

SUMMARY REPORT

**Working Sessions on the
Revision of Four Land Management Regulations
(Grazing, Trespass, Agricultural Leasing, and Rights-of-Way)**

**August to October 2011
Minneapolis, Billings, Portland, Phoenix and Albuquerque**

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on behalf of the

U.S. Institute for Environmental Conflict Resolution
for the

**Bureau of Indian Affairs
Office of Regulatory Affairs and Collaborative Action**

November 29, 2011

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Introduction

I. INTRODUCTION

In August, September and October 2011, the Office of Regulatory Affairs and Collaborative Action (RACA) within the Bureau of Indian Affairs (BIA) convened five collaborative and intensive 2-day work sessions throughout Indian Country as part of a process to review and revise four BIA land use and management regulations: agricultural leasing, grazing, right-of-way (ROW), and the possible creation of a separate trespass regulation. The purpose of this report is to summarize the results of the collaborative work sessions.

The regulation revision process began in 2005. In an effort to update and streamline several land management regulations, RACA undertook a process to prioritize regulations for reform. Originally working from a list of eleven regulations, RACA created teams of federal subject matter experts to revise the regulations. The first drafts were developed primarily by subject matter experts from BIA and the Office of the Special Trustee (OST), and were the subject of a consultation held in February 2006 in Albuquerque, New Mexico. At that consultation, tribes told the agency that dealing with so many draft regulations was overwhelming, so the process was divided into two phases. For Phase I, the administration prioritized business and residential leasing, as well as a new component for renewable energy. Consultation on the Phase I regulations is complete and publication should take place in early 2012. The Phase II regulations – agricultural leasing, grazing, ROW and trespass – were the topics of the 2011 work sessions.

Building on the 2005-2006 revision process, work session participants reviewed each regulation with RACA staff to discuss issues, identify needed changes and suggest specific revisions. For this preliminary phase, the BIA chose to include both federal employees and tribal stakeholders, whose experience and insights could offer a sound foundation for the revision process. Work session invitees included former and current BIA land management staff, attorneys with relevant experience, tribal realty specialists and land managers, and individual landowners who have navigated the process. These work sessions were the first step in a process that will eventually include government-to-government tribal consultation and public review of the revised regulations.

The overarching goal of the collaborative work sessions was to provide an opportunity in Indian Country for learning and dialogue on how to revise the current regulations to support a more streamlined, efficient and responsive process, while maintaining statutory requirements and minimizing the agency's liability. Issues of self-governance, self-determination and trust responsibility were expected to underlie the discussions. Work session objectives included the following:

- To inform participants about the history of developing the current regulation revisions
- To learn from participants how current regulations impact tribal self-governance and individual landowner opportunities;
- To explore ideas for implementing the revised regulations, including specific processes or other tools.
- To identify unmet needs/issues beyond the scope of the regulations that need to be addressed in another forum.

Introduction

Each work session was divided into two days: the first day was for BIA staff, and the second day included tribal stakeholders in addition to BIA staff. Each of the 10 individual work sessions covered the same information and materials. Approximately 227 Tribal and BIA staff members participated in the overall process, as follows:

• August 16-17:	Minneapolis, Minnesota	7 Tribal staff	11 BIA staff
• August 30-31:	Billings, Montana	50 Tribal staff	52 BIA staff
• September 13-14:	Portland, Oregon	8 Tribal staff	11 BIA staff
• September 27-28:	Phoenix, Arizona	18 Tribal staff	33 BIA staff
• October 12-13:	Albuquerque, New Mexico	11 Tribal staff	26 BIA staff
	TOTALS:	94 Tribal staff	133 BIA staff

See Appendix K for copies of the session sign-in sheets

At least two facilitators and at least one note taker served each session. Facilitators/note takers, engaged as third-party impartial facilitators through the U.S. Institute for Environmental Conflict Resolution, were: Dexter Albert and Jason Hurd (Intrinsic Consulting), Lucy Moore and Yolynda Begay (Lucy Moore Associates), Donna Silverberg and Robin Gumpert, (DS Consulting).

Timeline

II. TIMELINE

The revised regulations from this process are not expected to be complete before the 2012 U.S. presidential election because of comment period requirements and the fact that regulations are routinely not passed in the final months of an administration. The Bureau has chosen to use this time to undertake this new collaborative process that involves tribal voices prior to drafting. RACA will take input from these work sessions and form workgroups to begin drafting revised regulations. They will also look at new laws and cases for their applicability to the regulations. RACA will hold tribal consultation on the drafts before they are proposed for public comment in the Federal Register to ensure that tribal voices have priority. Assuming drafting begins early in 2012, consultation would occur in early 2013, with a final publication date later in 2013. As was noted at each work session, the overall timing is dependent on many factors, including resource availability and political leadership. RACA believes that these work sessions will build support for making these revisions a top priority in the coming months.

Overarching Themes

III. OVERARCHING THEMES

During the 10 working sessions in five locations, participants – both BIA and tribal alike – raised several cross-cutting issues that they felt applied to all or most of the four regulations scheduled for revision. What follows is a brief description of these themes.

Working session process:

“This session was different because participants didn’t just complain; they brought solutions to the table.”

“I’ve been through this before and we are still waiting for the changes.”

There was unanimous approval for the Bureau’s initiative to hold informal dialogue sessions with tribal and Bureau staff throughout the West. Participants applauded the decision to learn from those in the field about the strengths and weaknesses of the regulations before the regulation drafting team sits down to write. At the same time, there is a fear that this good advice from those with experience will be wasted. Many remembered having contributed in the past to similar efforts, with no result. There was no follow up and no regulations were forthcoming. This frustration and pessimism were present at almost every session, as participants asked for a commitment that the regulations would indeed be revised and their comments would be seriously considered. In spite of this, every participant contributed to the discussion with energy and often passion, hoping to play a part in improving the regulatory system.

