

The HEARTH Act of 2012 and the Navajo Leasing Act of 2000: Financial and Self-Determination Issues

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This article discusses funding and self-determination issues for tribes under the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (“HEARTH Act”), Pub. L. No. 112-151 (codified at 25 U.S.C. §§ 415(d), 415(h)). The article also discusses similar issues experienced by the Navajo Nation under a precursor law, the Navajo Trust Land Leasing Act of 2000 (Navajo Leasing Act), Pub. L. No. 106-568, § 1203(2) (codified at 25 U.S.C. § 415(e)). The HEARTH Act amended the Indian Long-Term Leasing Act of 1955 at 25 U.S.C. § 415(h) to provide tribes with an option to independently approve their own tribal trust land leases under tribal leasing laws. Tribes may exercise the act’s self-management option in agricultural, business, renewable energy, public purpose, religious, educational, recreational, and residential leases after voluntarily adopting tribal leasing regulations that are “consistent” with current federal leasing regulations at 25 C.F.R. part 162 and obtaining approval of those tribal regulations by the Secretary of the Interior.

Twelve years earlier, the Navajo Leasing Act had given the option only to the Navajo Nation. The HEARTH Act extended the Navajo Leasing Act option to all tribes, with the addition of a requirement that an opt-in tribe have in place a process for environmental review that identifies

and evaluates any “significant environmental impacts,” allows for public comment, and provides for responses by the tribe. 25 U.S.C. § 415(h)(3)(B). While the statutory language uses words that are also used in the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(C), and its implementing regulations, 40 C.F.R. parts 1500–1508, the HEARTH Act requirements are, in certain ways, quite different from the requirements of the NEPA process. Those differences, however, are beyond the scope of this article.

A HEARTH Act opt-in tribe needs the necessary infrastructure to monitor and review leases for those portions of the leasing program that the tribe chooses to take over from the Bureau of Indian Affairs (BIA). The tribe must continue providing documentation of leases made under tribal law for recording at the BIA Land Title Records Office (LTRO). 25 U.S.C. § 415(h)(6). Documentation of lease payments made to the tribe must also be provided to BIA. *Id.* The oversight powers of the Secretary of the Interior also continue, as the act authorizes the secretary to receive complaints and take any action to remedy violations of the secretarial-approved tribal lease laws, including rescission of its approval. 25 U.S.C. § 415(h)(8)(1).

During congressional hearings on the proposed HEARTH Act, Governor Everett Chavez, representing the All-Indian Pueblo Council, expressed his hope that the act “would allow tribes to make our own decisions about how our land is used.” *H.R. 2523, Helping Expedite and Advance Responsible Tribal Homeownership Act or the HEARTH Act: Legislative Hearing Before the H. Comm. on Nat. Resources*, 111th Cong., 1st Sess., Serial No. 111-39 (2009) (statement of Gov. Everett Chavez, All-Indian Pueblo Council). However, the HEARTH Act does not simply hand over tribal trust land lease approvals to tribes to administer as they will. HEARTH Act opt-in tribes are essentially required to adopt and maintain federal long-term Indian trust land management lease types, terms, and general processes as well as federal environmental protection priorities, rather than being able to freely devise land use processes pursuant to tribal priorities. Regardless of whether a tribe’s actual community land use needs are supported by the federal lease system, a HEARTH Act opt-in tribe must enshrine that system in its internal law. Tribes should also be aware that tribal administration of leases under tribal law pursuant to the HEARTH Act is an unfunded option.

An Unfunded Option

While tribes who acquire increased control over the management of federal programs that impact their members, resources and governments under the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, are provided federal funding under contracts or compacts, HEARTH Act tribes—having voluntarily made federal leasing regulations part of their own internal tribal laws—are viewed by the federal government as merely implementing internal tribal mandates and taking on no federal trust responsibility functions that the federal government is obligated to support. The HEARTH Act does, however, provide for

discretionary technical assistance to tribes through self-determination contracts for “development of a regulatory environmental review process.” 25 U.S.C. § 415(h)(3)(C), (D).

