

**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)**

**Portland State University, Native American Student and Community Center  
Multnomah Room  
Portland, Oregon  
September 13, 2011**

**Summary of Discussion**

**Facilitators: Dexter Albert, Donna Silverberg**

**Notetaker: Robin Gumpert**

**Central Office representatives: Michele Singer, Margaret Treadway**

**Welcome and overview:** Michelle Singer, Director of the Office of Regulatory Affairs and Collaboration Action, welcomed the group of 11 BIA employees and introduced herself. She thanked everyone for taking the time to participate in this new model for gathering ideas on regulation revision. She acknowledged previous revision efforts, explaining that with change of leadership, priorities shifted and the timeline for these regulations slipped. The intent now is to build on those substantive discussions that began in 2006 and move forward with the revisions. Her hope is that regardless of any leadership shifts next year, refinements to the regulations will be ready for proposal in 2013. She noted that the OMB will not accept any changes proposed by the current Administration, given the short time remaining. To make the regulation revisions as informed and useful as possible, the Bureau of Indian Affairs (BIA) is holding a series of meetings (this is the third of five) to gather ideas for improvements. Michele hoped that participants would offer answers to questions like: What is not working for you? What is out of date? What is causing you problems? What regulatory authority do you need? Where is the regulation too restrictive?

The first two working sessions were held in Minneapolis and Billings, and the next two will be held in Phoenix and Albuquerque. Facilitators will create a summary of each session, as well as an overall report to the BIA on all five sessions. These summaries will be available on the Bureau's website. Michelle again thanked the Bureau employees for contributing to the process, saying that she values their subject matter expertise at this point, and in the future as the revisions are being drafted.

**Introductions:** Michelle introduced facilitators Dexter Albert and Donna Silverberg. Dexter, principal of Intrinsic Consulting, based in Flagstaff, Arizona, and Donna, principal of DS Consulting in Portland, are teaming with Lucy Moore Associates of Santa Fe, New Mexico, to provide planning, facilitation and summary services for the working sessions. Participants introduced themselves and were asked to share something about themselves. Ladonna Carlisle from the NW Regulation Office extended a welcome to everyone as well and noted a few topics of interest from a Northwest Regulation perspective: shifts from 166 to 167; compliance funding;

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and lack of tribal participation in this process due to resource constraints. She asked for a list of tribes who are represented at these working sessions.

Facilitators reviewed the agenda and the materials with participants. Margaret Treadway, BIA's Office of Regulatory Affairs, added additional context. In 2004, the Office of Regulatory Affairs was created to simplify regulations in accordance with the mandate for "plain language," working with BIA subject matter experts at all levels of the Bureau.

In the past, there was little to no opportunity for Tribes and Bureau employees to offer input before the draft regulations were published in the Federal Register. The full report from these working sessions will be used to raise awareness about important issues to upper level administrators in the Central Office. The working groups that will be drafting the regulations will also rely heavily on the summaries and report. Tribal consultation will take place on the draft regulations prior to publication in the Federal Register. The goal is for a clear, concise and more efficient process that will incorporate the rich contributions from the regions. Every region is different and has unique issues, she added, so the goal is for a balance between national consistency and local flexibility.

In answer to a question about unfunded mandates, like trespass enforcement, Michelle agreed that this is a major challenge for the Bureau, especially given budget cuts. Other regions had discussed administrative fees or other self-funding mechanisms. She asked the group for their most creative ideas and urged a proactive rather than reactive stance.

**OVERARCHING THEMES:** Dexter explained that the facilitation team conducted interviews with various stakeholders at the national and regional levels -- experts, lawyers, professors, employees, regional directors, tribal employees and others involved with the issue. They identified themes that were common to all the regulations:

- Inter-related triangle of the BIA, the tribe and the individual landowner/allottee
- Need for consistency nation-wide and flexibility on the local level
- Need for simplified, streamlined regulations
- Need for timely permitting and leasing processes with deadlines
- Need for enforcement and remedies
- Need to streamline appraisal process
- Need for more resources and more staff

Participants added their ideas about overarching themes to the discussion:

- Probates: What is and is not trust property? Range permitting is being held up because records are impacting ability to use land. The TAAMS (Trust Asset and Accounting Management System) is not delivering the efficiency hoped for. Options are needed, including the ability to make gifts.
- National Environmental Protection Act (NEPA) and Categorical Exclusions (CATX) processes: These slow down leases and ROWs. Regions should consider programmatic environmental documents/regional EAs. Funding, usually from other agencies, for ARMPs (Agricultural Resource Management Plans) is not always available. As with land management in general, there is a lack of consistency across agencies.

