

Tribal Land Development: Legal and Regulatory Prepositioning

Prepared by

Pilar Thomas

Of Counsel

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Overview

- What can (and should) be regulated
- Typical types of legal and regulatory schemes (legal infrastructure) for land and resource development
 - Federal schemes
 - Tribal schemes
 - State and local government schemes
- Benefits of establishing legal infrastructure before begin development
- Developing legal infrastructure as part of planning process
- Best practices, practice models

Types of Development Activities

- Planning – policy
- Environmental assessment
- Site assessment
- Resource assessment
- Economic costs and benefits
- Infrastructure
- Construction

Tribal Legal and Regulatory Schemes

- Tribal Constitutional Authorities
- Tribal Ordinances

Federal Legal and Regulatory Schemes

- Indian Reorganization Act
- Long term Leasing Act
- Right of Way Act
- Tribal Energy Resource Agreements
- American Indian Land Consolidation
- National Indian Forest Management
- American Indian Agriculture Management
- Environmental Laws
- Federal delegations and authorities

State and Local Government Schemes

- Zoning
- Land management planning
- Taxation
- Business licensing and regulations
- Development regulations, permitting, fees
- Infrastructure development
- Utility regulations

Benefits of “Prepositioning” Legal Infrastructure

- Transparency
- Flexibility
- Control
- Targeted development
- Reduced costs and development timelines

Developing Legal Infrastructure

- What are your Tribal Laws and Ordinances
 - Land Use and Zoning
 - Environmental Laws
 - Tax Laws
 - Areas of Cultural Significance/No Development Zones
 - Building Codes/Inspectors

Developing Legal Infrastructure

- Leasing
 - Barrier is federal approval of all leasing
 - Hearth Act of 2012
 - Hearth Act allows Tribes to lease restricted lands for residential, business, public, religious educational or recreational purposes without the approval of the Secretary of Interior.
 - Allows Tribe's greater self-determination
 - Upon Secretarial approval of tribal regulations, tribes have authority to process land leases without Bureau of Indian Affairs approval.
 - Greatly reduces the time it takes to approves leases for homes and businesses

Developing Legal Infrastructure

- Hearth Act
 - How does it work?
 - Specifically, it allows tribes to execute agricultural and business leases of tribal trust lands for a primary term of up to 25 years plus two renewal terms of 25 years.
 - Leases of tribal trust land for residential, recreational, religious or educational purposes may be executed for a primary term of 75 years
 - The Secretary is required to approve tribal leasing regulations if they are consistent with DOI leasing regulations at 25 CFR Part 162 and they provide for an environmental review process and meets requirements set forth in the Act.
 - Tribal regulations may be submitted to the Deputy Bureau Director, BIA Office of Trust Services

Developing Legal Infrastructure

- **Hearth Act**
 - Many tribes are adopting tribal regulations for different purposes:
 - Solar
 - Wind
 - Business - this is very broad and can include shopping malls, outlets, grocery stores, restaurants, office space, light industrial uses, hotel and resort developments
 - Notably, the Hearth Act does not authorize leases for the exploration, development or extraction of mineral resources.
 - Doesn't apply to allotted lands

Developing Legal Infrastructure

- Hearth Act - What environmental review process must be included in leasing regulations?
 - Identification and evaluation of significant effects of the proposed lease on the environment
 - A period for notice and comment related to any significant impacts of the proposed lease on the environment
 - The Tribe's response to relevant and substantive public comments on environmental impacts prior to tribal approval of the lease

Developing Legal Infrastructure

- Avoid State incursion on economic activity on tribal lands
 - Bracker Test – “particularized inquiry”
 - State vs. federal and tribal interests
 - Federal preemption –
 - federal law and regulatory scheme
 - Chehalis tax on permanent improvements
 - Tribal taxes and regulations over activity
- Asserting tribal jurisdiction over non-Indians, on tribal and fee land
 - Montana – 2 exceptions for non-Indian fee land
 - Merrion - inherent authority over tribal trust lands; power to exclude is power to regulate, tax

Developing Legal Infrastructure

- Consider formation of entity to handle economic (energy) development
 - Tribal Authority or entity that would have certain powers
 - Limited waiver of sovereign immunity
 - Section 17 corporation
 - BIA approval – federal corporate charter
 - Articles of Incorporation and bylaws

Best Practices, practice models

- Assess the tribe's own needs related to leasing and development and whether self-regulation can benefit the Tribe
- Consider types of economic development activities that are appropriate and how to encourage investment and development in your tribal community
- Entity to conduct business
 - Tribal Division, Authority, Corporation
 - Section 17 corporation
 - Limited Waivers
 - Dispute Resolution
 - Environmental requirements
- Landscape level environmental review

Best Practices, practice models

- Adoption of Tribal Ordinances/Laws
 - Land Use/Zoning
 - Tax
 - Environmental
 - Health and safety, such as building codes
- Adoption of Health Act regulations
- Form of lease to promote consistency – standardize the way the Tribe does business
 - Waiver of sovereign immunity
 - Where will disputes be resolved
 - Applicable law

Conclusion

- Any questions?

Contact Information



Pilar M. Thomas

Of Counsel

pthomas@lrrc.com

(520) 256-6628 cell

(520) 629-4455 office

Pilar Thomas is Of Counsel in the firm's Tribal Lands and Natural Resources, Alternative Energy and Utilities, and Tribal Affairs and Gaming practice groups. Her practice is focused on Indian law, tribal renewable energy project development and finance, tribal economic development, and Indian gaming. She assists clients with strategic legal advice on tribal energy policy and planning, renewable energy project development and finance, federal and state energy regulatory, programs, and policy efforts, tribal gaming regulations, gaming-related transactions, litigation, and other business and economic development efforts.