In the run-up to passage of the HEARTH Act, the Congressional Budget Office (CBO) determined the act is a zero cost proposal, since it contains no “intergovernmental mandates as defined in the Unfunded Mandates Reform Act.” Congressional Budget Office, Cost Estimate for H.R. 205 Helping Expedite and Advance Responsible Tribal Homeownership Act of 2011 (Dec. 16, 2011), www.cbo.gov/publication/42796. Specifically, the CBO determined that the act does not involve a tribe’s participation “in programs and services conducted by the Federal Government” that would mandate contract funding under the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638 (codified as amended at 25 U.S.C. § 450 et seq.). As if to demonstrate tribes’ awareness that the option is unfunded, the legislative record includes a statement from a representative from the National American Indian Housing Council, acknowledging its understanding that the act “may save money [to the federal government] by transferring activities from the Federal to tribal governments.” *S. 546, the Little Shell Tribe of Chippewa Indians Restoration Act of 2011; S. 636, a Bill to Provide the Quillette Indian Tribe Tsunami and Flood Protection, and for Other Purposes; and S. 703, the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2011: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong., 1st Sess. (2011) (statement of Cheryl A. Causley, Chairwoman, the National American Indian Housing Council).

By the time the HEARTH Act was enacted, the Navajo Nation had had the option under the Navajo Leasing Act for over a decade but had only begun implementing a tribal business leasing law for less than five years. The Navajo Nation

has a gargantuan reservation landmass of 27,413 sq. miles, straddling Arizona, New Mexico, and Utah and a population of 173,667. It is by far the largest tribe by landmass in the United States, comprising 47 percent of all reservation land areas. The next largest tribe by landmass, the Osage Nation, is only 1/10th the Navajo Nation's size at 2304 square miles. Being the first to be given what other tribes viewed as self-governance privileges, the Navajo Nation was highly motivated to make its experiment a success. The Navajo Nation commenced its opt-in in the area of business leasing, obtaining secretarial approval for its business site leasing regulations in 2003 and issuing its first business leases in 2007. Like the HEARTH Act, the Navajo Leasing Act was unfunded, the CBO having reached a finding that the Navajo Act also involved "no intergovernmental mandates." Congressional Budget Office, Cost Estimate for S. 2665 Navajo Nation Trust Land Leasing Act of 2000 (Oct. 2, 2000), www.cbo.gov/publication/12866.

The Navajo Nation offered bitter testimony on its immense costs to the House Committee on Natural Resources in 2009 in hearings on H. 2523 proposing the HEARTH Act. Testifying on this bill, Arvin Trujillo of the Navajo Nation Division of Natural Resources (NNDNR) took singular issue with the CBO's finding on the Navajo Act, calling it "inexplicable." *H.R. 2523, Helping Expedite and Advance Responsible Tribal Homeownership Act or the HEARTH Act: Legislative Hearing Before the H. Comm. on Nat. Resources*, 111th Cong., 1st Sess., Serial No. 111-39 (2009) (statement of Arvin Trujillo, Exec. Dir., NNDNR). He described how the Navajo Nation, in taking on business leasing, had been promised cadastral surveys by BIA that ended up to be nonexistent or very old, dating from the 1920s, and "tied to rocks and trees." Additionally, BIA's Trust Asset and Accounting Management System (TAAMS), designated as the repository of all Indian land title records and managed by the BIA LTRO, was so insufficient and

slow that the Navajo Nation had to invest substantial capital to establish its own Navajo Land Data System to pull in all land titling and leasing information on a single database rather than rely on BIA to maintain and supply that information. In his opinion, the Navajo Leasing Act had "only transferred the costs and burdens of compiling and approving the lease information without the benefits." *Id.* H.R. 2523 died in committee. Two years later, the HEARTH Act proposal was revived via H.R. 205. The legislative record of H.R. 205 notes that the Navajo "pilot" had been a "success" after implementation of "over a decade" and contains no testimony on the Navajo Nation struggles with meeting costs. 158 CONG. REC. H2682, H2484 (daily ed. May 15, 2012) (statement of Rep. Tom Cole). To date, the author is unaware of any formal challenges to the CBO's findings of "no intergovernmental mandates" in both the HEARTH Act and Navajo Act.

