

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

**BIA Training Center, Albuquerque, New Mexico
October 12, 2011**

Facilitators: Dexter Albert, Lucy Moore,
Notetakers: Yolynda Begay
BIA Central Office: Margaret Treadway, Amanda Begay

WELCOME: William Walker, Southwest Regional Director, welcomed the group and expressed appreciation for the time and commitment participants were making to the process. He acknowledged that this was not the first time staff had been asked for their suggestions on these regulations, but he hoped that this group, with a lot of new faces, would be willing to contribute their perspective.

BACKGROUND: Margaret Treadway, Office of Regulatory Affairs and Collaborative Action (RACA), welcomed the group of 26 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, Director of RACA 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

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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 the list.

INTRODUCTIONS: Facilitators Dexter Albert and Lucy Moore introduced themselves and reviewed the agenda and the materials. They asked the 26 participants to introduce themselves and offer their hopes and/or fears for the day.

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:

Inconsistencies and contradictions: Participants noted major contradictions and inconsistencies between the regulations. Acknowledgement and cross-referencing is needed to understand the impact of one regulation on another, as well as the impacts on tribes. This tunnel vision is a serious problem, especially when dealing with NEPA and Categorical Exclusions.

There were examples of “creative” applications of regulation by attorneys – “cherry picking” – using leasing regulations to protect a ROW, or waiving regulations and negotiating instead.

Access: Some landowners are denying access to other allottees, who have to travel through checkerboard and allotments to reach their land. This problem is increasing.

Environmental concerns: Alternative energy like wind and solar require business leases for large tracts of lands and can have significant impacts on wildlife and natural resources, including water. A participant observed that politics can trump regulations if the will is there.

There are concerns that other agencies, like NRCS, have blanket exemptions from Washington for their actions, an automatic ruling of no environmental impact for their practices. The Natural Resource Conservation Service (NRCS) may want to do a joint project with the BIA but the

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NEPA processes do not always match. But the Bureau is still accountable for actions and impacts on Trust land. Other agencies need to include the Bureau in their management plans and projects. “We are always the last to know.”

If the Bureau could get categorical exclusions for fence line repairs, etc. projects could be expedited.

The group raised the need for bonding or other mechanisms to provide for reclamation if needed after a lessee leaves.

Enforcement: There were examples of environmental damage and the ineffective enforcement that is available to the Bureau. Oil and gas companies can pay fines “without feeling it.” “We need teeth that hurt.” Many were frustrated by their inability to effectively enforce regulations. Writing letters and sending notices is not enough; follow up and follow through are needed.

The right tool: The group discussed the importance of distinguishing between regulations, policies and directives and being sure to use the right guidance in the right circumstance. The regulations are a national document, said a participant, but many issues are local and can be covered by the Bureau’s policy statement, which is issued annually. MOUs are another option. The regulation should be the last resort.

Another participant asked for more directives and memos to help give guidance.

Another said that updating the policy statement should be the priority because it gives on the ground guidance for bonding, reclamation, and other actions, as well as identifying what can be enforced that is not in the regulations. Policy statements need to provide better mechanisms to act more quickly and efficiently. They also should cover relationships with other agencies like NRCS.

Conflicts with tribal law: Participants from the Navajo Region noted that under the Navajo Leasing Act the tribe is taking over the approval process, but the current regulations conflict with this process. Bureau staff are unsure about their role in managing these leases.

The practice and principle of real estate service and regulation are in conflict. There are assignments without consent, but the applicant needs to go back for consent from land owners.

Local flexibility: Participants hoped to retain local flexibility in the new regulations.

Incorporate other rules and policies: There was support for incorporating other rules and policies, like NEPA, in the regulations so that staff understand both the purpose and the requirements as they pertain to them.

Appraisal waivers: Tribes in the Southwest Region are requesting appraisal waivers. The current system requires waivers by the Central Office. Many feel that waivers should be issued at the regional level for more efficiency. The regulations should clarify where the authority lies for waivers.

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Service line agreements: In some areas service lines and their branches have resulted in multiple service line agreements. This situation makes converting to a ROW very difficult.

Notice: Policy is needed for constructive notice in newspapers and other vehicles as an option to streamline the system. Certified mail should not be necessary for consent. The requirements need to be simpler.

TAAMS: Consistent use of TAAMS by all agencies should be mandatory and needs to include contract and 638 tribes. “Everyone needs to be on board with TAAMS.”

Many felt that TAAMS needed improvements; the invoices are too complex, and there are a multitude of ways that invoices are submitted and payments made. Staff end up “babysitting everyone.”

