



HEARTH Act Presents Opportunity for Tribes to Improve Business Site Leasing in Indian Country.

The Act: On July 30, 2012, President Obama signed the Helping Expedite and Advance Responsible Tribal Homeownership (“HEARTH”) Act, sponsored by Representative Martin Heinrich (D.N.M.) and passed with strong bipartisan support. The HEARTH Act grants Indian tribes the authority to implement their own programs to approve leases for business, residential, and other purposes, pursuant to tribal regulations approved by the Secretary of the Interior (“Secretary”). Although much of the commentary on the Act focuses on its effect for residential leasing and mortgaging, we focus here on its impact on business site leasing, which complements the beneficial economic development effect of its residential application. If tribes implement this program, this change in the law promises to reduce delays arising from Bureau of Indian Affairs (“BIA”) approval processes for business leases on tribal lands.

The HEARTH Act amends the Indian Long-Term Leasing Act (a/k/a Business Site Leasing Act), 25 U.S.C. § 415, to extend to all federally recognized tribes the authority currently enjoyed by the Navajo Nation and certain other Congressionally-authorized tribes to enter into leases pursuant to tribal regulation, and without the requirement of federal lease approval. Excluded from the HEARTH Act’s process for transfer of authority to tribes are leases for exploration, development, or extraction of mineral resources. Business or agricultural leases that may be approved by tribes are limited to twenty-five years (with the possibility of two renewal terms of equal length), while leases for public, religious, educational, recreational, or residential purposes may be up to seventy-five years. Tribes may not approve leases for individually owned Indian allotted land.

Significantly, the HEARTH Act permits tribes with approved programs to conduct environmental analyses in lieu of federal agency compliance with federal environmental law, such as the National Environmental Policy Act, enabling faster review, particularly in coordination with prospective lessees. Tribal leasing regulations submitted to the Secretary for approval must include a process for identifying and evaluating potentially significant environmental effects of the lease and associated activities, seeking public comment on those effects, and responding to any comments and projected effects. If requested by a tribe, the Secretary will provide a tribe with technical assistance in developing an environmental regulatory review process. For federally-funded projects, a tribe may rely on a federal environmental analysis.

Parties seeking review of actions taken pursuant to tribal regulations approved by the Secretary under the HEARTH Act must exhaust tribal remedies before appealing to the Secretary. If the Secretary concludes that tribal regulations were violated, after notice, a hearing, and an opportunity to cure, the Secretary may take reasonable action (as a part of the federal government’s trust responsibilities), including rescinding the approval of the tribe’s regulations and reasserting federal responsibility for leasing of the tribe’s lands.



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The Effect: With the passage of the HEARTH Act, Indian tribes now have the opportunity to assume substantially increased authority to develop private investment and economic development in Indian country. Although tribes must develop programs and expertise in environmental compliance before being able to conduct the necessary environmental assessments prior to lease approvals, the ability to approve leases will allow tribes to exercise greater autonomy over tribal economies.

The HEARTH Act also presents opportunities for increased economic development in Indian country. The law allows businesses to work directly with tribes for the approval of all leases save those for the mineral extractive industries. The law will benefit businesses as they seek to attract a qualified workforce, as the HEARTH Act makes it easier for tribal members to own homes, and for non-tribal members to lease homes on Indian lands, which have been inhibited by delay and uncertainty arising from BIA approval processes.

A Proviso: Until such time as tribes pass and receive Secretarial approval of the necessary regulations, and develop environmental expertise, businesses in Indian country must continue to seek approval from the Secretary of the Interior for business on trust or restricted tribal lands. Although historically tribal leasing regulations have not been approved quickly (it took approximately six years for the leasing regulations of the Navajo Nation to receive approval, and over a decade for regulations to be approved for the Tulalip Tribes), it is to be hoped that the HEARTH Act will result in a speedier process for regulation approvals.

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