Each session ended with “final thoughts” from participants about their experiences during the day. The most common comment highlighted the value of being together with others struggling toward common goals, exchanging interpretations of the regulations, frustrations with certain challenges, and creative ways of making things work. The sessions satisfied a deep desire on the part of both tribal and Bureau staff to communicate, share stories and resolve issues. It was important, they said, that the community formed by these sessions included a diversity of roles – different geography, different disciplines, and different levels within bureaucracies. The message is loud and clear for the Bureau: Please continue this dialogue. Bring us together, tribes and BIA, for mutual education and support. The result will be a workforce that is better informed and with higher morale, as well as a regulatory process that is more efficient and coordinated.

Common goals:

“The comments today are the blueprints for the future, a future that affords tribes the flexibility they need and encourages them to take on as much responsibility as they can.”

“We want regulations that help us – not limit us – to be better stewards.”

Tribal and federal participants learned by listening to each other that they shared common goals. First is the protection and preservation of the tribal assets and resources and the promotion of tribal self-determination. People spoke of the role of the Bureau in helping tribes carry out federal programs, and the role of tribes in taking on more responsibility as stewards of their own

Overarching Themes

land. But equally important, felt many, is the responsibility to improve the quality of life on reservations. Participants often found that they shared fundamental concerns and cares for Indian Country, its people and its resources. Several spoke of being motivated to do the best job possible, seeing every day the hardships for Indian people as they try to improve their living standards and create a better future for their children. Both BIA and tribal staff agreed that the regulations should support those goals, rather than serving as yet another obstacle.

Communication:

“The more communication – especially face-to-face – the better for staff morale and an effective work product.”

“We need better communication to address the disconnect that plagues the BIA from top to bottom.”

Those who attended the sessions were hungry to communicate, in all directions and on all topics. They advocated for a Bureau that puts more value in communication and coordination, vertically within the bureaucracy from the field to the Central Office, horizontally across regions, and between the Bureau and tribal offices, and even between/among tribes. Many spoke of BIA “bottlenecks” and “black holes” where questions and requests seem to die, or at least languish for months and years. Some thought the source of this dysfunction is confusion about roles and lack of accountability.

Trust responsibility and self-governance:

“We need to draw the line on trust responsibility and understand what we can actually accomplish and what we can’t.”

“When we put our trust responsibility in the hands of bureaucrats we lose our focus. We do need to hold BIA accountable, but we have responsibilities to our own tribal communities.”

These dual mandates can be difficult for staff to balance. The Bureau must live up to its trust responsibility for Indian assets in both the letter and the spirit of the law. Concurrently, they are committed to enhancing tribal self-governance in the management of resources. A further complication is that the best interests of the individual allottee may be caught in this juxtaposition. Each session discussed at length this “triangle” of interdependency, where actions by the Bureau on behalf of an individual may negatively impact the tribe, or where the partnership between the Bureau and the Tribe may negatively impact the individual. The challenge for the Bureau is to support tribal self-governance while not compromising its trust responsibility to the asset and the welfare of the individual tribal member. The regulations play a large role in this dynamic, and participants urged that care be taken to anticipate unintended consequences of certain decisions.

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Both tribal and BIA staff expressed confusion about the opportunities and the limits for Bureau assistance especially to self-governance tribes. Tribes sometimes don't understand their role and responsibilities and the Bureau is seen as the "bad guys." BIA staff are constrained by lack of resources and feel unable to live up to the full trust responsibility. The regulations need to provide clarity for both federal and tribal staff.

Some suggested that the Bureau's paradigm has been maximization of income rather than preservation of assets, and in that paradigm the agricultural economy and the management of the resource have suffered. Others urged that the Bureau consider the impact to local economies in its revision process. In some cases a tribe or member is subject to a much more lengthy and complex permitting process for development than other landowners, causing development to go elsewhere and hurting the local economy.

Tribes made clear that the clause giving tribes the authority to supersede federal regulations with their own laws, resolutions and ordinances must be retained, and strengthened, in the revised regulations.

Finally, participants often mentioned the backdrop of history that is present in any federal-tribal relationship. The BIA-tribal relationship is understandably complex with layers of abuse and dependence, as well as layers of support and assistance. Politics, economy, society and individual identity are all shaped to some extent by this reality. Participants believed it is important to acknowledge this history in order to move forward with a partnership that is both productive and respectful on all sides.

Coordination among agencies:

"Why can't federal agencies talk to each other – it would make our lives so much easier."

"We can't sue ourselves."

Participants noted the need for coordination among federal agencies. BIA and tribal staff need working agreements with USDA and others at the regional level to implement programs – like conservation and farm support – that are crucial to the preservation of assets. Especially in hard economic times and with program budgets shrinking, pooling resources, time and staff can maximize the benefit from limited funds. The regulations need to be aligned with the laws, regulations and policies that can bring badly needed resources to the tribes and Indian producers. Specifically mentioned were AIRMA, NRCS, FSA, NEPA, ESA, and EPA. In addition, their data management systems need to be compatible. There are many examples of duplication and inconsistencies among required forms.

Conflicts with other federal agencies arise when one causes damage to the interests of the other. For instance a Forest Service prescribed burn can damage tribal land, but the Bureau is helpless to enforce against another federal agency.

Overarching Themes

Complexity:

“Not even lawyers who have been working with these regs for years can understand them. We don’t have a chance!”

“The Bureau should figure out what it has to do first, and then write a regulation for it. They need to get back to basics.”

At every session there were complaints about the complexity of the regulations. Participants begged for clarity, simplicity and the use of plain language. They spend too much time, they said, “flipping from one section to another” trying to figure out what is required and how to do it. The regulations are vague where they should be clear, and rigid where they should be flexible. The full range of tribal and federal staff, landowners and permittees need to be able to comprehend and follow the regulations. Authority should be clear, using “may” and “shall” as appropriate. Participants requested that the regulations also be accessible on the web, with regular updates.