Self-determination: Staff spoke of the difficulty of dealing with contracted programs. The process is burdensome and time consuming, and enforcement is confusing. At Navajo the range program is the only one that is intact. The regulations need to streamline this process.

Probates: Tribes are now buying up small probate interests. The Bureau advocates for the individual landowner and wants to be sure that any transaction is in the best interest of the landowner.

Rights of Way (ROW):

Catch all: Some feel that ROW has become a catch-all for all encumbrances.

Mineral leases: A participant raised the issue of mineral leases. A ROW document and tracking system is needed for mineral leases. He has seen the need for a way to record ownership of the ROW and mineral lease. Piggy backing off access to a house on a mineral ROW is an example. Mineral estates with structures on the surface pose a challenge. Essentially, there are sometimes conflicts/issues with surface versus subsurface mineral rights and access to those minerals.

Notification: With 30 – 50 landowners per allotment, notification is a challenge for Eastern Navajo. The Solicitor requires a letter, but staff would prefer public notice.

Appeals: People often appeal the decision because they simply do not like the ROW. Not understanding the process, staff may accept the appeal even if it is not valid.

Corridors: Many supported the corridor ROW that requires the applicant to include all uses and needs – roads, lines, etc. -- within a 30 foot width. The appraisal could be blanket.

Granting corridors is difficult where housing exists. It would be better to do a single grant and survey for all utilities, to save each entity having to go through NEPA compliance. This would save money and be more efficient, said participants. “Everywhere else in the real world you can do that.”

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Consent: ROW requires separate consents for survey and for the ROW itself. In the Southwest Region individual consent is the rule. In other regions, surveys are permitted with minimal disturbance. “With owners in different states it is difficult to get everyone’s consent. There are those that will never sign.”

Landowners need to be educated so they understand that non-consent means adjustments to the bond, money held and the payment greatly reduced.

There was a question about whether the consent was required of the landowner or the land users. There were examples of both. On Navajo, the land user consents, but this is not a Bureau regulation.

Indian Health Service (IHS) is constructing a hospital without getting land owners consent. Staff felt they should have to comply with the regulations even if they are a government entity. And, IHS tends to turn in “as-builts” after the fact, instead of going through the process beforehand.

Participants expressed confusion about the consent and negotiation processes. In some cases the Solicitor rules that if the agency consents to negotiate, the owners right to compensation is compromised. But staff understand that consent and negotiation are two separate steps – consent and then negotiate. There was discussion about why ROWs would be negotiated. Without majority consent there is no ROW. A participant said that when majority landowners waive compensation, it is assumed they are waiving the right to consent. But participants disagree, saying that the right to compensation is a separate right from consent.

Clarity of Solicitor’s opinions and decisions: The group needs a clearinghouse of Solicitor’s opinions and decisions. The wide range of interpretations makes work for the staff confusing and frustrating. Consistency in the application of the regulations is a major concern, both within a region and across regions. There were also questions about the relationship between a regional policy and a Solicitor’s opinion. Communication between the national and regional levels must be open and efficient.

Appraisals: Some companies are willing to pay market value even if it is much more than the appraisal. The Bureau accepts the company offer because it is the highest.

A geographical survey and appraisal of that area will give a baseline to evaluate impacts to the areas.

If the Superintendent had authority to handle appraisals, the process would be more efficient. Delays and waivers would probably be reduced.

Jurisdiction: There were questions about tribal jurisdiction on ROWs, the use of 162 regulations, and the Supreme Court *Strait* case and with adverse possession situations.

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ROW for range improvements: A participant asked about the applicability of ROW regulations to pipelines, like small water lines put in by permittees in cooperation with other agencies and the tribe. Are there size and dimension requirements? Do they only apply to major pipelines?

Who owns these investments (range improvements) and how should the contract be handled? In the past, said a participant, the Bureau was more active and managed the resources with the burden of a certain type of survey, clearances, etc. They saw it as conservation work and looked at two requirements: 1) protection and conservation of the asset; and 2) benefit to the owner. Now there is a tedious process that does not put either of these criteria as a priority.

What is needed is a tool that will meet the needs of the project and protect the landowner. Some felt that the regulations and the BIA mandate were often at odds. “There is some kind of disconnect there.”

