

**Bureau of Indian Affairs
Working Session for Bureau of Indian Affairs Employees
on the Revision of Four Land Management Regulations
(Grazing, Trespass, Agricultural Leasing, and Rights-of-Way)**

**BIA Training Center, Phoenix, Arizona
September 27, 2011**

Facilitators: Dexter Albert, Lucy Moore
Notetakers: Jason Hurd, Joan Calcagno
BIA Central Office: Michele Singer, Margaret Treadway

WELCOME: Stan Webb, Western Region Realty Officer welcomed the group and expressed appreciation for the time and commitment participants were making to the process.

BACKGROUND: Michele Singer, Director, Office of Regulatory Affairs and Collaborative Action, welcomed the group of 33 BIA employees and expressed appreciation for the participants taking time out of busy schedules to give the agency guidance on how to proceed with the revision of these four regulations: Grazing, Trespass, Rights-of-Way (ROW), and Agricultural Leasing. She acknowledged that the regulation revisions were long overdue and encouraged BIA employees to share their knowledge and experience in the discussions. This working session concept is new for the department and is designed to allow BIA staff and tribal voices (both government and allottees) to have some input into the revisions before the regulation drafting group takes over.

She also offered background on the regulation revision process and timeline. The first drafts were developed in 2005 primarily by BIA and OST (Office of the Special Trustee) subject matter experts. At the first consultation, the tribes told the agency that dealing with so many draft regulations was overwhelming, so the process was divided into two phases. For phase I the administration prioritized business and residential leasing, as well as a new component for renewable energy. Consultation on those regulations is complete and publication should be in early 2012. These four regulations – grazing, trespass, ROW, and agricultural leasing – make up the second phase. They will not be complete before the 2012 election, because of comment period requirements and the fact that regulations are routinely not passed in the final months of an administration.

The Bureau has chosen to use this time to undertake this new collaborative process that involves tribal voices prior to drafting. Michele Singer and her team will take input from these work sessions and from workgroups to start revising the regulations. They will also look at new laws and cases for their applicability to the regulations. The Office of Regulatory Affairs and Collaborative Action will hold consultation on the drafts before they are proposed for public comment to ensure that tribal voices have priority. After revision of the drafts, they will be published in the Federal Register for public comment. Assuming drafting begins early in 2012, consultation would occur in early 2013, with a final publication date later in 2013.

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All this is dependent, she explained, on political leadership. She hopes that these work sessions will also build support for the case that this is critically important work and deserves top priority. She added that she will be glad to hear about any other issues that participants have with other regulations, so that they can be added to the list.

INTRODUCTIONS: Facilitators Dexter Albert and Lucy Moore introduced themselves and reviewed the agenda and the materials. They asked the 33 participants to introduce themselves and offer their hopes and/or fears for the day.

OVERARCHING THEMES: Prior to these working sessions, facilitators interviewed 11 people who were familiar with the regulations and who represented a broad geography and range of experience. They included attorneys, academics, allottees, and BIA and tribal subject matter experts. From these interviews, the facilitators drew over-arching themes they believed cut across the four regulations:

- Inter-relatedness of tribes, landowners and the BIA
- Need to support tribal self-governance
- Need for simplified, streamlined regulations
- Need for consistency nation-wide and flexibility on the local level
- Need for timely permitting and leasing processes with deadlines
- Need for enforcement and remedies
- Need to streamline the appraisal process
- Need for more resources and more staff

DISCUSSION:

Need for education: A participant sees the biggest problem as tribal members not understanding their role and responsibility with respect to managing their own land. “They don’t know how to interact with BIA when it comes to notices and consent.”

Include the past: Since the 60s, when regulations were formulated, the way the Bureau does business has changed, thanks to case law from the courts and Interior Board of Indian Appeals (IBIA). There are now laws that allow tribes to make their own regulations. “We can’t go forward without looking back.”

Lack of resources: Several spoke of the Bureau’s lack of resources. They urged the Bureau to accept the fact that the budgets are not going to increase. “We need to draw the line on trust responsibility and understand what we can actually accomplish and what we can’t.” For instance, at Pine Ridge, there are 390 range units and 800 farm pasture leases covering 1.2-million acres. In spite of the fact that there are no NEPA documents nor conservation plans for the area, a participant said it was not right to hold back the money. “What really fits Indian Country and the budget we have?” he asked.

There was concern that the BIA is not funded well compared to other agencies like BLM and FWS, that seem to have more funding and greater databases, mapping capability, training, etc. In ways, land management for BLM with one landowner is much simpler than for the BIA with tens of thousands of landowners. The BLM receives \$73-million a year for range management,

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\$75-million for wild horse and burro programs, and \$23-million for riparian management, which does not even exist in Indian Country. The BIA receives \$23-million for all range and agricultural management. “What can we do with the money we have? We have to be realistic.”

A participant suggested: “Time management is key because nobody has enough staff. I would like to see a system put in strictly for time management for staff.”

Need for training: “We are put in the fire right away.” There is a big need for training of tribal staff, particularly because the turnover is so great. “When we send a form back to them because it is incorrect, they feel as if we are slapping their hands.”

Goal of tribal self-governance: There was a lengthy discussion about how to support tribal self-governance, and the relationship between tribal regulations and federal regulations. A participant pointed out that the Bureau should have as a goal to minimize federal regulations on tribes; the issue of self-governance is somewhat unrelated, he added.

Self-governance compact tribes administer programs under a self-governance compact, but any tribal regulations they create can not be less restrictive to what the federal regulations are and cannot supersede federal ones, the tribal regulations can be more restrictive but not less. These compact tribes naturally want fewer federal regulations.

It is hard to write perfect regulations for the future. “In reality, when a tribe compacts, everything changes.”

The current leasing regulations defer to tribal regulations if developed pursuant to an Agricultural Resource Management Plan (ARMP), and the agricultural statutes from 1993 allow tribes to proceed without appraisals and to negotiate on leases. There is a higher standard on the BIA because “we’re signing on behalf of someone.” Agricultural leasing allows tribes to self-regulate and can allow more restrictions than some of the federal regulations. “On leasing and grazing we’ve gone as far as we can go,” said BIA staff.

If tribes are to proceed quickly with ROW jurisdiction, the ROW rule needs to be done away with immediately. Tribes don’t want to have a ROW for their own utility company, for instance. A participant said that the agency tries to manage in accordance with tribal ordinances and would defer to negotiations for tribal ROW on tribal lands. On allotted land, staff felt that the BIA should have a higher standard of protection. Requiring an appraisal on allotted land may be beneficial, said a participant, “but on tribal land, maybe it’s not a good rule.”

Others agreed that the BIA should not stand in the way of tribes’ negotiations. The difficulty can be if a self-governing tribe then turns to the BIA and claims they are not fulfilling their trust responsibility. Some tribes are more independent than others. Some want the authority and others don’t want to release BIA from responsibilities. It is a difficult tightrope to walk. “If we promote self-determination, maybe tribes will take advantage and maybe they won’t. But the most difficult is when they come back and say that the BIA has trust responsibility.”

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Tribal Energy Resource Agreements (TERA) allow tribes to review and approve business leases and agreements and energy ROWs. A participant said the last one was executed in 2008 and was very complicated. Tribes are not taking advantage of TERA because the pre-conditions are insurmountable and require the BIA to have a greater role than tribes want.

Consistency v. flexibility: Participants noted there is a lack of consistency throughout the agency, as staff try to meet the needs of more than 500 tribes. On the other hand, several emphasized that one size regulations cannot fit all situations. All regions and tribes are different, and in some cases even clans make some key decisions. There are differences within tribes, as well as among tribes. Consistency is equally important. “Consistency and flexibility are almost oxymorons. How can you do both?”