There was universal support and enthusiasm for handbooks. The handbook is critical in giving the BIA employee guidance and establishing some consistency in the application of the regulation. The regulation and the handbook should go hand-in-hand, and be developed together to ensure their compatibility, said participants, so that staff knows how to interpret and implement the rule. If a procedures handbook were available as soon as a law or regulation was adopted, “our jobs would be so much easier.” Sharing handbooks with tribal staff has led to much improved working relationships, said BIA employees. There was a caveat that tribes should understand that they are bound by the regulations but not by the policies and handbooks.

Consistency and flexibility:

“The revised regulations need to protect us and show us what to do within the law, but they also need to provide for ‘wiggle room’.”

“The legal decisions handed down should be sound and consistent, and should support agencies to make their own decisions.”

The regulations need to be consistent at the national level, while allowing for flexible implementation at the local level to support local needs and priorities. Participants underlined the vast differences between regions, among agencies, and from tribe to tribe. Site-specific application of regulations will mean more efficiency and better compliance, but there are other reasons as well. Honoring the local way of doing things is important for the relationship between the tribe and the Bureau, and between Bureau leadership and field staff.

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Accountability/enforcement:

“There is no point in having regulations if they are not enforceable.”

“It becomes a shell game. They move the trespassing animals from one piece of land to another, and we just follow them around and write notices.”

Enforcement challenges cut across the regulation topics. Many commented on the “lack of teeth” in the regulations and the frustration of not being able to enforce against trespassers, lease breakers, those who damage property, etc. There was confusion and a variety of interpretations of responsibility for enforcement. Participants cited factors that influence the effectiveness of enforcement, including lack of staff and resources, cultural norms, politics, and in some cases the due process requirements of the regulations. The regulations need to clarify enforcement authority and include specific penalties and timelines.

Timeliness:

“Certified general appraisers don’t want to work for the tribe because they don’t want to deal with all the OST paperwork and “nit-picky” requirements.”

“Some surveys cost more than the value of the right-of-way.”

Participants, both tribal and federal, expressed great frustration at the delays that seem endemic to the regulations. Delays in approving leases, in enforcing against trespass, in renewing right-of-ways, in recording and retrieving data are all damaging to the interest of the landowner, as well as to the relationship between the tribe, the Bureau and the tribal member.

The survey and appraisal processes were cited at every session as bottlenecks to getting anything done. In most regions, there are serious backlogs of both survey and appraisal requests. Both are expensive, sometimes exceeding the value of the asset in question. Both require certification levels that may be excessive and methods that may be outdated and burdensome.

Certified general appraisers, required in the regulations, are reluctant to do tribal work because of the red tape involved – OST approval of the contract, etc. Residential appraisers are willing to do the work and could do it more quickly, but the regulations mandate review of the appraisal by a general certified appraiser. In addition, the residential appraiser then has to share his payment with the general appraiser. Some tribes would like to start their own appraisal companies but it is a challenge to find certified appraisers willing to move into a tribal situation.

Many suggested that tribes be able to waive appraisals for tribal land. Apparently, it can be waived by a tribe, but it must be completed first. Regional directors and superintendents also felt that the authority to waive should rest at the local level rather than with the Central Office. Understanding that valuation is necessary, there were ideas for options to appraisals – mass appraisals, market studies and bids, using residential appraisers or accepting a single bid without having to have an appraisal.

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Notification and Consent:

“We never know if we’re doing it right.”

Another contributor to delays, in the opinion of many, is the notification and consent process. There was much discussion about how to interpret terms like “too numerous” or “whereabouts unknown,” and when the Bureau could consent on behalf of landowners. The process is often so slow that landowners die before it is complete, and probate requires the process begin again for the heirs. There were many suggestions, including notification by priority mail, through newspapers, constructive notice, including the notice with TAAMS mailings.

Role of politics:

“When you mix politics with regulations, you end up with a mess.”

“We need leadership that survives changes in administration.”

Many spoke of the challenges of implementing regulations in the face of changing administrations, both tribal and federal, and with them, changing priorities and philosophies. Political shifts impact enforcement, and the BIA officers may find themselves opposed by tribal officials when they try to enforce on behalf of a landowner. On the federal side, regional directors often make policy decisions based on who is in the seat of power in Washington.

The lack of consistent direction from the Central Office is of particular concern to the regions and the agencies. Unanswered requests, long delays in decisions, contradictory rulings, all lead to a confused and demoralized workforce. Each Assistant Secretary for Indian Affairs seems to have his own agenda, said many, and the regions often feel left out of the loop, ignored and abandoned.

Training and education:

“The institutional knowledge in this room won’t be here forever. We need to take advantage of every opportunity we have to meet like this.”

“When I came to work here, I was just thrown in the fire. I don’t want to do that to my replacement.”

In every region, there were requests for training and education to be able to use the regulations, both existing and revised. Without training for all levels of staff, implementation will be inconsistent and ineffective. In many agencies, a large percentage of the workforce is eligible to retire in the next few years. New employees have much to learn from this experience. Some recommended this kind of information sharing every two years to capture new employees on a regular basis.

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A participant suggested that training be done in-house rather than by outside contractors for two reasons: a better, more relevant product, and saving up to \$14-million a year that could be used to support programs designated for cuts. Distance learning and new virtual technologies could also be utilized to reach staff efficiently. Such a program would also honor the knowledge and experience of current staff.

Education and training for tribal staff and leaders would also be extremely beneficial for efficiency, enhanced capacity for self-governance, and relationship-building. There is turnover in tribal offices, as well, when administrations change.

Landowners, particularly those where tribes have compacted the realty function, need to understand the rights and responsibilities of owning a fractionated interest. This information does not get passed on to new generations, causing many problems – delays in process, damage to the relationship with the agency, confusion about the BIA’s responsibility, and more. Participants had ideas about outreach to landowners that included regular realty meetings with tribes, radio talk shows, and a continuation of the OST sessions that were discontinued. And, as is customary, be sure to provide food!

Lack of resources:

“We do the best we can with what little we have...and it looks like it’s only going to get worse.”

“With less money, we’ve got to get creative and figure out how to work more efficiently and cooperate more.”

