

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

**Courtyard Marriott Hotel, Bloomington, Minnesota  
August 16, 2011**

Facilitators: Dexter Albert, Lucy Moore

Notetaker: Jason Hurd

BIA Central Office: Michele Singer, Margaret Treadway

**BACKGROUND:** Margaret Treadway, Office of Regulatory Affairs and Collaborative Action, welcomed the group of 11 BIA employees and expressed appreciation for the participants taking time out of busy schedules to give the agency guidance on how to proceed with the revision of these four regulations: Grazing, Trespass, Rights-of-Way (ROW), and Agricultural Leasing. She acknowledged that the regulation revisions were long overdue and encouraged BIA employees to share their knowledge and experience in the discussions. This working session concept is new for the department and is designed to allow BIA staff and tribal voices (both government and allottees) to have some input into the revisions before the regulation drafting group takes over.

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

The Bureau has chosen to use this time to undertake this new collaborative process that involves tribal voices prior to drafting. Michele Singer and her team will take input from these work sessions and form workgroups to start revising the regulations. They will also look at new laws and cases for their applicability to the regulations. The Office of Regulatory Affairs and Collaborative Action will hold consultation on the drafts before they are proposed for public comment to ensure that tribal voices have priority. After revision of the drafts, they will be published in the Federal Register for public comment. Assuming drafting begins early in 2012, consultation would occur in early 2013, with a final publication date later in 2013. All this is dependent, she explained, on political leadership. She hopes that these work sessions will also build support for the case that this is critically important work and deserves top priority. She added that she will be glad to hear about any other issues that participants have with other regulations, so that they can be added to list.

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**INTRODUCTIONS:** Facilitators Dexter Albert and Lucy Moore introduced themselves and reviewed the agenda and the materials. They asked the 11 participants to introduce themselves and offer their hopes and/or fears for the day.

### **PARTICIPANT EXPECTATIONS**

- This process:
  - Interested in how it will work, and hopeful
  - Look forward to good discussion and hearing what others say
  - Would be good to compare these regulations and coordinate them with forestry regulations
  - Want to hear what others have to say; hope for improvements
  - Want to listen and understand other agency cultures
  - It is critical to include the knowledge and recommendations of the employees, not just the SMEs in the revision process; that way the drafters can understand what works and what doesn't
- Need to look at BIA role and actions through the eyes of the Indian landowner
- Prior experience on residential leasing work group
- Trespass:
  - Regulations are badly needed
  - Important to clarify the responsibilities and steps to take in dealing with the many varieties of trespass: grazing, agriculture, roads, ROW, archaeological and more.
  - Learn more about ROW trespass, especially as it relates to forestry
  - Previous drafting team used American Indian Resources Management Act – 2218 (AIRMA) as statutory authority for trespass
  - Ft. Berthold has own policy for grazing, oil & gas trespass, and more; wants to know when to stop negotiating for the allottee
- ROW:
  - Many ROW issues in the Midwest Region
  - Prior experience on team that drafted ROW regs; a lot of good ideas
  - Have a regional ROW policy
- Leasing:
  - Need a new lease form
  - Consent issues need to be worked on; assignment of leases includes two types: one where allottees can consent to an assignment, or the basic lease that doesn't offer the same opportunity. There are economic consequences if they can't sign a lease; it lowers the value of the oil lease.

### **OVERARCHING THEMES:**

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

- Inter-relatedness of the BIA, the tribe and the landowner
- Need to support tribal self-governance
- Need for simplified, streamlined regulations

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- Need for consistency nation-wide and flexibility on the local level
- Need for timely permitting and leasing processes with deadlines
- Need for enforcement and remedies
- Need to streamline the appraisal process
- Need for more resources and more staff

### **Discussion:**

Purpose of the regulations: Participants advised the drafters to make sure that they focus on defining the responsibility of the BIA and the goal of protecting the lands held in trust. “Sometimes at BIA we just want to get jobs done, but sometimes the job shouldn’t be done in the first place.”

Reality of regulation drafting: A participant offered an opinion on the reality of regulation drafting. With an executive directive to consult with tribes, the BIA consults with everyone in the field, the agencies, the tribe and the land owners. Once the proposed regulation is published there is a comment period. The comments are incorporated, or at least considered, and then published as final. Regulations may be challenged in court, “but in the end it seems to be political.” The 151 regulations were published as final and then pulled back. “Whoever has the final policy call dictates how the regs will be rolled out.”

Organization of regulations: An employee suggested a set of regulations, followed by process recommendations to streamline the implementation of the regulations. Another suggested separating policy issues from regulation issues.

Be aware of the audience when writing the regulations. Realty specialists will be using them on a daily basis, probably with little training. Some might not be able to read the statutes. The regs need to be written in plain English and be easy to understand. Maybe the FAQ format would be useful.

They should also be organized “so I don’t have to look in 10 places to figure something out.” The use of flow charts to guide processes would help.

Start with what reports are needed, and then determine what data is needed to prepare those reports.

The revised regulations need to include new statutes, but a participant hoped that the new laws wouldn’t supersede the old laws. “It would be best to keep the options open.”

Handbook: There was strong support for revision of the handbook to match the new regulations. It is a crucial support for those working with the regulations every day. Many felt the handbook is an excellent starting point to educate people, because it is easier to use and more current than the regulations.

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A participant recommended giving handbooks to the tribes. “We had better communication with the tribes after giving them the handbooks.” Another suggested putting resource experts on the handbook development team before they retire. Also, handbooks should be available online.