Approval of the Navajo Nation Leasing Regulations

In 2013, Navajo Nation Department of Justice lawyer Karis Begaye described major disagreements with BIA during the drafting process of the Navajo Nation's business site lease regulations, with the Navajo Nation trying to maximize tribal autonomy and BIA insisting that the Navajo regulation substantially mirror part 162. Even after secretarial approval of the Navajo Nation's business lease regulations, BIA insisted that it would continue to be involved in monitoring and review unless a satisfactory tribal infrastructure was in place for those functions. *Tribal Land Leasing: Opportunities Presented by the HEARTH Act & the Newly Amended 162 Leasing Regulations*, National Congress of American Indians webinar (published on Mar. 29, 2013) (presentation of Karis Begaye, NNDOJ). Anxious to be as independent of BIA as possible, the Navajo Nation supplemented their regulations

with a detailed business land management plan that entailed the creation of management offices and staff and the elaborate delegation of duties across tribal divisions and agencies, at great cost. The Navajo Nation ultimately housed business leasing under the Navajo Nation Division of Economic Development and was finally able to issue its first business lease on March 1, 2007. *Id.*

The Navajo Nation began opting in to remaining lease areas with secretarial approval for its tribal General Leasing Regulations on May 16, 2014. *Id.* After promulgating internal regulations specific to home sites (residential leases) on October 4, 2016, that assigned responsibility for home site leases to the Navajo Nation Land Department (NNLD), Division of Natural Resources, the Navajo Nation began issuing its first home site leases under tribal law in the latter half of 2017. Mike Halona, land manager of the NNLD, has candidly described the tribe's need to hire surveyors and compliance officers and put management processes in place, involving designated tribal agencies, all of which involved costs and planning. *New Directions in Indian Land Management: Trust Reform and Tribal Empowerment*, Northern Arizona University, Office of Native American Initiatives Conference, Flagstaff, Arizona, November 28–30, 2016 (presentation of Mike Halona, NNLD). Unable to provide surveys which had been previously provided in-house by BIA at no charge to the applicant, the Navajo Nation's home site lease regulations require applicants themselves to pay for archeological surveys and hire private surveyors to generate certified land survey plats, which may cost in the several hundreds of dollars. With a tribal population with a 38 percent poverty rate, these are significant costs to the home site applicant.

The Navajo Nation is an anomaly among tribes, with funding and capacity issues that reflect its huge land and population size and complexity of its government. However, now more than five years since the HEARTH Act's enactment, funding and

capacity concerns are acknowledged as a major factor discouraging tribes from opting into the act. At a recent webinar published by the National Congress of American Indians, presenters including a BIA realty officer and representatives of the Ho-Chunk Nation of Wisconsin and the Agua Caliente Band of Cahuilla Indians of California discussed how a tribe with an approved tribal lease law may still elect to submit leases, on a lease-by-lease basis, to BIA for review and approval under 25 C.F.R. part 162. *Tribal Leasing and Self-Governance under the HEARTH Act*, National Congress of American Indians (NCAI) webinar presentation (published on Dec. 7, 2017). However, leases approved under part 162 and any amendments, assignments, or subleases will remain subject to part 162 until lease cancellation or expiration.

The BIA Leasing Regulations Get a Makeover

BIA's cumbersome lease approval process had been a major reason for the HEARTH Act's enactment. The stated intent of the HEARTH Act was to streamline the process for residential leases so that banks, which had balked at the lengthy waits first for lease approvals and then for lease mortgage approvals under BIA, would begin lending. At the time of the act's passage, BIA was taking two years to process leases, plus more time to approve lease mortgages. 158 CONG. REC. H2682, H2483–84 (daily ed. May 15, 2012) (statement of Rep. Martin Heinrich). The hope was that banks would buy in once the process was in tribal hands and could be rendered faster. However, soon once the act was enacted, the federal leasing regulations at 25 C.F.R. part 162 underwent significant revision. Bureau of Indian Affairs, Residential, Business, and Wind and Solar Resource Leases on Indian Land; Final Rule, 77 Fed. Reg. 72,440 (Dec. 5, 2012). This event suddenly made remaining under the C.F.R. a viable option for tribes moving forward.