The American Indian Agricultural Resource Management Act (AIARMA) offers tribes authority to manage their own resources and to have their own leasing and grazing programs, but most tribes haven’t taken advantage of it because it is an unfunded mandate. The law is a good one, and the BIA can help tribes develop long-term plans, but there is never any funding. There is a little bit of money available through forestry, but it’s not enough. Coordination with other agencies is the only way to make these programs work.

There is great diversity of experiences and situations within the BIA. “It’s like the blind man touching the elephant. It depends on where you are in the BIA what part of the elephant you are touching.” A participant said that it is almost impossible to have one set of regulations to govern Indian Country. “Different regions have different focuses. Pine Ridge sees the BIA very differently from tribes in southern California.” Perhaps subsets of regulations for tribal land and allotments would help.

The need for new regulations: Regulations are the guidance that staff use in the field. They look forward to updated regulations. Some advised that the regulations should be broad, with more specifics in the policies and the handbooks. “Tribes are bound by only the regulations,” said one, “but the BIA has to follow policy.”

The regulations need to be simple enough for landowners to understand.

It will also be a challenge to craft regulations that “fit current practice, when current practice is always changing.”

It was suggested that a “Frequently Asked Questions” section in the regulations might be useful as a supplement to the handbooks.

The regulations can be legitimized by putting them on the website in plain language, available to anyone.

Appraisals: The Office of Appraisal Services with only two appraisers has a serious backlog. Sometimes they have to hire additional appraisers. There was a question about jurisdiction over OST regulations in the area of appraisals. BIA staff would like improvements in the regulations that would make it easier for OST to coordinate with BIA.

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Participants urged regulation drafters to be clear on when appraisals are needed and when other ways of determining fair market value might be used. Many felt that tribes should be able to negotiate on tribal land, but that appraisals were needed for allotted land.

Tribal consultation: A participant speculated that tribal consultation on draft regulations could result in changes. Including tribal members in the drafting and review of the regulations will be critical to ensuring their acceptance in Indian Country. Without that, all the work of revisions may be wasted.

Wealth of experience: Participants noted that there is a wealth of experience among current BIA staff, who may be retiring soon. As the regulations are drafted, they urged including field level, regional office and eventually the solicitors. “We need to draw on the experience available now. It won’t be here in five years.”

Record keeping: Converting to TAAMS has revealed some gaps in record keeping. Many transactions, for instance, lack land descriptions.

Although BIA staff are trying to input data into TAAMS, there are aspects of the regulations that make that difficult. The fact that tribes are not required to use TAAMS, but the BIA is, also causes problems. “Central Office wants the regions and agencies to use only the information from TAAMS, but when all the information is not there, it looks like we’re not doing our job.”

NEPA compliance: Most of the regulations pre-date NEPA. A participant suggested a categorical exclusion be adopted for those tribal lands already encumbered.

DISCUSSION OF THE FOUR REGULATIONS:

Agricultural Leasing

Forms: Standardized forms are badly needed.

TAAMS: The fact that tribes don't have to use TAAMS makes record keeping difficult for the BIA.

Notice and consent: Participants asked for clarity on a definition of notice. What constitutes notice, what should be included in the notice, can the period be adjusted, how long is it good for? Currently, the 90-day notice is statutory. The Bureau can’t change the time period, but tribes can. Standard BIA practice is to notify land owners that their land is available for an agricultural lease by sending out a standard 90-day consent notice. These notices can be modified for a shorter period of time at the request of a tribe. For instance, a tribe wanted to pay land owners not to farm their land, but the 90-day notice was too cumbersome so the agency reduced it to 15 days. There is also confusion about how long the notices are valid once they are returned.

Today the Superintendent has almost unlimited authority, said a participant, but statutory language is needed to back that up.

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Clarity of notice and consent is also needed for negotiation of agricultural leases. Currently, the agency requires a majority interest consent with two witnesses, and once that majority is achieved, negotiation can proceed without giving notice to the rest. Many felt that is bad policy. The applicant is usually the person collecting the consent, but the agency should have documentation that a genuine attempt was made to contact everyone. TAAMS calls for two witnesses for each consent. Others questioned whether or not the BIA could sign if the majority was in question.

Once the negotiated lease is approved, the agency has to notify landowners again giving them the right to appeal. Many felt this was not honoring the majority that gave consent. “If we give prior notice and make sure it is documented, then we shouldn’t have to give backend notice.” “It is unfair to have one person appeal and stop the process and hold back payment, if the majority have already signed off. The regulation needs to be changed.”

Estate issues: There were questions about how to handle consent in cases of estate and the authority of the superintendent to sign on behalf of a person in estate. Consent would stand if that person endorsed it when alive. A participant asked for a provision in the regulation that would call for a document from newly determined heirs, saying they would not revoke the consent. In cases of ROW this could constitute retroactive approval.

If there had been a majority consent which was lost due to a subsequent death, how should that be handled? Some said unless the consent was revoked by successors, the consent for that interest stands. The regulations need to clarify.

Title: A participant described the title as “an everlasting evolving thing.” For instance, anytime that land is eligible for negotiation, the current title is pulled; when signature is required, the title is pulled. The regulations need to specify how to handle titles during the consent and negotiation process.

Archaeological reports: Current regulations require the tenant to provide archaeological reports, but the reality is that usually the tribe or the agency bears that responsibility. This needs to be clarified.

Bonding: “When do we have to get a bond and what does it cover?” were the questions. A rental bond is unnecessary, most thought, if the rent is paid in advance. But there should be a way of protecting against damage to the asset with a bond. Without a bond, the Bureau may be taking on liability if damage happens to the property. “We are already underfunded and don’t have the resources we need. How many times has there been a bankruptcy, and there we are holding the bag.”

Many felt that the cumbersome and costly bonding process puts an undue burden on the landowner and the would-be tenant. “Are we impacting the income of the landowner and tenant?”

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Tribes are able to waive the bond on tribal land and for allotments leased by tribal members. Further, the tribe doesn't have to indemnify anyone if they default on a lease and end up owing us rent. The Bureau has to gain a majority consent of owners to waive bond, but with hundreds of owners that can be impossible.

Managing the different types of bonds is complex, especially if it involves holding a cash deposit.

Improvements: Another participant raised the question of improvements made to leased land. With other agencies, like EPA, sharing projects on Indian land, it is possible that land could be significantly improved with the benefit going to the lessee, but with no increase in rent to the landowner.

Public involvement concept: A participant cited the Forest Service planning model as one that might be applicable in leasing situations. The concept is that the public has the right to know the overall intent of the federal actions before anything is implemented. The plan with leased areas, utility corridors, etc., is presented to the public for comment and consideration. He suggested a similar process that involves tribes and tribal members before leasing is authorized.

Another participant added that that was the intent of the American Indian Resource Management Act (AIRMA). Tribes with a broad resource plan would go through a similar public process, but without funding few tribes could afford it. What if the allotted landowner opposed the plan, he asked. Would he still have to abide by these AIRMA requirements? "That has never really played out to see how it would work and what would happen."

162 and 166 overlap: The differences between leases and permits should be clarified. The permit belongs in 166 not 162. Part 162 should be for leasing only, and not include a definition for permits. Timber should be removed from 162.

Grazing

Regional differences: It is impossible to make grazing regulations fit all parts of the country. The west is different from Billings; Billings is different from Oklahoma. Most of Western grazing lands are administered by tribes. The BIA manages a very small number of grazing permits.

Grazing trespass: Some suggested that grazing trespass should remain in the grazing regulation, where there is specific guidance on dealing with livestock trespass from overstocking to overgrazing to damages to reviewing and documenting.