TRESPASS:

Separate or integrated: The group was divided on the issue of a separate regulation for trespass or integrating trespass into other relevant regulations. Those favoring a separate regulation suggested that it would be easier to implement, would guarantee consistency across programs and that policy could guide its applicability to different regulations. Integrating it, they added, would require changing other regulations. Those favoring integrating trespass into existing regulations felt that there were too many kinds of trespass to be captured in a single regulation. Penalties, for instance, should be tailored to the different regulations. They also pointed out that it already exists in Section 166 (although it needs updating), and that the handbook could offer guidance. There was also discussion about the option of having both a separate regulation and clear integration in existing regulations.

Enforcement: Some felt that the most critical issue was enforcement – not whether or not it was a stand-alone regulation. The big question, said one participant, is who is going to take the responsibility?

Many expressed their frustration at not being able to implement enforcement and suggested that the federal government was in a better position to enforce trespass than the tribes, for political and cultural reasons. “Right now, landowners just see a lot of paper and no enforcement.” Others suggested that the enforcement authority exists in regulations, “but do we dare stick our necks out?”

Others suggested consistent and effective enforcement must happen at the local level, through tribal codes, ordinances, etc. rather than by federal regulation. “Let them figure out what they want to do with their land, and take responsibility.” The group acknowledged that not all tribes would be able to do that.

Unfortunately, the group agreed, the result is a vicious cycle where the responsibility is shuffled from the Bureau to the Tribe and back to the Bureau.

Agreements need to include trespass and clarify how tribal regulations apply to trespass.

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A participant identified the need for accountability in trespass enforcement. His understanding was that as a line officer he did not have the authority to discuss trespass. “If the buck is passed, the landowner loses.”

Without enforcement, all that is done is identification and notification. Staff needs policy guidance.

Enforcement requires a badge, a gun and training, reminded a participant. Enforcement can be dangerous.

There is no appeals process with respect to trespass.

The group agreed that these revisions should result in simplification, not further complication. They warned against creating something that can't be enforced, or that the leadership is unwilling to enforce.

There was support for coordination of protocols, policies and resources with both public and private entities to help with enforcement.

Definition of trespass: The regulations need to clarify what constitutes trespass. Is it having more animals than are permitted? Is it physical? Each kind of trespass needs to be identified with the appropriate monetary compensation to the landowner, allottee, or tribal entity.

Problems are caused when companies with a ROW for access sell their interest without going through BIA. When the ROW expires these companies are trespassing. The Bureau has to compensate the landowner for trespassing because the agency was not aware of the trespass. The question is how to hold companies accountable.

Politics and trespass: The group discussed the role of politics in applying the trespass regulation. “No one is willing to stand up; they are afraid of administration changes.” The result, said some, is the absence of justice in the system. “When you mix politics with regulations, we wind up with a mess.” The regional directors are influenced by the political climate in everything they do, said another, and must take responsibility.

Feral horses: A participant spoke of the serious problem of dealing with feral horses. They must be held and the regulations and guidelines offer no way to dispose of them.

AGRICULTURAL LEASING:

Permits v. Leases: Regulations need to distinguish between permits and leases, and “revocable permits” needs to be defined. One participant suggested that lease provisions, set up through contract language, should encompass everything from defining and penalizing the lessee for trespass to defining compliance and consequences for non-compliance, etc.

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Appraisals: One problem with agricultural leases is the bottleneck of appraisals and determining fair market value. If this could be done prior to leasing it would streamline the process. Another option done in some places is to use a market study of the reservation and advertise the leases, rather than doing individual appraisals for each lease. The lease is granted on behalf of the landowners. A market study is appropriate, said another, where the landscape is similar, but probably won't work region-wide.

The other is that the value of the land is so high, and with increasing irrigation and water costs, the leases have become too expensive. Some areas need to reconsider the viability of agriculture, and may have to move to homesite leases as a better use of the land.

Trespass: Realty staff need to address how to manage the leases so that the incoming lessee can plant crops without being in trespass. Seasons are cyclical and require pre-planning.

Clarity: A participant recommended that all leasing (agricultural and grazing) be included in a single part in Section 166.

Bidding: If bidding is not statutorily mandated, a participant asked that the language in 162.2.12c be omitted. Staff piggybacked on BLM and the Forest Service on a 40 acre allotment, trying to fulfill the law and benefit the range land. The required study took eight years to complete.

GRAZING PERMITS:

Compensation: A participant asked if a grazing unit that is being impacted by a 30 acre school deserves compensation. There are cases, he added, where permit holders receive compensation for reduction in surface area or an adjusted grazing permit when they may not be entitled.