New part 162 specifies a process for obtaining BIA approval of lease documents and imposes strict deadlines for BIA review of leases—within 30 days for residential leases and within 60 days for business leases—that may make continued reliance on BIA under part 162 a workable option for tribes. If BIA does not approve a residential sublease, or an amendment that does not substantially change a lease, within 30 days, the sublease is deemed approved and automatically goes into effect. New part 162 also moves away from the “one-size-fits-all” approach in favor of specific, tailored approaches to individual leases. Clarity for the submission and contents of the complete lease application package for BIA approval is provided, sure to cut down both confusion and lease approval time. New part 162 also limits grounds on which BIA may disapprove lease documents, e.g., providing that BIA must approve an assignment of a residential lease unless one of five specified circumstances exist or BIA finds a compelling reason to withhold its approval in order to protect the “best interests” of the Indian landowners. BIA approval is now also not required for assignments when leases are for housing or public purposes, or when the underlying lease specifies assignment to up to three named parties, or to a wholly owned lessee subsidiary. Flexibility is now permitted in determining fair market value, rental and performance bonds, and insurance, all of which should lead to enhanced support for tribal decision-making and swifter lease processing by BIA. See *Comparison of Current Leasing Rule to Final Leasing Rule*, BIA, <https://www.bia.gov/cs/groups/public/documents/text/idc-037329.pdf>. If faster turnaround for lease approvals is the motivation for a tribe to consider opting in to the HEARTH Act, the tribe may wish to consider whether its needs would be met if it continues to lease under revised part 162’s streamlined provisions. *Solar Energy Leases on Tribal Land: Project Regulatory Considerations*, BIA-Western Regional Office PowerPoint at 2, Aug. 2016. Nevertheless, presenters at the

December 7, 2017, NCAI webinar strongly advocated for opting in to the HEARTH Act, drawing attention to continued challenges at BIA.

One catch regarding the new C.F.R. “mandatory” deadlines for BIA to act on lease approvals is that the clock does not start running until BIA receives a “complete package.” This includes all surveys, environmental and other evaluations, and consents, which may be time-consuming and are the applicant’s responsibility to work with the tribe to provide. Additionally, BIA resources may not be up to their new regulatory responsibilities. The BIA TAAMS software was intended to record completed lease documents, not track the leasing process, and BIA may still lack sufficient software to track its new deadline targets. Flagstaff conference, *supra* (Presentation of Sharlene Round Face, Chief, BIA Division of Real Estate Services). BIA staff has been cut nearly in half since the Indian Self-Determination Act was passed in 1975, followed by a hiring freeze. Kevin Gover, *An Indian Trust for the 21st Century*, 46 NAT. RESOURCES J. 317, 349 (2006). Continuing resolutions aside, in May 2017, the president proposed to decrease the Indian Affairs budget by \$303.3 million and reduce its staff by 241 full-time staff.

<https://www.bia.gov/sites/bia.gov/files/assets/as-ia/obpm/pdf/idc2-064385.pdf>.

Two Examples of HEARTH Act Opt-in Tribes

There has not been a rush by tribes to opt in to the HEARTH Act. Since enactment of the HEARTH Act in 2012, only 26 tribes have opted in, 25 of them in business leases, 5 also opting in to residential leases, and 1 in agricultural leases. An up-to-date list of opt-in tribes may be found at <https://www.bia.gov/bia/ots/hearth>. The Ho-Chunk Nation and Agua Caliente Band of Cahuilla Indians are two HEARTH Act opt-in tribes that have

achieved a substantial degree of success. The Ho-Chunk Nation issued its first batch of three residential leases within the first month of secretarial approval of its tribal business on February 4, 2015, residential and agricultural lease ordinances since then, has executed 25 residential, 9 business, and 4 agricultural leases and even hired in-house TAAMS staff with no funding issues. The Ho-Chunk land area, however, is rather small, at less than 11 square miles of largely non-rural trust lands scattered across three counties and two states. NCAI December 7, 2017, Tribal Leasing webinar (Presentation of Matthew Carriaga, Realty Director, Ho-Chunk Nation).

The Agua Caliente Band, the largest landowner in the desert resort of Palm Springs, California, manages more than 20,000 leases and has opted in to HEARTH Act tribal business leases. The band's land base is also rather small, at 31,500 checkerboard acres, and its trust services office shares a building with BIA. Like the Ho-Chunk Nation, the band has in-house certified TAAMS technicians and performs recordation of lease documents in-house, having taken on those functions through self-determination contracts. The band makes full use of the ability to go back and forth between its tribal business lease law and part 162 according to the needs of the tribe and the "comfort level" of investors and developers, who may favor leases under the C.F.R. NCAI December 7, 2017, Tribal Leasing webinar (Presentation of Cynthia J. Morales, Trust Services Director, Agua Caliente). A takeaway from Agua Caliente Band's experience is that a HEARTH Act tribal lease law is only one tool among many that a tribe may use to manage its trust land to maximize benefits to the tribe and its members.