Every session underscored the hardships due to lack of resources – both monetary and staff. Training, outreach, enforcement, monitoring, record-keeping, coordination and relationship-building all suffer because regions and agencies are under-funded. The fact that other agencies like BLM receive more funds to do the same work – in some cases twice or three times the amount available to the BIA – was particularly frustrating to Bureau staff.

Record-keeping:

“We have to travel three hours one way to get access to TAAMS. It’s just not useable for us.”

There were concerns that record-keeping has been neglected in the past, and that the consequences are now being felt by both tribal and BIA staff and landowners. Expired ROWs, recording information on titles, probate records, and more have suffered from lack of attention.

Although TAAMS is an improvement and offers the hope for comprehensive, accessible record-keeping, there were complaints that it is cumbersome and time-consuming to use. Others said if the right question is asked, it can be very useful in tracking the history of leases, etc. Training on the use of TAAMS is critical. Apparently, the data that TAAMS requires is not reflected in many forms; correlation is needed between the forms and the required fields in TAAMS. In addition, the system is not available to many tribes, some for reasons of distance to travel, other for reasons relating to the *Cobell* settlement.

Specific Concerns and Recommendations

IV. SPECIFIC CONCERNS AND RECOMMENDATIONS FOR THE FOUR REGULATIONS

Following are brief summaries of *some* of the issues raised specific to the four regulations: Agricultural Leasing, Trespass, ROW and Grazing. For the complete discussion on each regulation, please see the individual summaries of each of the ten working sessions, found in the Appendix. Additional specific recommendations are listed in Section VI of this report.

While the recommendations (in bold italics, below) were not heard in each of the ten working sessions, they do represent the sentiment of many.

Agricultural Leasing:

Terms: There were many comments about the need to coordinate the length of terms of agricultural leases to coincide with other agencies' term requirements in order to be able to take advantage of these improvement programs. For instance, the USDA's Conservation Reserve Program and the Wetlands Program require leases of 10 or more years, but current BIA regulations limit allotted land to five years, and other land to 10 or in some cases 25 years. In checkerboard areas where leases expire at different times, it is difficult to coordinate a conservation program. Fractionated lands make signature gathering, required by the Farm Bill, difficult as well. Without access to those programs, tribes and tribal members are unable to make improvements, develop water, build roads and fences, etc., that would benefit both the land and the quality of life. There are inconsistencies in terms of leases that do not make sense to some. There are more requirements, for instance, for a 10-year agricultural lease than for a 100-year commercial lease.

Improvements: Without improvements – fences, wells, dams, conservation structures – it is hard to lease the land. If the BIA is the trustee of the land and working in the interest of the landowner and lessee, the regulations should promote, not discourage, these kinds of improvements. Many were concerned that there is no incentive for landowners or lessees to make improvements to the land. If investments are made, the lessee receives no reimbursement at the end of the lease, and no credit for maintenance of the improvements. In some regions, the lessee pulls up the fencing when leaving. Furthermore, because improvements are currently not considered to be held in trust, they are not included in BIA appraisals. The landowner who is negotiating a lease is deprived of that value of the property, and will be forced to take a lower rent.

Subleasing: The ability of a landowner to sublease his/her land is controversial. Some felt strongly that subleasing should be prohibited, while others felt it should be regulated. In some regions, “fronters” and “stand-ins” – those who bid without the intention or resources to follow through – are a serious problem.

Reasonable time frames: The Bureau needs to establish reasonable and practical time frames for leasing agricultural land. Many felt current processes take too long and the landowner suffers. Deadlines for lessee agreements in the fall, rather than the spring, allow for more time to process the lease before the growing season begins.

Specific Concerns and Recommendations

Other issues:

Owner-managed lands: Owner-managed lands should be specifically addressed in the new regulations.

Land assignments: There was support for retaining the ability of tribes to issue land assignments by tribal custom, without BIA approval.

O&M charges: Currently, the landowner must pay O&M charges even if the land is not leased and the water is not delivered.

Participants recommended that the regulations:

- *reconsider the length of lease terms to facilitate participation in other agency programs and funding opportunities.*
- *create timeframes and deadlines that coordinate notification, appraisal, bonding and fee deadlines to maximize income for the landowner.*
- *provide for incentives for improvements and clarity about the ownership, compensation and maintenance of the improvements.*
- *provide for assurances (bid deposits or a bond) that the bidder is able to follow through on the lease requirements.*
- *establish a process for crop-sharing in place of subleasing.*

Trespass:

Statutory authority: There were questions about the statutory authority for enforcing trespass and suggestions that congressional or at least Secretarial action might be necessary to establish trespass regulations outside of Agriculture and Forestry.

Separate, stand alone regulation or integrated in existing regulations: In Minneapolis and Billings, there was almost unanimous support for a separate trespass regulation. In Phoenix participants overwhelmingly favored leaving the trespass provisions in the different regulation sections. In Portland there was strong support for a separate regulation, with sub-sections of each of the existing regulations to address trespass. In Albuquerque, the groups were divided, some favoring separate, some favoring integrated and some suggesting a combination of both.

In general, those favoring a separate, stand alone regulation suggested that it would be easier to implement, would guarantee consistency across programs and that policy and handbooks could guide its applicability to different regulations. If trespass were integrated, they said, it would necessitate changing other regulations. Having trespass in one place would be simpler and easier to find.

Those favoring integration of trespass in the existing regulations argued that there were too many kinds of trespass to be captured in a single regulation. Penalties, for instance, should be tailored to the different kinds of trespass. Leaving trespass in existing regulations would avoid having to refer to a different section for trespass rules; it would all be included in one regulation. Some felt that if trespass were in a separate section, it might be diminished, easier to ignore.

Specific Concerns and Recommendations

Some supported the concept of a separate trespass regulation *and* integration of trespass in existing regulations. This would offer maximum clarity, they said.

Forestry model: Participants suggested that the BIA handbook on forestry trespass could serve as a good model for these regulations. The process is laid out well, in detail, with the framework included in the regulation and the statute.

