

NATIONAL AMERICAN INDIAN HOUSING COUNCIL WHITE PAPER
ON LEGISLATION TO AMEND THE INDIAN LONG TERM LEASING ACT OF 1955

June 29, 2009

INTRODUCTION

Most Indian tribal land is held in trust or restricted status by the United States for the beneficial ownership of Indian tribes or individual Indians. While trust lands are not alienable, they may be leased to Indians or non-Indians for a variety of purposes under applicable law. One such law is the *Indian Long-Term Leasing Act of 1955* (the “1955 Act,” 25 U.S.C. §415) which, among other things, requires the approval of the Secretary of the Interior (“Secretary”) for the leasing of Indian trust and restricted Indian lands for residential leases. The regulations implementing the 1955 Act indicate that they apply to “Indian land” which is defined as “any tract in which an interest is owned by an individual Indian or tribe in trust or restricted status.” 25 C.F.R. §162.102.¹

The Secretary, through the Bureau of Indian Affairs (“BIA”), is responsible for administering the land leasing process and, except as described below, any lease that is not approved by the Secretary is invalid. The secretarial approval process can be lengthy, taking months and sometimes years, which can hinder housing, infrastructure, and related economic development on trust lands. Because of these lengthy delays, and the desire by individual Indian tribes for more authority and latitude in the leasing of their own lands, proposals to amend the 1955 Act are made regularly.

THE SECRETARY’S ROLE UNDER THE 1955 ACT

The 1955 Act authorizes leases for up to 25 years with an option for one additional 25-year term for a total 50-year term for “public, religious, educational, recreational, residential, or business purposes...” The *Native American Housing Assistance and Self Determination Act* (“NAHASDA,” 25 U.S.C. §4101) authorizes the leasing of trust or restricted Indian lands for “housing development and residential purposes” for 50-year terms but retains the requirement of secretarial approval to render the lease valid. *Id.* at §4211.

¹ The 1955 Act applies, therefore, to trust and restricted Indian lands, including Indian lands in the State of Oklahoma. In 1971 Congress enacted the *Alaska Native Claims Settlement Act* (“ANCSA,” 43 U.S.C. §1601 et seq.) and, as part of a comprehensive land settlement, extinguished Native claims to land based on aboriginal use and occupancy. In Alaska surface interests are owned by village and regional corporations established by ANCSA and are not subject to the 1955 Act. For purposes of Federal housing programs, Alaska Native areas are eligible locations for both the Indian Housing Block Grant as well as the §184 guaranteed home loan program authorized by the *Native American Housing Assistance and Self Determination Act*.

Before approving any lease or lease extension under the 1955 Act, the Secretary must review whether adequate consideration has been given to the following factors:

- The proposed use of leased lands with the use of neighboring lands;
- The height, quality and safety of structures or facilities to be constructed on leased lands;
- The availability of police, fire protection and other services;
- The availability of judicial venues for criminal and civil causes arising on leased lands; and
- The environmental effects of the proposed uses of the leased lands.

Leases negotiated by an Indian tribe or an individual Indian may include remedies agreed upon by the parties including a requirement that disputes be heard in tribal court. Leases may also be advertised or negotiated by the Secretary through the Bureau of Indian Affairs and the applicable regulation provides that in reviewing a negotiated lease for approval, the BIA “will defer to the landowners’ determination the lease is in their best interest, to the maximum extent possible.” 25 CFR §162.107.

Under the 1955 Act, the Secretary has authority to cancel leases if there are violations of lease terms and remains responsible for ensuring tenants meet their payment obligations to landowners and for ensuring tenant compliance with any operating requirements contained in the lease agreement. The Secretary may also take “immediate action” to recover possession from trespassers operating without a lease, and may take “emergency action” to preserve the value of the land. 25 CFR §162.108.

NEED FOR FLEXIBILITY IN SURFACE LEASING

In the 54 years since enactment, the 1955 Act has been subject to severe criticism for the statutory limits on lease terms as well as the time-consuming requirement that the Secretary review and approve lease agreements under the statute. Accordingly, some 45 Indian tribes have sought relief from the lease term limits contained in the 1955 Act through the enactment into law of specific, tribe-by-tribe Federal legislation.

THE TULALIP TRIBES LAND LEASING ACT

In 1970, Congress amended the 1955 Act to authorize the Tulalip Tribes of Washington State to lease trust lands, for purposes described in the 1955 Act except for the “exploitation of natural resources,” without securing the approval of the Secretary. Under the *Tulalip Tribes Land Leasing Act* (25 U.S.C. §415(b)), Tulalip lands may be leased as follows:

1. For up to 15 years if there is no option to renew;
2. For up to 30 years if there is no option to renew and the lease is issued pursuant to tribal regulations approved by the Secretary; and

3. For up to 75 years including any period of renewal if the lease is issued pursuant to tribal regulations approved by the Secretary.

In 1981, the Tulalip Tribes issued tribal regulations that were approved by the Secretary.

