“The HEARTH Act and Tribal Zoning as Tools for Agriculture”

This presentation speaks about the long process the Menominee Indian Tribe of Wisconsin has been on regarding their submission and request for tribal leasing regulations review and approval of the HEARTH Act: Residential, Business and Agricultural Leasing Regulations. Timelines, lessons learned, and next steps will be discussed, as well as correlations to tribal zoning ordinance development and amendment. A lens of improving tribal food system sovereignty and economic systems will be used during the presentation.

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Why?

HEARTH Act - General Summary

The HEARTH Act, (Helping Expedite and Advance Responsible Tribal Homeownership) was signed into law on July 30, 2012, amending the Indian Long-Term Leasing Act of 1955, 25 U.S.C. § 415. The “clear intent of the Act is to provide tribes with the opportunity to exercise their inherent sovereignty in drafting regulations to meet their particular needs and to expedite the leasing process.” The Act created a voluntary, alternative land lease process for tribes so that they may lease tribal land without BIA approval. A majority of leases utilized by Tribes can now be negotiated and entered without approval of the Secretary of the Interior.

1. Sovereignty and Jurisdiction to draft regulations to meet our particular needs and protections (unique constitutional needs, archeological reviews, heir/descendant rights, etc.)
2. Expedite the leasing process sometimes by years
3. Provide more certainty for Tribal members for investment, expansion, contracting
4. Meet qualifications for loan/grant providers and vendors/contractors
5. Economic Development
6. Importance of proper decision making – must be mindful of the diminishment of trust responsibilities inherent in us making decisions, not the federal government

1 National Policy Memorandum, NPM-TRUS-29, Bureau of Indian Affairs, Office of the Director, January 16, 2013
2 Tribally approved agricultural and business leases have a primary term of 25 years, and up to two renewal terms of 25 years; residential, recreational, religious, or educational purpose leases have a primary term of up to 75 years without approval of the Secretary.
Chapter 138
LEASES and MORTGAGES

Article I. HEARTH Act Leasing

HISTORY: Adopted in its entirety by the Legislature of the Menominee Indian Tribe
December 1, 2016 by Ord. No. 16-27; adopted and amended in its entirety by Ord. No. 18-38;
approved by the Secretary of the Interior on ##-##-####.

§ 138-1. Purpose.

The Menominee Indian Tribe historically inhabited more than 12 million acres of land in
what became the State of Wisconsin. Land cessions by treaties reduced Menominee
Land to about 235,000 acres by 1856. Tribal lands were further reduced by the disastrous
policy of Termination. Today, almost 90% of tribal land is held in sustained yield forestry
leaving only 10% for other uses.
§ 138-1. Purpose.

A. **Recognize the authority** of the Menominee Indian Tribe of Wisconsin to enter into, and issue, residential, agricultural, and commercial leases and to establish procedures for environmental review, approval, management, and enforcement of those leases.

B. This Article shall **govern and control the leasing of all Tribal lands** on the Menominee Indian Reservation.

C. This Article shall be liberally **interpreted and construed to implement** the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (“HEARTH Act”), which amended 25 U.S.C. 415, by **establishing a process under which leases will not require approval of the Secretary of the Interior if the Lease is executed under Menominee Tribal HEARTH Act Leasing Ordinance approved by the Secretary of the Interior**.

D. **Nothing** in this Article is intended to expand the authority or responsibility of the Secretary of the Interior beyond that provided under applicable federal statutes or regulations.

E. This Article shall serve to **promote self-determination**, encourage **economic self-sufficiency**, facilitate **economic development**, and further **promote investment in the tribal community** while maintaining the critical role and responsibility of **protecting Tribal Land and resources**.

A. Except as excluded under subsection 138-2 B, or as contrary to applicable federal statues or regulations, these regulations shall apply to the following Leases approved pursuant to and in accordance with this Article:

(1) To all future Leases providing for residential use
(2) To all future Leases providing for agricultural use; and
(3) To all future Leases providing for commercial.