Courts have added to the requirements for dealing with grazing trespass – need for a witness, documentation, pictures, a determination of incidental or willful, sending a formal letter that is valid for one year. The Hopi tribes gives a five-day notice, followed by a second notice, and then impoundment. The trespasser is charged for all the costs of handling the trespass, including administrative, plus repairing damages to the land (twice the value of forage). "To try to merge all these details with commercial, home site, ROW, and leasing trespass doesn't make sense."

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Participants said that some trespassers run their cattle for months for free, “stealing the asset,” before a BIA agent notices. Under BLM rules violators are liable for damages and are subject to criminal penalties. The BIA should include criminal penalties to give enforcement more teeth. “Right now we have to put our necks out there for impoundment because we don’t have enforcement. It can get volatile.” Some agencies call law enforcement to go with them. “You can get into trouble out there alone.”

Grazing and tribal self-governance: Participants explained the extent of tribal authority under the current regulations. Tribes are allowed to manage grazing on tribal land and for tribal membership on allotted lands, as long as federal regulations are not violated. They can charge their own rate on tribal lands and have to pay minimum rate on allotted lands. Above the minimum rate, the land goes out to competitive bid and negotiated sale.

A participant suggested that the statutory requirement for stocking rates and season of use might be eased. Some tribes have the ability to take on these responsibilities, if approved by the BIA. The regulations could include this. “We could probably streamline the process, but we only have those two statutory requirements.”

It is important to understand the history of range units. When reservations were established, range units were meant to support a single family. Now the tribal allocation process for range units is political – they are only bid on if no one wants them.

Organized tribes are entering into agreements with tribal members and non-members. Could the regulations delegate that power to tribes? Perhaps the BIA does not need to authorize subleases in these circumstances, as called for in 162.

TAAMS: Tribes have ability to bill, collect and distribute grazing fees, but they are not required to use TAAMS. This is an issue.

Overgrazing: A participant said there is administrative authority in the Agriculture bill to collect damages for overgrazing, for instance, crossing desert land. This is the only workable option, he added. Another noted that anti-grazing sentiment is growing, among both special interest groups and the public. Even tribal members see that overgrazing damages the land.

Conservation: In the absence of a template or definition for a conservation plan, some look to grazing stipulations. Approved conservation practices sometimes cross allotted lands, creating confusion between agencies about notification and the type of approval BIA needs to ensure the rights of individual owners.

Improvements: Landowners and lessees need incentives to make improvements. Now, an individual may have the opportunity to make improvements to the long-term health of the land, but how can they recoup the value? Participants had ideas: the landowner could take less in rent so the user can improve the land. The lessee could have a longer term contract, as high as 25 years, according to AIARMA.

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But there are questions about how to handle compensation for an individual who leaves or loses the bid for the next lease period. Also, could the regulations identify requirements for conservation implementation and long-term maintenance?

Need for an overall plan: A participant recommended an overall land use and management plan for trust lands, to include grazing and other uses and specifying what types of land are appropriate for what uses, what the desired condition would be. He observed that on public lands people have a voice, and that on reservations people are beginning to raise their voices, too.

How to get from here to there: A participant reflected that there are a lot of old ways to overcome in order to institute the kind of improvements needed. “These are old issues. We’re afraid to be sued. That is the norm.” And it is not just the BIA that is part of this dysfunction. It is critical to coordinate with other agencies to make real change.

Lack of resources: “The natural resources program is on life support because we don’t have any resources. It’s the same with other programs and will probably get worse in the future.”

Administrative fees: Administrative fees could be used to address some of the impacts of overgrazing, if they are kept at the agency for agency use. “If we don’t keep fees at agency to help staff, why do we collect them?” Several suggested scrutinizing fees to see if they could generate more funding for critical local programs.

Need for education: Currently there are several different regulations governing grazing at Navajo – Eastern Navajo, the main reservation, the New Lands, etc. Landowners are ignorant and with no resources there is no way to enforce or educate. It is critical to coordinate with tribal communities, councils and grazing committees. Navajo New Lands staff are constantly meeting with permittees and landowners so they can meet the AUMs. They teach them what an AUM is and what the regulations mean. “If we don’t educate the permittees, we will never have compliance. And with enforcement unlikely because of lack of funding, compliance is our only hope.” The education must be local and site specific, because there are so many regional differences, even within Navajo.

BIA Responsibility: “Courts have held that no matter what we do, we are still responsible. If we turn over management to tribes, we are still responsible.” The regulations should maintain that responsibility. “We can’t just walk away.”

Right of Way

Waivers for easement and compensation: The statute requires just compensation, but participants felt that the BIA had authority to allow compensation for tribal easement to be waived. A problem is that in 1980 CFR added the requirement for an appraised value prior to the waiver. Tribes are willing, if they can get financing, to do their work without any easement. But the BIA needs tribal utilities, for instance, to get documented easements so that there is a record. In addition, the agency believes the tribe still needs to fulfill NEPA requirements. Participants acknowledged that there should be consideration for different rules depending on purpose of easement.

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Owner consent: On allotted land, majority consent of landowners is needed. In cases where the owners are whereabouts unknown or too numerous and no substantial injury will result, then the BIA can sign for all. But the regulations need to specify what “too numerous” means.

Many objected to the two step process in the ROW handbook that calls for consent for permission to survey, first, followed by consent on the easement. This takes too much time with multiple owners and is duplicative. Sometimes the two are combined into one consent form, but then you can't specify an amount of money because there is no appraisal yet. “It doesn't make sense.” With new technologies, they felt there should be a way to do the survey and include all the information on the consent form. “We should be able to do it at one time. With one there were 4,000 landowners and it's just too much work to do it twice.”

Others felt that the two part consent process was beneficial, even if cumbersome, because it helps educate the landowners about the process.

Termination of ROW: Participants asked for clarification of termination. It may be triggered by violations or by non-use or abandonment. But “non-use” needs definition. Does two years non-use constitute abandonment?

The Bureau doesn't usually sign off on an affidavit of completion, but merely records it. Tardy filing of the affidavit has resulted in a lawsuit because it related to the non-use issue. This should not be automatic grounds for cancellation.

Payment: The annual fee is usually set on volume of product moving through the ROW. The leasing regulations authorize direct pay, but the ROW regulations don't address direct pay.

Valuations: Calculating valuation in the field can be difficult when they are based on a per acre amount. The method for appraisal is per rod, not per acre. There was a request that the regulations specify that both methods are acceptable, and let those in the field choose what is appropriate. Many thought the value should be based on the real value of what is being transmitted – data, oil, fiber optics, etc.

Renewals: The regulations need to clarify how renewal happens. Now, usually whoever holds the ROW has the unilateral right to renew. Many tribes have been removing perpetual terms when renewing. Navajo told the Federal Highway Administration (FHWA) that they were limiting the ROW to 50 years on roads. A participant said it was a problem to use old regulations and laws for new term limits.

Life estates: The regulations should clarify who consents on the fractionated interest on life estates – the BIA with tribal consent? Different distribution rules are also needed for ROW. The program regulations need to deal with life estates.

ROW authorization: The group needed clarity on who authorizes the ROW – the tribe or the BIA? With leases it is the tribe, subject to BIA approval.

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Standard application form: A standard ROW application form would be a big help.

Termination: A participant suggested there should be an opportunity for the ROW holder to talk with the Bureau or tribe before termination. “There should be an easier, kinder way than just sending out a letter saying your ROW is expiring.”

New technology and surveys: 169.15 says that maps of definite location may be attached, but much of the tribal and allotted land is un-surveyed, making that hard to provide. The regulations need to account for new technologies. Many supported the level of detail in the regulations, but asked that the detail be updated.