Tribal Self-Determination

While the Navajo Nation found negotiations with BIA during the tribal regulatory drafting process under the Navajo Leasing Act frustrating, the HEARTH Act requires BIA to be flexible and deferential to tribes. In an interim guidance document on the act, BIA states that "Congress expressly rejected a 'meets and exceeds' standard during its final deliberations [on the Act]," describing the clear intent of the act as providing tribes with "the opportunity to exercise their inherent sovereignty in drafting regulations to meet their particular needs and to expedite the leasing process. In 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." *National Policy Memorandum: Guidance for the Approval of Tribal Leasing Regulations under the HEARTH Act*, NPM-TRUS-29 (Jan. 16, 2013). The interim guidance has now expired, but continues to be used as a reference until an update to the Indian Affairs Manual is released.

The interim guidance sets forth an extensive list of items to be included in a tribal regulation submitted for secretarial approval. The guidance also prescribes the minimum number of part 162 terms that the tribal regulations must define, although tribes are given maximum flexibility and are encouraged to create their own definitions of those listed items once these are identified in their tribal lease law. *Id.* However, the basic framework of the act—requiring "consistency" with the C.F.R. and subject to ongoing secretarial oversight powers—is non-negotiable. This means that there is only so much room for a tribe to tailor its lease law to community needs. To assist tribal regulation drafting, BIA has provided several model tribal leasing regulations at <https://www.bia.gov/bia/ots/hearth>. The act indemnifies the federal government, providing that the "United States shall not be liable for losses sustained by any party to a lease executed

pursuant to [approved] tribal regulations.” 25 U.S.C. § 415(h)(7)(A).

Cultural Traditions and Land Tenure

Navajo Nation tribal law recognizes that cultural heritage is “a living part of our community life and development [that gives] a sense of orientation to the Navajo People” and enshrines the need to “[u]se appropriate measures to foster conditions under which our modern society and our cultural resources can coexist in productive harmony and fulfill the social, economic and other requirements of present and future generations.” 19 N.N.C. §§ 1001(B)(2), 1002(A) (Navajo Nation Cultural Resources Protection Act). However, the tribe has not tailored its land use management schemes to its fundamental policy. Since fully opting all-in to the Navajo Leasing Act, all land use within the Navajo Nation now requires leases and permits that adhere pretty closely to federal leasing regulations. Even tribal laws mentioning or providing for “customary land use areas” and land withdrawals for community use ultimately require leases and permits for development and possession of those areas.

Upheaval has ensued at the community level since the Navajo Nation implemented its home site lease regulations and began issuing its home site leases in 2017. It is one thing to have a lease system used by the federal government. It is another thing entirely when that system is adopted and used by a community’s own tribe, on its own people. On March 17, 2018, the Navajo Nation Western Agency Council—the largest land area of five Navajo Nation agencies comprising 18 tribal chapters—passed a unanimous resolution urging that land use be “holistically planned to enable continuation of the Diné (Navajo) way of life, and must be premised upon [a foundational document setting forth] land use principles, laws and teachings embedded in [tribal fundamental law].” Resolution

No. WNAC18-03-NB8. The resolution was issued subsequent to formal statements by elders, youth, and traditional practitioners in the Kayenta Chapter denouncing the new tribal home site lease regulations as destructive of the Diné way of life. Formal Statement(s) Made at Natural and Traditional Council of Youth, Elders, and Medicine Diné, May 8, 2017, and December 18, 2017.

The Diné community approach to land use has traditionally been that land belongs to the Creator and must be used with proper stewardship. The Navajo Nation courts have in the past been emphatic that the collective Navajo people have chosen to use the common land for collective benefit under the spirit of *k'e*, with the notion of land management as a community’s “solemn responsibility.” *See, e.g., Atcitty v. District Court for the Judicial District of Window Rock*, 7 Nav. R. 227, 230 (Nav. Sup. Ct. 1996). However this concept is being steadily eroded.