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- Better relationships/coordination between tribal and other federal agencies: Additional confusion and delays can be the result of lack of coordination and communication with tribes and other federal agencies that fund or manage processes (via contract or regulation).
- Animal Plant Health Inspection Service (APHIS) regulations: will have future impacts and need a focus. Cross communication is needed. Resource gaps. Implications for transport of animals across state lines, border crossings.
- Inheritance: Current regulations pose problems for step children inheriting land.
- Consent authority: There are opportunities for improvements to constructive and individual notice that would make it easier for BIA to meet notice needs in a cost-efficient way.
  - Revisit 90-day obligation
  - “Highly fractionated” needs to be defined in the regulation to reduce inconsistencies, as well as “too numerous.”
- Confusion about roles and responsibilities: Clarity is needed on lines of authority within the agency with respect to implementation of the regulations. Those working with the regulations at both the BIA and tribes lack understanding about current expectations, and in some cases about the meaning of self-governance.
- Clarification about houses: Are houses real or personal property? What triggers the definitional change?
- Late payment penalties: Penalties for late payment on leases and permits are levied inconsistently. The wording in the regulations relating to ag leases and range permits needs to be standardized.
- Compliance consistency: There is inconsistency between agency and tribal program compliance.
- Outdated forms: The current grazing permit form (in TAAMS) is outdated, causing consistency problems and impacting range ability to brand/tag.
- Delays in appraisals: The appraisal requirements are not always in the ‘best interest of landowner.’ The regulations should provide for options.
- TAAMS: Clearer links are needed between TAAMS and accounting systems.
- Stipulation form: A stipulation form could make the processes more efficient.
- Fees: Make administrative fees for range easier or waiveable.
- Self-governance: The regulations include provisions to strengthen tribal self-governance.
- Enforcement and probate actions: To avoid delays, the regulations should empower tribes to act, perhaps with stipulations that tribal court is an option.
- Central/regional/agency communication: Many land management problems, including the implementation of regulations, could be addressed if the levels of the BIA, including the Solicitor’s Office, worked together more effectively.

### **Group Discussion on the four regulations:**

Participants were asked to consider: What are the major problems? What are some possible improvements? What are some options for implementation? How can the regulations strengthen tribal self-governance? Margaret referred to the crosswalk document as a starting point for discussions.

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### Rights of Way (ROW) regulation:

The following bullets summarize the comments from the group about issues, suggestions or questions relevant to ROW regulations:

- Tribes are involved. Not sure how to handle this tension. ‘It’s the law’ vs. ‘It’s our right of way’. Define ROW vs. easement.
- Any way to do “perpetual” instead of limited timeline? It might be easier to administer.
- On the other hand, Tribes’ biggest complaint is that perpetual can be damaging because there is no way to make changes to the terms of the ROW later. Older ROWs are not fairly paid especially on grants of perpetuity.
- Piggy-backing other utilities on an original ROW is a problem.
- Depending on authority, timeframe for ROWs is discretionary
- Franchising is an issue that we see with ROWs, mostly done by Public Utility Districts (PUDs). Tribal law does not allow this but nothing is stated in the regulations to stop them.
- Regulations could help inform tribal members about alternatives to ROWs that are more supportive of the stewardship of the land: BIA should look for alternatives that support the trust and give choices to either honor the trust or go somewhere else.
- Access to/through ROWs is an issue. Landlocked owners with no legal access – how to grant ROWs? Access through railroad ROWs, especially those on landlocked areas is an issue. Also, abandoned railroads, some parcels sold, others not. Those parcels requiring ROW should have surveys done and BIA needs to step up to enforce. Find a quick solution for those landlocked areas.
- Modernize ROW language to include telecom lines, rails to trails, etc.
- Clearer language needed about proper notification and consent. Normally done through TAAMS; but not always able to get in touch with landowners via mailings. Communication between TAAMS and other programs has helped reduce the number of people that slip through the cracks, but it remains a problem. A separate process for a tribal project would be more efficient. If a lot of landowners will be impacted, may need a different process for effectively notifying and getting consent.
- Don’t always do an appraisal in certain cases where it is unnecessary.
- Overlap with trespass – make sure crossover regulations match
- The regulations are based on different statutes passed at different times. Some allow piggy backing, some don’t. Regulations need to clarify.
- Definition of ‘abandonment’ needs clarification
- Railroad ROW: What if producible acres run along the perimeter of the rail line? This is potential trespass. The railroad has a lot of rights in some regulations; if the land is not used ‘for railroad purposes’ it is considered abandoned, but often the railroad allows it to be used for other purposes. This is a trespass.
- It is difficult to navigate through the ROW process when assignments and termination pass from one landowner to another. Right now, it is handled case by case, based on the purpose of the ROW.
- Majority rule brand identification from APHIS (ear tag system) will potentially affect how we do animal identification.

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### Trespass regulation:

The threshold question, said Margaret, is whether or not trespass should constitute its own regulation, or be addressed in the other regulations as appropriate. Forestry provides a model for a trespass regulation, although some feel that other BIA programs may not have that same authority. All agreed that having these regulations in one place would make them more user-friendly. Issues were raised around notification improvements, timeframe for notices, funding and enforcement.