Tribal members: At both Navajo and Zuni all the grazing permittees are Indian. At Zuni there are revocable privileges up to five years and tribal members pay a small fee. BIA staff determine the carrying capacity.

Trespass: Zuni has a range code that includes a trespass fee if the permittee has not paid the grazing fee. Tribal rangers enforce trespass in tribal court. A committee of two BIA and two Tribal Government representatives meet once a month to look at damaged range units and consider the current carrying capacity and trespass violations, and develop a plan for the unit. The tribal council signs off on the plan, giving credibility and authority to any needed enforcement. Most units are working well and damage is little (mostly because of the economics of grazing).

Grazing leases: Standard real estate agreements are used for grazing leases to non-Zunis on trust land. These are approved by the Zuni Governor and the Superintendent.

Annual rental rate review: Some advocated for a lock down of the rental rate, rather than an annual review, which is endlessly appealed. They suggested that regulation language may be needed to allow land owners who manage their own leasing to lock down rates.

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Late payment penalty rates: A participant asked that sections 162 & 166 clarify late payment penalty rates that are currently interpreted all over the board.

Coordination and simplification of CFR: A participant noted that 166, 167, 161 and relocation regulations apply to grazing. He asked for clarification of the relationship among these sections and why the discussion focuses on 166 if the other regulations are more recently developed.

Another recommended that lease language – like mortgages -- be removed from 166. “If the terms, bonding and rental look and smell like a lease, then it is hard to distinguish it from a grazing permit.”

Contract: Another suggested that contract law could govern grazing permits and violations rather than including that in the regulations.

Enforcement: Although Bureau staff handle grazing permits and agricultural leases, the Tribes handle enforcement. Many felt that both management and enforcement should be in a single jurisdiction.

A system that works: A Bureau employee said that the regulations are working for his office. Grazing rental rates are negotiated with the Tribe. Range improvement issues have been brought to NRCS. Bonding is required. The BIA is the land manager and appraisals are done for fair market value. He identified an item that needs work: the appeal is separated from the notice of cancellation process. They are working with Tribal counterparts on the Land Board to streamline the permit requirement. Range inventory is complete and there is a policy on eco-sites that determines the range carrying capacity. Any contracts with permittees and NRCS are approved by the Land Board and the Bureau.

Conservation plan: A participant asked for a separate paragraph in the regulations to clarify the role of conservation plans in contracts.

FINAL THOUGHTS:

Hope for results: There was acknowledgement that past efforts at regulation revision seemed to lead nowhere. Many expressed hope that this series of working sessions would be taken seriously by those developing regulations and policies. Agency level staff are desperately in need of this guidance. “I hope that our voices will be heard, especially by the Central Office. We are the ones on the ground, with the knowledge.” “I hope that our efforts are taken seriously and we are listened to.” “Someone from Central Office comes out here and nothing ever happens or changes.”

Several spoke of the desperate need for guidance in the regulations and the policies to help those in the field do a better, more efficient job. They added that training and education, both for themselves and the tribes they work with, is critical.

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“All things need to come from the ground up and not top down. If agencies understood that, we would not be faced with the situation we are in today.”

Appreciation for process: Several expressed appreciation to the Bureau for the opportunity to participate and offer ideas. The format allowed everyone to have a say about their priorities. Many said they learned a lot listening to the different viewpoints. “The learning does not stop here,” said one. Participants asked for continued involvement and the opportunity to comment on any proposed language. They hoped for a follow-up meeting like this one. It was a good dialogue among those in the field who are giving serious thought to these issues. “This has been a fascinating and complex session. We had a chance to brainstorm and learn important information at the same time.”

Motivation: The reality of the difficulty of surviving in Indian Country motivates Bureau employees to try to do the best job they can. They see the bureaucratic red tape and the frustration it adds to the lives of Indian people who are trying to improve their quality of life and living standards. Bureau staff have the same goal, to improve quality of life and raise living standards. Another said that BIA staff must learn how to “intertwine our programs with the custom and culture of those tribes we are working for.”

Politics: Helping individuals is often made harder by politics and the environment it creates.

Focus on implementation: Participants warned against major changes to the regulations. What is needed is to make the regulations work better in a variety of settings. This includes simplifying language and clarifying requirements.

Consistency: A participant emphasized that the regulations must be applicable to the entire Bureau, not a specific agency. They need to be vague enough to cover the variety of land and people. Certain issues like bonding requirements and fair market value appraisals need to be addressed at a national level. But for specific issues, each region and agency needs to tailor the CFR requirements to suit their situations. Each tribe has a different need; the detailed decisions should be made at the agency level.