Tribes find surveys too expensive. Are they really necessary? Many roads in Indian Country have no ROW, or the ROW location is unknown. In some cases a disclaimer is inserted in the map area if the ROW is not surveyed. “That’s what we used to do before GIS.”

Others emphasized the need for a legal description for ROWs, especially two points at a crossing. They suggested that the regulations could call for the use of new technology, like GPS. There was a caveat that the regulations should not specify technologies because they are changing so fast.

Specifics of ROW: The more specific the ROW is described on the ground, the easier it will be to enforce. The regulations should emphasize this and offer methods for describing.

Assignments: A step by step assignment procedure is needed. Currently, there is no documentation needed. “Assignments are done but we don’t know anything about them.” An assignment was executed between three individuals and a corporation, but when the corporation moved, they could not be reached. Clear procedures will make it easier to track the parties. There are cases where a bond may be required, and knowing how to contact a ROW holder is critical.

On allotted land, a participant suggested that the Superintendent be able to give permission. The point is not to impose consent approval, he said, but to require record keeping.

Damages: There was discussion about how to determine the amount of damages to the land, whether to require a deposit, need for schedule, etc.

ROW handbook: Please finalize the draft ROW handbook asap.

Waiving appraised value: Parts 169 and 170 need to be reconciled with respect to ROW. There are cases where sister agencies ask the agency to waive on behalf of the tribe or allottee for housing projects, sewer, etc. Agency staff need guidance.

Administrative fee schedule: Participants recommended an administrative fee schedule for ROW in the regulations. The \$500 maximum amount for damages is nothing, compared to the expense of administering the regulation. “It won’t even pay for some of the mailings.”

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Service line agreements: The regulations need to be updated to account for new technology needs. Dealing with a tribe servicing a casino with several lines may need a different provision in the regulations.

Need for education/collaboration: Participants asked that technology be used to capture, and collate in a useable form, information about how the regulations are being interpreted, lessons learned, good ideas from different regions. This is particularly important because senior staff are retiring soon, and valuable lessons will be lost.

Record keeping: It is critical to document ROW on titles by sending maps and descriptions to Land Title Records Office (LTRO). There were questions about what other information should go on the title – conservation practices, for instance.

ROW Recap– Lucy offered highlights from the two groups’ discussions on overarching themes and ROW.

- Regulations should be consistent nation-wide, in plain English, understandable to the landowner, and accessible on the web, with automatic and regular updates
- A national level practical guide, like a handbook, will make clear and transparent BIA policy.
- Tribes need to understand that they are bound by the regulations but not by the policies and handbooks.
- How can regulations fit current practices if the current practices are always changing?
- For ROW regulation:
 - Use appropriate technology to describe and survey ROW; do not dictate the method because technology is changing so quickly.
 - Be sure the legal description is done by the right person.
 - Valuation should be based on the volume and value of commodity, including fiber optics, data, oil, gas, etc.
 - Improve record-keeping for ROW, including titles, collection and distribution of damages (special deposit, direct pay, etc.).
 - Clarify who has the right to renew a ROW.
 - Define “too numerous” for ROW consent.
 - Two rounds of consent – for survey and application – consider merging into one? or is there value in educating landowner with two opportunities?
 - Assignments need step-by-step process.
 - An administrative fee is appropriate and should be significant.
 - ROW regulations should accommodate, not stand in the way of, a tribe providing community services.

Trespass

Separate, stand-alone regulation: Participants spoke in favor of leaving the trespass provisions in the different subject areas. It was simpler, they said, not to have to go from one regulation to another but to have it all in one place relating to that topic. “The regulations are already too complicated, and a separate regulation would just be more complicated.”

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It was observed that some sections of the regulations define trespass and procedures well, but other sections mention trespass but have no regulatory guidance on enforcement through appeal process. If a single regulation could clearly define everything -- determination and investigations, notifications, time frames, cancellation procedures, penalties, legal action by BIA, redemption processes, disbursement of collection, appeal rights – and “all were apples to apples,” then it might work. But the situations are too different. Agricultural leasing, ROW, commercial, grazing, each has its own set of trespass parameters, from investigation to appeal. Building trespass clearly into each section would be better than melding all into one new regulation. “You don’t want to have to flip back and forth in the regulations. The whole story should be in one place.”

There was also the fear that if trespass were isolated in a separate regulation, it would be diluted.

There was a suggestion that grazing and leases trespass could be combined.

Sharing responsibility with tribes: The group discussed a role for tribes in dealing with trespass. Although it would maximize resources to have tribes instructed in handling trespass, some worried that this would put the tribe in a position of responsibility for the trust asset. The unfunded mandate for the BIA means that tribes may take more responsibility. A participant warned, “Be careful what you wish for.”

This led to an exploration of the need to fundamentally re-examine the trust responsibility concept. “It is essentially broken, left over from a previous era.” Participants asked for clearer boundaries of trust responsibility.

Deferring to tribal court, said a participant, means “washing our hands of it.” With federal court action, there would be a bigger impact, and the BIA would be taking appropriate responsibility.

In any case, a participant recommended talking with the Tribal Ranger for ideas and possible coordination.

Enforcement: The main focus, said one, should be to get money for the trespass and distribute it to the landowner. “The regs are fine, it’s the enforcement that’s missing.” The problem is lack of staff and resources to enforce and cumbersome requirements, like using a camera with film, etc. “We need easier ways to prove trespass.”

Policy and guidelines can provide more clarity about authority and process for enforcement, and ensure that the conditions are safe for BIA staff.

Some spoke in favor of concurrent jurisdiction to maximize the enforcement dollars. In some states, California for instance, there are agreements between the state and tribes for law enforcement. Given the serious lack of resources for enforcement, this may be a good solution. In southern California the BIA is pursuing partnerships with EPA, BLM, USFWS, and the Army Corps of Engineers to collaborate on enforcement in un-safe situations.

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The US Attorney does not have resources to enforce what is required. They need more preparation and training in Indian Country issues and dealing with experts to be effective and win cases.

Actions are begun, but there is no follow-through. The BIA should be able to file on behalf of the landowner and act in a coaching, educating role.

BLM defines three kinds of trespass that call for different enforcement: incidental, consequential and willful. Staff want support to deal with the willful first. Participants recommended a triage of trespass offenses, where enforcement is based on the harm or potential harm. There is a difference between a few cows mistakenly let onto a piece of land, as opposed to an intentional, large scale trespass. The inadvertent trespasses can be dealt with administratively; the willful with enforcement. For instance, the Goshute surveyed the reservation boundary and found that a tribal road was trespassing on BLM land. The solution was administrative – a land transfer request. Another way of categorizing trespass would be those with authorization and without.

Participants agreed that there are too many ways to “game the system,” to avoid enforcement. “It has to be done just right – documentation, camera that uses film, notice, etc.”

There are serious risks to enforcement. Impounding cattle and horses can be dangerous and very time consuming. There was particular concern for female BIA employees who are sometimes in physical danger. “Who is going to enforce it? I am not trained to go out there and deal with those situations. There are hostile people out there.”

“If we can’t, as BIA, control what goes on out on the land, then we almost need to just pack it up and go home.”

Grazing trespass is more difficult to enforce than ROW, oil, gas, etc, because “the cattle, horses, etc, just move around.”

The penalties need to be very high; otherwise, it is worth it for the big operator to trespass and pay the fine. Agencies need a BIA law enforcement officer who can levy criminal penalties. “Enforcement needs teeth!”

Collection of penalties is a challenge. A participant said that the IRS is a potential collection agency, but that they might not be willing or able to collect on behalf of an Indian landowner, instead of the US government.

On tribal land, tribal authorities should be responsible for trespass.

Notice: The trespass notice takes so long, hand delivered in some cases, that the trespasser “gets a free ride and can do whatever they want.”

