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TRIBAL CONSULTATION

PROPOSED 25 CFR 162 (Leases and Permits)

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Taken at
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A P P E A R A N C E S

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TRIBAL LEADERS

P R O C E E D I N G S

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3 MS. KAREN ATKINSON: I'd like to go ahead and
4 get started. My name is Karen Atkinson. I'm the
5 Director for Indian Energy and Economic Development
6 within the Assistant Secretary's Office for Indian
7 Affairs within the Department of the Interior. I'm
8 here today on behalf of Jodi Gillette, the Deputy
9 Assistant Secretary. She was unable to join us this
10 morning, so I'm going to be here to provide the
11 introductions and work with you throughout the
12 consultation.

13 I want to welcome everyone. We're here today
14 to receive your input and comments on the proposed
15 business leasing regulations. These regulations
16 were drafted during these, this administration.
17 They're part of the CFR Part 25 162, and they govern
18 leases and permits. And the parts that we'll be
19 talking about today govern leases and permits
20 specific to residential and business leasing and
21 renewable energy.

22 The Department first provided the draft
23 proposed rule almost a year ago now in
24 February 2011. The Department held four
25 consultations to receive tribal input on those

1 proposed regulations. There were regional
2 consultations throughout the last year. One was
3 held March 17th in Las Vegas, another March 31st in
4 Minneapolis, and April 6th in Albuquerque.

5 The materials you got today, we have a book
6 providing the current draft but also some background
7 on the regulations. If you look to Tab No. 6 you'll
8 see the comments that we received from tribes during
9 those consultations were incorporated into the
10 current draft so that Tab 6 shows the changes that
11 were made from the proposed draft based on tribal
12 input that we received during the consultations.

13 We received written and oral comments from over
14 70 tribes, including Tribal Housing authorities and
15 six organizations, and we received over 2,000
16 individual comments that were reviewed and a number
17 of comments incorporated into the draft.

18 The proposed rule that we're here to talk about
19 today reflects tribal input and review and revision
20 in accordance with the regulatory requirements for
21 the Department.

22 We're going to start this morning with an
23 overview of the proposed rule and the changes, and
24 Ms. Appel is going to provide that overview.

25 MS. ELIZABETH APPEL: Good morning, everyone.

1 Can people see the screen or do we need to lower the
2 lights? Lower the lights?

3 Annette, can you get the lights lower? Thank
4 you.

5 My name is Liz Appel. I'm with the Office of
6 Regulatory Affairs and Collaborative Action, which
7 is within the Office of the Assistant Secretary for
8 Indian Affairs. And I'm just going to do a quick
9 overview of what the proposed rule says. I just
10 want to emphasize that this is still at the proposed
11 stage, so it's still very open to change, and we're
12 here to hear what your thoughts are on what changes
13 you would like to see.

14 So to start out with, as Karen said, we
15 distributed a draft of the regulations, and we
16 received many comments. And some of the more
17 significant changes that we made in response to
18 those comments, which have been incorporated into
19 this proposed rule, are listed here. For example,
20 we deleted the prohibition on lease terms beginning
21 more than one year after the lease approval. Some
22 of the other significant ones we're now deferring to
23 the Tribes, negotiated rent, so rather than
24 requiring an appraisal for tribal land, we're just
25 going to defer it to the Tribe what they deem to be

1 the appropriate, appropriate rent.

2 We've also -- we got a lot of negative comments
3 about the deemed consent provisions that were in the
4 draft, draft regulations, so there's no deemed
5 consent now unless the parties negotiate that in the
6 lease.

7 And I won't go through all these and bore you
8 but they're there. We have the handouts if you want
9 to refer back to them.

10 So the rules continue. There's some things
11 that don't change. They continue to apply to leases
12 on Indian land and BIA land, meaning government land
13 like, for example, the main interior building that
14 sits on government land, so the scope of the role
15 doesn't change in that respect. It requires anyone
16 who doesn't own all the interests in a tract to get
17 a lease before taking possession of that tract, and
18 it allows, continues to allow BIA to grant permits
19 for use of BIA land.

20 The new provisions, new provisions are that it
21 allows landowners to issue permits for use of Indian
22 land without BIA approval. This is a major change
23 that the Administration believes that there's no,
24 since there's not a legal interest being granted in
25 the land there's no rule for BIA to be approving

1 those permits, so that has been deleted.

2 We're requiring parties to provide the permits,
3 though, just notify BIA basically that there is a
4 permit, a permitted use on the land so that BIA is
5 aware of what the land use is so that it doesn't
6 approve a lease in conflict. And it provides
7 flexibility and consent requirements.

8 So before -- the current rights have a subpart
9 that just addresses all non-agricultural leases the
10 same. The proposed rule splits them out so there's
11 a residential subpart that addresses leasing for
12 housing purposes, business subpart, and then a wind
13 and solar energy subpart that addresses leases for
14 purposes of developing wind and solar resources.

15 The BIA approval process, one of the main goals
16 in these proposed rules are to provide more
17 certainty in how long it takes BIA to approve a
18 lease. So once BIA receives all the required
19 documentation, and that includes any NEPA
20 documentation that may be required, then the
21 timeline starts so that, for example, for a
22 residential lease, BIA then has 30 days to review
23 that lease and then may request 30 more if needed.
24 And it's likewise for business, wind and solar but
25 with a little longer time period. And there are

1 consequences if BIA does not abide by those
2 timelines, either the parties can take action under
3 25 CFR 2, which is a suit to compel action. Or in
4 the cases of amendments and subleases, the amendment
5 and sublease will be deemed approved if BIA does not
6 act within the required time period.

7 Another change we made was with the grounds for
8 BIA approval, we wanted to make the default to be
9 that the lease document would be approved rather
10 than, rather than this kind of uncertain discretion
11 for BIA to approve or not. So instead it says that
12 BIA may only disapprove documents if certain,
13 certain requirements are met.

14 The proposed rule also sets out when approval
15 is not required for different documents. For
16 subleases, BIA approval is not required if the lease
17 provides for subleasing. BIA has already approved a
18 general development plan, sublease form and rent
19 schedule, and the parties then just have to provide
20 BIA with a copy of the executed sublease.

21 Similarly with assignments, BIA approval is not
22 required if the assignment is two, not more than two
23 distinct legal entities that are specified in the
24 lease or to the lessee's fully owned subsidiaries.

25 For amendments BIA approval is always required,

1 and that's no change from the current rule.

2 And similarly, the leasehold mortgages approval
3 requirements are the same, but residential leases
4 aren't restricted to (unintelligible) capital only
5 for the purpose of developing the lease premises
6 anymore.

7 Rental requirements, as I said there's a big
8 change as far as tribal land. We're now deferring
9 to any amount negotiated by the tribe, as long as
10 they provide the BIA with the tribal authorization.
11 And the tribe may still request an appraisal if it
12 wants one, but it's not a requirement anymore.

13 And then for residential, business, WSR and
14 individually owned land, fair market value is
15 generally required unless it's waived.

16 The current rule is a little more strict about
17 adjustments of rental amounts requiring a periodic
18 review every five years. In the proposed rule we
19 include a little more flexibility by saying the
20 lease may address how the adjustments are going to
21 happen or how the (unintelligible) are going to
22 happen. The lease may have an automatic adjustment
23 in there such as CPI.

24 For direct pay, we're limiting the
25 circumstances in which direct pay is available to

1 those instances when there are less than or equal to
2 ten landowners in the tract and all of them agree to
3 direct pay.

4 Improvements, the main change with
5 improvements, besides requiring a lease to specify
6 what improvements are going to be allowed, are that
7 we're clarifying that permanent improvements are not
8 subject to any fee, tax, or other charge by state or
9 political subdivisions of states, but they may be
10 subject to tax, taxation by tribe, but that is
11 without regard to the ownership of the improvement.

12 Bonding and insurance, generally bonding is
13 required and BIA, the lessee must provide insurance
14 unless the BIA waives.

15 And then homesites, we added some slides on
16 homesites because there have been a couple questions
17 on these. Basically we're trying to show what's
18 changing and what's not. Under the current
19 regulations and the proposed regulations a lease is
20 required whenever, except when all trust and
21 restricted owners give permission for possession
22 without a lease. And you have to get the consent
23 and the ILCA percentages. And an appraisal
24 evaluation is required unless all of the landowners
25 waive, and that's sort of the sticking point.

1 We have the ILCA percentages listed here and
2 who BIA can consent on behalf of landowners who are
3 whereabouts unknown, et cetera, except with -- and
4 that's for the lease initially, but as far as
5 waiting the appraisal, BIA can't consent on behalf
6 of the whereabouts unknown. So this causes kind of
7 an issue where some people can't meet the
8 percentages for consent to lease but that's required
9 by ILCA, but then they can't meet -- even if they
10 can meet that, they can't meet the 100 percent
11 consent requirement to waive the appraisal, but BIA
12 is in this position where it has to ensure that all
13 the landowners receive their fair market rental, so
14 it can't waive the right to fair market rental on
15 behalf of those landowners who may be whereabouts
16 unknown or maybe they just don't want to consent.
17 So we're very open to suggestions from people on
18 ways that we can address this in the rule.

19 And, finally, the wind and solar resource
20 subpart, this subpart generally has the same
21 requirements as business leasing, but it allows for
22 a two-step process for wind energy. Because you're
23 actually constructing towers, towers to study the
24 wind and the evaluation phase, you can get a
25 short-term lease during that period and do sort of

1 an abbreviated NEPA at that point and then roll that
2 into a longer term lease for the WSR lease.

3 So those are -- that's a very quick broad
4 overview of the provisions. Our timeline that we're
5 shooting for is to review and address the comments
6 in February and March. We're asking that you get
7 your written comments to us by January 31st, if
8 that's possible.

9 In April the rule we're hoping will be going
10 through the DOI review and approval and then OMB
11 review and approval, and then July is our target for
12 getting it published in the Federal Register. And
13 at that point it will be 30 days before it's
14 actually effective. So we're looking at an
15 effective date of August. And what's driving this
16 really is the fact that this is an election year, so
17 we want to make sure that we get the rule finished
18 in sufficient time that, with enough space that it
19 gets published and effective before any potential
20 change in administration.

21 So written comments, we're asking again if you
22 can submit them by January 31st, and the e-mail is
23 Consultation@BIA.gov. And we're also open to
24 receiving comments in the mail, but if you can
25 e-mail, that's kind of the quickest way to get it to

1 us to make sure that, with the security procedures
2 that the mail doesn't get. So if you can e-mail it
3 to us, that is the preferred method.

4 So before we open it up for comments, we'll
5 have people carrying microphones around for anyone
6 who wants to speak, but I also want to mention,
7 please make sure that you sign in so that we can
8 make sure that we get your name and information.
9 And before you comment, if you wouldn't mind stating
10 your name and where you're from so that our court
11 reporter can be sure to capture.

12 And the transcripts will be made available in a
13 couple weeks on our website. All our information --
14 I don't have the website listed up here, but all our
15 information is available at www.BIA.gov, and you
16 click on the "consultations" link and the proposed
17 rule and all the associated information is up there.
18 So we will also be posting the transcripts up there.

19 So I'll turn it over to Karen now, and we'll
20 open up the floor for comments.

21 MS. KAREN ATKINSON: Before we start taking
22 comments, I'd like to just make some brief
23 introductions. We have representatives from the
24 Bureau of Indian Affairs today who are going to
25 assist us in answering questions you may have about

1 the proposed rule. From the Midwest region we have
2 Kayla Danks, the regional realty officer; and
3 Jay Daniels, also from the Midwest region; and the
4 Acting Regional Director from the Great Plains,
5 Bruce Maytubby, and his staff, Rick Clifford from
6 the real estate office. So they'll be assisting us
7 in answering questions you may have.

8 We'd like to open it up now for comments,
9 questions, or your input.

10 MS. ANEVA YAZZIE: I'm Aneva Yazzie, the CEO
11 with the Navajo Housing Authority.

12 I appreciate the consultation and the
13 opportunity to be here. I like some of the changes
14 that I've seen in there that you made applicable to
15 us as the tribal leaders and the Indian Housing
16 entity.

17 My question is: What's the mechanism or
18 process then of collecting all comments at the end
19 of January? And I see you have February, March to
20 collect those comments. For those that are
21 attending the consultation and other tribes, what's
22 that process, and how do we assure that we're privy
23 to all final comments before it reaches DOI
24 officials?

25 MS. ELIZABETH APPEL: So usually what we'll do

1 is we comb through all the written comments and all
2 the transcripts, and we pull out each distinct
3 comment. And we put them into an Excel spreadsheet,
4 and then we categorize them, we divvy them up based
5 on categories. You know, something as broad as
6 residential, if it's sort of miscellaneous about
7 residential or if a lot of people -- like the last
8 go-around a lot of people discussed taxation of
9 permanent improvements, so that's an example of the
10 category that we may have.

11 So then we each -- we have a spreadsheet for
12 each category, and then the BIA subject matter
13 experts go through each category and determine how
14 we can revise the regulation to meet the concerns
15 expressed in the comments.

16 MS. KAYLA DANKS: Did you post the comments on
17 line last time?

18 MS. ELIZABETH APPEL: We didn't post the
19 comments on line last time, but this time they will,
20 at the very least, be posted on Regulations.gov.
21 And if people want them posted on the BIA website,
22 we can do that too.

23 MS. ANEVA YAZZIE: I would hope that there is
24 some mechanism to see all the comments and then what
25 the BIA intends to then consider for revision into

1 the regulations. That, to us, would be very helpful
2 at the end of all the comment period and then what
3 is submitted then to the Department of Interior at
4 that point in time. Thank you.

5 MS. JENNIFER TURNER: Good morning, everyone.
6 My name is Jennifer Turner, and I'm an attorney in
7 the Solicitor's Office, Division of Indian Affairs
8 in Washington, D.C.