Communication and understanding: A participant spoke of the need for good, regular communication to ensure that all stakeholders in the regulations can keep exchanging ideas. It will be difficult to agree on some of the issues but it is critical to keep talking.

Accountability: There were comments about the need for higher management to fulfill their responsibilities with respect to implementing the regulations in a fair and consistent way, and giving guidance to the agency level.

Understanding: A participant observed how important it is for tribes to understand where regulations come from and what their purpose is. The processes are complex.

Summary prepared by Lucy Moore from notes by Yolynda Begay. Please contact her with comments or corrections. 505-820-2166 or lucymoore@nets.com

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(Grazing, Trespass, Agricultural Leasing, and Rights-of-Way)**

**BIA National Training Center, Albuquerque, New Mexico
October 13, 2011**

Facilitators: Dexter Albert, Lucy Moore,
Notetakers: Yolynda Begay
BIA Central Office: Margaret Treadway, Amanda Begay

WELCOME: Margaret Treadway, Office of Regulatory Affairs and Collaborative Action (RACA) welcomed the group of 11 tribal representatives and 11 BIA employees to this collaborative session. She looked forward to hearing the specific concerns and ideas from the Southwest and Navajo regions. She explained that the Bureau had contracted with facilitators to help with the conversation and the summary.

Margaret offered background on the four regulations: Grazing, Trespass, Rights-of-Way (ROW), and Agricultural Leasing. She acknowledged that the regulation revisions were long overdue and encouraged tribal representatives 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) attorneys. 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, Director of RACA, 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.

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She added that she will be glad to hear about any other issues that participants have with other regulations, so that they can be added to the list.

INTRODUCTIONS: Lucy Moore, Dexter Albert and Yolynda Begay introduced themselves and explained their roles: facilitate the conversation so that it is comfortable for everyone to participate; to help the Bureau listen to what the folks in the field have to say; to capture thoughts that are brought to the table and produce a summary of the points raised. They reviewed the agenda and materials and asked the 22 participants to introduce themselves.

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: The group responded to the overarching themes.

Lack of resources: Tribes suffer from the lack of resources, both money and staff. Taos Pueblo, for instance, has only one Realty person.

Need for training: The Bureau trained the agencies, but tribal staff need training, too, especially if the expectation is for tribes to carry forward the programs. A tribal realty officer described her experience new to the job, with no training. She is worried about her replacement when she leaves, who will be faced with the same challenge. Classes are expensive, but some kind of orientation by existing staff would be affordable and very helpful. Others agreed that the Bureau should focus on a training program for tribal staff to better understand the process and the paperwork. It would help both Bureau and tribal staff to work better together. Within the next couple of years, said a participant, most of the Bureau staff that began in the 70's will be retiring.

A new employee wished for training so that she could do her job better.

A BIA staff person supported the requests for training, especially for realty curriculum in all areas of management which she had been developing. She is concerned that the National Training Center may not be able to provide training in the future – training that is badly needed if the Bureau and tribes are to work together effectively.

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Enforcement: Clarity is needed on enforcement authority and procedures. The Secretary has the authority to enforce the regulations, but because it is unclear Tribes take on the responsibility and that leads to an appeal process. Some felt that the Superintendent should enforce regulations.

Tribal staff who try to enforce regulations are often seen by tribal officials and members as putting up an obstacle in the process. It is difficult to explain that the regulations must be enforced, particularly when tribal governments change every one or two years. Some are familiar with the process and requirements, but some are new and don't understand.

There is a critical need for enforcement of trespass and fencing violations, environmental hazards from waste disposal, and more.

Tribes are concerned that the Bureau will not enforce stipulations that tribal staff have written for the use of ROWs. How does the Tribe get involved in actively managing easements, asked a participant?

A tribal member working for a self-sufficient gaming tribe on grazing and land management has been given authority to handle many issues including enforcement. In contrast, he said, "The BIA takes forever to get things done."

Complexity: The regulations are too complex and hard to understand and include too many references to different sections. They need to be streamlined. "I end up bouncing around from one regulation to another, trying to figure out what I should do."

NEPA: The requirements of NEPA demand a lot of resources that could be used better elsewhere. There was discussion about the possibility of a Categorical Exclusion.

Need to honor local ways: A participant observed that sometimes bureau staff that come from another region try to impose that way of doing things. These interpretations may conflict with the existing way of doing things and cause friction between the Bureau and the Tribe. It is important for BIA staff to honor the local procedures and policies and not to change what is working. Otherwise, the relationship with the Tribe suffers and the potential for streamlining a project is lost without necessary collaboration.