Overstocking vs. trespass: Overstocking comes with a big fine, but if they are not your cattle then it is trespass, not overstocking. “The bottom line is under current regs you can do what you want out there, get your notice, and go home.”

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Lack of resources: Particularly with respect to trespassing, the lack of money and staff has a huge impact on what the Bureau can provide. “Trespass isn’t even on the list.”

Coordinating with other programs: A participant urged sharing information and strategies about trespass among the programs (grazing, homesite and agricultural trespass) to maximize and pool resources.

Cultural values: A participant suggested that cultural values need to be taken into account when defining trespass.

BIA trespass: The group acknowledged that regulations are needed to deal with trespass by the BIA – trailers, for instance – and how to remedy.

Mediation/arbitration: A participant asked for mediation and arbitration clauses in the leases to deal with potential conflicts.

Horses: Many complained of trespass by unauthorized horses.

Realty: If a trespass regulation mandated collection of damages in realty, without clearer authority, it could create a problem. There are limited remedies and the cases are hard to make and unlikely to go to court. The Ag Bill works to prosecute other types of trespass. Without broader statutory authority, administrative authority is needed. A participant said that cross-referencing 166 and 162 worked adequately.

Hold-over: When does hold-over become trespass?

NEPA: NEPA may be required on big trespass issues, because it is a federal action.

Settlement: Even with a summary process, many will want to settle land trespasses, but the challenge of finding everyone is enormous.

Trespass Recap – Dexter offered highlights from the two groups’ discussions on trespass:

- Need for better and stronger remedies.
- Need for clarity and guidance on how to deal with trespass, including details about who and how to enforce, authorities, procedures, etc.
- BIA staff can educate and empower tribes and members about their role and authority to enforce trespass on their lands.
- Call on other agencies to share responsibilities and share resources.
- Be clear that there can and should be concurrent jurisdiction with tribes so BIA can go to tribal court to enforce.
- Provide for mediation and arbitration to resolve disputes.
- Clarify when hold-over leases become trespass.
- There are many ways to game the system and avoid enforcement. Regulations need to help stop that cycle.

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FINAL THOUGHTS Participants offered final thought from the day:

- Those working on teams to update handbooks requested a clear synopsis from all the working sessions.
- Stock driveway and crossing permit are two useful tools for dealing with moving animals across land. (Montana)
- OST should be here for these discussions, particularly to hear about the appraisal bottlenecks and audits.
- Condemnation of land for ROWs results in loss of significant amount of acreage.
- Given the challenges, “We’re doing good work.”

Summary prepared by Lucy Moore from notes by Jason Hurd, Joan Calcagno and Dexter Albert. Please contact her with comments or corrections. 505-820-2166 or lucymoore@nets.com

**Bureau of Indian Affairs
Working Session for Tribal Representatives
on the Revision of Four Land Management Regulations
(Grazing, Trespass, Agricultural Leasing, and Rights-of-Way)**

**BIA Training Center, Phoenix, Arizona
September 28, 2011**

Facilitators: Dexter Albert, Lucy Moore
Notetakers: Jason Hurd, Joan Calcagno
BIA Central Office: Michele Singer, Margaret Treadway

WELCOME AND OVERVIEW: Michele Singer and Margaret Treadway, Office of Regulatory Affairs and Collaborative Action (RACA), welcomed the group of 18 tribal representatives and 21 BIA employees, as well as the Majority General Counsel, U.S. Senate Committee on Indian Affairs, and expressed appreciation for the participants taking time out of busy schedules to give the agency guidance on how to proceed with the revision of these four regulations: Grazing, Trespass, Rights-of-Way (ROW), and Agricultural Leasing. They acknowledged that the regulation revisions were long overdue and she encouraged the tribal representatives to share their knowledge and experience with the BIA and Central Office staff present. This working session concept is new for the department and is designed to allow BIA staff and tribal voices (both government and allottees) to have some input into the revisions before the regulation drafting group takes over.

They also offered background on the regulation revision process and timeline. The first drafts were developed in 2005 primarily by BIA and OST (Office of the Special Trustee) subject matter experts. At the first consultation, the tribes told the agency that dealing with so many draft regulations was overwhelming, so the process was divided into two phases. For phase I the administration prioritized business and residential leasing, as well as a new component for renewable energy. Consultation on those regulations is complete and publication should be in early 2012. These four regulations – grazing, trespass, ROW, and agricultural leasing -- make up the second phase. They will not be complete before the 2012 election, because of comment period requirements and the fact that regulations are routinely not passed in the final months of an administration.

The Bureau has chosen to use this time to undertake this new collaborative process that involves tribal voices prior to drafting. Michele Singer and her RACA team will take input from these work sessions and form workgroups to start revising the regulations. They will also look at new laws and cases for their applicability to the regulations. The Office of Regulatory Affairs and Collaborative Action will hold consultation on the drafts before they are proposed for public comment to ensure that tribal voices have priority. After revision of the drafts, they will be published in the Federal Register for public comment. Assuming drafting begins early in 2012, consultation would occur in early 2013, with a final publication date later in 2013.

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All this is dependent, Michele and Margaret explained, on political leadership. They hope that these work sessions will also build support for the case that this is critically important work and deserves top priority. They added that they will be glad to hear about any other issues that participants have with other regulations, so that they can be added to the list.

INTRODUCTIONS: Facilitators Dexter Albert and Lucy Moore introduced themselves and reviewed the agenda and the materials. They asked the 18 tribal participants to introduce themselves.

OVERARCHING THEMES: Prior to these working sessions, facilitators interviewed 11 people who were familiar with the regulations and who represented a broad geography and range of experience. They included attorneys, academics, allottees, and BIA and tribal subject matter experts. From these interviews, the facilitators drew over-arching themes they believed cut across the four regulations:

- Inter-relatedness of the BIA, the tribe and the landowner
- Need to support tribal self-governance
- Need for simplified, streamlined regulations
- Need for consistency nation-wide and flexibility on the local level
- Need for timely permitting and leasing processes with deadlines
- Need for enforcement and remedies
- Need to streamline the appraisal process
- Need for more resources and more staff

In addition, there were process-related suggestions:

- Include tribal voices
- Focus on the purpose of the regulations
- Listen to the participants and give feedback
- Make the sessions interactive

DISCUSSION OF OVERARCHING THEMES:

Appraisals and surveys: A participant pointed out that there is a bottleneck completing surveys as well as appraisals.

Clarity is needed on the role of the BIA in providing information about the property to the potential lessee, while maintaining necessary confidentiality. Staff also need written guidance on how long appraisals are valid. Without it, local staff create their own rules and the regulations are applied inconsistently. With guidance, the community can have better communication with local staff.

Record keeping: Historically, the BIA record keeping is inadequate. With no historical record of processes, it is difficult to identify and apply regulatory requirements and enforcement to leases for economic development.

There was discussion about the challenges of TAAMS and its “antiquated software.” When requesting information on agricultural leases, allotments or tribal and fractionated interests “the

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answer is lengthy, not specific, and generally a mess.” The documents are often so large they can’t be sent electronically. Tribal spokesmen acknowledged that agencies probably feel the same frustration, and BIA staff agreed that the tool is very frustrating because everything is pre-set. But, said another participant, the inquiry tool is “awesome,” able to respond to a request for specific information. She explained that, depending on the request, TAAMS can give the history of one lease, how many leases are ending, how many are on allotted land, etc. Once the data is in an excel sheet, it can be sorted, shifted, etc. All agreed that training and coaching on the use of TAAMS is needed.

Lack of resources: NEPA is required for leases, but lack of resources makes it almost impossible to do a credible job.

Timelines: Tribal participants said staff regularly falls behind on meeting the timeline for agricultural leases. Getting consent is too time consuming and results in loss of income for the allottee. Extending lease terms would be helpful, they said.