9 And I just wanted to add to what Liz said to
10 note that on the BIA consultation website there's a
11 document entitled "Response to Comments Received
12 During Tribal Consultation," and it doesn't look
13 like it was included in the binder of materials you
14 received today, but what the Department did after
15 the tribal consultations last spring is to draft a
16 document that goes through a summary of all the
17 tribal comments we've received, and then we provided
18 our responses. So whether they were incorporated or
19 whether a policy decision was made or a legal
20 decision was made not to adopt them. But I think
21 that will give you a sense of our responses to the
22 tribal comments we've received during the last
23 consultation.

24 And also as Karen mentioned earlier, there is a
25 document in the binder you received that has the

1 tract changes to show exactly what changes were made
2 from the previous, from the previous consultation
3 draft to the proposed rule, so hopefully that shows
4 you all the changes that were made in response to
5 the comments we received.

6 MS. ANEVA YAZZIE: Thank you.

7 MS. SYLVIA CURLEY: Good morning. My name is
8 Sylvia Curley. I'm an attorney with the law firm of
9 Wagenlander & Heisterkamp out of Denver, Colorado.

10 My firm represents numerous tribally designated
11 housing entities, for example the Oglala Tribe
12 Housing Entity, Lower Brule, the Cheyenne River
13 Housing Authority and numerous others in the South
14 Dakota area, and so I'm here today to kind of ask
15 questions on their behalf and submit input on their
16 behalf.

17 I actually have a couple of things that I was
18 hoping to ask about, but I just kind of wanted to
19 start with the provision that you discussed in the
20 power point about when BIA does not have to approve
21 a sublease. And I was particularly interested in
22 the provision in 162.351 that states the conditions
23 for when a sublease doesn't need to be approved.
24 Number 2 states, "We have approved a general plan
25 for the development," and my clients are really

1 curious about what does that mean, "a general plan"?
2 That's a very general broad term. You know, and for
3 TDHE, they're already submitting Indian housing
4 plans under NAHASDA and they already have a whole
5 regulation that they're already following, and so we
6 were curious what that term meant.

7 MS. ELIZABETH APPEL: Thank you. I think we're
8 going to be looking at that again. We received that
9 comment earlier last week, too, and we definitely
10 don't want to duplicate what other agencies are
11 already doing, so that comment is duly noted. Thank
12 you.

13 MS. SYLVIA CURLEY: Okay, thank you. If there
14 aren't other comments, I'll just continue. I was
15 just curious: How much input and how much
16 collaboration was there with HUD when the
17 residential leasing portion was put together?

18 MS. ELIZABETH APPEL: We did, we provided them
19 an early draft and then had several teleconferences
20 with Tom Wright and HUD, and they made several
21 suggestions that we incorporated. So we're
22 continuing to work with them to make sure that the
23 regulations work together rather than create issues.

24 MS. SYLVIA CURLEY: And that's great because I
25 think that was what I wanted to point out is that in

1 some ways it doesn't seem as if this proposed rule
2 really takes NAHASDA into account. There are
3 individual Indian landowners and there are tribal
4 agencies or the Tribe itself who have land, and
5 they're treated the same in this proposed rule. And
6 so our clients would advocate for possibly treating
7 them separately. I mean, it's possible that an
8 individual Indian landowner might need more
9 oversight as described in this proposed lease than
10 say the Tribe or a TDHE would. I mean, they already
11 have a lot of regulations. And in a way, if this
12 rule was an attempt to streamline the process, in a
13 way for the housing authorities it's actually laying
14 down another hoop for them to jump through.

15 MS. ELIZABETH APPEL: Thank you. We'd be
16 interested in some detail, too, on how we can reduce
17 the oversight for tribal land, too.

18 MR. ALLEN FISHER: Good morning. My name is
19 Allen Fisher. I work for the Northern Cheyenne
20 Housing Authority.

21 I've got a couple of questions. My first
22 question is, you know, how come there's a
23 requirement for 100 percent consent? That's a --
24 you know, from our country that's going to be pretty
25 hard to do to get everybody to consent to the lease.

1 I know the current way is a majority. And that's a
2 big question. There's a lot of family feuding.
3 Some people don't live in our country anymore. So
4 who in the BIA is going to be responsible also for
5 getting consent from the people that we don't know
6 where they're at?

7 Another question is: Is the BIA going to get a
8 larger workforce to handle all these leases within
9 the 30-day, 60-day period? You know, they're
10 already saying that they're overworked. That's my
11 concern.

12 MS. JENNIFER TURNER: Thank you for your
13 comments. I'm going to try to start with your first
14 question about consent, and the regulations make a
15 distinction between the consent requirements for a
16 lease document and the consent requirements for a
17 waiver of an appraisal and a waiver of, that all of
18 the landowners are getting fair market value. So
19 the consent requirements for a lease approval, they
20 are required by the Indian Land Consolidation Act,
21 and the power point that you have spells out what
22 the precise consent requirements there are. And if
23 there are -- for example, if there are 20 or more
24 landowners, the Indian Land Consolidation Act only
25 requires that you need majority consent, so you

1 don't actually need a hundred percent consent for
2 the original lease approval and likewise for the
3 approval for all the lease transactions like
4 subleases, assignments, amendments, and mortgages.

5 That said, these regulations do require a
6 hundred percent where we're talking about the waiver
7 of the fair market, of the fair market value
8 requirement and the waiver of the appraisal
9 requirement. And so when Liz provided her overview,
10 she explained that we're in a bit of a tough spot
11 because on the one hand we appreciate that the
12 requirement to get a hundred percent of all
13 landowners to consent to waiving fair market value
14 is a very difficult and burdensome one, but on the
15 other hand we have a trust responsibility to all of
16 the landowners. And so BIA is certainly willing to
17 work with the landowners and the lessees to get
18 consent, and hopefully that will help. And we're
19 also very interested in any suggestions that you may
20 have on facilitating the consent process.

21 And then in terms of the second question you
22 asked about how BIA is going to meet the timeline
23 set forth in the lease, certainly in the Solicitor's
24 Office we are also overworked, but -- so -- we get
25 complaints that we don't meet our deadlines as well,

1 and so I know that we are -- BIA is going to be
2 doing training on these new regulations, and we're
3 also hoping that some of the new provisions in the
4 regs such as the no requirement for BIA approval of
5 permits and the reduced appraisal and appraisal
6 review requirements are going to ease BIA's workload
7 in other areas.

8 And I don't know if anyone from BIA would like
9 to add to that comment.

10 MR. JAY DANIELS: My name is Jay Daniels, BIA.

11 The thing about the consent requirements, you
12 know, there's different like (unintelligible) that
13 we can sign on behalf of. And so when we sign on
14 behalf of those folks, it can help meet the consent
15 requirement to get the lease. So it's not that you
16 have to get a hundred percent consent, but you have
17 to get -- you have to meet the sliding scale from
18 ILCA, the Indian Land Consolidation Act consent
19 requirements, and then we can sign on behalf of
20 those others so that you can reach that consent
21 requirement.

22 And then I wanted to make a response also to
23 the law firm for housing. I've done this in a few
24 leases, but we're currently (unintelligible) this
25 authority to pre-approve subleases, and I've done it

1 on occasion. And basically what we do is you submit
2 us your sublease, we review it. If we're okay with
3 it, if it meets everything that's at least required,
4 then what we do is we give you a letter. Basically
5 we tell you that you have authority without further
6 consent by us or further approval by us to go ahead
7 and issue a sublease so long as you don't add to or
8 take away from it. If you add to or take away from
9 that lease that we preapproved, then we need to look
10 at it again.

11 MS. KAYLA DANKS: And then just to add a point
12 of clarification with regard to the consent
13 requirement, I'm just going to read from the law the
14 sliding scale because it provides for different
15 provisions and different scenarios, and so it's kind
16 of complicated.

17 And so ILCA, or now AIPRA as amended, provides
18 for a sliding scale. If you have 20 or more owners
19 then you need majority consent. And then if you
20 have ten or more owners or fewer than 20, then you
21 need 60 percent. If there are more than five such
22 owners or fewer than 11 owners, then you need
23 80 percent. And then if there are five owners, then
24 you need 90 percent. And so it's not 100 percent
25 but it's a sliding scale. The sliding scale will

1 actually be incorporated. It's a law passed by
2 Congress so we have to comply with it, and that will
3 be incorporated in the regulations.

4 UNIDENTIFIED SPEAKER: So, you know, maybe
5 something like that could be more (unintelligible)
6 rather than a hundred percent. Because you're just
7 saying it's not a hundred percent. You know,
8 instead of saying in there it's a hundred percent,
9 maybe it could refer to the sliding scale. It would
10 be a lot more -- less, what would you call it,
11 complicated. That's my comment.

12 MS. KAYLA DANKS: Thank you for your comment.

13 MS. ELIZABETH APPEL: Section 162.011 does
14 include the sliding scale, just for your
15 information.

16 MR. DONOVAN ARCHAMBAULT: Donovan Archambault,
17 Ft. Belknap Tribal Council.

18 That 60-day rule will be set in stone, right,
19 with the change? I mean, you guys say 30 days for
20 approval plus another 30 if needed, and right now
21 it's plus another 30 if you need it, plus another
22 30, and you never get a lease signed. So is that
23 going to be 60 days or -- if it is, it should say
24 that.

25 MS. ELIZABETH APPEL: Well, I think the point

1 was to make these, the outer bounds of how long it
2 would take so that there was some certainty that
3 people know it's not going to take longer than that.
4 But the idea is to, within the first 30 days, for
5 example, for residential, we're hoping that it will
6 only take 30 days or less than 30 days. And it
7 would only be, if it was especially complex, that an
8 additional 30 days would be needed.

9 MR. DONOVAN ARCHAMBAULT: Okay.

10 The other question I have is like a lot of the
11 tribes are doing their ARMPs, and they're quite a
12 ways down the road with them and then we're going to
13 change rules here, especially for business and
14 agricultural leases. I don't see how that's going
15 to help us.

16 MS. JENNIFER TURNER: Just to clarify, these
17 regulations do not address agricultural leasing
18 regs, nor do they specifically address agricultural
19 resource management plans. But going forward I know
20 that agricultural leasing regs are definitely on the
21 table for the next administration, along with new
22 rights-of-way regulations, for example, and new
23 grazing regulations. And so as of right now these
24 regulations don't specifically address agricultural
25 leasing rights.

1 MR. KEVIN KECKLER: Good morning. My name is
2 Kevin Keckler. I'm Chairman of the Cheyenne River
3 Sioux Tribe.

4 I've got a couple of comments on the undivided
5 interest. We struggle with this in our appraisal
6 process that we are using right now through the OST,
7 but as I'm looking through this, you're basing the
8 consent based on the number of individuals that own
9 the tracts. It don't have anything to do with the
10 percentage of land owned by them individuals. For
11 example, if you have a tract that has 20 owners and
12 one person owns 90 percent and the other 19 own the
13 remaining 10 percent, the other 19, if you can get
14 11 of them minority owners in that tract, they have
15 say over the person that owns the large percentage
16 of the land, and I don't agree with that.

17 To me part of the issue of owning land, whether
18 it's one over one or undivided status, is as you do
19 the appraisals and demonstrate control and use of
20 that land, the amount that you own within that has,
21 should have a factor because it does when you're
22 doing the appraisals and everything else.

23 The things that I'm going to touch on later in
24 terms of OST being mixed in there with BIA, I don't
25 see how you're going to get to these 30 day

1 approvals and things with the way the appraisal
2 process is right now. We struggle with -- 30 days
3 is totally unrealistic if we're relying on OST and
4 the Bureau to work together to get these appraisals
5 done and in the cases where there's going to be.

6 So I would rather see something be done in
7 terms of something on percentage of land owned
8 versus just basing it on a majority of ten people or
9 20 or 30, all the numbers.

10 The other thing is we've went through some
11 issues that have to do with consent on these, and I
12 was informed that we have a tract that has hundreds
13 of owners. And we sent out notices to all of them,
14 all the owners within there, and we got four
15 responses. So I don't see how you're going to meet
16 the numbers that you're putting in terms of
17 percentage of notifying and getting them to consent.

18 The other issue we have is with, this has to do
19 with the housing authorities. We have houses that
20 were placed on undivided interest tracts, and the
21 person that got the home gave it up or it was
22 repossessed, and then our housing authority reissued
23 that to another tribal member who wasn't a, one of
24 the interest holders in them tracts, so now there's
25 issues with that. And it's basically that person

1 has no control because the family that owned that
2 land, because they were selected to take that house,
3 they would never ever consent to them leasing them
4 lands because it was their family's land and it was
5 their house originally.

6 But those are my comments. Thank you.

7 MR. JAY DANIELS: A comment on the percentages,
8 on the ILCA what you do, there might be five owners
9 and one owns 90 percent, you're just required to get
10 that 90 percent, that person that owns 90 percent,
11 then you can get a lease. So it's not you gotta get
12 90 percent of the five owners, you have to get
13 90 percent of the interest.

14 MR. KEVIN KECKLER: Not just the number of
15 tract owners?

16 MR. JAY DANIELS: That's correct.

17 MR. KEVIN KECKLER: It don't really say that,
18 so --

19 MR. JAY DANIELS: And then also what ILCA
20 does --

21 MR. KEVIN KECKLER: It might be good to have
22 that specified based on land ownership versus
23 individual numbers.

24 MR. JAY DANIELS: And the good thing about
25 that, too, is under ILCA -- well, we use acronyms

1 all the time. It's Indian Land Consolidation Act,
2 and the American Indian Probate Reform Act, AIPRA.
3 What that does, that permits us so that when we sign
4 on behalf of whereabouts unknown and estates, it's
5 as if they have consented to the same agreement like
6 the other owners. The only difference is that if we
7 sign on behalf of somebody and say all the other
8 owners (unintelligible) consideration, we have to
9 collect consideration for those that we sign on
10 behalf of, and that's about the only difference.