May v. shall: A participant observed that the two words convey very different obligations. One is discretionary, and the other mandatory. The regulations need to use those two words with care.

Appraisals: Participants complained that it sometimes takes years for an appraisal waiver to be granted from the Central Office. Appraisals offer guidance in negotiations, but it is hard to find comparable values for uses like fiber-optics, wind energy, etc. Compensation for some of these new technical uses may be too low.

BIA-Tribal Meeting: A participant suggested that in the future the Bureau bring both BIA and tribal staff together to resolve issues, rather than having two separate meetings.

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RIGHT OF WAY (ROW):

Need for clarity regarding expirations: There were questions about how to handle ROWs that are expiring. Should they be renewed or go through a new application process? Most utilities want to renew to avoid triggering NEPA. But what is the renewal process?

There was also a request for guidance in a manual or handbook on the negotiation process. A tribal representative said that the tribal council needs to involve the land users and the land management programs in the negotiations.

The lack of clarity results in challenges from companies. The company does not want to go through the expense of a new application – appraising, surveying, mapping and legal descriptions, and complying with TAAMS requirements. In some cases, where ROWs are more than 25 years old, the tribe requires a new application, but it is unclear whether they have support from the Bureau. The tribal realty officer may require NEPA, but will the BIA enforce its completion?

Others felt that NEPA was unnecessary and that the same goal could be accomplished by requiring a Threatened and Endangered Analysis. Another participant felt that ultimately the Tribe pays the price for a long NEPA process. If the ROW has existed for 25 years, he asked, what is the purpose of NEPA?

Waivers: Many felt that waiver requests should be handled at the local level rather than the Central Office.

Assignments: The regulations need to provide procedures for assignments of ROWs.

Appraisals: One tribe is using third party appraisals, but there are questions about how to do that.

Consent: The statute states that if the landowners are “too numerous” the BIA can grant on behalf of the landowner, but the regulations are silent on what procedure to use.

Survey backlog: There was an extensive discussion about survey backlogs. A streamlined process is badly needed.

Some tribes complained that entering the surveys into TAAMS was the cause of the serious backlog. Utility company surveys that were submitted two years ago are still waiting, and the result is trespass by the company.

One surveyor has a back log over 135 surveys waiting for review. A BIA employee explained that the survey has to be reviewed by an engineer with other responsibilities as well. The regulations specify that if the surveyor is a certified land surveyor, further review for ROW is not necessary.

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A tribal participant gave an example of a certified surveyor who made an error on a survey that was revealed when the landowner's surveyor surveyed the property. There were questions about how to hold surveyors accountable and purge those who do bad work from the roles. The Bureau is prohibited from making a list of recommended surveyors because of the potential of being sued by those not on the list.

Many felt that when a board certified surveyor submits a complete and correct application, that package should be processed at the agency level. Remove the layers of review in place now and include administrative provisions for corrections.

Enforcement: Participants asked for clarity on the roles of the Bureau and the Tribe with respect to enforcement of ROWs.

For instance, who is responsible for the maintenance of the fence line along the railroad, especially in grazing areas where as many as 20-30 cattle are hit by trains. There are concerns that trains may be carrying hazardous materials, and the security of the fence lines is critical. Neither the tribe nor the railway wants to maintain those fences. Should the BIA be responsible for negotiating an agreement?

Compliance: Tribes with 638 contracts need more guidance on how to deal with compliance on ROWs. The language is too vague with respect to oil and gas ROWs. "We need more support from the BIA. We need to work together." Others suggested that if the tribe has capable staff to handle resources, "the Bureau should back us up instead of impeding the Tribal process."

Tribes v. individual landowners: A participant described situations where the regulations required tribes to grant ROWs to themselves. There need to be different regulations for tribes and for individual landowners. When it comes to consent, it can create some problems if the tribe is a majority interest owner. Sometimes as few as five percent can hold up a ROW.

Easements and access: Those in the checkerboard areas told of situations where landowners refuse access from tribal trust land to allotted land, rendering them land-locked. When there is a grant of easement executed with the Superintendent's signature, including a stipulation, participants felt the Bureau is responsible for enforcement of site specific stipulations, either by supporting the Tribe (e.g., supporting tribal policies or helping tribes enforce provisions) or doing it themselves.

