regulations that foreclosed state and local government taxation of Indian lands, it is unclear whether such a provision would survive a challenge brought by a state or local unit of government attempting to levy taxes on improvements constructed by non-Indians pursuant to a lease of tribal lands.[49]

Tax disputes between tribal and state governments, and tribal and local governments, have shaped the limits of tribal and state power over Indian lands; and, tribal efforts to foreclose state and local taxation under the HEARTH Act could open a new line of cases that would reshape the boundary between tribal and state power over Indian lands. The outcome of those disputes could turn upon whether a court views the HEARTH Act as a federal delegation of power to Indian tribes, or a relaxation of the restrictions placed upon the inherent authority of tribes to control the use of their own lands.

Conclusion

The HEARTH Act marks one of the largest shifts in federal Indian leasing policy in the past century. Allowing tribes to opt out of the secretarial approval requirement for leasing their own lands has the potential to transform land use and development across Indian Country. This new law offers tribes great flexibility in determining the extent to which they would reassert their inherent authority over the use and development of their own lands. Under the HEARTH Act, tribes can establish their own leasing policies and control as much or as little of the leasing process on their lands as they choose, provided that their own regulations are consistent with federal Indian leasing regulations. Finally, the resolution of important questions related to environmental review and taxation will shape the application of the HEARTH Act and help determine how useful the law will be in meeting the objectives of Indian tribes. ⊙

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Endnotes

[1]1 Stat. 137 (1790) (codified at 25 U.S.C. § 177).

[2]*Id*. at § 4.

[3]Act of Feb. 28, 1891; 26 Stat. 795, § 3 (emphasis added).

[4]Section 17 of the Indian Reorganization Act of 1934 did authorize tribal corporations to lease Indian lands for business purposes for a period of up to 10 years. See, Act of June 18, 1934; 48 Stat. 984, § 17 (codified at 25 U.S.C. § 477).

[5]Indian Long-Term Leasing Act of 1955; 69 Stat. 539 (codified at 25 U.S.C. § 415 et seq).

[6]In the author's view, tribes and individual Indians have the inherent authority to control the use and development of their own lands. Federal law does not vest them with this authority. Therefore, federal law acts as a restriction on this inherent authority, and, any federal enactments relating to Indian leases either enhance or relax this restriction.

[7]25 U.S.C. § 477. Congress has amended the Long-Term Leasing Act on dozens of occasions since 1955 to authorize specific tribes to enter into leases for up to 99 years.

[8]See, 25 U.S.C. § 415(b).

[9]*Id*.

[10]*Id*.

[11]P.L. 112-151.

[12]See, 25 U.S.C. § 415(e).

[13]25 U.S.C. § 415(e)(1).

[14]25 U.S.C. § 415(e)(2)-(3).

[15]The Puyallup Tribe of Indians, the Swinomish Indian Tribal Community, and the Kalispel Tribe of Indians were later included in 25 U.S.C. § 415(b) alongside the Tulalip Tribes. As noted above, the Navajo Nation was authorized to lease its lands without secretarial approval in 2000.

[16]In one of its earliest Indian law cases, the Supreme Court described the relationship between Indian tribes and the United States as resembling "that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Over time, that relationship has been more accurately described as that of a beneficiary to a trustee, with the United States serving as the trustee. See, *United States v. Mitchell*, 463 U.S. 206 (1983). Within that relationship, the Secretary of the Interior is charged with fiduciary responsibilities in carrying out the United States' Indian policies.

[17]In 2012, the BIA published amended regulations governing the leasing of Indian lands under 25 U.S.C. § 415 that included deadlines by which a lease of Indian lands must either be approved or disapproved. See, Final Rule, 77 Fed. Reg. 72440 (Dec. 5, 2013); and, 25 C.F.R. Part 162.

[18]See, e.g., Elizabeth Ann Kronk Warner, *Tribal Renewable Energy Development Under the HEARTH Act: An Independently Rational, but Collectively Deficient Option*, at 20 (March 11, 2013) University of Kansas Law School Working Paper, available at Social Science Research Network: ssrn.com/abstract=2231755

("Because the federal government must approve leases of tribal lands under the existing scheme, it can take substantially longer to put land in Indian country into renewable energy development.").