The following bullets summarize the comments from the group:

- Define roles: tribal/agency/contractors.
  - What role do tribes and tribal courts have in trespass enforcement?
  - Give specific responsibilities and authorities beyond just BIA to enforce.
  - Assign roles for maximum education and efficiency
- Habitual trespassers should have specific and meaningful enforcement beyond the current misdemeanor. Make this a criminal act? Include a ‘rehabilitation process’ that requires them to go look for other trespassers?
- Clarify liability issues.
  - E.g. animal injuries. Clarify roles and responsibilities – who notifies? Jurisdiction issues depending on where the animals get hurt.
- Is there a way to respond to ‘retrieval of pivots’ (irrigation system frequently used on ag lands in the Northwest) via third party involvement? Could the regulations help clarify this? There are inconsistencies in the way banks are responding in debt situations. Regs should clearly state whether pivots are a ‘fixture’ or not.
- Can the tribe adopt trespass laws/regulations used by others?
- Funding trespass: use equations in compliance tabs in TAAMS. Add a fee?
- 166 should address ROW trespass as well as trespass on agricultural lands.
- On whether to create a separate trespass regulation:
  - There should be a separate trespass regulation instead of being passed down to range and agriculture from lease as is currently done. Separate each category, not all in ‘range’.
- There was concern that a single trespass regulation which included all real estate trespass issues could weaken the grazing trespass regulations currently in 166. There was support for using the grazing regulations as the standard, and adapting real estate as permitted by law.
- Clarification of ‘sale of seized property’ – the regulations need to make clearer that this is an option, and under what conditions/circumstances.
- Trespass regulations need to address holdover tenants and trespasses on ROWs, as well.
- The regulations should address coordination and information sharing between BIA, Tribes, the National Business Center and Department of Treasury.

### Agricultural Leasing Regulation:

Margaret suggested these regulations are very government focused so asked the group to look at impacts on the landowner and tribe. What should be in a handbook/policy vs. regulation? The

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regulations shouldn't be overly complex but do need to be clear. Administration, compliance and enforcement issues should be considered.

The following bullets summarize the comments from the group

- 'Fair rental' on idle land doesn't mean much.
  - Different tracking systems for lease retrieval is an administrative 'nightmare'. Multiple leases and owners complicate the processes, making efficiency almost impossible. A unitized lease might be a solution?
- 'Bond per lease' – what if you have 20-30 leases per land? Could the farmer post one bond that each lease would adhere to? Or waive all together?
- If a bond lasts 25 years, how can we be certain of the future that damages might be done and that the amounts required years earlier will be sufficient, leaving tribes with no recourse?
- Lapse between leases. Process gets 'lazy' in some areas – that is a BIA in-house problem, improvements have been made but still need to go further.
- There needs to be more guidance in the handbook for BIA employees about Tribal vs. individual leases.
- Inconsistencies in how consents are handled. There is a suggestion to use the 90 day notice for constructive notification.
- Landowner involvement/responsibility is an issue and an education and communication need. Getting the various landowners to talk with each other to get consensus on issues can be problematic.
  - Some solutions to this issue were suggested – e.g., set up protocols within the regulations so that the Superintendent can sign off on a lease or permit as the last stop.
- Use a minimum fair market value rather than having the tribe subsidize.
- Tribe as single landowner: How do we handle agricultural leases in this situation?
- Compliance is underfunded. Funds for compliance of agricultural leases are still in realty even though the responsibility has been moved out of realty. Cross-train people to do compliance in addition to their usual jobs to make up for limited resources.
- Compliance and enforcement – language that BIA will 'ensure' compliance is problematic. BIA is responsible regardless of who is at fault.
  - Regulations need to match the current era of shared responsibility for enforcement – tribal and BIA, rather than 'BIA must ensure'...
- Fees for compliance are not coming through TAAMS. A policy is needed around a standard penalty rate. TAAMS is set up to calculate this, it just needs an equation.
- Suggest using CDs instead of savings assignment to accommodate rent adjustments.
- Bond waiver inconsistencies. If a tribe decides to make a standard resolution, that should be acceptable instead of requiring one for each permit.
- Deal with landowner difficulties acquiring bonds and insurance.
- Account for crop-shares vs. cash crop.
- What to do during the probate period with regards to fractioned ownership?
- Is the house trust property or not? Clarify regulations to articulate BIA's responsibility around this.
- Farm Service Agency changes are impacting leases.

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- New regulations should consider new owner-managed abilities under AIARMA (American Indian Agricultural Resources Management Act. .