11 MR. KEVIN KECKLER: One more response to that,
12 our superintendent followed the CFR regs on, this
13 had to do with a permit for right-of-way, but he
14 followed the process that was spelled out in the CFR
15 and issued an easement for this land. And after the
16 improvements were made, the one landowner within
17 that permit challenged that, and even though there
18 was no numbers spelled out in the CFR, how many you
19 had to notify, I think in this case there was 35
20 landowners, the BIA came back and reversed that
21 because they said the number didn't meet the, a
22 large amount of the shareholders within.

23 So I know in our agency they're very hesitant
24 to do any of that anymore because of the reversing
25 of the decision that was made by our superintendent,

1 which I don't agree with, by BIA.

2 Thank you.

3 MR. SCOTT WESTON: Good morning. My name is
4 Scott Weston from the Oglala Sioux Tribe, Council
5 Representative.

6 I was at the Albuquerque consultation, and when
7 we were there, there was a lot of small land-based
8 tribes there. I think I was -- from my recollection
9 I was the only representative from our large
10 land-based treaty tribes. And it kind of gave me
11 the impression that they didn't want me around
12 there, so I stuck around there and made sure that,
13 you know, that I -- they had shared that we put our
14 issues on the table because all they were dealing
15 with was pretty much everything that was kind of
16 catered toward these small tribes.

17 And being the vice chair of our land committee,
18 we deal with a lot of this stuff all the time. The
19 biggest thing that we have our problem right now in
20 the leasing regs is that when -- the process is so
21 scrutinized, and we do everything like Chairman
22 Keckler from the Cheyenne River Sioux Tribe related
23 to us, is that what happens is that we do it to the
24 T and it's wrong every time, just about every time.

25 And then we go -- don't get me started on this

1 appraisal process. You know, we talked about
2 appraisals and ILCA versus OST, we don't never have
3 a -- they're not consistent. Either one is higher
4 or one is lower or vice versa.

5 But those are just some of the comments that
6 I'll make right now for, just to kind of maybe open
7 up a discussion so that we can get started and kind
8 of get to moving here.

9 Thank you.

10 MR. IRV PROVOST: My name is Irv Provost. I'm
11 with Scott. I'm an Oglala Sioux Tribal Council
12 Representative from Pine Ridge. And this is the
13 first time I've been at one of these leasing
14 consultations.

15 You know the word "consultation" really puts a
16 bad taste in my heart and my mouth because all of us
17 sitting around in this room are going to make
18 comments in the best interests of our people and our
19 tribe, but the more and more I look at the
20 regulations here, the more and more cumbersome it
21 gets and the timelines are forgotten within these
22 activities that need to be done.

23 Like my buddy here Scott, you know, we have
24 these appraisals. And we're on our land committee.
25 We have seen these appraisals set in Aberdeen for

1 years without a word, up to actually three on one of
2 them. And these individuals has questions to be
3 answered, and we can't give it. And we're not
4 getting no word. You know, so I'm pretty much a
5 sticker on accountability and timelines to show
6 performance for our people, and I'm not going to be
7 looking at the bureaucracy of every little issue
8 here that has to be addressed and has a timeline
9 that ain't gonna be addressed. It's not good for
10 our people out there. It's not.

11 You know, one of our environmental regulation
12 individuals here was looking over some of the
13 changes here, and I see that there's a lot of the
14 environmental review process that we do have
15 ordinances and regulations with our tribe that we
16 can do these activities instead of seeing OST and
17 ILCA contracting these out and belaboring these
18 assessments and these leases and these appraisals.

19 It's time us as tribes start taking our own
20 responsibility to our people, and that's what I'm
21 getting at here is that I'm looking at these and
22 there's a lot of changes, but I don't see that being
23 a proposed package in front of me.

24 I see all these word documents and I've seen
25 these before in legal activities where they just

1 cross something out and they (unintelligible). I
2 want to see that package in front of me so I can go
3 back to my people and say, Hey, these are what
4 they're proposing and what we want to address, need
5 to have some changes.

6 Thank you.

7 MS. KAREN ATKINSON: Thank you for your
8 comment.

9 Are there further comments?

10 MR. ERNIE LITTLE: Good morning. My name is
11 Ernie Little, and I represent the Oglala Sioux
12 Housing Authority, Oglala Sioux Tribe. I've worked
13 with the leasing with the Bureau and the Tribal Land
14 Office for several years.

15 The issue is what I heard over here, the
16 right-of-ways. One of the I guess conflicting
17 information about percentages, you know, I
18 understand what you're saying about the ILCA now for
19 clarity, which is good.

20 The other thing is I guess I have concerns as
21 the person that has a budget to get some things done
22 and ran into some situations where our fair market
23 value is used in the detriment of a tribal member
24 getting a homesite or having a right-of-way.

25 And in a situation where there's a huge request

1 for amount of money that, to cross somewhere, to get
2 water or power or a road, I think if there is
3 something there that says definite, it would be good
4 to see in black and white where you offer a fair
5 market value, offer a reasonable amount, which
6 (unintelligible) did to the landowners. I guess
7 that thing is one of the concerns.

8 The other one is amount of -- and I've brought
9 this up in a number of conferences, and I think the
10 last one was in Montana, but the amount of -- the
11 responsibility. I guess I should say to me it's the
12 Bureau's responsibility to protect that allotted
13 land or that land, the trust responsibility.

14 Each time I do a homesite for the Housing
15 Authority for tribal membership, I have to do a
16 survey. We issue leases on GPS. We issue leases on
17 some of the old methods on a scale and they're
18 accepted. I don't know if the Bureau, to me, should
19 pay for surveys that's done on homesite leases if
20 they require the HUD program because of their
21 limited dollars to do that.

22 We sent -- we actually surveyed the
23 right-of-ways for the 30-foot right-of-way, surveyed
24 the homesites, and it just takes dollars away from a
25 home. I've talked with a number of tribes about

1 that, and some of them have it but their tribal
2 budgeting put some of it in, but I do know in cases
3 where the Bureau was forced to survey. But we've
4 expended a huge amount of dollars to do that, which
5 I think should be for the compliance you have or you
6 wish to have for them homeowners and the trust
7 responsibility, that you should provide that survey.
8 So I do want to make them comments.

9 And I do also think it's really important to
10 address the amount of money that, could be the top
11 end of, like a road crossing or a power crossing,
12 prohibits people to actually enjoy a piece of land,
13 you know, that they went through the processes to
14 secure for their home or for their children. So I'd
15 like to say that for the public record. In the
16 interest of the Housing Authority, we've struggled
17 quite a few times.

18 Thank you.

19 MR. JAY DANIELS: Sir, you know, for the
20 right-of-way things, those are a necessary element
21 for a homesite, and what I did in the past was I
22 implemented a plan with the Tribe where before they
23 would approve a homesite, I would go out and inspect
24 where they placed it and try to make it easily
25 accessible as possible without, you know, reducing

1 the value of the property for (unintelligible) or
2 something like that. That worked fairly good.

3 As for the consent requirement for
4 right-of-way, we use, in the Midwest Region we use
5 the right-of-way Part 169, majority consent, but we
6 also include the ILCA consent requirements because
7 sometimes you can get the required consent using the
8 majority consent under 169 right-of-ways, but
9 sometimes you have to use the ILCA to get to that
10 level. And the reason being is because under 169 we
11 have to have majority consent, then we can consent
12 on behalf of the owners that didn't consent.

13 But sometimes under ILCA, for example like I
14 stated earlier, if you utilize the AIPRA, ILCA -- I
15 hate to use acronyms, but when you utilize those,
16 the people that we sign on behalf of under the life
17 estates and whereabouts unknown, they count toward
18 the required consent. So it's not set in stone that
19 you have to use ILCA consent requirements,
20 especially for rights-of-ways. You can utilize the
21 majority (unintelligible) as far as the regulations
22 there.

23 As for the surveys, we have taken GIS surveys
24 for homesites. We always run through our BLM Indian
25 land surveyor, and we (unintelligible). So we've

1 done that a few times.

2 MR. MARIO GONZALEZ: Mario Gonzalez. I'm one
3 of the attorneys for the Oglala Sioux Tribe.

4 And my comment is that under (unintelligible)
5 25 United States Code Section 410, I don't have the
6 statute here but my recollection is that when money
7 is going to your IIM accounts, only the Secretary of
8 the Interior has the authority to release those
9 funds, and only a tribal court can issue an order
10 regarding those IIM funds, but it still requires
11 approval of the Secretary to honor the tribal court
12 order. Federal and state court does not have the
13 authority from that statute to order the release of
14 funds from your IIM account to pay the season of
15 dispute between a lessor and lessees.

16 So in the regulations, proposed Section
17 162.006, (b)-1-(i) it says that the lessee must pay
18 rent directly to the life tenant under the terms of
19 the lease. And one of the protections that lessees
20 have in life estates is that the money goes into an
21 IIM account and it's shielded from federal or state
22 courts ordering you to use those funds in a certain
23 way.

24 But it appears to me that if you're stripping
25 these lessors of that protection, what's going to

1 happen under that section is you're going to have a
2 situation where you have, there's no more money
3 going into your IIM accounts coming directly to you,
4 then you'll have a state court ordering you to pay
5 those funds to a lessee in the contractual dispute
6 arising under these between lessor and lessee.

7 And so, you know we've always been against
8 state courts having anything to do with trust funds
9 or trust resources, but it appears that you're
10 stripping that protection away under that section.
11 And I don't know if you looked at Section 410 of 25
12 (unintelligible) code, but we look at that as
13 protection, and I see that being stripped away by
14 that provision.

15 MS. JENNIFER TURNER: Thank you for your
16 comment. We will certainly look at that issue.

17 MR. WILFRED KEEBLE: Good morning. My name is
18 Wilfred Keeble. I'm Chairman of the Crow Creek
19 Sioux Tribe.

20 I know you're not addressing agriculture leases
21 right now, but back home on Crow Creek we have
22 addressed that issue. And the reason for that is
23 because of the IRS attack on the Crow Creek, and we
24 start looking at our ag leases.

25 And the first thing that shocked me was that

1 lease, that, being used, the lease that's being used
2 was put in place in 1956 I think he said and hasn't
3 been updated since then. We looked at the lease,
4 and we found out that in that lease the only
5 protection in there is for BIA.

6 We -- because of the situation that we were in,
7 we redone the lease, and we finally got it finished
8 up to where, to where we're satisfied with it. It's
9 got a lot more provisions in there that protects the
10 tribe. If that's the case here with the
11 agricultural leases -- I really haven't gotten a
12 chance to look at the residential leases. Is that
13 to say -- how long ago was that implemented, and has
14 there been any updates on that?

15 MR. JAY DANIELS: You want to answer that for
16 him, Rick?

17 MR. RICK CLIFFORD: I wasn't paying attention.
18 Sorry. I was reading. What was the question?

19 MR. JAY DANIELS: Sir -- okay.

20 MS. KAYLA DANKS: Were you asking about when
21 the latest residential lease was updated?

22 MR. WILFRED KEEBLE: Yeah.

23 MS. KAYLA DANKS: There's a residential lease
24 that's been negotiated between HUD, V.A., USDA and
25 BIA, and that's been in place since -- it was

1 updated in the late '90s, so we have a pretty
2 current residential lease that we use for those
3 programs for residential leasing.

4 Other than that, of course, you know that the
5 tribes can put together their own lease and then the
6 BIA will review it to make sure that it was subject
7 to the or in compliance with the regulations, for
8 example what you've done with agricultural leasing.

9 But with regard to residential leasing, there
10 is a model lease out there for residential leasing,
11 and it was updated in the late '90, very late '90s,
12 and that was negotiated with USDA, V.A., HUD and
13 BIA. So there's a pretty current residential lease
14 form.

15 MR. WILFRED KEEBLE: The reason why I made that
16 comment is because if we looked at our agriculture
17 leases, they were way below state average. We had
18 to bring it up to, almost to where we wanted it and
19 start upgrading our systems on the ags.

20 But the same situation is what I'm asking. Do
21 they need to be brought up to what ag leases,
22 residential leases going rate, fair market rate?
23 What I heard earlier, is that what we're getting at
24 here?

25 MR. JAY DANIELS: Rick, do we have -- we have

1 an agricultural (unintelligible), don't we?

2 MR. RICK CLIFFORD: Yes.

3 MR. JAY DANIELS: The BIA has put together
4 handbooks for every facet of leasing, a separate one
5 for residential, a separate one for business, oil,
6 gas, agriculture, rights-of-ways. And the handbook
7 actually explains every process that we go through
8 to approve a document. And it used to be on our
9 website in D.C. and is available. And I give it to
10 tribes every time you call me. But been working
11 hard to get them to post those back on the website
12 so that they're available to tribes, and I guess
13 I'll have to work a little bit harder to get that
14 done.

15 But if you look at those handbooks, they have
16 every type of document. It'll tell you the process,
17 and it'll give you sample documents for the lease,
18 sublease, assignment, amendment and cancellation.
19 So that would probably help you out quite a bit.

20 I can't really speak on the ag regulations
21 because I got in on a team on the tail end of it and
22 they pretty much were done with it.

23 I believe, Rick, you were --

24 MR. RICK CLIFFORD: Yes.

25 MR. JAY DANIELS: Rick would probably be an

1 excellent resource to talk about, on that.

2 MS. ANEVA YAZZIE: Good morning again. Aneva
3 Yazzie from the Navajo Nation.

4 I want to just express on the record the
5 concern expressed earlier with regard to residential
6 leases and sub-leasing of residential leases. And
7 the notion of that being approved automatically
8 without BIA approval, so long as BIA approves the
9 development plan and a rent schedule, that needs
10 some clarity.