Consistency: An employee felt that the splitting of residential, commercial and agricultural leasing into different processes was a problem. It is critical, he said, to follow the law and regulations consistently. Any deviation will lead to more deviations in the future.

Need for local discretion: Employees know they have to follow the regulations, but they hope for the ability to make discretionary decisions.

Need for new directives: The BIA Directives in place now for trust programs are 30-40 years old. People in the field are struggling to make sense of something that was written so long ago.

The BIA-Tribe-Member Triangle: A participant identified this relationship as the subject of a great debate in DC and elsewhere. What is the BIA’s primary responsibility – to the individual or the tribe? What should the BIA do when the two are in conflict?

Title reconciliation: The current system doesn’t always reflect correct owners. Employees need a system to keep that current.

Fractionation: A regulation is badly needed to address owner’s use and fractionation. BIA staff need to know how to handle disputes over who can live on the land, or use it. The process for securing landowner consent on highly fractionated leases needs to be streamlined and less costly to the agency.

Partitions: BIA needs the ability to partition land in cases where landowners want to live on their own land. If there are conflicts among owners, the Superintendent should be able to do a forced partition. Tribal committees often frustrate the situation by not passing or ignoring resolutions for partition. A co-owner cannot be charged with trespass on their own land; the BIA needs another mechanism to handle these conflicts.

Deemed Approved: There’s a push toward “deemed approved,” said an employee, meaning that if something is not complete by a certain time, then it is automatically approved. This is not appropriate in cases where an appraisal may take a long time.

Another pointed out that “deemed approved” can also be used as a political tool – using “inaction” instead of actively approving a lease. Another suggested “deemed approved” should only be used where specifically authorized in the statute.

An example from forestry: Staff solicit power of attorney from allotment owners, and 99% of the time they don’t respond. It might make more sense to send a letter asking them to respond if they oppose the action, and assume approval otherwise.

Appraisals: Many had concerns with the appraisal process, including the expense, the delays, the potential for bias, and the standards for appraisers. They asked for options to appraisals in the

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regulations, and also questioned whether or not it is the best tool to determine market value, or to give the landowner the best price.

- Appraisals should be able to be used to set a market analysis. Then any ROW application within the period is good. With market analysis ability, landowners would know upfront and be able to waive the appraisal.
- Sometimes owners may be able to get a better price by negotiating than by using the market value. A participant added that the market value is just the minimum and that owners can seek more.
- “If OST won’t give an appraisal, BIA get’s the blame.”
- Hiring an appraiser can be costly. Tribes should be able to waive the need for an appraisal on tribally owned land. Currently they can waive the appraisal, but they must have it in hand first. Outside entities applying for ROW on tribal land usually have the money to hire the appraiser, giving them an advantage.
- Appraisals need to be done by somebody without bias.
- In the past any certified engineer could do an appraisal; now it is only a BIA certified individual who can be qualified as an appraiser.
- Tribes feel strongly that members should not have to pay for appraisals on residential leases and prefer to let another party provide the appraisal, like the one who wants to use the ROW. OST has to approve or redo the appraisal, adding long delays to the process. If BIA does the appraisal, the landowner is getting fair market value. Members should be able to waive appraisals only if they are benefitting from the use of their own land.
- Appraisals must be timely.
- The agency should be able to do undivided interest appraisals.

Education of landowners: 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. Some ideas for education follow:

- The Minnesota agency holds quarterly realty meetings within tribes/bands to address issues, assist them to plan landowner workshops, etc.
- Start a radio talk show.
- Continue the OST outreach sessions held for a couple of years; make them annual. Even if people only come when they are facing a problem, it is a chance to learn and connect.
- Be sure to provide food.

Education of tribes: The BIA needs to do a better job of communicating with tribes in advance, particularly about all the rules that need to be followed for a big project. Given the high turnover rate of tribal government staff, the education process needs to be constant.

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Education of employees: A participant noted that the BIA does not adequately educate its own employees about the statutes and regulations and the complexity of implementation. Another suggested rotating staff so that knowledge is spread among a greater number.

Coordination with other agencies: A participant gave a vivid example of the need for cooperation among agencies. It involved a huge hog farm at Rosebud. With so many hogs, there were serious issues including diseases and quarantines, and periodic discharges, which required an EPA permit. The company refused to obtain the permit because of the expense, and continues to discharge. The BIA considers this environmental trespass, reports it to EPA, but there is no response. How could this kind of situation be incorporated into BIA trespass regulations? Whose job is it to regulate the environment on tribal land? Some tribes have their own environmental codes. Other agencies that the BIA needs to coordinate with are Bureau of Reclamation, the Corps of Engineers, US Department of Agriculture (USDA), and others.

Another aspect of federal agency relations involves damage caused by one agency's actions. At Leech Lake a Forest Service prescribed burn caused damage to tribal land. The BIA is helpless because it cannot enforce against another federal agency. "We can't sue ourselves."

The USDA is trying to support tribal agriculture, but is often thwarted by the regulations that are confusing and not conducive to coordination with other agencies.