New technologies: Many spoke of the challenge of dealing with broadband and fiber optics companies that push to use existing ROWs and start their projects as soon as possible. Tribal staff are in a difficult position, trying to advise the tribe, find old documents from the 50's, determine whether or not the tribe still has jurisdiction or creating a ROW with multiple uses.

Broader Notice: There might be a need to include notice not only to the land owners, but to land users and government programs/departments that are also conducting projects on those affected lands.

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TRESPASS:

Separate regulation or integrated: Most favored keeping the trespass language in each section intact, as well as including a separate section similar to Forestry regarding general trespass, with teeth to the regulations.

Enforcement: Tribal participants noted that enforcement is the responsibility of the Secretary or the Superintendent. Enforcing at lower levels is difficult. They try to work out trespass issues internally, with the other party, but if they cannot be resolved, they are taken to the Bureau for assistance. It is unclear, however, when and how the BIA should be involved. The understanding is that if the trespass involves the boundary of the reservation it is a matter for the tribe and the BIA to work out. But if it is a legal problem, then the BIA is responsible. There was agreement that tribes should be proactive to mitigate issues, and the BIA should be supportive when asked.

Buffer zones: The group discussed the use of buffer zones to protect tribal resources from encroaching development, which brings with it a lot of litter. The jurisdiction on the buffer land is often in question. Maintaining and keeping the buffer zone clean is a county responsibility, said a participant, but getting them to act is another thing. It is important, said a participant, to negotiate details of the buffer zone with the developer in advance and make sure they understand the tribe's point of view and needs. "It goes back to communication; we are in the dark most of the time. We do not know until something is done."

There were examples of tribes buying land (and with it jurisdiction) for a buffer against development. There was also a caveat that the tribe can inherit problems with that piece of land.

A tribe requires entities proposing development adjacent to tribal lands to summarize projects and their impacts. Tribal land managers work with the entity to address those impacts.

Cattle: There was discussion about the responsibility for keeping cattle in a certain area, or preventing them from entering a certain area – fencing in, or fencing out. The state is responsible for fencing the interstates; if a cow gets through, the state is liable. In the case of BNSF railroad, the company will provide materials for a fence, or they will fix the fence on their own schedule. In one case, the tribe billed the railroad for the material, time and effort and they were reimbursed. The regulations need to clarify where responsibility lies.

GRAZING PERMITS:

Appraisals: A tribal participant said that his tribe requests appraisals to determine fair market value (FMV) for annual grazing rental rates for tribal members, as well as non-tribal members. The negotiated rental rate must be documented especially if it falls below the FMV for the use of the land. There was a question about who adjusts the stocking rate. A participant answered that the Bureau receives funding for range inventory and to change the stocking rate.

Tribal role: Many spoke of the appropriate role of the tribe in dealing with grazing issues through livestock and grazing ordinances. Allocation of the grazing permit is often done through

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the local board. “Leave the Bureau as far away as possible and have the tribes deal with it internally. It is less messy.”

A BIA participant confirmed that the laws (Indian Reorganization Act (IRA) and the Self-Determination Act) support strengthened tribal sovereignty and responsibility for resource management. The Bureau consults with tribal governing bodies, but no longer deals with management, mostly because of funding cuts. The Bureau retains an oversight role as well as responsibility for administration and record-keeping. “Tribes should have a lot to say,” said one participant.

A tribal participant gave an example of the benefit of tribal control of grazing land. In 2002 the tribe suffered the worst drought in 200 years. They were able to respond quickly and effectively to protect the rangeland by resting the acreage for several years.

Consent: Some felt that consent should be possible without full consent, given the high fractionation of some tracts. They asked that the regulations define ownership interest.

Enforcement: One tribe has 28 pastures and 2,000 head of cattle. Some permittees were not paying their fees. The tribe set up a grazing management plan and educated the permittees about its requirements. The term is five years, and if the fee is not paid within the three-month grace period, the lease is cancelled. There is also a 50% penalty fee. After a full term, permittees understood and compliance is now very good.

A participant said that 638 tribes were responsible for enforcement. Another suggested that a Bureau-Tribal partnership could be proactive in addressing problems.

The group agreed that education is an important part of enforcement. Once people understand why the regulations are necessary, the need for enforcement declines.

Rangeland condition: A participant asked if there were rangeland standards that the Bureau needed to meet. To address noxious weeds and invasive species, the tribe can pass a resolution and request funds for control. Another suggested language in the regulations on invasive species and pest control, including rodents. It is a big expense for tribes to contain these unwanted plants and animals. A BIA employee suggested that tribes include cleanup and removal costs in grazing agreements.