### **Grazing Regulation:**

The following bullets summarize the comments from the group:

- Clarification is needed from self-governance tribes. Some contracts are incomplete and do not clarify what is expected.
- Pasture grazing: without range units, do we still follow these permits? Regulations should clarify: is pasture grazing ‘grazing’?
- Is it a revocable permit? 166 speaks to revocable permits but is not clear.
- Bonding issue similar to that of lease
  - Solution: take bonding requirement out.
- Improvements -- lease says improvements should be taken down when the permit ends. Regulations don’t ‘require’ it and offer opportunity to waive.
  - Why tear down?
  - But if it remains, who owns it?
- Compliance for noxious weeds – permittee responsible for pesticide use reduction.
  - Regulations should be re-written with expert advice to clarify degree of responsibility and feasibility of BIA ensuring noxious weeds are kept off trust lands – what, when, how, how not?
- Range unit – need to clarify how to manage home sites removed from range unit and how to compensate.
- Add: ‘llama, alpaca and bison’ to list of animals; use ‘including but not limited to...’ language.
- TAAMS coding consistency is needed.
- Under the grazing permit, owner managed status allows owner to lease tracts without BIA supervision/oversight.
- ARMPs and IRMPs – integrate the two so the latter can be used in lieu of ARMPs (not both) to be in compliance.

### **Other overarching issues:**

The group returned to the overarching issues before the end of the day and added others:

- National Pollutant Discharge Elimination System permits will go in to effect soon and will impact tribes and BIA. Add to regulations: “We follow the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).”
- Restricted Use Pesticides: new certification required from EPA. Not many tribes are already certified. Put this as a requirement in the regulations.
- Home site leases: BIA employees are flying blind as to whether we are doing the leases right – the regulations do not include any language about ‘reserved’ stipulations, and need to.
- Lack of guidance on sources or directives re: current Indian land management in place. The public needs to be updated on current policies. (Some training is being done for range, and it was suggested we might learn from this in terms of resources that might be

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useful for BIA staff education. It was noted that OST offers fiduciary trust courses and other training opportunities.)

- Jurisdiction is an issue around enforcement.

**Final Comments:** The group offered their final thoughts on the day:

- With different type of leases (predominantly ag leases but others too), standardizing language formats could be useful in streamlining, reducing confusion.
- The regulations need to be clearer about responsibilities of the tribes if they are running programs, in terms of documentation and information sharing with BIA. Look to language in the funding agreements for compact/contracted tribes about self-governance.
- Lack of/stalled resources for self-governance programs: this has partly been addressed by bringing all relevant stakeholders into the communication loop. This is an internal issue rather than one needing to be addressed by regulations.
- BIA will protect the individual landowner when ‘push comes to shove’ with regards to tension issues that come up between a landowner and tribe.
- Recognize that each individual tribe and their funding agreement will be different. There is no one size fits all. Clarity is needed on roles and responsibilities. Plain language will improve clarity.
- Regarding contracting and lack of resources: There are not enough awarding officials and others responsible for handling contracting and compacting transactions. Tribes are not getting their money in a timely fashion. If BIA supports self-governance, we need to provide staff to support the process.

The facilitation team wrapped up the first day’s meeting and reminded the group that the next day would follow the same format but would give an opportunity to tribal representatives to speak on the issues, while BIA staff listened and contributed as appropriate.

*Summary prepared by Donna Silverberg and Dexter Albert based on notes by Robin Gumpert  
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**Bureau of Indian Affairs  
Working Session for Tribal Representatives  
on the Revision of Four Land Management Regulations  
(Grazing, Trespass, Agricultural Leasing, and Rights-of-Way)**

**Portland State University, Native American Center, Multnomah Room  
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September 14, 2011**

**SUMMARY OF DISCUSSION**

Facilitators: Dexter Albert, Donna Silverberg

Notetaker: Jan Kelley

Central Office: Michele Singer, Margaret Treadway

*Day Two of the Portland session engaged Tribal participants as well as BIA staff in a dialogue about the issues that are important to them with regards to the four regulations on topic.*

**WELCOME AND INTRODUCTIONS:** Michele Singer welcomed the group of eight tribal members and representatives, as well as the nine Bureau employees, and expressed her appreciation for their commitment of time and energy to this process. She looked forward to hearing the tribal perspective on how the four regulations could be improved.

**OVERVIEW:** Michele offered background on the regulation revision process and timeline. The first drafts were developed in 2005 by BIA and OST attorneys primarily. At the first consultation, the tribes told the agency that the information provided was too much, so the process was divided into two phases. The second phase includes this group of four regulations: grazing, agricultural leasing, trespass, and ROW. The new 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. The four regulations in the second phase will not be done before the election in 2012, because it is not possible at this point to meet the OMB deadline for drafts to be published for comment.

The Bureau decided to use that time to experiment with a new process that would involve tribal voices early in the drafting process. Michele and her team will take input from these work sessions and form workgroups to start revising the old regulations. They will also look at new laws and cases not covered in 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 the public to provide comment. If they begin the drafting process next year, consultation would occur in early 2013, with a target final publication date of 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 any other concerns participants have with other regulations, so that they can be added to the list.