Consent: There were many comments about the consent process. It is costly and burdensome to the Bureau. Its processes and standards are unclear. It can cause delays and result in lack of lease for the landowner. Revised regulations should address the following:

- The secretary can consent under 169.3(c.)(5) to a ROW when landowners are "too numerous," but what is the definition of "too numerous?" Should 20 or more require a simple majority? In draft regulations, there is a sliding scale, and there are other options. The sliding scale of consent requirements was provided in the draft regulations, because you can't always get every owner's consent.
- A participant observed that "whereabouts unknown" cannot be counted toward the majority. If someone can't be found, the BIA has to get consent from the majority of those with whereabouts known. The law (ILCA) requires the agency to prove that they attempted to get consent from every landowner.
- Some encumbrances can benefit the landowner, and others not. Consent standards should be flexible to accommodate the best interest of the landowner.
- The clock for consent shouldn't start until everything that is required has been submitted.
- BIA staff need to ensure that landowners are informed and that they receive the maximum, before consent is asked for.
- Landowners should be responsible for making sure their address/location is current so BIA knows where to find them.

### **THE FOUR REGULATIONS:**

The group discussed each of the four regulations, highlighting problems with the current regs and suggesting improvements.

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### **ROW:**

The group discussed authority for ROW and abuses of ROWs. ROW was not in the original statute, and so it is not in the title. Many felt that ROW and trespass issues need to be kept separate, and that the opportunity for confusion is great because of trespass issues on ROWs. Distinction from trespass: Trespass deals with violations; ROW defines rights, suggested a participant. An individual with ROW will not be the trespasser, but someone using that ROW without the right to do so needs to be addressed in the regulations. The ROW holder should notify the BIA if someone else is using the ROW.

Abuses: There were many examples of abuses of ROWs that hopefully will be addressed in the revised regulations. One of the most significant seemed to be piggybacking. The 1948 act requires landowner consent for ROW for a specific purpose, such as “maintenance and construction” of a road. But permits were issued to utility companies or even pipelines to piggyback on another entities’ ROW. A Turtle Mountain case sued the BIA for granting a permit to a power company. If a BIA permit is issued, the fee goes to the landowner. But in cases of subsequent users using the ROW without a permit, the landowner receives nothing. The regulations need to deal with piggy-backing.

ROW on tribal land: For tribally owned land there are often no ROWs, and companies simply put lines across tribal land without asking. Tribes need to be able to maintain jurisdiction over ROWs. If they consent to an easement they are giving jurisdiction to the easement holder.

Appeals: Participants were concerned with the thousands of cases that could still be appealed, given the Solicitor’s statement that nothing is final until an appeal opportunity is given. They asked that the regulations deal with this potential backlog.

Deposit v. Bond: Currently the applicant must pay a deposit double the estimated amount of damages at the time of application to survey. The money is deposited in the Federal Finance System (FFS) until the application is complete and then it is distributed. Some felt instead of double value on the survey application, the applicant should provide a bond to cover any additional damages. Substituting the bond for the double damage estimate would mean less bookkeeping for the Bureau. This bonding requirement would need to be identified in TAAMS. Some suggested requiring both the estimated damages deposit and a bond, “to be sure it’s covered.”

Bonds are allowed in the regulations, but are only intended to cover rent, not additional damages. Holding the bond until completion of the survey could be hard on the landowner.

One employee explained his handling of the problem. He tells tribes to authorize in a resolution the right to survey at the same time as the ROW application is put forth. Then the company has to secure consent from all owners and submit the application to survey. The survey must include cultural resources.

From the landowner point of view, it is unwise to consent to the ROW before the survey defines the limits of the ROW. The BIA needs to be sure that the owner(s) know they can withdraw consent up until the document is signed, even if they have given their consent earlier.

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In perpetuity: There were concerns about perpetual ROWs. Understanding that oil and gas pipelines and others may need 20 years or more to recoup the millions spent on the project, in perpetuity does not bring benefits to the tribe.

Staff had suggested options for the revised regulations:

- approve perpetual ROWs (beyond 20+20) only with the guarantee of a rental or use payment every 5 years. Otherwise, new generations of owners will not be compensated for the ROW they are living with. In addition, perpetual ROWs should have a higher degree of review.
- a new appraisal on an anniversary date
- the landowner could negotiate a lease (which could be renegotiated later using CPI index), instead of a ROW.
- using 20 years as the basic term, with the option to negotiate for additional years

Impact of ROW on lessee: Permit forms should reflect Temporary Construction Easements (TCE). Otherwise, the lessee might be paying for property that can't be used because of ROW-related storage of materials and equipment. A lessee may be paying for a full tract, but only is able to use a part of it because of the ROW and TCE. The lease should be modified and rent reduced so the lessee only pays for what they have access to.

Service line agreements: These are not recorded or approved. The regulations should define service line agreements.

### **Trespass:**

There was unanimous agreement that trespass should be handled in a separate regulation, although participants acknowledged that some duplication would be necessary, since other regulations should cite the trespass regulation where appropriate. Most felt that it should cover all types of trespass.

Defining trespass: Participants had ideas for how to define trespass:

- Define under general trust responsibility.
- Two categories: criminal trespass vs. civil trespass
- Clarify distinction between lease violations and trespass. For instance, a residential lease trespass may be more accurately described as an unauthorized person on the property.
- ROW should not be addressed in the context of trespass; mixing the two can be confusing. The regulations should say that any unauthorized use will be processed in accordance with trespass regulations.
- AIRMA (American Indian Resources Management Act) language could be used to cover all trespasses, other than forestry, since they have their own statutes.
- Definition should include all types of trespass – agricultural, roads, grazing, wood cutting, dumping trash, etc. (Example: case was won against a neighbor's pesticide trespass on a tribal organic farm)

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Trespass authority: AIRMA gives forestry statutory authority for trespass, and BIA has “borrowed from” that authority. If the BIA promulgates trespass, a participant feared that statutory authority might not hold up in court.