11 You know, the area of TDHEs, I'm glad to hear
12 that I have some colleagues in the room. We are
13 (unintelligible) of the (unintelligible) resources.
14 Obviously that's the road we have to take with all
15 the funding constraints that are impending upon
16 Indian Country.

17 So when you look at the general rent schedule,
18 that needs some clarity in terms of what does BIA
19 intend on in terms of rent schedules? Because we
20 leverage funding with federal resources, state
21 resources, local housing tax credits. I just kind
22 of see a burdening of a process again in doing this
23 approval on a per sublease basis. So in that regard
24 I think we need clarity as to what that means in
25 advance relative to the leverage on funding that a

1 lot of tribes are already participating in.

2 Secondly is what is the anticipated transition
3 period when these regulations are finalized and you
4 have this whole backlog of leases already pending in
5 the various BIA offices? Are those going to be --
6 are we turning the clock back to zero for those that
7 have been in the mill for quite some time, or are
8 they automatically going to be approved given the
9 30 day, plus 30 review time period? And I think in
10 that regard they may be looking at (unintelligible)
11 approvals. I know the workload has not been in
12 favor of BIA, and I think it continues to be
13 protracted through, especially even more so
14 exacerbated through federal funding reductions. So
15 looking at it from that respect, what is the BIA
16 looking at at this point in time in anticipation of
17 these revised regs with set timelines? And I think
18 those timelines are needed, but are they realistic I
19 guess at this point?

20 The other matter is while I appreciate the
21 consultation on leases and permits, when will tribes
22 be engaged in other consultations with regard to
23 timelines even for environmental reviews, legal
24 surveys? You know, the TAAMS system is requiring
25 certain business rules which is imposing additional

1 workload and re-surveys of some of the sites that
2 had been previously withdrawn under an existing
3 lease with tribes and especially for Navajo. So
4 we're having to fund and redo those legal surveys to
5 meet the business rules of how the TAAMS is
6 requiring these new legals.

7 And then of course the backlog for the title
8 status reports, there should be timelines on that as
9 well to execute transactions for home ownership
10 opportunities.

11 So I appreciate the time. I want that on the
12 record. The Bureau of Indian Affairs can look at
13 those other peripheral type of functions that are
14 still relative and pertinent to the execution of
15 delivering home ownership to our families in Indian
16 Country. I appreciate that.

17 Thank you.

18 MS. JENNIFER TURNER: You raised a lot of
19 interesting comments, but I just wanted to respond
20 to your comment regarding leases that are currently
21 pending before BIA for approval. The regulations,
22 and this is proposed regulations, this is
23 Part 162.005, specifically provide that these new
24 regulations apply to all leases, amendments,
25 assignments, subleases and mortgages submitted to

1 BIA for approval after the effective date of the
2 rule. So let's say the effective date of the rule
3 is August 1st and you submit your lease on
4 August 2nd for BIA approval, then these regulations
5 will apply.

6 But a more difficult question as you raised is
7 what happens if a lease is already sitting before
8 BIA. You raised the possibility of whether certain
9 documents would be automatically approved, and if
10 they're already before BIA under the terms of these
11 regs, the new regs and those timelines won't apply,
12 but we're certainly interested in your views on how
13 to handle the leases that are already pending before
14 BIA. And there is also the option of resubmitting a
15 lease for approval. So -- but it's a very difficult
16 question, and we appreciate your comments.

17 MS. JONI TOBACCO: Good morning. My name is
18 Joni Tobacco, and I work for the Oglala Sioux
19 Tribe's Natural Resources Regulatory Agency.

20 I just wanted to voice my concern on 162.014,
21 the language that's in there, I would like to see it
22 changed a bit to support the tribes' right to
23 protect their environment and natural resources,
24 fish and wildlife, things that don't recognize
25 boundaries but are within the reservation

1 boundaries.

2 One of the examples that I have that I would
3 wish to see the support is our ability to protect
4 our water say on fee land or even our wildlife that
5 travels through fee land which is still surrounded
6 by tribal land. And it's not so much that the
7 state's jurisdiction is highlighted in those areas,
8 it's just that it doesn't exist, and nothing in
9 BIA's regulations even attempt to address those
10 issues.

11 UNIDENTIFIED SPEAKER: I have a comment, too.
12 I don't know if you want to respond to her first.

13 MS. JENNIFER TURNER: We'll take a look at the
14 concern that you raised, but I just want to note
15 that these regulations, as I think you noted, only
16 apply to the leasing of trust or restricted land as
17 well as government-owned land, so they don't apply
18 to fee land.

19 MR. PETER YACUPICIO: My name is Peter
20 Yacupicio. I come from Arizona, Pascau Yaqui Tribe
21 from Arizona.

22 And my comment to this whole process is: Is
23 this just a listening session to where anything we
24 say and what we say, like the gentleman said, Where
25 is it documented and how do we find out that some of

1 our concerns and our questions are actually being
2 looked at, implemented in the final?

3 My concern, just like Mr. Provost said, is once
4 it gets to finalization, what recourse do the tribes
5 have? Some of these listening sessions -- I don't
6 call them consultations because I think if we put a
7 team together to consult and look at who is looking
8 at the process, did they even look at the comments
9 that we had, concerns?

10 You know, I understand that the BIA is the BIA,
11 but it has to be a more even playing field for the
12 tribes. It absolutely has to be. And I recommend
13 that the BIA considers regional like caucuses
14 tribal-wide to bring these issues to finalization.
15 Because if you don't do that, then we're going to be
16 left out in the cold and somebody is going to decide
17 for us how these processes are going to be done.

18 I look at how the President's proclamation or
19 how he decided you are to work closer and closer
20 with the tribes, and these sessions are fine,
21 listening sessions, and comment sessions, but how
22 much of that is really going to be the meat of a
23 final document? That is my concern because as you
24 can see there's a lot of struggles, no definition;
25 yes, definition; yes, we're not doing these kinds of

1 leases.

2 And the percentages are a concern because in
3 Arizona that's the biggest comment that they had is
4 the percentages, but still to this day -- I came all
5 the way over here to figure out, and I didn't go to
6 Palm Springs, but I wanted to come to a different
7 country that I haven't been in because I think it's
8 important that as nations we address the BIA and we
9 tell them how on the tribes' side we would like this
10 addressed. Because if we don't do that, then we're
11 just leaving it in their hands again. And the
12 frustrations will continue, and it'll always be
13 like, Well, we said what we said, but what did it
14 mean? And that's my concern today. When I listen
15 to all the tribes that truly, truly these listening
16 sessions --

17 And I really think that regional wise the
18 gentleman that's handling a lot of these things,
19 please consider exactly what the tribes are trying
20 to tell you that there are a lot of issues still,
21 and the finalization is a concern of who's going to
22 approve it through this department.

23 So thank you.

24 MS. DENISE MESTETH: I would like to say
25 something, if you don't mind.

1 My name is Denise Mesteth. I work for the
2 Oglala Sioux Tribe. I am a Tribal Land Office
3 director.

4 I'd like to thank you guys for bringing such an
5 elaborate meal over there. The last one I attended
6 was coffee and water, and we ran out of it at about
7 nine o'clock, so thanks a lot.

8 Just for the record, I'd like to ask you guys
9 about the reduced oversight on tribal land. I know
10 that you have said that just briefly and didn't
11 elaborate on it, but I, for one, working in the
12 Tribal Land Office, would like more tribal land
13 oversight.

14 I think that there's a lot of violations out
15 there of contracts that the BIA has not paid
16 attention to, lack of resources. Whatever the
17 reason why, it's not there. It's a step out of the
18 land business, you guys. We want more -- we want to
19 be able to say more things about our land. Well, we
20 can, but according to the treaties BIA is
21 responsible for the management of those lands,
22 including tribal lands, and I see it being let go.
23 I see a lot of violations out there on those
24 contracts.

25 And I would really like to ask that instead of

1 reducing the oversight, I'd like to see you guys put
2 some money into helping us develop regs, helping us
3 develop our own office and then slowly stepping out
4 of the picture. I don't know how long it's going to
5 be, ten, 20 years. I know that's the process. I
6 mean, everybody has been saying it.

7 So, you know, instead of reducing that
8 oversight, assist us in developing our regs, because
9 as tribal members we want to see our land being used
10 wisely and not abused. And so that's my thought for
11 that.

12 Thank you.

13 MS. ELIZABETH APPEL: Thank you for your
14 comment. And if that came from me saying that the
15 regs are reducing oversight on tribal land, I
16 apologize, I misstated. What I was trying to get at
17 is that the regs require BIA to defer to tribes in
18 those cases where tribes provide a tribal
19 authorization saying that they've negotiated this
20 lease for a certain amount of compensation, BIA is
21 now required to defer to that tribe's determination
22 that that compensation is in the tribe's best
23 interest.

24 And I'd also like to note there are other
25 provisions in the regulations that require BIA now

1 to consult with the tribe for taking enforcement
2 actions, for example, and the goal there is to make
3 sure that there is an open line of communication
4 between the tribe and BIA so that the tribe is
5 getting the action out of BIA that it wants.

6 But also in response to your comment about the
7 tribes developing their own leasing regulations, I
8 know that this administration does strongly support
9 that HEARTH Act which would allow tribes to have
10 their own leasing regulations and take BIA out of
11 the picture. So that is something that this
12 administration supports.

13 MS. DENISE MESTETH: Do you support it with
14 funding?

15 MS. ELIZABETH APPEL: I know that this -- well,
16 you know, I'm just a lowly government worker. I
17 don't have any say over the funding, but I've heard
18 (unintelligible) in the past consultations express
19 the administration support, and he's stated that
20 they've been fighting for the funding to make sure
21 that these regulations can be fully implemented.

22 I know that that, as others have stated, that
23 there are concerns about whether BIA is going to
24 have the resources to meet these deadlines. You
25 know, it's all well and good to have something on

1 the books, but if you can't, you know, implement it,
2 what good is it? And this administration definitely
3 recognizes that and is fighting for the funding to
4 make sure that these regs can be fully implemented.

5 MR. DAN ADAMSON: Dan Adamson, legal consultant
6 to the Crow Creek Sioux Tribe here in South Dakota.

7 In furtherance of what was mentioned over here
8 about violations, BIA not properly managing their
9 trust responsibilities, one of the things that Crow
10 Creek has been very, very concerned about is years
11 and years of agricultural leases with extremely
12 valuable improvements on that land being ultimately
13 trashed by the lessee, either worn out to the point
14 it doesn't work anymore or simply sometimes robbed
15 of parts as they leave the lease, et cetera, et
16 cetera. Clearly you would think it would be a
17 violation of the BIA lease agreement.

18 Well, I recently, very, very recently went to
19 the BIA superintendent of Crow Creek and I said,
20 "How is it that you've had this trust responsibility
21 for decades and yet you're allowing these tenants,
22 these lessees to leave this property in horrible
23 condition, not properly maintained, et cetera, et
24 cetera, et cetera?" And I got the most interesting
25 response. And I don't know if it's just because I

1 was looking for something new in life or if it just
2 hit me wrong, but I was informed by our
3 superintendent that BIA has a trust responsibility
4 over the land. They don't have a trust
5 responsibility about anything that's hooked onto the
6 land. And if it's hooked onto the land, even if
7 it's a house, it's up to the tribe to regulate,
8 watch over and care for it.

9 And I said, "Well, that's interesting. Does my
10 tribe know that?" "Well, they should after decades
11 of watching their center pivot irrigation systems
12 deteriorate to the point of being hardly scrap."

13 I wonder -- Crow Creek recently put a multipage
14 addendum onto their agricultural lease, bringing
15 many of the boilerplate clauses that you would find
16 off the reservation into the BIA lease, which is, of
17 course, two or three pages. And one of them is
18 establishing a way in which the assets attached to
19 the land are being managed.

20 But I just found it very interesting that their
21 interest stops at the dirt and everything else is
22 someone else's responsibility. I presume HUD if
23 it's a house, the tribe if it's a piece of
24 irrigation equipment. And maybe I'm the only one
25 that didn't know that. I'm certain the tribe didn't

1 know it because there's one thing I've heard, why
2 doesn't the BIA regulate and watch over our property
3 like the center of pivot irrigation systems? And
4 they don't because it's not Indian land.

5 MS. JENNIFER TURNER: Thank you for your
6 comment. You've raised some interesting issues.
7 But with regard to improvements and improvements
8 being trashed during the lease or at the end of the
9 lease, under these regulations improvements will be,
10 the lease will address whether improvements will be
11 constructed.

12 And, for example, in the wind and solar
13 resource context, the lease will describe the
14 improvements and can even provide for how, how
15 damage to the improvements will be handled. And so
16 if, for example, a lease requires that improvements
17 be in good working condition and the landowner then
18 notifies BIA that it has not been or that it's been
19 abandoned or there's some other situation with it,
20 then BIA under these regs has an obligation then to
21 treat that, with consultation with the Indian
22 landowners, as a lease violation, and it could
23 potentially lead to cancellation.

24 And in terms of the condition of the lease
25 premises at the end of the lease, if there has been

1 a bond issued for that lease, these regulations
2 provide that BIA will not actually release that bond
3 without consulting with the Indian landowners, and
4 BIA will make sure that the -- I'm reading from
5 162.436 for residential, and there's similar
6 provisions for the business and for wind and solar.
7 But BIA will be ensuring that the lessee has
8 complied with all these obligations and only then
9 release any bonds that are required.

10 UNIDENTIFIED SPEAKER: You know, I would agree
11 with you that that is what it is. And using the
12 context that I was previously with agricultural
13 leases, it clearly says that.