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In answer to a question, Michele said that the Bureau is hoping to make revisions to the regulations and look at triggering statutory changes.

**OVERARCHING THEMES:** Dexter explained that the facilitation team conducted interviews with various stakeholders at the national and regional levels -- experts, lawyers, professors, employees, regional directors, tribal employees and others involved with the issue. From these interviews, they identified themes that were common to all the regulations:

- Inter-related triangle of the BIA, the tribe and the individual landowner/allottee
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- Need to streamline appraisal process
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Participants considered the themes and added some other cross-cutting issues they felt related to all four regulations:

- The “triangle” of inter-relatedness: Besides the BIA, Tribe and members, participants suggested adding other government agencies, 3<sup>rd</sup> party end users, non-Indian landowners, energy companies, and probably others. Actions by any single party can have impacts on the others, and the regulations should take these impacts into account. The regulations should conform to the American Indian Resource Management Act (AIRMA).
- Flexibility: There was support for regulations that include national standards that allow for tribal self-governance and honor tribal laws.
- Definition of trust property: What does the probate process include as trust property, asked a participant?
- Appraisal bottlenecks: Across all regulations, including agricultural leases and probate, the requirement for appraisal results in delays, and often causes trespass. Funding is desperately needed to hire more qualified appraisers who can keep up with the demands of appraisals and paper work. Flexibility with deadlines and timeframes could also help. Finally, there is no clear jurisdiction for enforcement of the appraisal process.
- Enforcement: Enforcement is inadequate in many areas, including collections, penalties and trespass. There is a need for dialogue between federal and tribal governments to support timely enforcement actions. In trespass cases, there are multiple forums for enforcement: federal court, IBIA, tribal court. Clarity and coordination are badly needed. The regulations should clarify the authority of tribal policies and tribal court jurisdiction for enforcement.
- Complexity and tribal self-governance: A common complaint was that the leasing, ROW, transfer and other land management processes on tribal lands are too complex, with too many steps. Additionally, the complexity is compounded by other regulations, such as the Endangered Species Act, NEPA, DEQ, and many other federal land policies. This web makes the process of leasing confusing, difficult and lengthy. Participants asked if tribes could have the option of deciding which of these other regulations apply to them. Many tribes have felt for a long time that many of these federal regulations are a constraint on tribal sovereignty. It feels as if BIA makes demands but doesn't do the

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work. One suggestion was that the Bureau should train tribal staff to become the appraisers, surveyors, etc., for a more efficient process.

- Timeframes: Regulations need to address timelines and current inconsistencies. Drawing up contracts is a much shorter process than appraisals and surveys, for instance. The consenting timeline for allotments needs to be shortened.
- Policy and process: The group discussed the need for the regulations to clarify policy and process in a way that supports both and enables tribes and the Bureau to do their jobs better. Sometimes, these distinctions are in handbooks, rather than in regulations.
- Clarity: The regulations need to be clear, in content and in language. Enforcement, trespass and orders to vacate need to be clarified.
- Conflicts: The regulations need to address how trust assets will be protected when agencies – BIA and BLM, for instance – conflict.
- Recordkeeping: The regulations should ensure that recordkeeping is done in a timely, accurate, thorough way. This is particularly important when enforcement is necessary.
- Access to TAAMS: Tribes need access to TAAMS. The current system is cumbersome and time consuming. Some NW tribes have to travel 3 hours for access to TAAMS. There also is a two week waiting period for the security check to use the system. The Cobell settlement has caused delays in making TAAMS available to tribes, and hopefully the system will be working efficiently by the end of the year. TAAMS does not automatically create a receipt, but some observed that TAAMS does provide history reports of payments which the tenants could receive. Information is provided to certain agencies but not to all and the information available is for the owner not payer.

**THE FOUR REGULATIONS**: Participants looked at each of the four regulations and offered ideas for improvement.

### **AGRICULTURE**:

- MOU revision: There is a need to revise the MOU to include compliance as a requirement of the lease.
- Enforcement against default: The regulation should address questions of default and enforcement against those who don't make payments. The county that includes the Yakama tribe has started a practice of issuing tax bills for orchard crops. If there is a default who is responsible? Does the county have the right to enter tribal members' property to remove equipment or the crop? The regulation should address this. Also, can you add enforcement and compensation guidance to the lease language?
  - The reservation and county both want compensation. Because of the confusion **and** obstacles, individuals are choosing an individual contract rather than partnering with the tribe.
- Appraisals: Many spoke of the need to streamline the appraisal process. Suggestions included:
  - Get the tribes pre-clearance with the BIA for speedier process
  - Allow tribes to contract with appraisers to complete a fair rental study.
  - Provide good lists of available, qualified appraisers (there are online lists of certified surveyors but not appraisers)