Need for enforcement: Many spoke of the need for enforcement by the BIA.

- Proving trespass can require a resurvey and appraisal to prove and quantify damage.
- The trespass regulation should cover the situation of noncontract trespass, when someone, like a hunter, trespasses on land with no lease.
- Enforcement of game regulations is usually the responsibility of the tribe.
- There should be provisions for repeat offenders.
- Enforcement should follow the rules of due process.
- Tools for enforcement: impoundments, damages

Damages: AIRMA allows BIA to collect double damages; Forestry allows triple. The trespasser only has appeal rights on damages assessment, not on the trespass notice. It would be useful to be able to assess the damages at the same time the trespass notice is issued. The goal should be to stop the damage as quickly as possible, i.e. remove the livestock before more damage is done. Notice periods cause delays.

Conflicts with Tribe: BIA staff need the regulations to address conflicts with the tribe over whether or not to enforce. There are cases where the tribe may not want enforcement, but the landowner wants BIA to enforce. Participants felt that the BIA is responsible for enforcing the regulations on trust land, and that it is critical to get this understanding in writing from the tribe.

BIA/landowner responsibility: The group discussed the role of the BIA and the landowner in identifying trespassers. Monitoring or patrolling for trespass is beyond the current capability of the agency. It should be the responsibility of the landowner to notify the BIA of trespass. A participant suggested that use of security cameras in some situations might be useful.

Need flexibility: The agency needs the flexibility to do what needs to be done in a timely way.

### **Agricultural leasing:**

Lease violations/trespass: Employees agreed it is important for the regulations to clarify the difference between lease violations and trespass. Leases have a specified purpose. If the lessee misuses it or adds another purpose, it is a violation. Trespass is someone using the land with no authority. A participant gave an example of two causes of action under one event: lessee has farming lease but allows someone to ride a recreational vehicle on the land. The lessee is violating lease and the recreational rider is trespassing.

### **Process recommendations:**

- Better to make processes shorter.
- Option for farmer to pasture cows after harvest, with temporary use permit and ability to receive the income

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Tribal laws: There were questions and discussion about the relationship between tribal law and federal law and the implications – a subject for an attorney to clarify. In general, the group agreed that tribal laws are enforceable by the BIA as long as they are not in conflict with federal laws, and that the BIA has to approve tribal regulations. With a hearing, those laws can also be applied to allotted lands, with the option for the allottee to exempt himself in writing. The tribe has the right to zone land through a land use plan.

Federal agency coordination: USDA is trying to deliver more services to tribes, but they have problems understanding BIA regs and ROW may inhibit their programs from being implemented.

ARMPs and IRMPs: Tribes and the BIA are mandated to complete IRMPs and ARMPs, but to many they seem like unfunded mandates. The role of the BIA should be to develop programs that will move Indian landowners and lessees into agriculture, but how the agency can work with tribes to do that is not clear. Participants acknowledged the need to provide education and professional development, but it is hard to do given all the demands.

Staff felt the plans should be living documents, updated annually and kept current. They also felt they were falling short in evaluating the resource annually and recommending new rates. “The true natural resource work is not getting done. We need more bodies on the ground during the growing season.”

Burden on ranchers and farmers: Current regulations have been in place 10 years, and have proved to be a burden for the lessee.

Term of leases: Participants recommended longer term contracts for several reasons: to reduce the workload and paperwork, to give the landowner and lessee some stability, and to better coordinate with improvement programs, like USDA. A ten-year contract could lead to more conservation and improvements to the land. On the other hand, “with longer term leases, lessees can start thinking it is their land and do things they shouldn’t be doing.” There should be a provision for the Conservation Reserve Program (CRP) to coordinate with leases.

Bonding: Many spoke in favor of eliminating, or at least modifying, the bond requirement in favor of long term (10 year) contracts. There was a question about whether or not the BIA could support an ARMP that did not require a bond for long term contracts. There are cases where a tribe “just gets mad and wants to cancel it.”

Direct pay: Many spoke in favor of having direct pay included in the regulations, although there were concerns about the inability of the Bureau to track the payments. There was a question about whether direct pay should be available for single owners only, or anyone.

Lease form: Participants recommended use of a standardized lease form with standard provisions, and the ability to include additional provisions as necessary.

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### **Grazing:**

Annual stocking rates: Employees asked for flexibility in establishing annual stocking rates. There are so many variables, including climate, and it is important to graze the grass for the benefit of the lessee and because uneaten grass is a fire hazard later. Lowering the rate can be done locally by the Regional Director with good cause, but he does not have the authority to increase it. Many felt the Superintendent should be able to make those decisions.

Annual rental reviews: Grazing regulations call for annual rental review. This can lead to appeals. It may be preferable to lock the rates in for five years, as is done with agricultural leasing. A participant suggested that there is more fluctuation on grazing rates, and that you don't want to lock rates in too high or too low. Staff hoped the regulations could provide a way to avoid the annual rental review. Some added that Indian pasture land is artificially low.

Staff needs: The agency needs more staff to adequately monitoring the resource and deal with the paperwork involved in permitting pasture. If permitting of pasturing authorizations to increase forage availability were allowed, it would mean additional income for the landowner. But it would also mean more staff, time and energy.