With the support of the BIA, the Hopi tribal council has approved tribal policies and processes regarding ROW, leasing and NEPA. But there are still problems with documents becoming bogged down at the BIA once they leave the tribal system. Since there are no timelines, the tribe’s practice is to consider the document approved after 30 days. When it comes to field solicitors’ opinions, the wait can be up to two years.

Consistency of interpretation: Tribes are caught between different interpretations of the regulations at the local agency level and the regional office level. “We need an interpretation that does not change when BIA gets new employees.”

Notice: There was a request for more detail about the notice process – especially methods of delivery and timeline. “Ten business days” is not adequate guidance.

FOUR REGULATIONS: Participants discussed the four regulations and made recommendations for revisions.

Right of Way (ROW):

Broad regulation: Participants emphasized the need for broad, general regulations because of the huge differences between communities and reservations.

Renewal process: Fifty years ago ROWs were handled in different ways for different reasons and rules were not always followed. “We have to deal with those today as they come up for renewal. Our hope is that somebody listens and recognizes that there are issues and that we can all work together to come up with the best way to deal with those.”

At Salt River old ROWs are coming up for renewal. The renewal process will dictate whether or not some of these ROWs will be renewed, and if so, for how long and under what terms. Landowners may want compensation for old ROWs that were never paid for. The timing of the new regulations will impact the future of the tribe and members.

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BIA staff added that if an old ROW is not documented the tribe has the option of taking it back and asking for BIA assistance, or simply documenting the ROW. But documenting can be a major undertaking given costly NEPA compliance – even for a tribal utility.

Tribes need clarity on how to renegotiate an old ROW with no time limit. There are cases where an economic developer assumes that an old lease managed by the BIA included access to the property. When they are shown the ROW renewal process they are discouraged and often go elsewhere.

BIA roads: At Hopi, the majority of unpaved BIA roads don't have ROWs. There is a need for enforcement and compliance.

Crossing Roads: These are an issue at Hopi where villages are usually clan-controlled lands.

Record keeping: Participants said that many ROWs are not in TAAMS. In order to update, renew or terminate ROWs they will have to be entered into the system – a major task.

With no records of roads currently in use, they are in trespass. There may have been informal agreements for passage through allotments, but are they still valid when those transfer to the next generation? There is potential for conflict among allottees.

Water and sewer lines: There is an exception for water and sewer lines. When dealing with a tribal utility, it would be simpler to get consistent documentation for recording water, sewer and fiber optics.

Tribal coordination: Tribes want better communication with the BIA about how to process ROWs, including working with TAAMS. “There is much complexity and not good enough communication between tribes and BIA.”

Surveying and appraisal challenges: Newer technology and new uses for ROWs create unique issues. Tribes want to be able to create ROWs for adjacent economic development or home sites. They cited the BLM program that trains private surveyors to meet BLM standards and use BLM methodology. Currently they are only focused on exterior reservation boundaries, but tribes hope this program can be expanded to other field work benefitting tribes. This would help alleviate the 6-month to 2 year wait for a basic survey (township and range) from BLM. Another help would be handheld GPS systems so that tribal staff could at least identify positions using GPS coordinates.

In addition, tribal participants asked that the regulations allow for outside appraisers in the interest of streamlining the process. “We don't want to have to request an appraisal through OST and BIA.”

The regulation should clarify that tribes can waive appraisals for ROWs.

The Hopi Land Information Systems Office handles surveys, but the BIA requires a legal registered land surveyor. The BIA has approved leases that were done by our program for home

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sites and agricultural leases in the past, but now they won't accept the tribe's work. "Is there a compromise? How do we deal with that?"

Consent: Hopefully the regulations can streamline the consent process, especially for fractionated lands with many land owners. At the Gila River Indian Community (GRIC) some road cross 30-40 allotments. The consent process is so slow that there are often changes in ownership before the process is complete. "People pass away and probates happen and we are told that we need more consents." Another 29 roads with residences and utilities hooked up are in ROW appraisal, "but the landowner listing will change by the time we're ready to start getting signatures. Will they be valid?"

Service line agreements: The regulations should clearly define the use of service line agreements for commercial and residential uses. At GRIC there are many home site leases with service line agreements, but staff is unclear if allotments need easements through them.

Valuation: The regulations need to provide guidance for valuation of ROWs for different uses, including types of methodology.

Negotiations: Tribal participants said that when utilities negotiate their own ROW agreements – sometimes with no time limits -- the tribe can be forced to sign away rights that could be substantial. Tribes need protection and the assurance that these negotiations will be more equitable.

BIA staff explained that anything tribes want to put in ROW is negotiable, and that all new ROWs are subject to tribal consent by resolution. Grounds for termination and any limitations could be spelled out in the document.

Terminations: Tribes have ROWs that are not being used, or not being used for the intended use. For instance, there is a railroad ROW with no railroad. "If the ROW is not being used, there should be a time limit and the ROW should go back to the tribe." BIA staff said that the tribe has to prove non-use, but they can "put BIA on notice to help."

If ROWs have no time limit, BIA staff said they will be hard to challenge if they are in compliance.

State jurisdiction: A participant said the State applies state law to ROWs even though they are on federal trust land. They should not be able to spray pesticides, for example. States need to be educated in the legal status of federal trust land.

Trespass:

Separate stand alone regulation? If trespass is handled in a separate regulation, it needs to encompass all possibilities and all types of trespass. For instance, at Tohono O'odham the Border Patrol assumes they can do whatever they want on Indian land because they are federal agents. The tribe needs to be able to enforce civil penalties and damages for their trespass. The regulation will need to specify enforcement responsibilities. There are so many types of trespass

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– illegal entry, archaeological vandalism, illegal dumping, a leaseholder expanding their facility by moving survey poles in the middle of night, use of pesticides, etc. Or, the trespass may simply be the result of inadequate record keeping. Whoever enforces must have background on which kinds of mechanisms to use to identify the different kinds of trespass. Staff needs to know what constitutes a trespass and how to identify boundaries and surveys. “Tribal lands have become staging grounds for illegal activities.”

Timelines: The regulations need to specify timelines for the trespass process. Some tribes have had to wait 10-12 years with no action. The situation is critical in some places, particularly where illegal immigration and criminal activity are rampant. These tribes need backup to enforce trespass, and perhaps an MOA with the state.

Unpaid leases: Trespass can include unpaid leases, such as a satellite communication lease on a mountain belonging to a tribe. The leases are 25-30 years old, and the users have never paid.

Enforcement: Although tribes want to hold the BIA accountable for its trust obligation, they realize they also have an obligation to police their own property and people and keep accurate records of trespass and ROW issues. Some tribes have non-Indians living within tribal lands and protected by certain laws and grandfathering provisions. There can be problems when trespass occurs on these properties. Council members may have different opinions about these rights, or personal matters may intervene. Tribal governments need to be vigilant and keep clear, strong records.

Clarity is needed about the level of responsibility of the BIA to enforce on tribal land. “If we can’t enforce laws, then there is no point in having the laws.”

Tribes need active enforcement on the ground, a clear process, clear responsibilities, and follow-up on issues. They need to work with the BIA to make authorities clear.

At GRIC staff worked with law enforcement and tribal rangers, and sometimes with the legal office to cite and bring people to court. There were no ordinances to cover allotted land, so bringing in tribal law enforcement was problematic. When the trespasser was non-Indian, outside law enforcement was called. Rangers were on the front line, protecting cultural sites and resources. Communication was critical and the report writing was demanding, to prepare for submission to the law office. The tribe uses damage assessments.