B. This Article shall not apply:

(1) To Recreational leases, defined as Menominee Constitutional land use assignments;
(2) To the extent that any such land exists or may exists, to any lease of individually owned Indian allotted land; and
(3) Subsurface leases, including but not limited to mineral and water leases.
A. This Article may be amended through the ordinance process by majority vote of the Menominee Tribal Legislature, provided that no major substantive amendment hereto shall be effective unless approved by the Secretary of the Interior in accordance with applicable federal laws and regulations. Minor technical amendments shall be effective without approval by the Secretary of the Interior.
Timeline-Hearth Act Ordinance History

- **October 27, 2016** first **Public Hearing was held.** Comments and recommended changes start process. Tribal member comments surfaced that were not even discussed prior to public hearing. Actual ordinance development was years before the public hearing.

- **December 1, 2016** **Final Approval of Ordinance 16-27 by Menominee Tribal Legislature.** Ordinance approval starts the DOI/BIA review and approval process.

- **December 12, 2016,** Tribe submitted approved leasing code for review and approval according to 25 U.S.C. § 415.

- **March 13, 2017,** BIA sent letter acknowledging receipt of letter of request for review and approval from tribe on **December 19, 2016.** “(w)ithin120 days of the December 19th receipt date, April 18, 2017, the Division of Real Estate Services and Office of the Solicitor will conduct a joint review of the proposed Regulations. Upon completion of the review, we will contact the Tribe to discuss the review and any recommended or required revisions to the document. After the Tribe completes any required revisions, we will forward the Regulations to the Office of the Assistant Secretary – Indian Affairs for final review and Secretarial approval.”

- **June 19, 2017,** Tribe sent letter to BIA requesting HEARTH regulations status and update.

- **January 2018,** the Tribe received Chapter 138 back from the BIA and DOI review with comments that included required and recommended changes. Following that discussion, all HEARTH Act leasing regulations were separated from the Mortgage Articles and organized into its own Article. The required changes were made and the recommendations that expanded the maximum ability to lease and approval Tribal lands. The reorganization combined the general requirements for all of the leases and updated the specific requirements.

- **March 21, 2019,** the Menominee Tribal Legislature approved by legislative motion Ordinance 18-38, with amendments and reorganized. Actual Ordinance amendment process started earlier with Public Hearings.

- **April 12, 2019,** Tribe again submitted approved leasing code for review and approval according to 25 U.S.C. § 415.
Lessons Learned and Next Steps

Except for the lease term for agricultural leases, the addition of the Agriculture Department, and the definition of public for purposes of the environmental review, there were no major/substantive changes after the second review. There were many reorganization changes. The other changes based on DOI/BIA recommendations came straight from the CFR language so that the review would not have to start over again. If the Legislature is going to make any substantial changes, the BIA and DOI review process will likely have to occur again.

By-law II of the Constitution and Bylaws of the Menominee Indian Tribe of Wisconsin, Section 2, “Ordinance, Resolutions, and Motions,” (a) requires that “(a)ll acts of a general and permanent nature or those affecting compelling interests of the Tribe or tribal members shall be by ordinance.” This means any changes, no matter how small, to Ordinance 18-38, as approved on March 21, 2019, must complete the ordinance amendment approval process again to obtain approval by legislative motion.

Start the process now if you are thinking about it, the timeline can be extremely long. Expect long turnaround times. Election year transition and a “lost application” also were part of our process.
Lessons Learned and Next Steps


Remember the type and size of the agricultural leases you will apply this to, and modify accordingly. Tribes should refer to respective tribal ordinance and management plans while writing respective HEARTH Act related leasing provisions. Be unique to your constitution, tribal beliefs, land base, seasonality, and community wants and needs. **Our reference to AIRMA, or tribal ordinance and/or management plans** in the absence of AIRMA, will direct us when customizing an Agriculture and Food Systems Code or amending zoning and land use regulations and policy.

Be cognizant of your tribal infrastructure limitations and needed expansion. You may need extra staff, such as a realtor and maybe even a surveyor.

Upon final review and approval, the Tribe will need to update the policies, procedures, and documents for leasing to ensure compliance with the new law. Following that, the Tribe will be able to approve any leases within Article I. HEARTH Act Leasing without BIA approval.

Finally, here are links to our code(s) and to DOI-approved tribal HEARTH regulations and sample regulations. Waewaenen!

- Code of Menominee Indian Tribe of Wisconsin
  - [https://www.ecode360.com/11987441](https://www.ecode360.com/11987441)
- Regulations and Date Approved by The Secretary of The Interior
  - [https://www.bia.gov/bia/ots/hearth](https://www.bia.gov/bia/ots/hearth)