Protecting the resource: Many felt the agency is not doing an adequate job of protecting the resource. With more training, education and staff, and with more efficient regulations, it would be possible.

Improvements: The regulations should address ownership of improvements. Fences are sometimes pulled up and taken by a lessee when he leaves the property. Removable range improvements require Superintendent approval to remove.

### **FINAL THOUGHTS**

Tribal self-governance: Current regulations offer no guidelines for employees about how to handle self-governance, and the result is an uneasy tension for all involved. The regulations need to provide clarity about what the BIA can do and what they can't with regard to tribal self-governance. The standards need to be the same for everyone – self-governance tribes and the BIA. "We're all working with trust lands." Tribes often don't know what their responsibilities are, and the BIA is seen as the bad guy. "The more tribes can do on their own the better, and we need to support them however we can."

Training for tribes: Contract tribes need training and access to TAAMS. They aren't clear on their limitations, or what standards to use, or how to process forms. One problem is the high turnover among tribal employees and the time and energy required to learn TAAMS. Tribes want training, and sometimes have more staff than the agency. The group had the following ideas:

- charging tribes for continual training
- training at all levels, not just for the more experienced or longer-term employees
- use Cobell funds to Indian colleges to set up training programs

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### Training for BIA:

- critical to include training on dealing with, and supporting, tribal self-governance
- Eastern agency is not online and does not use TAAMS; training is critical

Communication: The more communication with both tribal governments and individuals, the better. “We need to communicate with them in a way that lets them know we are on their side, working with them.” Right now, the regulations are so complex that trying to explain them to tribes is frustrating for both sides.

Trespass: Streamline the trespass regulations and give them some enforcement.

*Summary prepared by Lucy Moore from notes by Jason Hurd. Please contact Lucy with any comments or questions. 505-820-2166, or lucymoore@nets.com*

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BIA Central Office: Michele Singer, Margaret Treadway

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

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### **PARTICIPANT EXPECTATIONS**

- We have a lot of land we need to take care of, so this is important for us.
- I want to wrap my head around regulation process.
- My main function is to buy land. I like the advance notice, working on this now instead of at the last minute. We have a lot of trespass issues at Oneida.
- I want to learn more about the land issues.
- I want to learn more about the grazing issues and trespass, administering that where we have a little more say. Working on these issues is time-consuming, and I hope to get things more streamlined and where the tribes have more say-so.
- Want to get a clearer picture of what the regs will be.
- Hope to have a good discussion between BIA and tribes.
- I'm here to listen, learn and offer my input.

BIA staff expressed the desire to listen and learn from the tribes, and better understand their concerns with the regulations.

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

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

### **Discussion of overarching themes:**

Title: There are issues with how title is held. BIA has difficulties dealing with other federal agencies, like US Department of Agriculture (USDA), over what encumbrances can be attached to the title. Each agency and each program seems to pose a different challenge. In some regions, conservation easements cannot be attached to titles. A participant offered an example where title issues prevented the establishment of a wetland bank. "These encumbrances should be consistent across the board with other federal agencies."

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Another title issue involves privacy versus transparency. How much title information should be considered public, asked the group. Some see the title like a county recorder, a source for public information, and come down on the side of transparency. Others say that some landowners do not want a public version of a restricted trust, and cite FOIA concerns. “They might say it’s nobody’s business where they live.”

Need for education: Tribal staff are frustrated by the fact that so many members do not understand the basic concept of trust land. They believe if they have an Individual Indian Money Account (IIM) that gets their Title Status Report, there is a piece of ground that they own. They don’t understand they own a percentage within the legal description. Some innovative way to train and educate tribal members in the basics, especially elders, would be a big help.

Update forms: It is difficult to deal with the outdated forms of the BIA. Many of the questions asked do not need to be included any more.

Appraisals: The appraisal process is burdensome on tribes. As a compacted tribe, Cherokee contracts with appraisers and then has to submit the contract to OST for approval. 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. It would help if the tribe could use a certified residential appraiser instead. They are willing and could do the work faster, but the current regulations allow the lower level appraiser only if a general certified appraiser can review the work. The residential appraiser then has to share his payment with the general appraiser.

An alternative would be to use more market studies and bids instead of appraisals for all leases. If a tribe holds an open bid and gets only one bid, they would like to be able to use it. That would save the appraisal money.

Some tribes would like to start a tribal appraisal business, but it is a hard field to break into. The established firms have a monopoly in their area, and to find an individual or a firm that wants to move in and take tribal work is impossible. It is a lucrative, self-contained business and most appraisers are in large cities, and charge travel time to serve tribes.

One appraisal can cost between \$400 and \$2,500. Sometimes the appraisal costs more than what the land is appraised for.

Improvements to the land: The group was concerned about the lack of incentives to make improvements to the land, and felt that the revised regulations should be able to provide relief.

Because improvements are currently not considered to be held in trust, BIA appraisals will not include them. A landowner who is negotiating a lease is deprived of that value of his property, and will be forced to take a lower rent.

Improvements could include fences, dams, extra wells for conservation purposes, and would usually be considered a benefit. 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

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improvements. Currently, any improvement made to the land receives no reimbursement at the end of the lease.

At Oglala, the NRCS is helping bring water from the Missouri to the reservation through a rural water program, but where is the incentive to put that water to use and be a good steward of the land if there is no reimbursement for the landowner or the lessee?