Tohono O’odham officials explained that they have an ordinance, but there is not the needed coordination among authorities. Education is needed especially in dealing with the Border Patrol. One of the biggest problems for the tribe is other federal agencies that create roads, go into archaeological sites without clearances, put in fiber optic lines without clearances, etc. “They are our biggest headache.” Dealing with politicians is also a big headache, he added.

The Hopi Tribe has adopted a civil trespass ordinance to deal with land dispute agitators and outsiders coming onto the reservation. They have authority to enforce trespass, but the problem is always resources.

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Need for education: Some tribal members don't understand the process. Although they have no authority to create leases, they will give permission to the Border Patrol to occupy land. Because there is no documentation or recording, they have just created a trespass.

Flexibility: Those drafting the regulations were asked to provide the compacted tribes with flexibility to implement their programs. Many have their own environmental staff, enforcement capability, surveyors and more. "We will comply with the requirements, but please don't impose undue burden on compacted tribes." Participants asked that the regulations maintain flexibility, and recognize differences between tribes in terms of the resources they have, or the enforcement ability they have.

Non-signers: These are people within the disputed Navajo-Hopi area without lease agreements, untouchable by the tribe because they are under the protection of the federal government. The Hopi tribe resents the label "awaiting relocation" and would like to prosecute. The federal government said in 2002 it is the tribe's responsibility, but they are still waiting for an opinion from the solicitor's office.

Animal trespass: Maintenance on the Hopi-Navajo northern boundary is disputed. Fences are cut, animals trespass, but there are no convictions or prosecutions.

Horses from BLM land are a big problem, bringing disease and destroying land. "People have this romantic idea that all Indians were pony soldiers, but horses are not native to our lands and they destroy it." The BLM needs to keep the horses on their side.

Air space trespass: Sometimes the line between Pyramid Lake tribe and the State of Nevada is "just some spotty barbed wire." But the Pyramid Lake reservation is a no-fly over zone; no planes are allowed in tribal airspace without council permission. At one point, military operations were trespassing with planes and helicopters, and when confronted, headquarters apologized and removed them. The tribe appreciated the respect.

Fencing: Participants asked who is responsible for maintaining fences -- BIA, BLM or the tribe, or is it all three? The lack of resources probably underlies the lack of maintenance, which is creating trespass. Need to identify and maintain boundaries properly.

Damages: BIA staff explained that there is a streamlined administrative process to gain possession of property and award damages through tribal court. Tribes should budget for this because the current BIA funding is at risk.

Expired lease: BIA staff said that once a lease expires, the tribe has authority to deal with land trespass and can adopt their own ordinance to enforce.

Coordination: There are various levels of trespass so regulations need to encompass all possibilities, and delineate who is responsible for what. There is a need for coordination between the tribe, BIA and other departments and agencies.

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Agricultural leasing:

Authority: For 638 tribes, agricultural leasing on tribal land is handled by the tribe. The BIA has authority over the allotted lands.

Complexity: There were complaints about the complexity of the language in the leases. One tribe has leases with 40-50 paragraphs that are very hard to understand. The annual revenue calculations “don’t make any sense to me. The percentages don’t match up. Rental rate times percentage of ownership would make more sense.”

Compliance: Tribes have issues with non-payment and need more enforcement. There are instances where tribal members have built houses on agricultural land, and at Salt River farm roads are being used for residential access. Staff there are trying to educate landowners on the definition of a farm road.

Non-members living on leased land: One tribe has problems with non tribal members (farm hands, often) living on leased land. Can this issue be covered in the regulations? At Pima there were tribal ordinances to deal with this problem. In some places, enforcing against non-members living on farms will be very controversial.

Clarity needed: Clear definitions are needed for agricultural leasing, including which lease to use for which kind of activity. Sometimes business and commercial development defer to the agricultural leasing regulations. The regulations should be clear about which lease applies to which use. Tribes also need clarity on how and when to comply with NEPA requirements.

Bond requirements: Participants suggested that the regulations should consider environmental permitting regulations and modifications with regard to the Clean Water Act. They said that when community members farm, no bond is required. The BIA has the discretion to determine if a bond is needed, and they suggested requiring a bond if the lessee is renewing and has defaulted or is late on payments. Bonding is especially critical when long term droughts are a factor.

Valuation: The valuation of community agricultural lands for appraisal purposes should include water availability and distribution. The value has changed in the past 20 years, and will change in the next 20. The regulations should account for this.

Term of lease: Participants asked for the ability to review, modify or terminate an agricultural lease before a 25 year term expires. Salt River lease terms are limited to five years, but if the BIA determines there had been substantial development they can be extended to 10-15 years. Getting consent for renewal of a lease on fractionated allotted land is a challenge, and to be avoided when possible.

Another participant noted that short renewal terms are burdensome because the renewal process is lengthy, and the entire process has to come up more often for short-term leases.

Inequity in the regulations: A participant noted the inconsistency in the term of leases: There are more requirements, he said, for a 10-year agricultural lease than for a 100-year commercial lease.

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This is a disconnect between the economic return on a commercial lease and on an agricultural lease. What is the justification, he asked, for the 25-year maximum on the agricultural lease? He pointed to the current debate over what constitutes a substantial investment by farmer, and asked for more guidance, especially for dealing with third party, commercial farmers, rather than small family farms. If investments are made, like drainage, does the lessee get continuing credit for the maintenance of those investments? For fractionated allotted land, consent is hard. “Getting them all into a negotiation is impossible. You have more leverage with commercial.”

Tribal v. federal: For some tribes, there is a disconnect between their tribal policies and ordinances and federal requirements. “We end up trying to make them fit the federal requirements. We are in a hard spot – do we do it federal or do it tribal?”

Substantial investment: Participants asked for a definition of “substantial investment,” as well as a methodology for determining it in the regulations. Does the investment need to be appraised? Does the investment need to increase the productivity of the land, or would farm worker housing be considered an investment? Does the impact of the investment, or improvement, carry over to subsequent lease terms? Does operational maintenance constitute an improvement?

Assignments: Some tribes are making agricultural assignment but without environmental clearances.

Best interest of the landowner and tribe: Communities need assurance that the lessee is a financially stable business. Landowners desperate for income may take a low offer. It is important to make sure that fair rates are negotiated, otherwise the community can end up taking the blame and it can become a political issue.

TAAMS: TAAMS doesn’t provide information about the greater tract of land that a parcel may be part of. Tribal government and landowners need that information. The consent form simply states the rate and asks who wants to lease for ten years, but it doesn’t show the larger tract involved.

Grazing:

Hopi Partitioned Land (HPL): What is the impact of existing and revised regulations on the HPL? The Hopi Tribe as a 638 tribe has had full jurisdiction over reservation lands since 1997. In 1998 there were amendments to accommodate Navajos with signed leases and give them some grazing rights. Hopi is responsible for maintenance of windmills, fences and operations – everything except roads which BIA handles on range land. There is a high level of trespass from Navajo livestock, and the Hopi document and bill them annually.

Use of Memorandum of Understanding (MOU): Hopi has used MOUs with both the BIA and US Department of Agriculture (USDA) conservation district to clarify responsibilities for land management.

Need for education: Hopi is making efforts to involve the BIA in an agricultural and land management education program, particularly for youth in schools.

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Permittee responsibilities: A participant suggested that the regulations should include responsibilities of the permittee, for keeping the public safe from roaming animals, for instance, and can be included when considering more than the option to renew.

Conservation plan: A participant noted that the BIA does not provide an annual conservation plan nor perform the annual review. The conservation requirement is not being enforced. Some interpret this lack of conservation planning as a lack of interest in addressing long-term sustainability, ensuring that the land will sustain grazing in the long term.