Challenge of enforcement: Staff need clarity and guidance on enforcement authority, impoundment procedures and penalties. Too often the BIA passes the buck to the Tribe and the Tribe passes it back to the BIA, and valuable time is lost while damage continues to the resource. The notice requirements and timelines make enforcement almost impossible. The result is frustrated landowners who see the BIA as a bureaucratic machine unable to do anything about their trespass issues. Penalties need to reflect today's economics and be an effective deterrent. Too many trespassers are more than willing to pay whatever penalty and continue to trespass because it's more economically feasible to them than complying or going through the proper BIA procedures. Lack of resources means that there are not enough enforcement officers. Partnering with tribes and other agencies to share resources and responsibility will be a necessity. Concurrent jurisdiction with tribes and the BIA could enable the BIA to enforce in tribal court. Mediation and arbitration should be an option for resolving disputes and settling claims.

Given the scarce resources and need for more targeted protection of resources, participants suggested a triage system that gives priority to the emergencies. Those trespasses that are causing immediate damage would be handled first – perhaps even in criminal court – and the regulations would allow for suspension of certain notice timelines, etc. Participants noted that trespass covers a broad range of actions or inactions, from willful to incidental. Hazardous dumping merits a different response than a few cows walking through a broken fence.

Kinds of trespass: In every region, participants created long lists of kinds of trespass, or possible trespass. The wide range indicates the need for regulations that can apply in very different circumstances.

- Wood cutting
- Overstocking, grazing animals beyond permitted area, or overstaying their permit
- Hazardous dumping, littering
- Archaeological vandalism
- Contamination from pesticide use by neighbors
- Invasive species from neighbors
- Border patrol operations without permit
- Air space violations by military aircraft
- Squatting on residential lots
- Seeding

Specific Concerns and Recommendations

Participants recommended that the regulations:

- *clarify the definition of trespass, (for instance the difference between unauthorized use and trespass), enforcement authority, impoundment procedures and penalties.*
- *Include adoption of a triage approach to facilitate resolution of the most damaging trespass violations first, on an emergency basis.*

Right of Way:

Valuation: The survey and appraisal processes result in delays and loss of income to the landowner. Regulations need to provide alternative methods for valuation. A landowner should be able to capture a percentage of revenue from the utility, beyond the original lease payment, but currently there is no way to value that commodity. Valuation should be based on the volume and value of commodity, including fiber optics, data, oil, gas, etc.

Renewal, re-application or lease: Staff need clarity about when to renew a ROW, when to ask for a new application, and when a lease can be used instead. BIA has not adequately tracked ROW expirations in the past, and landowners and ROW holders are unclear about how to proceed with renegotiation. Many ROW holders push for renewal, hoping to avoid the updated appraisal and additional, modern requirements for a new application. Tribes prefer leases because they have been more profitable.

Appraisal waiver: There was agreement that tribes should be able to waive an appraisal for a ROW on tribal land, particularly if it is a ROW for a tribal road, utility, etc. Waiving an appraisal may also be in the interest of the individual landowner who may want to grant a ROW to a relative.

ROW Exclusions: Survey and appraisal requirements are obstacles to an individual who is developing a conservation project. To put in a pipeline to move water from a spring to a tank, for instance, requires an appraisal and survey. This can cause delays and expense to a project designed to add value to the property and increase protection for the resource. Exclusions in these cases are beneficial.

Two-step consent process: There were many questions about the two rounds of consent in the current ROW process: one for consent to survey and one to consider the application.

Landlocked allottees: Landlocked allottees often can't get a ROW to their own land because of the fractionated ownership and consent requirements.

Enforcement: Clarity is needed on enforcement responsibility for fencing, repairs, control of invasive plants, etc. Landowners are not being compensated fairly, if at all, for ROWs that cause damage to their land. Like trespass, many utilities, railroads and others would pay significant compensation for damages caused, if required.

Piggy-backing: Many utilities use existing ROWs without paying. Record-keeping suffers and expiration dates are hard to determine.

Specific Concerns and Recommendations

Terms: Many felt that perpetual ROWs should be prohibited.

Appropriate technologies: Regulations should allow for use of appropriate technology for ROW surveys, without dictating the method and limiting the options. Technologies are changing too quickly to identify them by name at any point in time.

Administrative fee: There was support for levying an appropriate – and significant – administrative fee on ROWs, and retaining those fees at the agency level to help provide resources.

Archaeological surveys: Given culturally significant areas and sacred sites that are priceless, many felt that regulations should require archaeological surveys anytime there is a potential disturbance.

Participants recommended that the regulations:

- *include the value of the commodity being transported – oil, gas, fiberoptics, etc.*
- *clarify when ROW renewal or re-application should be used.*
- *provide for waiver of appraisals and surveys, and exclusion status, in certain circumstances when it benefits the tribe, the landowner and the protection of the resource.*
- *provide access to land-locked allotments.*
- *allow for use of appropriate technologies, without specifying which ones, given the changing nature of technology.*
- *levy an administrative fee on ROWs to be used at the agency level.*
- *require archaeological surveys for any potential disturbance of land.*

Grazing:

BIA impact on local economy: In some regions there was concern that BIA regulations and practices were damaging the economy and discouraging cattle business on the reservation. If the BIA raises the value of the land, then the cost of an AUM goes up and the landowner may be forced to cancel the lease, or lease to a non-Indian.

Empowerment and responsibility: Some tribes feel that BIA staff are interfering with, and disrespecting, the authority of tribal grazing committees. On the other hand, BIA staff often are caught in the middle, asked by landowners to enforce and forbidden by the tribe to do so. Tribal resolutions can be politically influenced and implemented in ways that are not in the best interest of the land or the landowner. It is a delicate situation and one where the BIA staff need some clarity and guidance. It is understood that empowering a tribe to manage grazing brings with it the authority and responsibility to protect the resource and keep it healthy.