If appraisals are based on AUM across the board instead of taking into consideration land features, it is unfair to landowners. A participant suggested that AUM rates be done on a case by case basis, if resources allowed. Another offered that TAAMS could handle that. There would be no impact to OST unless appraisals were required.

Some tribes will give a lessee who has been a good steward the first option to renew, or give them the right to match the highest bid. Another incentive to make improvements is a 5-year contract.

**FOUR REGULATIONS:** Margaret Treadway reviewed the crosswalk matrix for each of the four regulations to be revised. She highlighted the main issues identified so far by previous efforts, but she emphasized that the Bureau is not tied to any of these ideas and is open to any thoughts or recommendations that come from this group.

### **ROW:**

Setting the amount: A participant reminded the group that a tribe has the right to negotiate for more than the appraised fair market or the minimum amount in the contract. The BIA encourages landowners to do so. The appraisal and the minimum provisions that must be included in a contract are just that – minimum.

At Ft. Berthold, the volume of oil and gas ROWs was so great that staff couldn't get appraisals. They used the market study and set it at three times the value, wanting to be sure that the landowner received at least fair market value. The companies never hesitated. The BIA has latitude about setting the minimum.

There were stories about oil and gas companies and their willingness and ability to pay high rates and make improvements to the land. There is a risk of their taking advantage of tribes and landowners in negotiations. "One company said that it would be nothing to them to be asked to plant 10,000 trees."

Need for training: Tribal staff need training to know how to negotiate with companies and corporations. Currently, without training, they are vulnerable and can be taken advantage of. The corporations are trained to ask for perpetual ROWs, for the whole property, as broad coverage as possible. Tribes need to know the authorities for the ROW and how to limit and define specific uses, etc. The regulation language could help tribes better understand what their rights are.

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Many tribal staff look to CFR for instructions, but there is not enough realty training in tribal country. Also, the regulations do not give specifics about contracting.

Need for balance in regulations: The regulations need to offer enough detail to be useful, but not be so detailed that they are difficult to use.

ROW crossing tribal land: A participant asked if there is a tribal road on tribal land, “do we still have to jump through all the hoops?” An appraisal seems pointless for a tribal road that is going to benefit tribal members. If it is in a tribal resolution, that should be enough. The regulations should allow flexibility for the tribe to waive the compensation.

If a state highway crosses tribal or allotted land, the state does an appraisal that is reviewed by OST. The tribe should not have to do another appraisal.

Surveys and appraisals cost more if crossing multiple tracts of land; but, if the tracts are all tribally owned, it should be possible to consider that a single owner can go from the beginning of the road to the end. The same should hold true for a lease that crosses tracts.

There was an example of a single survey that crossed both tribal trust land and individual restricted land. The BIA wouldn't accept it. They had to redo it with separate legal descriptions.

Record keeping: Some argued that it is important for OST and BIA to have records of tribal uses on tribal lands. “Record keeping is sometimes not strong on the reservation.” There may be a need later for those records, for instance, if federal funding is involved. At Rosebud, a finance company for the casino wanted all the records and they couldn't be found.

Some counties charge to put something in the record, but BIA does not charge.

There were comments about the quality of BIA record keeping – expired leases not renewed, etc.

Again the issue of training came up, as participants cited examples of title examiners' not recording against titles. Some county liens expire in a couple years, but they are still showing up on title.

TAAMS has much greater capability than the previous system, so in the future records should be much more complete, *if* staff are trained to record properly.

The regulations should provide more detail on titles and record keeping, with provisions that are more permissive than restrictive, including opportunities to opt out. If tribes want to use the system for record keeping purposes, they could; others would have the flexibility not to.

Survey requirements should be changed to reduce redundancy and number of copies, and to recognize the scanning and digital capability.

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Improvements: There was a question at Wounded Knee about the definition of improvements: is a fire trail that is an old trail used by ancestors an improvement? If so, does it need an archaeological assessment? What about two-track trails that were used 80 years ago, and since then have been graded and asphalted? Can the BIA maintain those roads? Can you have legal access even if there is no record? The regulations seem to say if it is not an established road, it is trespass even if the landowners consent.

### Trespass:

Margaret explained that previous revision groups raised the idea of a stand-alone trespass regulation. They considered the forestry trespass regulation a good model and considered one overall trespass regulation to cover everything including forestry. The Solicitor's office felt forestry should remain separate. The concept now is to perhaps have a stand-alone regulation for other uses with as much enforcement with penalties and damages as possible.

Stand-alone regulation: All present favored the stand-alone regulation for trespass, rather than including trespass in each of the other sections.

Definition of trespass: There were recommendations for specifics in identifying trespass:

- agricultural
- commercial and residential
- collecting red willow, etc.
- big game
- wood
- property that shouldn't be there, like a car or a tree stand

Managing the funds: There were questions about how funds would be handled in cases where the tribe has compacted these functions. Would the money be internal or go to a lock box? Managing money for trespass should be as simple as possible.

Although the regulations do not specify, some tribes give the money collected from the trespass to the landowner. The regulations say the money is to mitigate damages or make improvements, livestock impoundment or transportation, etc.

Trespass reporting: For tribes without a compact, a report must be sent to the BIA and from there to the Solicitor. This might take months. It would be more efficient for the tribe to send the report directly to the Solicitor. During those precious months, evidence is lost or damages are remedied by themselves. In one example, a forestry trespass sat with BIA for 3-4 years. The result is landowners get angry at the tribe, and resources are lost and damaged. "I want the tribe to have more say-so when we go out there and confront trespassers, and we need more backing when we try to enforce. A marijuana patch can get harvested by the time we get back out there."