14 Then it begs the question: At the end of the
15 lease whose responsibility is it to go out and
16 inspect those improvements? And I guess what I'm
17 trying to say is the tribe always assumed that it
18 was the BIA's responsibility managing, watching over
19 the trust lands of the tribe, and at the same time
20 (unintelligible) the BIA is saying to the tribe,
21 Well, we'll be giving this -- we'll be releasing
22 this bond because no one has come forward to tell us
23 what a poor job we've been doing of managing your
24 property, when they never intended to manage it in
25 the first place. So it's kind of a tail chasing the

1 tail when people realize that if it says that we're
2 going to manage trust properties for the benefit of
3 the tribe, you'd better just realize that it's the
4 trust property, real property and nothing attached
5 to it. They're not going to engage themselves in
6 anything that doesn't relate specifically to that
7 dirt, that trust property.

8 MS. JENNIFER TURNER: Thank you for your
9 comment. And it seems like this is an area where
10 clarification should be provided and a regulation to
11 address your questions.

12 And we are also open if anyone else has any
13 comments on how BIA handles improvements,
14 particularly when they've been damaged at the end of
15 a term of a lease, we're certainly interested in
16 those comments as well.

17 MS. SYLVIA CURLEY: Hello again. I'm Sylvia
18 Curley with Wagenlander & Heisterkamp.

19 Just two other provisions or two other issues I
20 wanted to make comments on. This section in the
21 residential leasing regarding compliance and
22 enforcement, in particular I'm looking at 162.361,
23 the language states that the BIA can enter the lease
24 premises at any reasonable time upon reasonable
25 notice to protect interests of the Indian landowners

1 and ensure compliance.

2 And I would also just like to point out on
3 behalf of my clients that many of the tribal housing
4 authorities, they have lease provisions that discuss
5 notice requirements for when the housing authority
6 is going to enter the premises, and so we would hope
7 that that would be taken into account when looking
8 at "upon reasonable notice" because there are
9 already other agreements in place regarding
10 compliance and enforcement.

11 And we'd also like to just suggest and the hope
12 is that there would also be a lot of due process
13 provisions regarding compliance and enforcement. I
14 see a few sections where there's an issue -- or they
15 address appeals, but we would just want to make sure
16 that the BIA would not be able to take unilateral
17 action and that there would be due process
18 provisions in place.

19 Then my second comment is something that I
20 noticed that is missing in the rule. I don't see
21 any provisions regarding how the BIA addresses
22 mistakes in residential leases. And I'll just give
23 you kind of a brief example. One of my clients had
24 a lease with the, it was a leasehold mortgage for
25 allotted land, not tribal land but allotted land,

1 where a number of individuals consented to the
2 lease, but the problem was that the legal
3 description of the land was wrong. And when my
4 client went to foreclose, they were unable to do so
5 because there was the wrong land description in the
6 lease. And unfortunately now they're unable to
7 foreclose on this land unless the legal description
8 is corrected, but the landowners who consented to
9 the lease originally, well they're not going to
10 consent to revising the lease because they know that
11 their family member will be foreclosed on. And I'm
12 just wondering if those kinds of issues are
13 addressed elsewhere or, you know, will that be a
14 possibility later on to be added?

15 MS. ELIZABETH APPEL: We would absolutely be
16 open to if you have any suggested language on how to
17 address a situation like that, absolutely would look
18 at it.

19 MR. JAY DANIELS: And I'm not an attorney, but
20 I was always trained -- I'd worked 20 years in
21 Montana for the BIA before I moved to Rapid. I was
22 always taught that if there's an error in the legal
23 description, then the lease wouldn't be valid
24 because they gave consent for land it didn't own.
25 Or maybe, you know, if the house was off the site,

1 out of the right description, you know, that would
2 be something that would have to be corrected.

3 MS. SYLVIA CURLEY: Right. And, I'm sorry, I
4 didn't clarify. The house is still on their land,
5 it's just not on that legal description. It's on
6 the wrong parcel of that. It's still the same
7 landowners. I apologize for not clarifying that.

8 MS. KAYLA DANKS: I know that the Bureau of
9 Indian Affairs does provide a certified TSR to the
10 lender, and at the beginning of lease they also pull
11 a TSR to ensure that, you know, the landowner. So
12 it's the applicant that's applying for the lease.
13 So I guess they would have to work together.

14 But also the lease needs to provide the venue
15 under which the mortgage will be foreclosed. And so
16 when we receive foreclosures, I guess we just deal
17 with them on a case-by-case basis because we have to
18 follow whatever foreclosure law is within the
19 contract.

20 MS. SYLVIA CURLEY: Right. Well, in this case
21 it went to the tribal court that was the venue, and
22 the tribal court ordered, as, you know, would be
23 expected, that there would be no foreclosure in that
24 instance unless the lease was modified.

25 So as you can see, it puts the client and, you

1 know, the tribally designated housing entity, it
2 puts them in a bind because a mistake was made and
3 now there's really no possible way to correct it as
4 far as we can tell.

5 MR. MARIO GONZALEZ: I would like to make an
6 additional comment or two.

7 The federal regulations, when promulgated, have
8 a force of the law just like the statute, and the
9 courts give deference to an agency's interpretation
10 of a federal law, mainly by looking at regulations.
11 So it's really important that the Bureau promulgate
12 these carefully.

13 I'm looking at Section 162.013(a)(3) where it
14 states, "State law, in the specific areas and
15 circumstances in Indian country where Congress or a
16 Federal court has made it expressly applicable," and
17 that's in regards to the regulations in this part,
18 approval of leases. Now, I don't know of any
19 federal law that allows the state law to be applied
20 to trust land or the regulation of trust land.

21 Public law 280 expressly states that state law
22 is not applicable to Indian trust land or the
23 regulation of trust land. That's 25-USC-1322. And
24 it's really important that you look at that because
25 you state here that state law may be applied in

1 Indian Country where Congress or the Federal court
2 has made it expressly applicable. Well, Congress
3 has made it expressly inapplicable. And I don't
4 know of a federal court that has ruled that states
5 have the authority to regulate any trust land,
6 leases or otherwise, in Indian Country. And Indian
7 Country, of course, is defined in (unintelligible).

8 So when you promulgate this and you ask some
9 federal court looking at it and say, Well, it
10 appears that the agency is interpreting the statutes
11 to allow federal court to make state law applicable
12 to the regulation of leasing of Indian land, you
13 know, I think that's (unintelligible) because the
14 federal court is going to say, Well, I must have the
15 authority to do this, this is law. And then before
16 you know it we have a chipping away of protections
17 and authority over leasing of Indian lands. So I
18 think a better approach here is just to say state
19 law is not applicable to the leasing of Indian land.
20 And of course Congress can change that, but I don't
21 think a federal court can legislate
22 (unintelligible).

23 And the other comment I have is in regards to
24 subleasing under 162.351 and 341. You know, there's
25 language in here where it says, just for example in

1 162.351(b) it says, "Where the sublease is part of a
2 housing development for public purposes, the lessee
3 may sublease without meeting consent requirements or
4 obtaining BIA approval of the sublease, as long as
5 we have approved a sublease form and general rent
6 schedule for use in the project."

7 I think when you start allowing lessees to
8 sublease without the landowner's consent that's very
9 dangerous. The Bureau has allowed this in oil and
10 gas leasing, and what happens is in the regulations
11 it provides for a consent for subleases or the
12 flipping of oil and gas leases, but yet in the BIA
13 forum they don't allow landowner consent that they
14 use everywhere. So the form itself is in conflict
15 with the regulations in that regard.

16 So all of a sudden you get these oil companies
17 coming in there and they start flipping, flipping
18 and flipping, and the landowner gets no benefits
19 from the subleases and don't even have a say in it.
20 And so they can end up leasing to one company, and
21 then the lease is up with maybe three, four or five
22 times. And the landowner gets no additional
23 compensation either.

24 And so when you start allowing, especially a
25 lessee, to start subleasing even in the context of

1 these regulations, that can be abused. You can have
2 a developer come in and pay the landowner, you know,
3 a fixed amount and then turn around and start
4 subleasing and make a huge profit without the
5 landowner even benefiting. So I don't like the idea
6 of a lessee subleasing at all. I think that that's
7 going a little too far.

8 And then my final comment is that there's no
9 provision here on the WEEL, the wind energy
10 regulations. I recall that there was some
11 discussion in South Dakota to impose a severance tax
12 on wind energy, and that's not addressed here, but,
13 you know, the Oglala Sioux Tribe has always viewed
14 the state as not having any authority to tax our
15 trust resources or land, and yet the Supreme Court
16 in a (unintelligible) petroleum case out of New
17 Mexico in 1988, a (unintelligible) decision in my
18 view legislating and allowing the states of Montana
19 and New Mexico to impose a severance tax on oil and
20 gas revenues, royalties.

21 And so we would not want any state to be
22 imposing any type of a severance type of tax on wind
23 energy. And I think you need to put that in there.
24 You need to say in here that on these wind energy
25 regulations that no state tax will be permitted in

1 the leasing of lands for wind energy. Because if
2 you don't do that, all of a sudden they'll be
3 applying the Cotton Petroleum case and the 1980 Crow
4 decision to these leases and then they'll be
5 imposing like a 10 percent severance tax on a
6 (unintelligible) tribe or individually
7 (unintelligible) under respective leases.

8 MR. JAY DANIELS: Sir, when we worked on these
9 draft regulations, I believe that our consensus was
10 that we wanted to provide tribal housing authorities
11 with the ability to sublease without coming back to
12 us. You know, because as you know on the
13 reservations, you can't let a house sit vacant very
14 long so it doesn't get vandalized and stuff like
15 that. So they need to be able to move quickly to
16 put another tenant in there, so I believe that was
17 the intent. It would be in the original lease
18 that's approved by (unintelligible) you can sublease
19 without further consent.

20 And on the oil and gas issue, you talked about
21 assignments and stuff like that. All contracts are
22 negotiable and, you know, there's provisions that
23 have to be in the lease agreements, and then there's
24 provisions that can be added to it. And as long as
25 they don't conflict with federal law, then we can

1 consider them and approve them sometimes.

2 MR. MARIO GONZALEZ: That's not a true
3 statement.

4 MR. JAY DANIELS: Pardon?

5 MR. MARIO GONZALEZ: I said, "That's not a true
6 statement." Because the sublease in the oil and gas
7 area, unless there's a consent provision right in
8 the lease, they can be flipped without the landowner
9 consent, and those are contracts, too.

10 MR. JAY DANIELS: That's what I meant, if it's
11 not in there then you don't, but everything is
12 negotiable. You can negotiate that with the company
13 that leases your land before you sign the agreement.

14 MR. MARIO GONZALEZ: The problem that you have
15 in oil and gas leases, if you go look at your forms,
16 is that even though the regulations say that, you
17 don't have a provision in your form that allows
18 that.

19 MS. KAREN ATKINSON: I noted as a comment that
20 the current form conflicts with what the regulation
21 provides, so we'll take that comment.

22 I did just want to follow up on your state tax
23 issue, we'll definitely note that and look into
24 that. There is a provision on the wind energy part
25 that addresses state taxes on improvements, and so

1 there is a statement in the proposed reg that says
2 states cannot tax the improvements for wind energy
3 permanent improvements, but I don't think in our
4 discussions both with the Department of Energy and
5 IRS, in those provisions I don't think there was
6 anything raised about severance taxes, but we'll
7 look into that.

8 MR. ALLEN FISHER: I have a comment on the
9 lady's legal description when it had a mistake. I'd
10 like to put a little plug for the corporate tribe or
11 the tribe's corporate charters where they address
12 those type of situations, it kind of puts that back
13 in the hands of the tribe to look at those honest
14 mistakes like that where they are dealt with.

15 MS. KAYLA DANKS: I have a question for
16 Mr. Gonzalez basically on your comment with regard
17 to state law, and I kind of wanted to get a little
18 bit more information from you on this issue because
19 it was a very good comment more or less stating
20 state law is not applicable. And so what language
21 would you propose that we put in there?

22 For example, the reason I'm saying that is
23 because, you know, with regard to the tribe doesn't
24 have foreclosure laws or certain laws, should we say
25 state law is not applicable unless explicit or

1 provided for in the lease?

2 MR. MARIO GONZALEZ: Basically what I'm trying
3 to say here is that (unintelligible). In
4 25-USC-1322, I'm sure that's the section, but it
5 states in there that any probates and regulation of
6 Indian lands, trust lands or fee lands, is not
7 subject to state law, state regulation. So what you
8 need to state here is that -- let me find that
9 section again -- is that state law is not
10 applicable. It states, "State law, in the specific
11 areas and circumstances in Indian country where
12 Congress or a Federal court has made it expressly
13 applicable," well, Congress has made it expressly
14 inapplicable to state law to regulation, leasing of
15 Indian land or restricted lands. And so you need to
16 put that in there and cite 25-USC-1322.

17 And then it's dangerous to put "or a Federal
18 court has made it expressly applicable" because if
19 you're a Federal judge looking at that this has a
20 force of law, then you're going to see an erosion
21 where a Federal court thinks that it can start
22 making state law applicable to oil and gas -- not
23 oil and gas, excuse me, to the leasing of Indian
24 trusts and restricted fee lands.

25 So what I'm suggesting is turn that language

1 around to say it's not applicable under 25-USC-1322.
2 Of course, Congress can change that, but I don't
3 think a Federal court can legislatively change that.

4 MS. KAREN ATKINSON: Thank you for those
5 comments.

6 Let's go ahead and take a 15-minute break, and
7 then we'll come back at 10:40.

8 (Recess taken from 10:25 a.m. to 10:45 a.m.)

9 MR. DENNIS CHARLIE SPOTTED TAIL: Good morning.
10 My name is Charlie Spotted Tail, Rosebud Sioux Tribe
11 Council Representative, and I'm here on the
12 (unintelligible) wind and solar leasing.