A participant observed that tribal range standards might be higher than the Bureau’s, and that it made sense for the tribe to manage range and conservation issues.

Another suggested that the Bureau could assist with development and implementation of a conservation plan.

Idle lands: Some suggested regulation language on management of idle lands and FMV compensation. Returning land to production can be very costly. Tribal conservation areas can be established by the tribe, not subject to permit or lease, and managed according to the goals in the conservation plan and utilize lands informally at times.

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AGRICULTURAL LEASING:

Focus: Some felt the regulations focus on trust lands rather than on the landowners. Leasing to tribal members should be the priority, they said. They advocated for separate requirements for tribes and allottees.

Coordination with BIA: Tribes that handle their own agricultural leases need the final signature from the BIA. The process is pretty smooth for one tribe, except that “it is a headache, making our maps match their maps.”

Assignments: The landowner can gain more from an assignment than an agricultural lease in many cases. There is a need for strengthening contract language, providing technical assistance and giving needed support to 638 tribes. The Bureau’s focus should be education, training and enforcing contract terms, said another.

FINAL THOUGHTS:

Facilitators asked the group to offer some final thoughts, particularly with respect to tribal self-governance implications. How can tribal self-governance be enhanced, they asked, without giving up federal trust responsibility?

Hope for results: Many expressed the hope that the outcome of these meetings and the notes would be implementation of new and useful regulations that address some of the problems raised today.

Education: Tribal participants are eager for education and training on the existing and new regulations. The Bureau hopes to offer training, although there are hurdles to overcome, including budget cuts and the need to wait for consultation to be complete. “The new regulations will not happen overnight. In the meantime we need to keep learning how to do things better.”

Another suggested sending draft regulations to tribal leadership organizations, like AIPC, so that tribal leaders can be educated as well. Focusing on the revised regulations at these meetings could help frame useful dialogue between tribal leaders and staff.

BIA staff also requested comprehensive training on the four new regulations for all new and existing Bureau staff.

This process: Participants appreciated the chance to chat informally with each other and “discuss things that we had not discussed in a long time.” Many thanked the Bureau for convening this dialogue between tribal and BIA employees and asked that it be a regular event. “There is so much complexity in our relationship -- politics, sociology, economics, history, as well as legal and regulatory.”

A participant wished that more tribes had been present so that the exchange and learning could have been even richer.

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The meeting was very productive and informative, said another. “We have to make it work. We do not have to agree on everything but this way we get a chance to see how everyone does things.”

“Good dialogue and fresh ideas,” added another.

Communication: Communication is critical, said several. “When we talk with each other and get on the same page, things are easier to do.” Another suggested an annual dialogue of Line Officers and managers so the leadership can understand what the issues are.

A clearinghouse of Solicitor opinions, along with a meeting format like this on the subject, would help tribes manage their resources more efficiently.

A BIA employee urged tribal staff to communicate with the Bureau whenever questions or problems arise. The regulations should specify clearly what happens if deadlines are not met, tasks not done. “We don’t want to end up in court with a judge deciding.” He acknowledged that politics on both sides may keep people from being proactive, and that the turnover in tribal elections and in BIA staff hurt continuity of relationships. It is important to work on the “triangle” [above]. Many issues should be settled by Line Officers, rather than the Central Office or the Solicitor, he added.

Remember common goal: A participant reminded everyone that the Bureau and the Tribes share a common goal – the protection of Tribal homelands – and that working together can produce real results.

Implementation: A tribal employee suggested that tribal and Bureau staff be brought together to design implementation strategies for the new regulations.

Honoring tribal processes: There were examples of tribal resolutions and documents that were not respected by the Bureau. In one case a tribal easement document was sent to the BIA for signature, but came back with different terms and language. “It felt like our toes were stepped on,” said a participant.

A self-governance tribal employee advocated for more tribal control and access to funding decisions. He felt that regulations often tie tribal hands.

Regulation language: The use of “may” and “shall” should be carefully looked at in the regulations because that is the area where it needs to be clear what is optional and what is mandatory.

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CONCLUDING REMARKS:

Margaret thanked everyone for coming and taking time away from both families and jobs. She appreciated the chance to communicate and collaborate, and said she and her office were committed to making this happen as often as possible. She said that the summary of today's meeting would be emailed to all participants before the end of the year. She encouraged everyone to make additional comments to Margaret, or Michele, Director of RACA, any time in the next few months.

*Summary prepared by Lucy Moore. Please contact her with comments and corrections.
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