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BIA employees expressed the same frustration about delays while cases are held up with the Solicitor and the Department of Justice (DOJ), and then the service has to be done by a federal officer.

It is equally difficult to evict someone who is trespassing in a house on restricted land.

Enforcement: The BIA and tribes all want more enforceability, but the Solicitor's opinion is that there is no authority.

Some regions have a \$10,000 minimum on enforcement of trespass. If the damage is lower than that, they will not enforce. But, the amount could still be very significant to the landowner. With no jurisdiction over non-Indians, the Cherokee Attorney General has to ask the BIA to represent the tribe in District Court. "We need a little more say-so in what we can and can't do."

Trespass investigations cost more than what can be collected from trespassers.

With oil companies, money is nothing but time is everything. The regulations should have the flexibility to choose the enforcement most effective.

Some recommended that until a trespass is satisfied, the offender cannot receive additional permits.

A participant recommended potential, but not mandatory, remedies in the regulations, providing options and using language like "may" rather than "shall."

Current regulations call for penalties and costs payable by trespasser should equal the value plus two times the value. (like Forestry) This entails a crop assessor in some cases, taking more time and money. There were questions about who could be used for that assessment that would not be likely to be appealed. It is also possible to use markets, establishing the day the cost is established, etc.

Currently, if a marshal catches a trespasser on allotted or tribal property, he has no authority to ticket. "We need more standing, especially if they are non-Indian." An alternative is charging the trespasser and turning him over to Fish and Wildlife, but the tribe would need regulations to cover that.

Triage of trespass: The group agreed that the regulations should contemplate different levels and different classifications of trespass to identify what is immediate, what needs further investigation, etc. They suggested some trespasses need more immediate action than others and that the regulations should provide for an "immediate stop action" capability. "When people realize they have the ability to take tribal resources, they will do it. It will be a free for all."

Need for education and training: Realty staff need training so that they can educate landowners.

Record keeping: The MADS (Master Account Distribution System) system, predecessor of TAAMS, produced a report that showed equivalent acreage on allotted tracts, which could be

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used to show what land is actually owned. TAAMS does not have that capability. There may be sections of MADS that need to be revived.

Notice of trespass: There was much discussion about the lengthy process of notice. The first letter of notice may not be sent for a few days, and then it may not be picked up for a few days. At some point, the BIA will publish the notice in the newspaper, although they would rather not. Often there are grazing trespasses at the end of the permit/lease period, sometimes weather related, but sometimes blatant violations. It is important to be able to act quickly to restore the landowner's ability to make money from the resource.

Suggestions for improvements to the notice process:

- Skip the certified mail for repeat offenders and simply put their names in the paper
- Seek damages retroactively from the first day it is noticed
- Seek stiffer penalties
- Be proactive, notify in advance that they will be trespassing at the end of the lease, if lease ends in December, you will be charged if cows are still there in January
- Stipulate in the lease that they will be trespassing after the lease end date
- Track delivery of trespass notice with priority mail, can check on-line, cheaper than certified
- "Send notices FedEx because everyone likes getting FedEx"
- Serve the trespasser personally, using tribal police, etc.
- Confront the trespasser face-to-face and let them know verbally (pre-letter)
  - Should be a third party to deliver so your bias is not an issue
  - Could send two people, one as witness

Compatibility with other regulations: Participants pointed out that the new trespass regulation will need to be compatible with the existing and revised regulations, for residential leasing for example. The new proposed residential lease covers cases where owners consent and a lease is not needed to live on the property. This should not be included in the definition of trespass in the new regulation.

### **Agricultural leasing:**

Margaret explained that the business and residential leasing regulations were farther along in the revision process, nearing publication in the Federal Register. Logistically, the Bureau felt that the agricultural leasing regulations fit with grazing and trespass, and although these regulations are the most recently revised (2001), feedback is that they still need revisions. Issues are longer leases, shorter approval stages, timelines applied evenly to BIA and tribes, and deemed approval.

Leasing process: Ideally, the process of advertising and awarding leases is done well in advance of the expiration date so there is a smooth transition. An agency said they had quarterly meetings with tribes, where they pass on the TAAMS information about what leases are coming up for renewal. This expedites the process.

If the BIA grants a permit for a tribal member, the tribe should be notified along with land owners.

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Effective date: The regulations need to define clearly the effective date. There are many interpretations. This applies to all regulations. Some say the effective date is the Secretary's approval date. Others say the effective date is the date defined in the lease.

Conform to other regulations: Once the residential and business regulations are in effect, some of the duplicative language can be removed from the agricultural leasing regulations, so that these regulations relate to agriculture only.

Consent: A participant suggested that there should be no case in which a landowner's consent is not required. If there are no living landowners then the land should revert to the tribe. But at Cherokee the land goes to the estate and the estate can go to an individual account.

Whereabouts unknown: There was discussion about "whereabouts unknown" landowners and how to ensure that every effort is made to find them. Many felt that that more effort should be made.

In some cases, the BIA sends a letter and if it comes back undeliverable, that person becomes whereabouts unknown. In other cases, the names are published in the newspaper. Tribes could be helpful in identifying these landowners, many of whom may be deceased. It would help if the list of whereabouts unknowns included tribal affiliation as well as name, but there are federal restrictions about privacy.