13 I'd like to touch on what Mario mentioned about
14 severance tax and state. And when we talk about
15 commercial developments on Indian trust lands, the
16 proposed regulations would move significant
17 obstacles to wind and solar energy development. For
18 tribes to become more self reliant through
19 self-determination and economic development, once
20 the (unintelligible) is state taxation and on
21 proposed wind development.

22 I was looking at something here under the
23 two-step process, the short-term lease and move to
24 long-term lease, but I'm looking at more of a, I
25 suppose a negotiation, and I'm hearing that I think

1 when we're looking at the bigger picture is to
2 reform and improve management of Indian lands across
3 the United States. I think the Bureau and the
4 Federal Government needs to uphold its trust
5 responsibility.

6 Because one of the main issues is I think
7 people in Washington don't know what it's like here.
8 We've always talked about educating them, but if you
9 brought -- it was told to me that if you brought
10 somebody here to live on this reservation, one day
11 you'll see the impoverishment.

12 And so it doesn't make any sense to our
13 developers when they have to pay the state taxes and
14 the tribal tax. And now it was told to me that our
15 developers, which was (unintelligible) through our
16 negotiation, and this is our wind development and
17 our trust land.

18 Thank you.

19 MS. KAREN ATKINSON: Could you give us some
20 specifics on what state taxes would apply to wind or
21 what the state is trying to impose on wind
22 development on tribal lands?

23 MR. MARIO GONZALEZ: Just to recapitulate what
24 I said earlier, we understand that the State of
25 South Dakota is planning to impose a severance tax

1 similar to an oil and gas lease severance tax or
2 (unintelligible) severance tax upon wind energy, and
3 the -- Congress has never allowed that except
4 perhaps in Oklahoma Indian well tract where they
5 allow, you know, 2 percent tax on revenues on trust,
6 oil and gas resources on restricted -- or trust
7 status.

8 But in recent years the Supreme Court of the
9 United States in a Cotton Petroleum case out of New
10 Mexico and later in the 1998 Crow case dealing with
11 coal, Cotton Petroleum dealt with oil and gas, has
12 allowed the states to impose a severance tax on
13 revenues from oil and gas leases and coal leases.
14 And there's no statutory authority for that. The
15 Supreme Court is basically legislating that states
16 have a right to do this. And it also allows a tribe
17 to impose such a tax, you know, when it's private
18 development.

19 And so we would like a provision in the
20 regulations to say that these leases for wind energy
21 development that state taxes, no matter what type,
22 would not be applicable to the leasing of lands for
23 wind development. If that could be put in the
24 regulations and they would have the force of law,
25 then we won't have states or the Supreme Court

1 trying to impose, allow states to impose severance
2 taxes or other types of taxes on wind energy
3 development on Indian lands. (Unintelligible),
4 except, as I said, in Oklahoma (unintelligible).

5 MS. KAREN ATKINSON: Thank you for your
6 comment, and we'll take a look at that.

7 Any other comments?

8 UNIDENTIFIED SPEAKER: We have a comment from a
9 tribal program director.

10 MS. COURTNEY TWO LANCE: My name is Courtney
11 Two Lance, and I work with the Oglala Sioux Tribe
12 Credit Office.

13 And the regulations, who's going to be
14 responsible for the reporting? Is it the Bureau, or
15 is it going to be the tribe, or how is this going to
16 work?

17 MS. ELIZABETH APPEL: What type of reporting?

18 MS. COURTNEY TWO LANCE: For the GPRA. Because
19 according to the (unintelligible), all of the
20 funding will be I guess applicable to the Government
21 Performance Rating Act, and who's going to be
22 responsible for that, for these new regulations, and
23 how are you going to share that with the tribes?

24 MS. ELIZABETH APPEL: We will look into that.
25 I'm not sure off the top of my head. I know that

1 federal agencies are responsible for GPRA
2 training -- or reporting, but if tribes are
3 fulfilling federal functions, then they would need
4 to report the measures associated with those
5 functions that they're carrying out, but is there --

6 MS. COURTNEY TWO LANCE: I have an issue with
7 that. With GPRA, the format basically is as if the
8 Bureau is still administering that program that you
9 do have a lot of tribes, especially within the Great
10 Plains Region, that have contracted some of those
11 services.

12 And when you look at the GPRA format, including
13 or inserting the data to secure your funding or to
14 secure your program services, it doesn't fit.

15 We have some of our own benchmarks that we try
16 to accommodate tribal members, but there's no place
17 to insert that in the GPRA report. And when you're
18 making new regulations, you're not sharing it with
19 the tribes who may have those services or perform
20 those services, so how or where do we insert our
21 data? Because I do that with my credit reports, I
22 give some information to the realty regarding the
23 mortgages or encumbrances, but there are also other
24 benchmarks that I do that there's no place to fit
25 it.

1 So, in other words, OMB is not receiving the
2 numbers on how I spend my money based on tribal
3 needs. So in the regulations I'm not finding that
4 anywhere, and I'm just hoping that this isn't
5 another tool to eliminate or get out of trust
6 responsibility.

7 MS. ELIZABETH APPEL: Thank you. We will find
8 others in the agency who are familiar with the GPRA
9 reporting and make sure that that comment is
10 addressed. And if you don't mind, we may try to get
11 back in touch with you to make sure that we
12 addressed your concerns. So thank you.

13 MR. IRV PROVOST: Same thing along the lines of
14 what Courtney just said, you know, GPRA is a
15 mechanism and a law, but what they actually do is do
16 a PART review, Performance Assessment Rating Tool.
17 And we want to know if you're meeting these
18 requirements within the Bureau. You know, a lot of
19 times when we look at the performance rating tools,
20 they're generally just twenty some questions.

21 And I'm not sure if the whole BIA has been
22 subject to PART yet, because this is a Congressional
23 action that if you do not meet these needs, you go
24 on a list called "Results not demonstrated," and you
25 have two years to qualitatively resolve those issues

1 or else Congress will pull your funding.

2 Given this information, you know, a
3 consultation we're going through now, but what I'd
4 like to see from the Bureau on this issue is how are
5 we performing the PART issues? And to see our
6 assessment, when is the last time that GPRA or PART,
7 for example, the mechanism they use, when was this
8 last done to give us assurances that you and I are
9 on track?

10 MS. ELIZABETH APPEL: Thank you. And, again,
11 I'm not really familiar with this, but I am
12 wondering if we might have information on our
13 website about this, too. So we'll look into that.
14 Thank you.

15 MS. COURTNEY TWO LANCE: No, you don't.

16 The other comment I had, the danger to putting
17 new regulations in place is you are basing
18 everything on what other people want to do to make
19 it easier for themselves, but you're not looking at
20 it from the point of view of the large land based,
21 the land base, not the population, not
22 the (unintelligible) you want -- you know, those
23 tribes who have the money that can speak the loudest
24 and get their lobbyists there. You're not looking
25 at increasing the funding for the tribes who have

1 large land bases.

2 And when it comes to reporting, they do this on
3 a national average. All 565 tribes will report. It
4 will take one, I guess one regulation and say, Okay,
5 how many leases were done that year? Okay, you're
6 going to have all your large land base tribes
7 submitting, Well, this many leases were done, but
8 then -- because they have the land. But then you
9 have all of these other tribes who don't have the
10 land that may not do as much leases as your large
11 land-based tribes or maybe none at all and they will
12 sometimes not even report. So you're going to get
13 all these zeros, and then you're going to get all
14 these little bitty amount of numbers from those
15 large land-based tribes, but it will get averaged
16 out by 565 tribes. That number becomes very, very
17 low.

18 And then your appropriations committee will
19 say, Okay, well, there's not that much leases being
20 done in Indian Country, but they're not really
21 looking at the reality of it, and so we're going to
22 cut the funding or we're going to eliminate that
23 program because there's, results are not
24 demonstrated.

25 So I guess what I'm saying is basically when it

1 comes to reporting, don't depend on that one GPRA
2 report. Look at your actual land base. Because we
3 need more money up here in the Great Plains Region.
4 We have a report here that shows how much land per
5 tribe there is up here versus all of the other
6 tribes (unintelligible). And based on some of my
7 research with Mario, there's 181 treaties that were
8 done, and the Great Sioux Nation has three of those
9 treaties. How many of the other 565 tribes have a
10 treaty that can have a say-so with these
11 regulations? They were just federally recognized.

12 So I guess what I want to say is everything
13 that we're asking of you is (unintelligible) -- who
14 is the person that we can submit our real concerns
15 to that can give us an answer?

16 MS. ELIZABETH APPEL: I'm sorry, I can't give
17 you a name right now, but I will make sure that your
18 comments get to the right people, and I'll make sure
19 that those in this administration, like the
20 Principal Deputy Assistant Secretary Del Laverdure
21 are aware of this issue. It is an important issue.
22 Everything comes down to funding, so I will make
23 sure that this is brought to his attention.

24 MS. KAYLA DANKS: I can't speak for the Great
25 Plains Region, but the Midwest Region, we pull a lot

1 of our GPRA data right out of TAAMS because all
2 those documents that are processed, whether the
3 tribe reports them or not, they have to be approved
4 by the Bureau of Indian Affairs.

5 So I'm not saying there's one right way or one
6 better way, but that's a very good comment because
7 in this day and age with self-determination and
8 tribes contracting, we need tribal input for the
9 numbers that you're talking about because the
10 tribes, more or less, are working right along BIA
11 managing the program. So thank you for your
12 comment.

13 MR. IRV PROVOST: I'd just like to make a
14 comment on Courtney's situation. I totally agree
15 with getting a different type of format matrix
16 generated by regions and land base is what she's
17 getting at, because the numbers would quantifiably
18 show the need.

19 When we look at a broad perspective of all the
20 tribes, you know, in a good way they're all
21 represented within the treaties with federal
22 recognition, but we have to look at the larger
23 land-based tribes as showing the need here. And we
24 need to come up with a system or statistical format
25 or a matrix that's going to meet our needs. Because

1 in the overall approach, you know, we are getting
2 these statistical numbers through these
3 subcommittees that are not very in favor of the
4 larger land-based tribes getting these services.

5 So in reality we've got to start looking at a
6 format within the BIA of getting these numbers that
7 are quantifiably, justifiably true that we can get
8 these types of services where it's needed.

9 You know, the TAAMS system is great, but it
10 needs to be revised. There's a lot of revisions
11 that need to be done with that to make that a more
12 qualitative, quantitative database.

13 Thank you.

14 MR. KEVIN YELLOW BIRD STEELE: Good morning.
15 My name is Kevin Yellow Bird Steele. I'm a council
16 representative from the Oglala Sioux Tribe.

17 (Unintelligible) wants you to know that
18 President Steele would have been here today, but due
19 to a family emergency he is out, so the council
20 itself has come to, you know, to be here today.

21 This is going off something about what Courtney
22 had stated, you know, being with -- and what she
23 stated earlier and the questions that were asked by
24 Denise here and the responsibilities. You know, the
25 Bureau, as we can see, is trying to get out of the

1 responsibilities. By changing these regs would
2 surely give the tribes more power to regulate their
3 lands, but on Pine Ridge we pretty much regulate our
4 lands to a point.

5 These regulations have, it's taken a couple
6 hundred years to put into place, and to do these
7 changes, you know, it's not going to be an easy
8 task. It's going to take some time here.

9 But what we would like to see, you know, with
10 Denise's comment earlier about the funding, you
11 know, where some of the funding would come from,
12 with our treaties, with being one of the tribes with
13 the treaties' help, you know, the Federal
14 Government, you know, we would like to see that they
15 take care of these trust responsibilities and these
16 treaty obligations. It's an obligation.

17 So it kind of feels like it's our
18 responsibility to, you know, hold your feet to the
19 fire, per se, you know, to see that you -- we're not
20 asking that the BIA, you know, get out of the Indian
21 business because, you know, we're here to stay. We
22 ain't going nowhere, and -- but we want to see more
23 of a, like in that oversight reduction to tribal
24 lands is more working with the tribes and helping
25 the tribes in building their own regulations and

1 land offices.

2 And this is something that, you know, we fully
3 believe in that the Federal Government has that
4 responsibility. So just from that, we would like to
5 see a little bit more of a working relationship
6 together with our tribes in building that trust.

7 Thank you.

8 MS. ELIZABETH APPEL: Thank you.

9 MR. WILFRED KEEBLE: I'd like to make a comment
10 on the appraisals that were brought up earlier. The
11 land appraisals that are done back on the Crow
12 Creek, they're done if a member comes in and wants
13 to sell or do something with the easement that they
14 have, we need to get an appraisal done. And if that
15 piece is going to be sold, there has to be an
16 appraisal done. And when the appraisal is done, the
17 funding that we get to pay for that is handled
18 through the BIA. And if there's not enough money in
19 the account at that time to pay for the land, we
20 have to wait. And when we wait, next time we do
21 have enough money funding in the account, we have to
22 go and get another appraisal because it's a yearly
23 deal. And what it amounts to is wasting.

24 And then I'm going to comment again on the tax
25 that was brought up here. I'm pretty sure that all

1 the tribes here have an agreement with the state of
2 some sort. One of them is a tax agreement. Crow
3 Creek looked at it, and we opted out of it for the
4 simple fact that we were trying to add some language
5 into the state agreement. And the state wouldn't
6 accept our language, and we opted out of that
7 agreement. Because of it they're kind of holding
8 that over our heads and saying, Well, we got you
9 guys' tax money, and you guys can't touch it until
10 you sign the agreement. And that's a form of
11 political blackmail, the way I see it. And that's
12 (unintelligible) an agreement that my tribe has with
13 the state, and it's one of them agreements, it's
14 called an agreement but really is a lopsided, If you
15 don't sign on the dotted line you're not going to
16 get X amount of funding.