THE NAVAJO NATION TRUST LANDS LEASING ACT

In 2000, the Navajo Nation sought more sweeping changes to the 1955 Act and succeeded in having Congress enact the *Navajo Nation Trust Land Leasing Act* (25 U.S.C. §415(e)). The *Navajo Nation Trust Land Leasing Act* authorizes the Navajo Nation to negotiate and enter into lease agreements and renewals of leases of trust lands without the requirement that the Secretary review and approve such leases. The Act required the Navajo Nation develop regulations governing such leases including, among other requirements, an environmental review process, before it could institute its own land leasing regime. In July 2006, the Secretary approved the Navajo Nation's leasing regulations.

For business or agricultural leases, the initial lease term may be for up to 25 years with the option to renew the lease for two additional terms of 25 years each. For public, religious, educational, recreational, or residential purposes, the leases may be for a term of up to 75 years. While the *NAHASDA* authorizes 50-year leases of tribally-owned or individual Indian-owned trust or restricted lands for purposes of housing development and residential purposes, as noted above these leases are subject to the approval of the affected Indian tribe and the Secretary.

THE SECRETARY'S ROLE UNDER THE NAVAJO TRUST LAND LEASING ACT

The 2000 amendments maintain the Secretary's authority to take appropriate actions, including cancellation of the lease, in furtherance of the Federal trust obligation. The United States, however, is not liable for losses sustained by any party to a lease (including the Navajo Nation) entered into under the Navajo Nation's regulations.

Interested parties may, after exhausting tribal remedies, submit a petition to the Secretary to review the compliance of the Navajo Nation with the regulations approved by the Secretary. The Secretary may take actions deemed necessary to remedy the violation complained of, including rescinding the tribal regulations and re-assuming responsibility for approving leases for Navajo Nation trust lands.

SECTION 184 – THE HOME LOAN GUARANTEE

In order to address the lack of mortgage lending in Native communities, Congress established the Indian Home Loan Guarantee Program (known as the "Section 184 Program") to offer mortgage lending to eligible Native American individuals, families, tribes and tribally-designated housing entities. The Section 184 Program involves the issuance of a Federal guarantee by HUD on loans made by private sector lenders. Because tribal trust lands may not be foreclosed on in the case of a default, the Section 184 Program requires that the borrower have a valid leasehold in place and demonstrate as much on the application.

Under the Section 184 Program, the borrower and the Indian tribe would negotiate a lease agreement covering the relevant land and the lease would be subject to the approval of the Secretary. In lieu of using real property to collateralize the mortgage, the consideration for the loan is the structure itself and the leasehold interest in the homesite. In the event of a default, the structure and leasehold interest are subject to foreclosure. The requirement of secretarial approval in this instance, as in the others described above, is time-consuming and is a contributing factor to the low homeownership rate in Native communities.

PROPOSALS TO AMEND THE 1955 ACT IN THE 111TH CONGRESS

For years, legislation has been introduced to amend the 1955 Act to provide tribes 99-year lease authority on a case-by-case basis or to amend the Act to broadly reform the leasing approval process. Under current law, Indian tribes (except the Tulip Tribes and the Navajo Nation) are limited by two options: they may choose to operate under the strictures of the 1955 Act, complete with the requirement of secretarial approval or, alternatively, they may secure 99-year lease authority through the enactment of Federal legislation.

On May 20, 2009, Rep. Martin Heinrich introduced the “Helping Expedite and Advance Responsible Tribal Homeownership Act” or the “HEARTH Act” (H.R. 2523). The HEARTH Act offers willing Indian tribes the authority to enact their own tribal leasing regulations and to negotiate and enter into certain leases without the approval of the Secretary.

The Heinrich legislation would also require the BIA to prepare and submit to the Congress a report detailing the history and experience of Indian tribes that have chosen to assume responsibility for operating the Indian Land Title and Records Office (LTRO) functions from the BIA. Before Indian lands may be encumbered with a home mortgage, the BIA must prepare and issue a Title Status Report (“TSR”). In 1999 and again in 2005, the BIA issued guidance to its Regional Offices that this process should not, to the maximum extent possible, exceed 30 days.

In 2000, Congress enacted legislation to establish the *Indian Lands Title Report Commission* to make recommendations to the BIA on ways to improve the TSR process. To-date, the Commission has never met due to the failure of the last Administration to nominate commissioners.

Despite BIA aspirations that the TSR issuance should take no more than 30 days, Congress in 2005 determined that a more realistic timeline for TSR issuance is 6 months to 2 years. The study and report mandated by the Heinrich legislation will include a review of how the tribal management of the LTRO functions has fared and determine the challenges these tribes face in managing these functions.

H.R. 2523 was referred to the Committee on Natural Resources where it is currently pending. As of this date, no hearings have been scheduled on the measure.

NAIHC is the only national organization solely dedicated to the promotion, support, and encouragement of Indian tribes and tribally-designated housing entities (TDHEs) in their efforts to provide culturally-relevant, decent, safe, sanitary, and affordable housing for American Indians, Alaska Natives and Native Hawaiians. NAIHC has a membership of 267 tribes and TDHEs, representing nearly 460 Indian tribes, and provides its members with training, technical assistance, research, communications and advocacy.