Money can be a motivator for people to be "found." But some checks are for such small amounts that the recipient sends it back to OST. Others just collect the envelopes without ever opening them.

Proposed market studies: OST is considering doing market studies and using bids to create a fair market value. The process would include National Environmental Policy Act (NEPA) documents and a programmatic environmental assessment. There would be a categorical exclusion for the property.

AIRMP: Tribes observed that the mandate to create and identify agricultural resources in a resource management plan is an unfunded mandate.

Family management provision in AIPRA (American Indian Probate Reform Act): Many felt that the regulations should provide for the continuation of the option for family management, instead of BIA.

A law directed BIA to do a pilot project regarding Family Management and to submit a report on the project's success, but the project has not got off the ground. Some tribes are trying to identify where to start and how to do the pilot, and have talked about working with tribes that have a business or corporate code so issues can be settled by tribal law instead of state law. People are interested and have called to ask about the program. It would not be universally used, but would be good to include in regulations.

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Land assignments: There was support for retaining in the regulation the ability of tribes to issue land assignments by tribal custom. They are useful for small tracts where a small farmer may want to add an adjoining tract for a couple of cows or a garden, or in cases where less than \$500 income is expected. The farmer can have the land for the next five years without going through the BIA. It is all done in-house. There was discussion about the dilemma of multiple heirs to these land assignments, some of whom want to sell and others who don't.

### **Grazing:**

Resources and compliance: The lack of resources in the grazing program means a minimal compliance rate. The current system doesn't work; it is outdated and doesn't handle the complexities and the variety of situations in Indian country. Agencies and regions need to be able to implement programs that suit the needs of their areas.

Clarity about functions: Participants need clarity in the regulations about what are inherently federal functions. Does fiduciary trust cover everything? The OST appraisal is considered an inherently federal function that can't be contracted out. The regulations should spell out exactly what is inherently federal.

In the case of a compact, the tribe does all the functions that are compacted. The tribal documents are approved by the Superintendent, but the tribe keeps the originals. Does the Superintendent have to approve? The regulations are not clear on this.

A participant didn't think it was appropriate for the BIA to define fiduciary responsibility. He sees it as a treaty issue, and one that tribes should define.

Training for contract/compact tribes: There is a great need for training of tribal leadership, staff and members of tribes who are going to become contracted or compacted.

Range billing: TAAMS has made range billing more complicated. TAAMS will adjust if a title changes so that a permit bill might be \$12,000 the first year then the following year just barely below \$12,000 because some interest went to the fee. If TAAMS makes that adjustment, said a participant, the grazing permit needs to be changed to generate a new billing amount. If billing is determined by the number of animal units and you're not changing the number of units, the bill should stay the same, he said.

**REVIEW OVERARCHING THEMES:** The group returned to the overarching themes and implications for tribal self-governance.

Archaeological surveys: A participant recommended that archaeological surveys be done in all cases, instead of only in cases where the amount is valued at \$10,000 or more, as recommended by BIA standards. "There are culturally significant areas and sacred sites that are priceless." Others were not aware of the threshold and agreed that anytime there is potential disturbance, a survey is needed.

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USDA Farm Services sometimes conduct their own archaeological surveys, using a certified surveyor, not an archaeologist. NEPA has different requirements.

Consistency across agencies: The regulations should make sure there is consistency with other related federal regulations in Indian country, such as USDA, NEPA, Housing and Urban Development and more. This consistency should include definitions, timelines, record-keeping, forms, requirements, to the greatest extent possible.

There were stories of federal agencies not understanding, or not following, the unique relationship with tribal governments. A memo from DOI environmental compliance was issued without consultation; it includes a 62 page worksheet that duplicates NEPA processes. Clean Water Act amendments address federal lands and storm water fees. This could have a huge impact on Indian land, if it applies.

Agencies should honor the process that requires giving other agencies a chance to review regulations that will impact them.

**CONCRETE SUGGESTIONS:** Lucy offered a *not* all-inclusive list of some of the suggestions made during the day to be considered by regulation drafters. Participants added to it.

- Refuse to renew lease or ROW until trespass is cleared up by trespasser.
- Notify trespassers using priority mail, can track delivery -- certified takes too long and is costly
- Be sure there is compatibility between residential and commercial regulations and the stand alone trespass regulations
- Give jurisdiction to tribes to enforce against non-Indians:
  - confiscate from non-Indians for trespass and damage
  - refer violations to feds for action against non-Indians.
  - Procedure is already in place. Just need to contact the Fish & Wildlife agents or EPA or other.
  - Also for cases of trespass without damages.
- Provide for triage of trespass cases, allowing bypass of certain requirements in emergency cases, or where delays will result in more damage
- Waiver for appraisals on tribal land for tribal projects.
- Clarify in the regulations “inherently federal functions” and the role of compacted/contracted tribes in those functions
- Support for the CFR section that defers to tribal policy and ordinance, if not in conflict with federal law; this helps tribal governments function more independently, and also helps BIA do their job.

**FINAL THOUGHTS:** There was support for this kind of session as a way of contributing to the revised regulations. It is frustrating when the only chance for input is to submit comments to a draft document, without knowing if the comments are even looked at. Other agencies have no idea how to approach Indian tribes, and this can serve as a model.

*Summary prepared by Lucy Moore from notes by Jason Hurd. Please contact her with comments or corrections: [lucymoore@nets.com](mailto:lucymoore@nets.com) or 505-820-2166*