17 If you guys really want to help the tribes, I
18 would make a suggestion that you help the tribes
19 develop their own tax regulations so we can
20 implement our own taxes without going through the
21 state. The tribes do pay a heck of a lot of taxes,
22 and Crow Creek is a good example of that, again the
23 IRS attack on the tribe because of taxes.

24 Thank you for your time.

25 MS. KAREN ATKINSON: Thank you for your

1 comments.

2 Do we have any additional comments?

3 MR. PAUL LITTLE: Hello. My name is Paul
4 Little. I belong to the Oglala Sioux Tribal
5 Council.

6 I've been in tribal government for 14 years.
7 I've seen a lot of these things come, but you never
8 (unintelligible) until the day you show up for me
9 and they want you to read through it. We should
10 have got these a week ahead of time so we could come
11 here and make comments on these issues, but I guess
12 you might say that's the way the tribal -- the U.S.
13 Government operates.

14 The other issue is appraisals. I have a friend
15 who had to do his appraisal over because it laid
16 there. And then he told me again, "I submitted
17 mine, and it'll be seven months before it ever gets
18 appraised." The appraisals, you know, somehow the
19 BIA needs to assign an appraiser for Region 8 or
20 assign a couple of them, assign one to Pine Ridge so
21 he can work both in Rosebud and Pine Ridge.

22 We have people that, standing in line that want
23 to exchange land to the tribe, can't get the
24 appraisals done. That's our problem with it. We
25 need some mechanism to speed this process up.

1 Otherwise some people have been there for a long
2 time and the year comes up, they have to do an
3 appraisal over. And then they wonder what's going
4 on, what's wrong with tribal government. Well,
5 we're doing our best, but go back to the BIA and
6 tell them. That's our problem. So that's my
7 concern is appraisals on the Pine Ridge Indian
8 Reservation, that people want to exchange land but
9 yet their appraisals are taking forever.

10 Thank you.

11 MS. KAREN ATKINSON: Thank you.

12 Are there other comments?

13 MR. KEVIN KECKLER: Thank you. I have a couple
14 comments on the 162.415. This is a follow-up to
15 what Mario had. I believe that it's important to
16 explicitly state the comment that I have, In order
17 to stave off potential state imposition of taxes,
18 this section should pertain more to justification
19 for the exclusion of state taxation. It should
20 include the language similar to that written in the
21 background section of the proposed ruling you guys
22 already have. What this proposed rule says is the
23 purpose of business leasing on Indian land is to
24 allow Indian landowners to use their land profitably
25 for economic development. The federal statutory

1 (unintelligible) for leasing, including the
2 regulation of improvements, is so pervasive as to
3 preclude the additional burden of state taxation.
4 The assessment of state taxes would obstruct federal
5 policy supporting tribal economic development and
6 self-determination and tribal interests and
7 effective tribal government and economic
8 self-sufficiency. So I think something in that
9 section should -- we need to highlight that, the
10 exclusion of state taxation, instead of how it's
11 written, similar to what Mario said.

12 The other comment I have, and it's 162.511 on
13 wind and solar resources, I believe that these,
14 these should be permits versus leases in the fact
15 that we've already went through this process on
16 Cheyenne River and we have leases. Most of the --
17 where we're doing these met towers to determine the
18 need as we move forward and put in turbines, the
19 land that we currently have is leased out mainly to
20 tribal ranchers, agricultural use and their leases.

21 And I was looking at your guys' definition
22 somewhere in the table in here where you had the
23 difference between a lease and a permit, and being
24 that this is a, just putting up the met towers to
25 determine if, with the anemometers if it's suitable

1 for further development, I think they should be
2 permits instead of leases. You had that, I think
3 had it originally maybe as permits. I can't
4 remember as I was looking through.

5 And then my last comment has to do with
6 Section 162.519. This has to do with gathering of
7 the -- okay, this has to do when you're gathering
8 the data on the wind, how is the BIA going to able
9 to enforce this provision? I don't see that being
10 spelled out in there. Actually, I don't see them
11 being able to do that. We have issues with ones
12 that we're doing in terms of the anemometer and
13 owner of the data as a generation of the data that
14 comes through it, and what I would like to see is
15 some language in there on how the BIA will demand or
16 force the lessee to submit any wind data gathered if
17 the WEEL is terminated. This section should be
18 strengthened. So those are my comments.

19 Thank you.

20 MS. KAREN ATKINSON: Thank you for those
21 comments.

22 MS. JENNIFER TURNER: If I can add something on
23 the tax issue, the issue of state taxation of
24 improvements on Indian land is a sticky one, and
25 there currently is -- I'm sure you know there are

1 currently states that are trying to impose taxation
2 on improvements where they're not directly owned by
3 the tribe, and we anticipate litigation on the
4 taxation improvement, on the taxation language that
5 you mentioned. And so we appreciate your comment on
6 possibly moving up the justification for the new
7 taxation provisions into the regs itself so that we
8 can strengthen them in anticipation of getting, of
9 litigation on the issue.

10 With regards to the second issue about where
11 anemometers are put on tribal land treating that as
12 a permit and not a lease, I think there may be cases
13 where putting anemometers up may actually be a
14 permit and not require BIA approval, but there are
15 also cases where they are more significant
16 installations in where the lessees have more rights
17 and so it would fall under the definition of the
18 lease and not a permit. And so I think -- and it
19 depends on the actual agreement at issue, but we did
20 think long and hard about how to handle the, these
21 agreements to put up anemometers in those towers.
22 So we appreciate any additional comments you have
23 based on your experience on that issue.

24 MR. VERNON IKE SCHMIDT: Good morning. My name
25 is Vernon Ike Schmidt from Rosebud Sioux Tribe.

1 I didn't want to comment on my (unintelligible)
2 Paul Little commented on out of respect for my elder
3 over there. Me and Paul, we go back a long ways
4 with different collaborations between the Oglala
5 Sioux Tribe and the Rosebud Sioux Tribe, and we've
6 gained a good comradery.

7 I'm involved with Tribal Land Enterprise on the
8 Rosebud, and we perfect leases, and we also have
9 homesite leases, business site leases on those lands
10 that are turned over to TLE management. And then we
11 have another entity on the Rosebud Reservation
12 called a Chuchangu (phonetic) Oyate Land Office, and
13 they also perfect homesite and business site leases
14 on those lands that weren't turned over to TLE. And
15 so we've been collaborating with their office to try
16 to get more uniform procedures in our homesites and
17 our business site leases because we've come to a
18 situation where some of these leases have been
19 perfected -- I mean, they've been put into place and
20 they've been signed off on but for one reason or
21 another they haven't been perfected.

22 We've recently had a lady come into the land,
23 the Natural Resources Committee who had a business
24 site in Rosebud for probably 16 years, but she never
25 had a business on that site. And to me the

1 regulations it says if you don't perfect it in such
2 a period of time, then you need to, you know, negate
3 the lease, but we have quite a few situations where
4 we've allowed people to hang onto their leases
5 without having to perfect. Some of them have had
6 homesite leases for ten years or so and no home put
7 on it and they're saying they're waiting for the
8 housing authority, they're on the waiting list.

9 So we've had our share of problems once the
10 superintendent signs off on these leases because
11 they're hard to terminate once the lease is signed
12 off on. We found that out with this hog farmer, we
13 gave him a multi-year lease, and even Kevin
14 Grover (phonetic) tried to take that signature off
15 that lease but he couldn't do it, so we were stuck
16 with that hog farm for all these years until the
17 term of the lease is up.

18 So it's very important with these new
19 regulations that these leases are followed. And
20 I've been reading in here, you know, if they're
21 violated there's things that can be done.

22 Just recently we gave a homesite lease to an
23 individual who was living in this home, but we
24 didn't do proper research on that home and come to
25 find out another party came in and he just recently

1 got that home probated to him. And so we tried to
2 get back to the bureau superintendent, who is right
3 behind me, and see if we could correct that
4 situation, if we could negate the lease and maybe
5 give the individual another lease. And he said,
6 "I'm sorry, but the ink is dry on that, and there's
7 nothing that can be done. The individual is going
8 to have to remove that home from that site." But
9 there's situations like that I think where there
10 needs to be some type of a remedy.

11 And then we need to do our own work at home
12 with regulatory because we've allowed a lot of these
13 sites to be, leases to be signed but nothing is
14 being done on these sites. We're working right now
15 on a big site for a wind farm, and they recently
16 told us they needed some more acreage. So we're
17 accommodating for that, but we want to make sure
18 that once we get this project in place that
19 everything is in place and it becomes a successful
20 project.

21 But those are just some of my comments I wanted
22 to make. I'm learning quite a bit just from today
23 listening to the proposed amendments to the
24 regulations. It gives us a chance to go back
25 through the CFR, and it's helpful for us over at

1 Tribal Land Management for what we're doing. I
2 don't know if Cleve wants to comment on anything I
3 said, but that's my comments.

4 Thank you.

5 MS. KAREN ATKINSON: Thank you.

6 Are there further comments?

7 MS. ELIZABETH APPEL: I'd just like to point
8 out in keeping with your comment about perfecting
9 the lease, that with the wind and solar subpart, we
10 do explicitly allow for what we're calling due
11 diligence provisions in the lease to make sure that
12 the developer is actually developing the wind and
13 solar farm rather than just tying up the land.

14 MS. KAREN ATKINSON: Any further comments?

15 Anyone else who hasn't spoken today that would like
16 to say something?

17 (No response.)

18 MS. KAREN ATKINSON: That's it then, huh? I
19 appreciate then everyone taking time to be here
20 today. We've learned a lot of important
21 information, and we have a lot of information that
22 we'll bring back to our team that's working on these
23 regulations. We heard, I guess just to --

24 One more question or one more comment.

25 MS. CAROL LAKOTA: Good morning. My name is

1 Carol Lakota.

2 I have a question. We're talking about
3 appraisals and we're talking about surveys and all
4 this and that. I work with the Housing Authority,
5 and Ernie is my supervisor. But he explained some
6 of the things we went through about right-of-ways
7 and homesite leases. Well, my question is: We
8 spent a lot of money on an individual lease this
9 past year, and we had to create an alternate
10 right-of-way. So my question is: We're talking
11 about surveys with this land acquisition. So when,
12 let's say, our regional electrical office is
13 (unintelligible), they come and do their line bill
14 and they record it with the realty office, does the
15 appraisal come into view in the TAAMS? Does it come
16 up to declare what value of that land is?

17 And the improvements that go to this homesite,
18 how quickly do you appraise it or if you appraise it
19 at all?

20 MR. RICK CLIFFORD: I don't believe the
21 appraisal takes into account the electrical line
22 that's installed there.

23 MS. CAROL LAKOTA: But that would be an
24 improvement, and that would be, affect the value of
25 the land, right?

1 MR. RICK CLIFFORD: I agree. I think if we
2 made it known to OST appraisers that something is
3 there like that, they may take it into account, but
4 I don't think they do.

5 MS. CAROL LAKOTA: Can we put that in TAAMS so
6 we have a value on land? Will TAAMS be able to
7 bring that up in one of the (unintelligible)?

8 MR. RICK CLIFFORD: You can put the service
9 line agreement in TAAMS.

10 MS. CAROL LAKOTA: And the value of it through
11 those tracts of acreage?

12 MR. RICK CLIFFORD: We wouldn't really be able
13 to assign a value. That would be something the OST
14 would do for us. We can put the service line
15 agreement into TAAMS so that we know that there's an
16 electrical line there.

17 MS. CAROL LAKOTA: Because I'm looking at
18 housing purposes for tribal entities and doing their
19 lease agreements, that was one of the questions I
20 had to ask.

21 MS. BERNICE DELORME: Hi. My name is Bernice
22 Delorme. I'm General Counsel for the Oglala Sioux
23 Tribe.

24 We've been talking about state taxation of wind
25 energy that's sited on trust land. I would like to

1 see the federal taxation of that same resource being
2 addressed because to this point trust assets haven't
3 been subject to state or federal taxation, but it
4 seems like as we move into, you know, this new
5 energy sector, you know, it's kind of like gaming,
6 all of a sudden you're getting taxation in there
7 that wasn't intended to be there in the first place.
8 So I would like to see the issue of federal taxation
9 of these assets addressed.

10 Thank you.

11 MS. GAY KINGMAN: Hello. Gay Kingman, Great
12 Plains Tribal Chairmen's Association, Executive
13 Director.

14 And I wasn't going to speak because a lot of my
15 chairmen are here, my bosses, but we are going to
16 meet tomorrow at one o'clock, and Chairman Hall will
17 be here, as well as some of the other chairmen that
18 aren't able to be here today.

19 But I wanted to mention appraisals has come up
20 several times, and I know it's not a bureau
21 function, but we've had a longstanding
22 recommendation from the Great Plains Tribal
23 Chairmen's Association that areas in OST be returned
24 back to the Bureau of Indian Affairs. And I think
25 this will go a long ways toward streamlining the

1 process that we have in Interior for the whole land
2 appraisals. The whole land situation is cumbersome
3 the way it was done under the past administration
4 and that reorganization. So I have to mention that
5 that it would help greatly if appraisals was back
6 with the Bureau of Indian Affairs.

7 And then as far as TAAMS, we do have problems
8 with it. And one of the biggest problems is just
9 getting communication on it. We've been trying to
10 get how much of the current land base situations is
11 in the Great Plains.

12 And I also work with the Council of Large
13 Tribes, and the COLT organization has been trying to
14 get the amount of land for the large tribes in the
15 United States, and it's just really, really hard
16 getting that information. And it's probably not a
17 function that you're involved with, but I mention
18 that for the record. And we'll be submitting more
19 comments by the deadline of January 30th.

20 Thank you.

21 MS. KAREN ATKINSON: Any further comments?

22 MS. KAYLA DANKS: I want to make a comment on
23 TAAMS since we have the tribes here. Tribes now are
24 authorized to have access to TAAMS if they have a
25 638 program and the Managing of Real Estate Program.

