Tribal Wind Farm Leases
Hearth Act Versus BIA Approval

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DOE TEP Peer Review Meeting
Helping Expedite and Advance Responsible Tribal Home Ownership

Tribes can develop and implement their own leasing regulations
Tribal regs can include a tribal NEPA process
Secretary must verify compliance before approval
Federal permits are still required
Tribal Regulation Design

* Tribal regulation must provide the same protections that BIA would provide “as much as possible”.
  * Gives tribes some latitude but BIA (Asst Secretary) must approve.
  * Tribes can approve their own NEPA.
    * Does not affect other federal law
      * Endangered Species Act
      * National Historic Preservation Act
      * Bald and Golden Eagle Protection Act
      * All others
  * Modeled on 25 CFR 162
On the other hand...

* BIA abdicates trust responsibility
  * BIA will not serve to protect the Tribe in disputes

However....

BIA, upon request of the tribe, can intervene and could cancel the lease.
Kaw Nation
Land Leasing Ordinance

* HEARTH Act Allows Tribal Land Leasing After Approval
* Kaw Ordinance submitted in November
* Approved by Kevin Washburn in December
* Kaw Approval of Chillico EA and Lease in December
* Limited Notice to Proceed Authorized
* Construction completed of 8000’ of Roads and 5 turbine excavations before December 31st.

* Chillico Project Now Qualified for PTC
National Wind Farm Construction Company and Local Subcontractors
Revised in January 2013

Imposes time limits for BIA review

Provides recourse for inaction by BIA

Creates a new Subparts
  * Wind Energy Evaluation Leases (WEEL)
  * Wind and Solar Resource Leases (WSRL)

Provides for BIA deferral to negotiated terms

Allows lease review without NEPA docs
Time limits

- Residential – 30 days
- Business/ Commercial – 60 days
- WEEL – 20 days
- Wind and Solar – 60 days
Starting the Clock!

Upon Receipt – acknowledge packet complete...

- If not – deficiencies listed (162.563)
- Tribal Authorization for the lease
- Valuation – or waiver
- Insurance – or waiver
- Performance Bond – or waiver
- Statement that land use is compliant with Tribal Law
- Environmental Documents
- Resource Development Plan
- Restoration and Reclamation Plan
- Corporate Qualifications and Experience
- Legal Description of the Land
- Corporate Documentation / Authority for the Lease
At Last…. A simple procedure to follow!
No Clock Start if BIA:

- Does not acknowledge receipt
- Does not send notice of deficiencies
- Lists deficiencies
- Shifts venue
- Questions Content
Time Limits and Recourse

1. Tribe Submits Lease Packet to BIA Local Agency
   - Resubmit
   - Packet Returned with deficiencies noted

2. BIA determines lease packet complete
   - YES
   - BIA Notifies Tribe of 60-Day Clock Start
     - Local Agency Process Lease 60 Days

3. Tribe Files Notice to Compel Action with Regional Director (RD) under 25CFR 162.588
   - BIA Regional has 15 Days to Respond
     - No Response
       - Tribe files Notice with BIA Director to Compel Action
         - BIA Director has 15 Days to Respond

4. RD Orders Superintendent To issue Decision
   - RD Issues Decision
   - BIA Director Orders RD or Superintendent to issue decision
   - BIA Director Issues Decision
Deferral to Negotiated Terms

- BIA can evaluate or Tribe can request waiver:
  - Valuation – lease rates
  - Insurance Requirements
  - Bonding Requirements

- BIA has to agree that terms or waivers are in the Tribe’s interest.

- BIA still has Trust Responsibility
NEPA

- Allows for review of the lease before or simultaneous with NEPA Review
- BIA or Other Federal Lead Agency
- EA – FONSI
- EIS – Record of Decision
- Lease Packet is incomplete until NEPA is done
- Permits as an aspect of NEPA
- BIA discretion over requirements
PERMITS

* US FISH AND WILDLIFE SERVICE
  * Endangered Species Act Section 7 Consultation
* BIA
  * National Historic Preservation Act -Section 106 Concurrence
  * SHPO Concurrence
* Army Corps of Engineers
  * 404 Consultation
  * Impacts to Wetlands and Waters of the US Permit(s)
* Take Permits
  * Eagles and Listed Species
More Permits and Consultations

- Bald and Golden Eagle Protection Act
- Migratory Bird Treaty Act
- NAGPRA
- Native American Religious Freedom

You always have to comply with federal law.

Invite Consultation with Federal Agencies early on
WEEL
Wind Energy Evaluation Lease

* Short-Term (3 years)
* Limited land (1 acre per MET Tower)
* Option for the WSRL
* 25 CFR 162 requirements are very similar to WSRL
* Good Practice with BIA Approval Process
  * 20-days
Wind and Solar Resource Lease
WSRL

* Numerous Requirements
  * Compliant Lease terms and legal protections
    * Solicitor’s review
  * Resource Development Plan
  * Corporate Qualifications Volume
    * Developer
    * EPC Contractor
    * Finance
  * NEPA
  * Permits
Hearth Act

- Asserts Tribal Sovereignty
  - Right to control trust land
- Retains control of lease terms
  - No BIA opinion of value
- Tribal NEPA process
  - Develop Tribal Capacity
- All leases including residential and commercial
- Faster
Things to Consider

- Record of BIA Performance
- Need for improved lease processes
- Tribal Capacity to implement and manage leases
- Tribal Capacity to implement and manage NEPA compliance
- Time
Things To Do

* Get Started Now
  * Hearth Act draft... examples available
    * Develop Tribal Capacity to Implement
  * Working with Local and Regional BIA
    * Let them know what you want to do
    * Get their input during the negotiations
    * Tell them what waivers you want
    * Do not take NO for an answer
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