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- There is a gap between the tribes wanting to speed up the process and coordination between OST and the National Business Center (within the Dept. of the Interior) on this issue
  - Is it possible for them to come out with an appraiser referral list or move forward with tribal member certification?
- Regulations should not prevent a lessee from getting crops in the ground, but without a timeline for the appraisal sometimes this happens. According to some, it should be possible to write a lease to a set rate once the appraisal comes in. Others say this is not possible because the landowner wouldn't have made provisions for the higher payment or factored it in at the onset of a growing season.
- Change the regulation to state “in the best interest of the landowner,” to build in flexibility with respect to the need or timing for appraisals.
  - Appraisals are costly and take time. The tribes needed to have information on grazing one year ahead. Can this work for agriculture as well? Can BIA bring in extra appraisers to get the system caught up? Contract and compact tribes are responsible for appraisals, but is the Office of Special Trustee (OST) willing to help?
- Permits: Participants said that revocable permits are similar to leases, and that if the requirements for revocable permits are eased, the demand on the leasing process would lessen.
- Building trust: Some spoke of the need for trust between the Bureau, the tribe and the individual. BIA employees hope that tribes understand that the Bureau, as trustee, intends to act in the best interest of the tribe and the individual. However the tribes fear that a permit application might be rejected for requirements they were unaware of. The development of regulations that protect the landowner, while allowing him to expedite the leasing and permitting process, could contribute to this mutual trust.
- Coordination with USDA and NRCS: Making improvements to trust land can be difficult when environmental issues are involved. It is critical for the BIA to cooperate with USDA and NRCS to ensure that environmental policies are complied with.
- Easements: clarify through the regs what constitutes a formal easement on ag lands. Not always clear and the process for sorting this out can be time consuming and feels like red tape.
  - Development Concept Plans (DCP) & Conservation Resource Plans (CRP) are attached to allotments and tracked with TAAMS. Matching them up has been a problem.
  - One participant noted that getting more members involved in the agricultural leasing would be helpful so that tribes can stay involved in these activities. Is there a need for advertising of tribal tracts for agricultural leasing and grazing?
- Regulatory changes recommended by one participant:
  - 162-214 (a)(3) should be eliminated. 162-231 (b) need to change the definition of ‘community goals’ or rephrase the term altogether. As it is written, it is misleading or vague. Does the term ‘community goals’ guide a plan but not define it? Someone has to make the decision if there is conflict in the community.
  - 162.255 – replace the term lease premise with agricultural land.

## **GRAZING:**

Although there are not many tribes dealing with grazing issues in the Northwest, participants had a few thoughts:

- **Appraisals:** Some tribes are able to approve without an appraisal, using a formula that seems fair.
- **Trespass:** Trespass regulations have no teeth. Ranchers simply move animals from one location to another, escaping enforcement which is ineffective. Tribes can impound animals but there is no way for tribe to support animals in impoundment.
- The Trespass regulation should include enforcement. The federal language needs to include the authority to seize. The tribes cannot effectively enforce trespass; they need the fed regulations to define this clearly. They also need the ability to use waivers to support grazing leases.
- **Confusion with 162 and 166:** Grazing is covered under both section 162 agricultural leasing and 166 range. Those working with the regulations are confused about which rule to apply and where records should be kept. There were questions about irrigated pastures and whether or not they are covered under grazing. If so, how should the lease be written? Can waivers be approved at the local level if tribes want them waived, like agricultural leases?
- **Jurisdictional issues:** There were questions about whether or not tribes have the right to make a decision regarding the applicability of other federal policies. Some felt that tribes should have the right to decide which regulations they will consider.
- **Handbooks:** Regional directives regarding grazing and agricultural leasing need to be clarified and consolidated. BIA plans to create new handbooks, with input from field staff, toward the end of the year. The process will include a conference call with self-governing tribes on a variety of issues regarding horse transfer, pesticides, permitting, water, forestry, agriculture and fisheries. A participant added that it is important to clarify the roles of statutes, regulations and administration. Regulation revision needs to go hand-in-hand with policies and procedures. “We need to think about the tools we can give tribes to implement existing and future regulations.”

## **TRESPASS:**

There was strong support for a separate trespass regulation, with sub-categories to address details within each of the areas.

- **Clarity:** The trespass regulations need to cover all purposes, and the definition needs to specify what is covered and what is not.
- **Jurisdiction and Enforcement:** The regulations need to provide authority for enforcement, such as provided in the forestry regulations. There was a caveat, however, not to combine forestry with these regulations for fear of dilution. There were complaints that the BIA “does nothing if non-Indians commit trespass,” and a plea for enforcement with teeth. Currently, tribes feel helpless. To enforce a 10-day vacate notice, it is unclear whether tribal police or the federal marshal are responsible. If the trespass is off-reservation it is more confusing. Regulations should make clear who has authority to forcibly vacate in what situations.