Non-Indian lessees: Participants suggested permitting tribal members first, and then putting the rest of the permits out to bid in order to decrease the high number of non-Indian ranchers in some regions. Some characterized it as modern day range wars, with large numbers of non-Indian ranchers bringing in outside cattle, often with diseases, and making money off tribal resources.

Specific Concerns and Recommendations

Enforcement: Enforcement is difficult with scarce resources and could be supported with strong regulations to address overgrazing and exceeding AUMs.

Clarity: Current regulations 166, 167, 161 all apply to grazing. They need to be consolidated for easier use.

Bonds: The regulations need to address bond issues. Participants saw no need for a payment bond if the rent is collected in advance. But they did advocate for a conservation bond or some funding source to restore damaged land. Bonds should not be returned if the lessee takes improvements (like fences) with him. Bonds and letters of credit can be a hardship for many landowners, and the regulations could provide an option for waiver.

Improvements: Like other areas, grazing permits should eliminate barriers to making improvements and include incentives. Clarity is also needed about ownership and compensation for those improvements. Without improvements, Indian land values are decreasing.

Animal health and welfare needs: Participants noted that the regulations need to include more proactive language to protect the health and welfare of animals, including vaccinations, treatment for disease and malnutrition, and disposal.

Participants recommended that the regulations:

- *offer clarity and guidance on authority and responsibility with respect to grazing permits on tribal and allotted land.*
- *acknowledge the importance of promoting a healthy business economy for Indian Country.*
- *revisit the role of bonds in grazing permits with the goal of minimizing hardship to the permittee, while ensuring the damages can be covered if they occur.*
- *provide incentives for improvements and clarity about ownership of the improvements.*
- *include strong language to protect animal health and welfare from disease and abuse.*

Other Issues Not Related to These Regulations:

Probate: Frequently participants asked how to handle the hundreds of probate cases that need attention before the new draft probate regulations are ready in 2013. How can staff handle these numbers of new allottees? Will probates supersede allotments? How can families be educated so they understand these complexities that they are inheriting and can become responsible fractionated owners?

Other federal requirements: Both tribal and federal staff expressed the need for education about the many other federal laws, policies and programs that they need to understand. Which ones apply to their daily work, how are they implemented in Indian Country, and what are the opportunities for cooperation and partnership? Should certain blanket requirements for federal lands (such as NEPA on small-scale projects) be exempt to Indian Country?

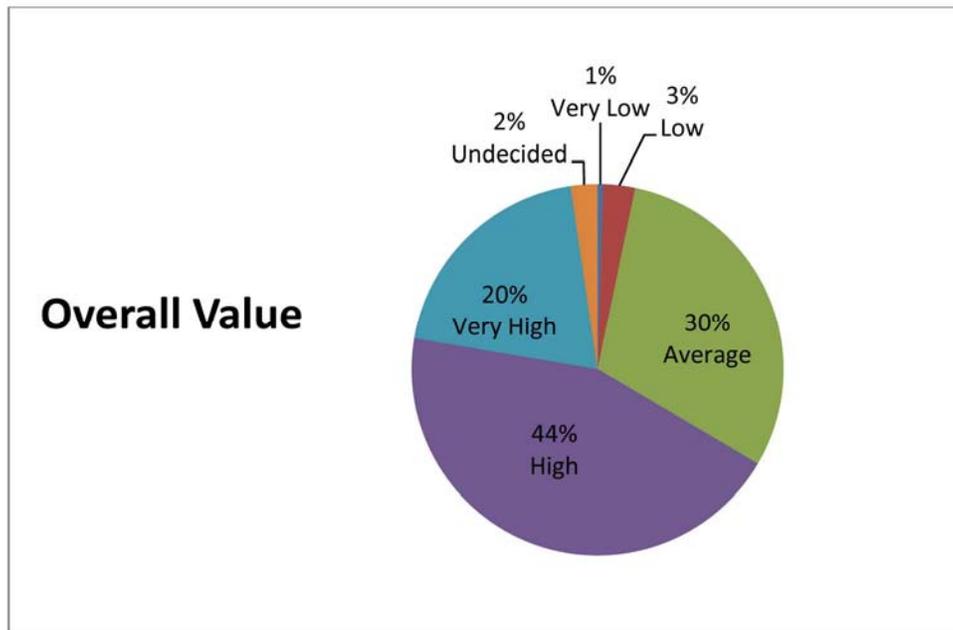
Summary of Evaluations

V. SUMMARY OF EVALUATIONS OF THE TEN WORKING SESSIONS

At the conclusion of each work session, participants were requested to complete a prepared evaluation form. Participant feedback on the work sessions and the overall process provided insights into what worked well and what could be improved. Work session facilitators used the feedback to make field adjustments to subsequent work sessions, as necessary. Overall, the 215 completed evaluation forms provided important quantitative and qualitative information about the process. Detailed evaluation results are presented in Appendix J.

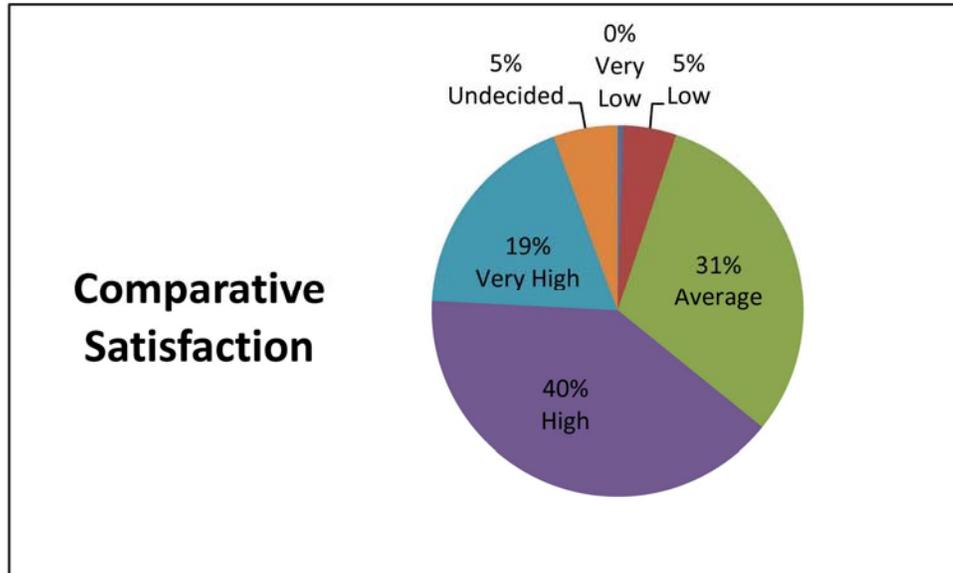
Quantitative information included the value participants received from the work sessions as well as a comparison to other workshops of a similar nature:

- *Question #1: Overall, what value did you receive from this workshop? (On a 5-point scale from Very Low to Very High): 64% rated the workshop value as High or Very High.*



Summary of Evaluations

- *Question #2: How satisfied were you with the workshop compared to other workshops of this type? (On a 5-point scale from Very Low to Very High): 59% rated their comparative satisfaction with the workshop as High or Very High.*



Qualitative information was obtained by asking a series of open-ended questions about what participants liked most, what the best ideas were and whether or not the content was appropriate and informative:

- *Question #6: What did you like most about the workshop?*
 - Numerous responses to this question included words and phrases such as open discussion, dialogue, interaction, hearing different views, sharing knowledge, participation, and having a voice.
 - Many participants liked the opportunity to work with and learn from different tribes, agencies and regions. There seemed to be great value in learning how other areas handle similar situations
 - “The fact that other tribes and BIA staff bounced ideas off of each other.”
 - “To hear how other agencies handle the same problems that we have.”
 - “Networking with peers from other communities; discovering what we have in common vs. differences.”
 - “Hearing other attendees speak on same issues, makes me feel that I’m not alone.”
 - Participants also liked the diversity of the work session groups
 - “The mix of people involved, the experience that people shared.”
 - “Nice mix of employees, levels of responsibility.”
 - “Variations of work group with cross sections and cross agencies.”
 - “Different people from different backgrounds, agencies, experiences.”

Summary of Evaluations

- *Question #7: What is the best idea you heard in this workshop?*
 - Many specific ideas were expressed. A full list is included in Appendix J.
 - Consistency and streamlining were two words that appeared multiple times in response to this question.
 - A number of participants reflected that the revision process itself was the best idea heard
 - “That there is an effort to address regs to speed up processes.”
 - “Our voices might be heard.”
 - “Changes are possibly coming.”
 - “Asking for our ideas and working as a team to make change.”
 - “Talking to tribes before drafting regs.”
 - “To have input on regs prior to them being written instead of looking at a draft.”
 - Many participants expressed that more cooperation between BIA and tribes, as well as other agencies, was the best idea heard
 - “FSA, BIA, tribe, sheriffs, Dept of Livestock working together.”
 - “Cooperation.”
 - “To have regular/annual meetings with BIA, much like EPA annual tribal conference.”
 - “Region meeting with tribes.”
 - “Network and communicate with other agencies and tribes.”
 - “Tribes and agencies should work together for the betterment of all.”
 - “Having everybody speak and taking part in the discussion.”
 - “Willingness to work together.”
 - “The need for open communications between BIA tribes and other tribal entities.”
- *Question #8: Do you feel that the content of the workshop was appropriate and informative? Why or why not?*
 - Nearly 75% of respondents indicated that the content was appropriate and informative.
 - When describing why, responses were varied:
 - “It will help improve job responsibility.”
 - “These topics are of great importance to the conservation and protection of homelands.”
 - “Good to know to answer questions for office clients.”
 - “It's a chance for each agency to share their concerns and to hear other agencies give their opinions on how to develop a plan to make it better.”
 - “The regs need to fit the needs of what is happening now.”
 - “I found other tribes are having similar issues.”
 - “We discussed issues that are of big, and common, concerns to American Indians.”

Summary of Evaluations

- “It was open to voice real cases and how they were handled where the regs were not justified.”
- “This is a way for us to improve our business practices.”
- “Great opportunity for BIA to hear from tribes on their issues and frustrations.”
- “It allowed for any or all ideas.”
- Participants who did not think the content was appropriate or informative offered few explanations:
 - “No, NEPA is the unknown factor that delays the process.”
 - “Not extremely informative; meeting was more geared toward providing information.”
 - “We listened to problems experienced by many, but not solutions.”
 - “Should go over regs, explain materials, be more specific.”
- Some participants were hesitant in their responses:
 - “Good discussion, but I am not hopeful that the new regs will be helpful. The real money to be made is at the policy and procedure level.”
 - “Given that the current administration will not actually move to pass any new regs, somewhat discouraging.”
 - “Yes, though the issues are so complex it is hard to get too deep in the short time.”
 - “Did not hear about solutions.”
 - “Seemed more like a gripe session.”
 - “Needs to be built on to be effective.”
 - “Good content, but conversation was dominated by one group.”
 - “Most people were afraid to say too much for fear of retaliation when they go home.”
 - “Reserve judgment until I see results; been through this before.”
 - “Yes, very important; hope it really happens.”
 - “Was ok, need more answers to our questions.”
 - “Hopefully you all will get more feedback and can implement some ideas.”
 - “Hard to say until the regs get promulgated.”
- Some comments reflected on the process:
 - “Should have been set up to be inclusive with BIA instead of them on the outside - it feeds the already obvious division.”
 - “Breakout sessions were short.”
 - “Every topic was well covered, but it could have been longer.”
 - “There is so much information to discuss, it should be two days instead of one.”
 - “Should also solicit written comments.”
 - “Yes, but a copy of the drafted regs that were done previously would have helped.”