Land being held for the sake of having land is a foreign concept. It was the federal government that first injected individual land parcel possession into reservation land use by trying to discourage seasonal camps and encourage homesteading instead. Article V of the Treaty of 1868 provided for farmlands to be individually or family held “so long as [the family] may continue to cultivate it,” which in modern times has translated to the automatic renewal of farm permits on the reservation, akin to ownership. The sense of ownership has also spilled over to other land uses that are not based on relationships and which may not be transferred even between members. Instead, land use “title” is conferred by government authorities through leases and permits that have evolved to single-use parcels getting smaller and smaller over time.

A recent government report notes the sentiment among many stakeholders that Indian Country

land “is generally not managed according to tribal priorities and does not reflect that Indian lands are intended for the use and benefit of Indian tribes and their members” but are instead “being managed according to priorities generally associated with public lands.” U.S. Gov’t Accountability Office, Report to the Chairman, Committee on Indian Affairs, U.S. Senate: Indian Energy Development: Poor Management by BIA Has Hindered Energy Development, GAO-15-502, 25 (June 2015), *cited in* Monte Mills, *What Should Tribes Expect from Federal Regulations? The Bureau of Land Management’s Fracking Rule and the Problems with Treating Indian and Federal Lands Identically*, 37 PUB. LAND & RESOURCES L. REV. 1 (2016).

The right to apply Indian customs, laws, and tribal jurisdiction to descent and distribution of property and rights of occupancy in tribal land is among the most basic powers of inherent sovereignty. Notwithstanding built-in flexibilities of the HEARTH Act, it still requires tribes to voluntarily adopt a foreign lease system in their internal tribal laws.

Beyond Leases and Permits

Alternatives for tribes beyond the lease and permit system do exist. The revised leasing regulations provide for land use to be authorized by a “tribal land assignment,” defined as “a contract or agreement that conveys to tribal members or wholly owned tribal corporations any rights for the use of tribal lands, assigned by an Indian tribe *in accordance with tribal laws or customs*.” 25 C.F.R. § 162.003. Tribal land assignments have no off-reservation equivalents and are entirely within the power of tribes to define so long as they violate no federal law. They are outside the federal trust responsibility, do not need to mirror any federal land use system, and are not accepted for recording in the BIA TAAMS system. *See*

Indian Affairs Manual, Real Estate Services, Tribal Land Assignments, pt. 52, ch.10, sec. 1.1–1.5.

Another way that tribes may authorize the use of tribal land without secretarial approval is to enter into a contract or agreement that does not encumber tribal land for seven years or more. 25 C.F.R. pt. 84, Implementing the Indian Tribal Economic Development and Contract Encouragement Act of 2000. Pub. L. No. 106-179 (amending 25 U.S.C. § 81). Types of agreements that do not require secretarial approval include subleases and assignments of leases under part 162, and “[c]ontracts or agreements that convey to tribal members any rights for temporary use of tribal lands, assigned by Indian tribes in accordance with tribal laws or custom.” 25 C.F.R. § 84.004(c), (d).

In the past, tribal land assignments and section 84.004(d) assignments have not been useful in obtaining bank mortgages or HUD funding due to their not being accepted for BIA-certified title recordation. The HEARTH Act may have made the financial environment surrounding such assignments more favorable, since HEARTH Act leases managed by tribes under tribal law also lie outside the federal trust responsibility and may, in the future, no longer need to be recorded in TAAMS once a tribe develops its own internal land data system.

Some tribes have provided such assignments for tribal members, including the Owens Valley Paiute-Shoshone (Ordinance Governing Land Assignments on Bishop, Big Pine, and Lone Pine Reservations, providing for conditional life estates with beneficiary preference rights, <http://www.bishoppaiutetribes.com/assets/ordinances/Land%20Ordinance.pdf>); the Duck Valley Shoshone-Paiute Tribes (Ordinance for Standard Homesite Assignments of the Governing Body of the Duck Valley Shoshone-Paiute Tribes, allowing

inter-member rentals, <http://www.shopaitribes.org/land/images/stories/pdf/homesite%20ordinance.pdf>); and the Te-Moak Tribe of Western Shoshone (Standard Homesite Assignments Ordinance, Ordinance of the Governing Body of the Te-Moak Bands of the Western Shoshone Indians, Nevada, allowing inter-member exchanges, <http://www.narf.org/nill/codes/temoakcode/standardhomesite.html>).