1 And it's fairly new. There's maybe a handful. I
2 know there's quite a few down in the Southern Plains
3 Region where they have a self-governance tribe and
4 they manage.

5 Tribes in the Midwest Region, we've just
6 connected some of our, one of our tribes to TAAMS.
7 And so I don't know if that's something that the
8 tribes are thinking about up here, but I just wanted
9 to add to your comment and say that tribes now can
10 have access to TAAMS to manage their real estate
11 programs.

12 MR. ERNIE LITTLE: I guess I just want to ask a
13 question. And maybe you do have a provision for it.
14 I participated in a discussion about direct leasing
15 or, of family membership land and direct payment,
16 and I see you have some proposed stuff. And in the
17 discussion there was, we visited about a form that
18 would be formatted by the Bureau, so someone like
19 me, if I wanted to have an agreement with one of my
20 family members. For the record, I see you mentioned
21 for (unintelligible). In here is there actually a
22 form formatted for allotted land that you would make
23 an agreement from the original owner and make
24 provision there where it says you have to at least
25 pay what the Bureau requires in place for what you

1 actually pay so it can be on file for, in case if
2 something did arise out of that?

3 I do know in one instance I share some land
4 with a landowner that's a sole owner, and I made
5 agreement with her to -- and I know the cost. I pay
6 her quite a bit more than what the lease is, and we
7 just had a handwritten one, so I don't know if I'm
8 in violation or what. But I was agreeable to that.
9 So I was just looking for some easier method. Maybe
10 that was one of your forms to accomplish that same
11 goal.

12 Thank you.

13 MR. JAY DANIELS: I can answer that. You know,
14 actually if you were a co-owner in that property,
15 that trust land, there's a case law out of Interior
16 Board of Indian Appeals where an individual took
17 possession, and the other landowners were agreeable
18 to that, and they just gave it to him in writing.

19 After it went through the (unintelligible),
20 they came back, and they suggested or highly
21 recommended that they do get a lease. You know, I'm
22 not sure if you're saying owning that. You said a
23 single landowner?

24 MR. ERNIE LITTLE: Don't own it.

25 MR. JAY DANIELS: Okay. Yeah, you would

1 definitely need to have a lease.

2 MS. ELIZABETH APPEL: Do we have any model
3 leases that --

4 MR. ERNIE LITTLE: The form is what I was
5 asking for.

6 MR. JAY DANIELS: You probably -- is it for
7 farming?

8 MR. ERNIE LITTLE: No. Just pasture land.

9 MR. JAY DANIELS: They could just get away with
10 a permit then.

11 MR. RICK CLIFFORD: You can do a permit or an
12 agricultural lease approved by the BIA, or that
13 individual sole owner could request owner managed
14 leasing. It's a provision of AIPRA. I think
15 they're going to do some regulations on that in the
16 future here. You know, the superintendent at
17 Pine Ridge and the realty officer there will be able
18 to explain to you about the owner-managed leasing
19 provision. It allows the co-owner to enter into
20 agricultural leases without the BIA's approval. You
21 can use whatever form you wish at that point.

22 MR. JAY DANIELS: And the permit is a pretty
23 simple form. It's like a one-page form, I believe,
24 maybe two, but that's available also in our
25 handbook, the one that I referred to earlier, a

1 sample copy in there.

2 MS. KAREN ATKINSON: Are there any other
3 comments? Any further questions or clarifications
4 that we can provide while we're here? Are we ready
5 to wrap up?

6 (No response.)

7 MS. KAREN ATKINSON: Well then I'd like to ask
8 Liz to do a recap just on the process for submitting
9 written comments, the time period, where you can
10 submit your written comments, and then also just a
11 recap on the process that we're going to follow to
12 finalize the regulations.

13 MS. ELIZABETH APPEL: So before I do that, I
14 thought I saw a hand over here. I just want to make
15 sure. Okay.

16 So if you can get your comments to us by
17 January 31st, e-mail is the preferred way, if that's
18 possible, but we'll also look at anything we get in
19 the mail. It's just that the e-mail gets to us
20 faster. And that address is Consultation@BIA.gov.

21 And this is our last scheduled consultation, so
22 after we get the transcript from this session and
23 the other two sessions that we held last week, we'll
24 be going through the comments in the transcript and
25 all the comments and the written comments and

1 categorizing them and meeting and following up, if
2 necessary, with any of you for clarification or
3 otherwise.

4 And then we'll incorporate the changes into the
5 regulatory language. That will go through the
6 Department and OMB approval processes. And we'll
7 also develop a Response to Tribal Comments Document,
8 which we did for the draft regulations, to address
9 comments on how the comments were addressed in this
10 proposed regulation, so we'll do the same thing
11 showing the changes from the proposed to the final.

12 I just encourage you to provide your comments.
13 If you have recommended language that you'd like to
14 see in the regulations, that helps a lot. And I
15 think that's it.

16 We all can stick around here until close to
17 12:30 if you'd like to come speak with us
18 individually, but otherwise now is your last chance
19 if you want to say something on the record.

20 UNIDENTIFIED SPEAKER: Who's on that team
21 that --

22 MS. ELIZABETH APPEL: I'm basically the
23 documenter as regulatory affairs contact. We have
24 Jennifer Turner from the Office of Solicitor who's
25 here today. Also Steven Simpson who's with the

1 Office of the Solicitor, Bryan Newland who is
2 Special Assistant to the Assistant Secretary for
3 Indian Affairs, and Del Laverdure when he can make
4 it. His schedule is busy. So Brian is there
5 representing the administration.

6 And then we have a number of subject matter
7 experts who join in, for example, Jay Daniels and
8 Kayla Danks who are here today. We also have Stan
9 Web and Gloria Coney from the Western Region, and
10 we've had Roger Knight from IED and a number of
11 other people. Does that answer your question?

12 UNIDENTIFIED SPEAKER: Kind of, yeah. Who
13 decides what comments are most justified, I guess?

14 MS. ELIZABETH APPEL: I'm sorry, what was the
15 question?

16 UNIDENTIFIED SPEAKER: What comments are the
17 most justified? I don't know how you're going to
18 decide that, you know, with the different tribes and
19 stuff.

20 MS. ELIZABETH APPEL: We go through every
21 single comment, and we do our best to incorporate
22 all the suggestions, to the extent we can, within
23 our statutory authority. When there are conflicting
24 comments from different tribes, that's when it gets
25 a little more difficult, but I can't think of an

1 instance off the top of my head when that's
2 happened. But in that case it may require follow-up
3 with the commenters.

4 MR. PETER YACUPICIO: One final thought: So
5 once you guys decide what's on here, then that's it?
6 Then tribes have no input? Whoever stamps it,
7 that's it?

8 MS. ELIZABETH APPEL: Well, in a way, yeah, I
9 guess you're right.

10 MR. PETER YACUPICIO: We're not going to get to
11 see what the final version is until it's final, and
12 by that time it's too late for us. I think that's
13 the consensus here that I feel about that.

14 MS. ELIZABETH APPEL: We could -- I mean,
15 that's why we want to encourage you to get your
16 comments in.

17 MR. PETER YACUPICIO: Yeah, but it's only a
18 comment, not -- see what I'm trying to say? It just
19 doesn't make sense to me that yes, you are
20 supposedly our representatives and you're looking at
21 the best interests of all the comments of the
22 tribes, but how do we know that's going to happen?

23 MS. ELIZABETH APPEL: Well, so that's why we
24 had the draft regulations before we published
25 proposed so that we would have that extra back and

1 forth. But if you believe that they're not at a
2 place yet where -- if you think that we still need
3 another back and forth, you know, please let us know
4 and we can do that.

5 Also, once they're published proposed, I'm not
6 sure if we can distribute draft final before the
7 published final because we're confined by the
8 Administrative Procedures Act to follow certain --

9 MR. PETER YACUPICIO: I think you just hit on
10 one because even if you send it out through e-mail,
11 at least some of the tribes will get that and then
12 they can comment. That way whatever your deadlines
13 are and whoever the final signature, from Laverdure
14 or whoever it might be up at a higher level, then at
15 least the tribes get a few days or weeks to comment,
16 and they might not be everything that works for
17 everybody, but at least you've given them one final
18 chance to that final.

19 MS. ELIZABETH APPEL: That's a really
20 interesting suggestion, and I'll check back and see
21 if that's possible. But what I'm -- the only reason
22 that I'm kind of hesitant is because I'm not sure if
23 legally we're allowed to do that under the
24 Administrative Procedures Act. But it seems like to
25 me that tribal consultation would trump that. So if

1 there is a way that we can do that, then I'll make
2 sure that we can do it, that we will do it, yeah.

3 MR. RICK CLIFFORD: I have a question. So
4 under Tab 2 of the book here, those are proposed,
5 that's a proposed federal registered publication?

6 MS. ELIZABETH APPEL: Right.

7 MR. RICK CLIFFORD: There will be another one,
8 another proposed rule in the book after these
9 comments are taken into consideration?

10 MS. ELIZABETH APPEL: It will be final after.
11 But that's what he's saying before it goes final if
12 we can do another draft.

13 UNIDENTIFIED SPEAKER: I have one more
14 question. I guess what I was trying to get at:
15 When we do our right-of-ways and our residential
16 leases, businesses, can there be a blanket appraisal
17 done in that area? Because I'm not only talking
18 about this, but what about -- you know, like Cobell
19 is coming in, and I'm looking at lands for
20 development for housing. So I was just wondering,
21 do you consider blanket appraisals over these
22 individual tracts that we applied for and leased
23 for? Can the Bureau do that? Or can Mr. Obama do
24 that appraisal?

25 Please, Mr. Obama.

1 Those are my questions.

2 MS. ELIZABETH APPEL: That's a good question.

3 I don't know.

4 Do you know legally if that's something --

5 MS. JENNIFER TURNER: We've obviously received
6 quite a few comments on appraisals today, and some
7 of the comments, they don't fall within the scope of
8 these meeting regulations, but we are definitely
9 going to be planning internal meetings to talk about
10 facilitating the appraisal process because we
11 understand that, you know, if we have all these
12 deadlines on BIA to act but we're still waiting
13 three years for an appraisal, then they become
14 meaningless. So we definitely plan on following up
15 on all of the appraisal issues that you've raised to
16 see -- in both the leasing context and the
17 rights-of-way context to see what we can do to
18 facilitate the process. So stay tuned on the
19 appraisal issue.

20 MS. KAREN ATKINSON: Any further thoughts or
21 questions on the process going forward?

22 MR. RICK CLIFFORD: One last thing: What about
23 trespass? Is it going to be its own subpart here,
24 or is there going to be trespass in each individual
25 subpart? There's nothing in these that are

1 proposed. I just say that because the only thing we
2 use for trespass now is the 166, trespass on
3 agricultural lands, and it doesn't really apply to
4 some of these lands for residential leases.

5 MR. JAY DANIELS: I talked to Eugene about it
6 this morning, too, but I believe (unintelligible)
7 put together those trespass regs (unintelligible).

8 MS. ELIZABETH APPEL: There has been some
9 investigation as to whether we should do a separate
10 subpart for trespass. We've held some facilitated
11 workshops throughout Indian Country on ag, grazing,
12 rights-of-way and trespass to get input on whether
13 people would like to see a separate subpart for
14 trespass.

15 I think with regard to trespass and these
16 leasing regulations, I think I'll turn it over to
17 Jennifer because I think there's some difference in
18 authority, statutory authority with ag and non-ag.

19 MS. JENNIFER TURNER: Yeah, Liz is correct.
20 Congress has given us broad authority to pursue
21 trespass on Indian agricultural lands and Indian
22 forest lands. Unfortunately they have not given us
23 that same authority to go on non-agriculture or
24 non-forest lands. And that broad authority we have
25 on agricultural and forest lands includes authority

1 to go after tribal damages, so we're able to double
2 the amount of damages, for example, to forest
3 resources or to agricultural leases. And we simply
4 don't have that clear statement of Congressional
5 authority for going after trespass on
6 nonagricultural and non-forest lands.

7 That said, courts have recognized that we do
8 have authority to go after trespass generally, and
9 these regulations do mention that BIA will pursue
10 trespass in appropriate circumstances. And we have
11 succeeded in Federal Court in trespass cases. So
12 that the question then is, Well, how do we want --
13 do we want specific regs that deal with trespass
14 generally, or do we want to simply have broader
15 provisions here for non-agricultural lands and then
16 specific provisions for agricultural lands?

17 And as Liz mentioned, we had facilitated work
18 groups over the summer to discuss this issue, and
19 it's certainly going to be on the table for the next
20 administration. So we're -- again, stay tuned on
21 the trespass issue.

22 And we always -- you know, if Congress would
23 simply give us more authority to go after trespass
24 on all kinds of Indian land, we'd certainly
25 appreciate that authority, but we have to wait for

1 Congress to act on that.

2 MS. KAREN ATKINSON: Any last thoughts?

3 (No response.)

4 MS. KAREN ATKINSON: Let's go ahead, and we'll
5 adjourn for the formal record.

6 And we will be here for another half hour if
7 anyone would like to come up and talk with any of us
8 individually.

9 And we do encourage you to submit written
10 comments as well, especially if you have specific
11 recommendations on how to address some of the
12 issues.

13 Thank you, everyone.

14 * * * * *

15 (The proceedings concluded at 11:55 a.m.,
16 January 18, 2012.)

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1 STATE OF SOUTH DAKOTA)
2 COUNTY OF PENNINGTON) ss.

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I, CINDY K. PFINGSTON, hereby certify that the foregoing pages numbered from 1 to 107, inclusive, constitute a full, true and accurate record of the proceedings had in the above matter, all done to the best of my skill and ability.

DATED this 6th day of February, 2012.

CINDY K. PFINGSTON
Registered Professional Reporter

My commission expires:
February 4, 2016