[19]See, Reid Peyton Chambers and Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stanford L. Rev. 1061, 1062 (1974) ("[A]lthough business leases were not formally prohibited [before the Long-Term Leasing Act], the effect was to discourage commercial development and use of Indian lands by non-Indians.") Moreover, 25 U.S.C. § 81 is only applicable to Indian tribes, which means that individual Indians cannot take advantage of agreements under this statute.

[20]25 U.S.C. § 415(h)(1).

[21]25 U.S.C. § 415(h)(3)(B).

[22]25 U.S.C. § 415(h)(4).

[23]25 U.S.C. § 415(h)(1).

[24]25 U.S.C. § 415(h)(2).

[25]*Guidance for the Approval of Tribal Leasing Regulations under the HEARTH Act*, NPM-TRUS-29 at 2 (Jan. 16, 2013) [hereinafter HEARTH guidance], available at www.doi.gov/cobell/commission/upload/National-Policy-Memorandum-HEARTH-Act.pdf.

[26]*Id.* (emphasis added).

[27]See, *Id.* at 5.

[28]See, *Id.* at 6 (stating that tribal regulations must address whether insurance and performance bonding is required).

[29]See, 25 U.S.C. § 415(h)(1) ("At the discretion of any Indian tribe, any lease by the Indian tribe … shall not require the approval of the Secretary …")

[30]The Pueblo of Sandia's Leasing Regulations and What Businesses Need to Do to Enter into Leases, Modrall Sperling Native American Law Watch (2013) (modrall.com/Files/Docs/Pueblo%20of%20Sandia%20Leasing%20Regulations%20Article.pdf).

[31]*Id.*

[32]25 U.S.C. § 415(h)(7)(A).

[33]See, e.g., *United States v. Mitchell*, *supra* note 15.

[34]See, 25 U.S.C. § 415(h)(8).

[35]*Id.*

[36]25 U.S.C. § 415(h)(3)(B).

[37]25 U.S.C. § 415(h)(3)(B)(ii)(II).

[38]See, HEARTH Guidance, *supra* note 24 at 7.

[39]42 U.S.C. §§ 4321 et. seq.

[40]This assertion is based upon firsthand accounts of the author, who participated in many of the discussions about whether the HEARTH Act should extend NEPA to tribal governments. NEPA's environmental review provisions apply to agencies of the federal government and are not directly applicable to Indian tribes. See 42 U.S.C. § 4332.

[41]The HEARTH Act does provide a review process for any interested party to challenge decisions under tribal leasing regulations. Any interested party seeking to do so must first exhaust tribal remedies. Then party may petition the Secretary of the Interior to review the tribe's compliance with its own leasing regulations. If the Secretary of the Interior determines that the tribe's regulations were violated, she may remedy the violation (which may include rescinding the approval of the tribe's leasing regulations). See, 25 U.S.C. § 415(h)(8).

[42]See, *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d. 457 (2d Cir. 2013).

[43]Residential, Business, and Wind and Solar Resource Leases on Indian Land Final Rule, 77 Fed. Reg. 72440 (Dec. 5, 2012).

[44]25 C.F.R. § 162.017.

[45]77 Fed. Reg. at 72447 (Dec. 5, 2012). In *White Mountain Apache Tribe v. Bracker*, the Supreme Court examined whether certain state taxes were applicable to activities occurring on the tribe's reservation. The Court stated that it would analyze the interests of the tribal, federal, and state governments to determine whether the taxes would apply. See, *Bracker*, 448 U.S. at 145.

[46]*Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); 77 Fed. Reg. at 72447-72448 (Dec. 5, 2012).

[47]*Id.* at 72447 ("In addition, the Federal regulatory scheme is pervasive and leaves no room for State law.")

[48]25 U.S.C. § 415(h)(3)(B).

[49]One local government has already challenged the taxation provisions in the Department of the Interior's revised leasing regulations. See, Complaint at 1, *Desert Water Agency v. United States Department of the Interior*, No. CV-13-606 (C.D. Cal. 2013).