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- There were questions about enforcement against Indian and non-Indian squatters on Indian land. An Indian squatter can be taken to tribal court; with a non-Indian both the federal marshal and the tribal court seem to not have jurisdiction. In the end, tribes do not have the time and resources to prosecute trespass. There were also questions about the civil jurisdiction over tribal and non-member trespass. Again, tribes do not have the resources to take these cases to federal court. What is the forum for addressing these issues?
- Does the BIA have jurisdiction over non-Indian trespassers who lay claim to land or deny use of land?
- Contract tribes: There may be questions of authority with the BIA where a tribe has contracted the functions and manages the property. Regulations should clarify.
- Improvements: Under probate, improvements are not part of the trust asset. So tribes should be able to go in and remove the improvements as well as go to tribal court to get trespassers out. However, the tribal courts don't feel they have jurisdiction over non-Indian trespass on reservations.
- MOUs with counties: Tribes and counties need MOUs regarding trespass. It is a quagmire and we have to think through and get the process in place.
- Land and Property Abuse as priority: USDOJ has expressed its eagerness to work with tribes to get jurisdiction over legal access regarding domestic abuse. Can they use similar legal reasoning, approaches and logic to create both a cause of action and jurisdiction for land and property abuse as well?
- Trespass v. unauthorized use: In cases of fractionated owners and interests, when are they trespassers and when is it unauthorized use? The regulations need to make that determination. Probate can further confuse the situation and add delays.
- Forestry model: Participants suggested that the BIA handbook on forest 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. The statutory authority is necessary to create the regulation. They added that the regulations and the handbook were developed together, ensuring their compatibility.
- Current frustration: Tribes described the current process of dealing with trespass, which is lengthy, confusing and frustrating. If they are unclear about their authority, they may write letters that are then referred to the Solicitor, all resulting in a lot of paper and the authority to proceed. Then the tribe goes to the Department of Justice, although most trespasses never go to court. The cases need a lot of work by the BIA or the tribe for the Solicitor to proceed. There were many questions about how to handle trespass. Can the BIA give guidance to the tribes to help them gather the necessary information? If the tribe doesn't have their own trespass laws do they have to depend on the BIA to proceed? Can the tribe still do all of the investigation? These questions reveal a gap at every step and every level.

### **Right-of-Way:**

- Service line agreements: These agreements are rare, but some have been executed. They can be confusing as to the actual need for them—and seem a waste of time. Unlike on fee property, on the reservation a Public Utility District (PUD) needs a federal document (ROW) to run a service line to a residence from a line on the road. This requirement should be eliminated.

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- More information about underground capabilities is needed for siting service lines underground
- Trust land v. fee land: The regulations should clarify how ROW is handled on trust land and fee land.
- Land locked tracts: Land locked tracts have ROW issues that should be addressed in the regulations.
- Records: ROW records need “cleaning up.” Tribes have difficulty using TAAMS and the scanning function is limited in its character recognition. For 638 tribes, tribal access to TAAMS and TFAS (Trust Fund Accounting System) is critical. If ROWs are not recorded in appropriate systems, they may become subject to trespass. In addition, if ROWs are abandoned or vacated, there may be gaps in title.
- Appraisals: There is confusion about the ROW appraisal requirements. Currently, it seems a landowner can waive under certain circumstances. Some recommended waiving the appraisal requirements if there are minimal impacts, or if the ROW term is short, or if there is limited transferability. There needs to be clarification about what difference (if any) may exist regarding waiver rights for an owner and lessor. Also, how are ROWs impacted by fractionated owners?
- Other jurisdictions: The ROW process in the current regulations is outdated and does not have the necessary flexibility to account for county or state regulations, or for road regulations and other regulations.
  - Example: A county gives back a road to the tribe and then wants taxes for that land. Currently each state has different laws and it is felt there should be uniformity.
- Uniformity: ROWs are loosely defined as an easement, but there is no uniformity. Is it necessary to get a certification of completion once a road is built? Is it a regulation and if so, should it be removed?
- Section 169.2(c): FERC and federal regulators need to work together to clarify the procedures.

### **OTHER ISSUES**

During the day, participants touched on other issues not related to the four regulations:

- Probate: The draft regulations will be ready in 2013, but what will happen to probates and allotments between now and then? In Yakama there will be 75-100 deaths per year and it is estimated in 2013-14 there will be 2,000 more people potentially participating in allotments. Will there be funds to deal with this? Will probates supersede allotments? Probate gets complicated if families don’t understand the law.
- BIA-Tribal relationship: There is a need to discuss and support tribal self-governance. There is a need to address individual rights in relationship to those of the tribe. Why can’t the tribes have the right to determine use on their lands? The worst case should not drive the discussion. Sometimes BIA gets caught up in their liability issues and risk management. They should help the tribes make the system work for them—not against them. They need to act quickly and timely because time and money are being lost.
- One participant asked for the floor and offered several thoughts. A synopsis of these ideas are bulleted here, but a complete statement was provided to RACA staff members.