The full potential of such tribal land assignment systems for incorporating tribal traditions into land use management is not known. If that is a tribe's objective, then, in drafting tribal legislation, it will be important for the lawyers and others engaged in developing the legislation to have a full understanding of how tribal traditions operate with respect to land use practices.

Some limitations of such land assignments came into full view in 2014 concerning an attempt by the Tribal Council of the Chemehuevi Indian Tribe to use such assignments to encourage tribal members to return to their reservation, which had been in effect diminished in size by the building of Parker Dam, but was later partially restored when the waters of Lake Havasupai receded. The Chemehuevi Tribe enacted a creative ordinance for "land deed assignments" that would give returning tribal members hegemony over individual parcels akin to fee simple ownership. The Chemehuevi land deed assignments failed, however, when the Ninth Circuit found that they too closely resembled outright conveyances to tribal members with the tribe able to reclaim the land in only limited circumstances. *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900 (2014); see also *Chemehuevi Indian Tribe v. W. Reg'l Dir.*, 52 IBIA 192 (2010). In the course of more than 10 years of litigation, Chemehuevi held firm to their position that tribal members had ownership-like rights, despite lower tribunals giving the tribe opportunities to simplify their position to get in line with federal law. The Ninth Circuit

determined that the tribe would be required to gain Congress's approval pursuant to the Indian Non-Intercourse Act of 1834, even though the tribe would still hold title to the land.

Two federal statutes were implicated in the Chemehuevi Tribe's firmly held losing position: 25 U.S.C. § 177 (the Non-Intercourse Act) and 25 U.S.C. § 81 (implemented as amended through 25 C.F.R. pt. 84). The Non-Intercourse Act renders void any "purchase, grant, lease or other conveyance of lands" made by tribes unless otherwise expressly allowed by a treaty or convention. The Chemehuevi "land deed assignment," as drafted, was viewed by the Ninth Circuit as amounting to a forbidden conveyance. The tribe had submitted the assignments for BIA approval pursuant to 25 U.S.C. § 81, which requires such approval for any agreement with a tribe "that encumbers Indian lands for a period of 7 or more years." Section 81(d)(1) forbids BIA from giving their approval if it is determined that the agreement "violates federal law." The regulatory definition of "encumber" provides some examples of contracts or agreements that may be "encumbrances" but generally leaves the determination of whether a contract or agreement constitutes an encumbrance to be made by the secretary's designee on a case-by-case basis. 25 C.F.R. §§ 84.002, 84.005, 84.006.

The *Chemehuevi* case stands as a caution to tribes that when providing rights over land to their members the Non-Intercourse Act, intended to prevent losses of land to cunning outsiders, remains in force after more than two centuries. Traditional land principles of some tribes may actually favor collective community stewardship, perhaps with land held by a community-based or governmental entity for the benefit of all, rather than individual land possession. It may be possible to fashion some kind of creatively designed tribal land regulations supportive of a community's traditional relationship with land use that would not violate federal law, with tribal traditions serving as the driver of the

regulatory scheme. Otherwise, a tribe that seeks to enact a system that is not supported within the current framework may choose to press Congress for legislation to authorize such a tribal innovation.

Conclusion

Adoption of federal leasing regulations in an area as fundamental to inherent sovereignty as land use should be done by any tribe only after a full examination of a range of needs and alternatives, including community land use needs, what land management would best support tribal community life, potential harms to community life of any land use method, what the tribe hopes to achieve by using any land use management method, whether the method will achieve it, whether alternatives exist that may better serve the tribe's full range of goals, and finally, the costs.

Given its flexibilities, an assessment of the HEARTH Act option should also include which

kinds of land uses the tribe wants to authorize through a tribally administered leasing program, and, for those kinds of leases, whether developers would be encouraged to invest in a tribal-run system or may prefer to enter into a lease under part 162 of the C.F.R. with continued deep involvement of BIA. The tribe should also consider whether it is feasible for the tribe to go back and forth between tribal law and the C.F.R., which is permissible. For sovereignty, cultural heritage, and community protection reasons, an overarching foundational document should be in place, setting forth the customary methods, values, and principles of a tribe regarding land use, and the tribe's land use laws should actually be based on that foundational document.

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