Horses: Horses pose a big challenge. They are grazers, but they eat more than cattle and “they don’t fit in with our long term AUM rates.” BLM receives funding to deal with wild horses, but tribes and the BIA get none. Plus, they are often in the roadways. “The horses are the elephant in the room.”

At GRIC there are between 900 and 5,000 horses, many more than cattle. “What little fencing there is they just run through it or roll over it.”

There is no accountability for feral horses. Permits should account for the grazing horses. And, bonding requirements should account for that factor too.

Grazing permits: Grazing permits touch on many areas – the environment, politics, noxious weeds, land use, maintenance of fences, everything. “We have to be out there and set the example – the tribal administration has the responsibility to put up fences and enforce regulations.”

Role for BIA: Participants asked whether or not the BIA should be involved in permitting on tribal lands. Should agricultural leases and grazing permits be handled by tribes? Is there even a need for these regulations? How can you permit something with no management plan or enforcement? BIA issues grazing permits for land that has no resources.

FINAL THOUGHTS – SMALL GROUP REPORT OUTS:

The last session divided the participants into four groups to consider how the regulations might enhance tribal self governance. Each group included tribal and BIA staff. In general, the groups found that both the BIA and tribal representatives had the same goal for the land and the tribes, and that they faced the same challenges. They also hoped to be able to meet again, and to take some concrete steps together before that meeting.

Specific final remarks from the participants included:

- Appreciation to the BIA and facilitators for this opportunity to share ideas.
- Regulations need to promote self governance and provide tribes maximum flexibility.
- Tribes are asking for technical support and in some cases, for responses from agencies. Lacking response, BIA staff urged them to go to the regional level. “It is important that you are responded to. We do have technical experts at the regional level if needed.”

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- Good to hear perspectives and issues from the tribes. This is a good dialogue and we need more sessions like this.
- At the regional level we need to hear these concerns. It sounds like we all have a lot of the same concerns.
- The region helps the agencies a lot with record keeping, etc. “Compacted, contracted tribes are welcome to call us for help.”
- Good to hear from other tribes. Self governance tribes need the capacity and resources to adopt their own regulations and standards that exceed federal or state standards.
- Tribes need to move forward and adopt their own regulations to exercise their sovereign muscle. Right now people that don’t live on the land are making these decisions. “When we put our trust responsibility in the hands of bureaucrats we lose our focus. We do need to hold BIA accountable, but we have responsibilities to our own tribal communities.”
- Thanks to the staff for the workshop. Good to hear from the tribes.
- Appreciate the opportunity to hear from everyone and discover what we have in common.
- Flexibility and open dialogue. Tribes need to have flexibility in leasing and also in the ability to regulate their own lands. I appreciate the open dialogue we had today.
- It would be nice to have a review of the BIA session from the previous day.
- Thanks to Michele for inviting me from the Pacific Region. My take away today is something we’re implementing in Riverside, California is networking with other departments, Army Corps of Engineers, Fish and Wildlife – fostering relationships because we don’t have the money to do it all ourselves. Technical assistance is key.
- Appreciate the opportunity to listen to all the information, hardships and successes that I heard. Things are not going to be resolved over night but over time through discussions such as this and keeping the chain of communication open to discuss and work through problems. Hearing discussion – both tribes and BIA are in the same boat and do have the same goals and objectives.
- Thank you everybody for identifying GRIC to participate. This is unprecedented. I don’t know when BIA has done this before. This is the time to revise the regulations, and this is a good first step. This forum needs to be available on a biannual, regional and local level. Just sitting down and talking to BIA doesn’t even happen in our own communities. “Let’s agree that it is important – a necessity – to take time to build these relationships and to communicate. We are all just people trying to do the same thing.”
- This is a great idea to invite us to spend time together. We can see how unique we all are. “The sharing was eye opening.”
- I appreciate the opportunity to participate in this diverse gathering and to interact with my peers and hear how they do things. Hopefully, we are making some inroads on these regulations.
- Thanks to BIA and the Western Region Office (WRO), tribes, facilitators, for enabling us to deal with historic issues in an enjoyable setting. We are heading in the right direction and should do this more often.
- One of the things we deal with is longstanding historical memory. There is still that perception of us vs. them. This is not meant as a negative statement, but being segregated in the seating arrangement in the morning – tribes at the table, BIA in back – gave me, as tribal member, that us vs. them feeling . Sometimes it’s just really simple things like that that keep us from working together. I would have liked to know what had been discussed

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yesterday, and maybe sitting next to our BIA counterparts, might have allayed some of that. It's not us vs. you anymore.

- Providing a full lunch would be good.
- For a grassroots tribal member trying to make this work, communication and meeting like this is so important, if we are going to protect and restore our lands. I don't think anyone can recall a meeting like this. There is much more to talk about. Thank you for the invitation.
- As a new employee, I look forward to the revisions of the regulations, and I appreciate that the BIA is including tribes in that process. It was good to learn about other tribes and their different structures and ways of doing things. We need more meetings like this, as well as trainings.
- Tribes have come a long way toward self sufficiency. Our children are going to college and coming back with technical and professional expertise. We want to move forward. We know our lands better than anyone else does. We need to find a common ground and better understanding with the BIA and other agencies. There were good ideas from other tribes about how to get through the red tape.
- Thanks to BIA and Michele for bringing us together. This small group today represents many more people out there helping with land management and protection. It is good to see tribal and BIA land staff working together. I appreciate this and it needs to happen more often.
- Sovereignty is the exercise thereof. To have it we have to exercise it. The more tribes create their own regulations and ordinances the more we are exercising our sovereignty. It is a paradox to ask BIA for permission to be sovereign. It doesn't make much sense, but that's what we have to do.
- Thank you to BIA and WRO. I heard a quote earlier: trust responsibility is not only trust, but responsibility. Grazing is a huge job that takes 85% of our time out there and includes everything. I appreciate this dialogue and hope to spend more time with BIA folks. We all have common concerns. The more we work together the more partnerships we can create. We have a good relationship with our superintendent, who is also a member of our tribe. Our people benefit from what we are doing here.
- Thanks to everybody for their comments. I learned a lot. Given the state of our economy we need to use our funding very wisely and efficiently. We have a lot of customers out there, requesting permission to use a resource. These customers – tribal members – need a lot of education.
- I learned today that we all have the same concerns and issues. We need more communication and education, especially for new employees. We really need a handbook developed to coincide with the regulations and explain more of the process. It was good to meet new people. Hopefully change won't take another 20 years.
- I learned a lot about grazing and agriculture – it all goes back to resources and the land and our trust responsibilities. Landowners call or visit my office and I try to give them an inventory of their allotments, what they own, show them maps, and answer their questions.
- Thank you for the invitation. It was great to hear what other tribes had to say. We all have our own challenges and our own levels of capacity and need, and the regulations need to recognize that. The goal should be to reach the point where all tribes make their own decisions, and the regulations allow that flexibility.

Appendix H: Phoenix Session Summaries

- Thanks to BIA, I learned many things today, including the importance of adopting our own tribal ordinances.
- Hearing others talk made me realize that we are not alone. I was reminded that the people we work for are the landowners who are affected by these regulations. We need to always keep them and their challenges in the front of our minds. They might be mad at us, but we have to consider what they have gone through to get to our office.
- An overall theme from the day is that the BIA mission is to encourage self-determination, to help tribes carry out federal programs. The participation and comments today are the blueprints for the future, a future that affords tribes the flexibility they need and encourages them to take on as much responsibility as they can. This is a partnership now and into the future as far as tribes and BIA working together. The more we cooperate and communicate the more we can achieve.
- Thanks to everybody. Another theme was the need for tribes to be better stewards of our own land. We want regulations that help us do that, rather than limiting us. I look forward to relaying this information back to my tribe for their comments and ideas.

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