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- Current procedures just aren't cutting it for the landowner. She recommended changes to include individual Indians. Currently just the tribe and individuals are out of the loop. They support the tribe but when it comes to the individual management regulations the tribe doesn't have time to deal with this.
- There is an issue with Indian land reforms and removal of trust. Why can't we see these regulations before they are finalized? She felt she didn't get an answer and individuals still aren't included. We need to go back to correct this and fight to undo rather than talking before moving forward.
- Probate, consolidation & reducing fractionation: On tribal lands they need to go through the federal regulations. The individual needs to be a part of this group. She spoke of it being under Indian trust management (a different form), probate and of the need for permanent improvement. Who can probate without consent? Some read like it should be allowable but then some permanent improvements turn into non-trust issues. She gave an example of a permanent building attached to a trust building becoming part of the trust building. The language needs to change in order to clarify and prevent suits.
- The agencies and bureaus need to keep their word in order to help the individual. AIFRA & ILCA need to stay together and not separate because if they do it will fractionate. They need to work with landowners, family members; educate, clarify a gift exchange, help them understand what will happen to their family lands if they don't know how to pass the land to their children.
- There is no enforcement. They run into statute of limitations and individuals couldn't understand what was being said.
- She feels the government doesn't need to keep inventory. Tribes can keep records for the trust. If it is on trust property then it is a part of the trust. The Indian Land working group will be talking about it in October in Morongo, CA.

**FINAL THOUGHTS:** As part of the wrap-up process from today, representatives were paired up and asked to review and reflect upon the conversations from the day. Each small group offered refinements, additional thoughts or general comments to the overall issues:

### Agricultural Leasing

- Streamlining timelines
- Ownership concerns
- Dates on contracts
- Need to confirm/clarify
- Payment schedules (prorating?)

### Grazing

- Cost cutting efforts. Simplify owner consents. Option for constructive group notice rather than individual
- Do they need annual rental review for grazing rates? Does this create more appeals?
- Associated trespass issues that should be dealt with in the trespass regulations
- Need to clarify the appraisals and completion of leases.

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### Trespass

- Need tools to deal effectively with trespass issues
- There is a need for uniformity in the regulations about trespass on grazing and agriculture lands. Currently grazing is different from agriculture.

### ROW

- Distinction between ROW and easements; easement is area and ROW is use.
- ROW gets bogged down and it is difficult to get answers
- Service line agreements need to be very structured
- Distinction and impacts regarding property designation change from ‘trust’ to ‘fee’
- Tribes should be allowed to construct their own documents
- Abandonment is in regulations
- There are big questions stemming from railroads and non-use

Michele Singer offered her thoughts from the day. She heard several important messages, including the need for clearer guidance and the need for more education and dissemination of information about the new regulations to a broad audience. Coordinating the development of the regulations and the handbooks, as was done by Forestry, may be a wise approach. She acknowledged that she needs to be able to refer those concerns that she has heard to the right people, so that they can be addressed as effectively as possible. She closed by saying that she has hopes that the Bureau will do a better job with these regulations in the future. She appreciated everyone’s time and attention.

Participants shared their final reflections on the day:

- Having a voice: It is important to have a voice in this process. A participant hoped that tribes that were absent would be able to ask questions and offer input. [Margaret answered yes.]
- Support for sovereignty: Any regulation changes should support and protect tribal sovereignty. The regulations should consider both self-governance and self-worth issues.
- Mutual benefit: There is hope that the rules and changes will be updated and will benefit both BIA and the tribes.
- Clarification: Tribes asked for clarification of policy, regulations and statutes.
- Trespass: Trespass should be handled at the local level.
- Correcting mistakes: A participant spoke of the abuses of the land and people, stemming in part from 200 year old statutes. “The pendulum has swung to the other side from 200 years ago. The burdensome regulations are a reaction. We have an opportunity to correct the mistakes made and to move forward to work collaboratively.”
- TAAMS: The Bureau was encouraged to take a proactive approach with regard to TAAMS and using systems to get information to more people more quickly—without the current problems.
- A fresh start: This is the chance to take a broad look at the regulations in a fresh way. For instance, should certain initiatives like the Hearth Act be include? The BIA can help enhance tribal authorities. “We are starting fresh and need to make it more than window dressing.” This is a good start.

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The facilitators ended the session by encouraging all participants to act as ambassadors for this process when the BIA moves forward with the suggested changes. At the end of the day, many participants expressed their belief that this was a good start of a dialogue about these issues. In order for changes to occur, all will need to stay engaged and stay as positive as possible to support forward progress.

*Summary written by Donna Silverberg and Dexter Albert based on notes from Jan Kelley.  
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