Additional Specific Suggestions

VI. ADDITIONAL SPECIFIC SUGGESTIONS

During the sessions, participants made dozens of specific suggestions for those revising the regulations to consider. Some are included below:

Organization of Regulations:

- Organize regulations so easy to use, with flow charts, etc.
- Use plain language, frequently asked questions
- Separate regulations for tribes and allotments
- Include standardized forms that match the requirements of TAAMS

Include definitions for:

- Too numerous
- Highly fractionated
- Whereabouts unknown
- Lease violations v. trespass; unauthorized use v. trespass
- Effective date of leases
- Range land (over 800 acres); pasture land (800 acres and less)

Options for notice, appraisals:

- Offer options for giving notice (priority mail, in the TAAMS mailout, in the newspaper, etc.)
- Send notice by Fedex
- Serve trespassers personally
- Offer public (tribal input) before leases are approved
- Offer alternative to appraisals
- Train tribal members to be appraisers
- Allow tribes to contract with appraisers to complete a fair rental study
- Waiver for appraisals on tribal land for tribal projects

Land use/conservation:

- Include requirement for overall land use and management plan for trust lands, to specify what uses are appropriate for which lands, desired condition, etc.
- Enforce conservation plan requirements
- Accept and coordinate with conservation plans done for other agencies
- Identify requirements for conservation implementation and long-term maintenance

Bonds:

- Substitute a bond for the double damage deposit for simpler record-keeping
- Eliminate the rental bond if rent is paid in advance; secure a way to cover damages

Enforcement:

- Put names of repeat offenders in the paper
- Seek damages retroactively from the first day it is noticed
- Seek stiffer penalties

Additional Specific Suggestions

- Notify prior to lease/permit expiration that lessee/permittee will be in trespass as of this date
- Stipulate in the lease that trespass will occur after the lease end date
- Refuse to renew a lease or ROW until trespasser has complied and compensated.
- Give jurisdiction to tribes to enforce against non-Indians, including confiscation, with the option to refer violations to federal authorities
- Provide for triage of trespass cases, allowing bypass of certain requirements in emergency cases, or where delays will result in more damage

Valuation:

- Calculate Fair Market Value by reservation, not by region – too much difference in landscape, climate, etc.
- Prohibit perpetual ROWs
- Approve perpetual ROWs (beyond 20+20) only with high standard of review, a new appraisal on an anniversary date, and with the guarantee of a rental or use payment every 5 years, to insure that new generations will receive compensation
- Option for landowner to negotiate lease rather than ROW
- Valuing ROW should include commodity being transmitted – optic fibers, etc.

ROW:

- Eliminate double consent (survey and application) requirement on ROW
- Include specific procedures for assignment
- Update regulations to accommodate new technology needs (service line agreements)

Improvements:

- Allow individual compensation for value of improvements
 - landowner takes less in rent so the user can improve the land
 - lessee has longer term contract, as high as 25 years, according to AIRMA
- clarify procedure if lessee leaves or loses bid for next period

Other recommendations:

- Incorporate, reference other rules (NEPA, etc.) so staff understand their purpose and requirements as they relate to their jobs
- Clarify the role of compacted/contracted tribes with respect to “inherently federal functions”
- Eliminate the crossing permit
- Add restricted use of pesticides to conform to EPA certification
- Annual stocking rates adjusted by superintendent, not regional director – too many variables
- Add compliance requirement to lease
- Remove timber from 162
- Consolidate permits in 166
- Clarify authority for removing noxious weeds from trust lands
- Require annual administrative fees on all leases and ROWs, for use by agency
- Provide for new technology –GPS, etc. – in surveying

VII. FACILITATORS' PROCESS RECOMMENDATIONS

The facilitation team was fortunate to hear the wide range of opinions and experience in the five locations. They, of course, are not in a position to make substantive recommendations about the revision of the regulations, as are enumerated above. They do, however, hope that the Bureau will consider the following process suggestions.

Look at what is working: In all regions there were examples of what is working in the field. This is very valuable information for those revising the regulations. These sessions inevitably focused on what was not working, and the ideas from those discussions were rich. But we urge the Bureau to learn from the expertise within the agency about their successes, and find ways to promote those solutions in the regulations.

Emphasize the common goals: Participants were often surprised to learn of their common goals with respect to BIA trust resources. Protection and preservation of the resource, enhancement of tribal self-governance, and improvement of the quality of life for Indian people are all powerful bonds that unite both federal and tribal staff. These common goals can form a focus for tribal-BIA dialogues in the future and strengthen the relationship, without which productive work cannot be done.

Continued tribal involvement: Tribal participants urged the Bureau to include them in the revision drafting process. Many have experience in previous drafting efforts and feel that their perspective is crucial to implementable, effective regulations. We suggest that as the revision process continues, the Bureau keep lines of communication open with all tribes, and specifically with those who participated in this process by frequent communiqués and updates and periodic in-person meetings. Their contributions were significant and their energy and passion brought a reality and creativity to the process.

Continued communication with BIA regional and agency staff: Like the tribes, the BIA staff who participated in these sessions offered critical insights and useful suggestions for a better regulatory process. Many have participated in previous efforts, and although discouraged by the lack of result, they are eager to contribute to this revision process. For the sake of morale, as well as in order to produce the finest possible product, we urge that leadership continue this dialogue that cuts across the bureaucratic hierarchy, from Central Office to Agency, and links the different disciplines and geographies of BIA land management. There is great diversity of experience within the BIA. A participant was reminded of the story of the blind man and the elephant. "Your image of the 'elephant' depends on where you are in the BIA. We can all have very different pictures of the whole." Current staff are dedicated, knowledgeable and full of valuable experience. Regular sessions to exchange information and generate ideas will be well worth the time and effort.

Appendices

VIII. APPENDICES

- A. Glossary of Acronyms
- B. Sample Invitation Letter
- C. Sample Meeting Agenda
- D. Session Materials
- E. Minneapolis Summary
- F. Billings Summary
- G. Portland Summary
- H. Phoenix Summary
- I. Albuquerque Summary
- J. Evaluation Data
- K. Work Session Sign-in Sheets