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MINUTES OF THE  
BUREAU OF INDIAN AFFAIRS  
TRIBAL LEASING CONSULTATION SESSION

January 10, 2012

Arctic Club  
700 Third Avenue  
Seattle, Washington

REPORTED BY: Yvonne Gillette, CCR, RPR

- 1 PRESENT:
- 2 Bryan Newland
- 3 Elizabeth Appel
- 4 Stephen Simpson
- 5 Regina Gilbert
- 6 Amy Borchert
- 7 Brian Svec
- 8 Sarah Lawson
- 9 Ralph Honhongia
- 10 Laurie Ann Smith
- 11 Rodney Abrahamson
- 12 Rudy Peone
- 13 Wes Friday
- 14 Michael Burnett
- 15 Ricky Joseph
- 16 Frieda Booth
- 17 Jan Michael Reibach
- 18 Gary Bohnee
- 19 Chris Stearns
- 20 Philip Hartu
- 21 David Burnett
- 22 Jeff Warnke
- 23 John Dossett
- 24
- 25

- 1 PRESENT (Continued):
- 2 Lael Echo Hawk
- 3 Leora C. Circle
- 4 Herb Westmoreland
- 5 Harry Chesnin
- 6 Robin Arnoux
- 7 Ed Goodman
- 8 Joe Diehl
- 9 Claudia Tenney
- 10 Monica Sampson
- 11 Amber Green
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TUESDAY

January 10, 2012

8:30 a.m.

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MR. NEWLAND: Good morning. Why don't we-- this ain't church, so why don't folks in the back come up to the table and we'll have a nice consultation session this morning.

I'll introduce the federal folks here. My name is Bryan Newland. I'm a senior policy advisor to the assistant secretary. With me here is Steven Simpson and Liz Appel from our office of regulatory affairs.

And I know we have several other folks from the bureau here, if you could please stand up, maybe introduce yourself.

MR. WESTMORELAND: I'm Herb Westmoreland for the Olympic peninsula agency.

MS. GILBERT: Good morning, everybody. My name is Regina Gilbert. I work with the Office of Regulatory Affairs. I work with Liz Appel.

MS. GREEN: Good morning. My name is Amber Green. I work in the Northwest Regional Office in the realty department.

1 MS. CIRCLE: My name is Leora Circle. I'm a  
2 realty specialist at Puget Sound Agency in  
3 Everett, Washington.

4 MR. JOSEPH: Good morning, Ricky Joseph.  
5 Realty officer, Puget Sound Agency. Everett,  
6 Washington.

7 MR. SVEC: Good morning. My name is Brian  
8 Svec. I represent the Makah Tribe.

9 MR. DENNEY: I'm Dale Denney, realty officer  
10 for the Makah Tribe.

11 MS. ARNOUX: I'm Robin Arnoux, realty  
12 officer from the Spokane Tribe.

13 MR. BOHNEE: Good morning. Gary Bohnee with  
14 the Salt River American Indian Community in  
15 Arizona with the Office of Congressional and  
16 Legislative Affairs.

17 MR. GOODMAN: Good morning. My name is Ed  
18 Goodman. I'm an attorney. I represent a number  
19 of tribal housing authorities and tribal housing  
20 programs.

21 MR. DIEHL: My name is Joe Diehl. I'm with  
22 the Northwest Indian Housing Association.

23 MR. STEARNS: My name is Chris Stearns. I'm  
24 an attorney with Hubbs, Straus, Dean, and Walker  
25 here in the Seattle office.

1 MS. SULLIVAN: I'm Bethany Sullivan. I'm  
2 with the solicitor's office in Washington, DC.

3 MR. REIBACH: Jan Michael Reibach. I'm the  
4 tribal lands manager for the Confederated Tribes.

5 MR. CHESNIN: Harry Chesnin, general counsel  
6 for the Skagit Indian Tribe.

7 MR. WARNKE: Jeff Warnke, government and  
8 public relations for Chehalis.

9 MR. BURNETT: David Burnett, Chehalis Tribe.

10 MR. HARTU: Phil Hartu, chairman of the  
11 Cowlitz Indian Tribe.

12 MS. TENNEY: Claudia Tenney. I'm a board  
13 member.

14 MR. NEWLAND: Good morning, everybody.  
15 Thank you for coming out today. This is my third  
16 day up here in the great northwest. I had the  
17 privilege of playing some basketball the other  
18 night at the Suquamish Indian Tribe. I thought I  
19 was invited to play pick up basketball, but I  
20 apparently joined the team. And we got our butts  
21 kicked by Port Gamble.

22 Yesterday I got up early and drove out to  
23 the coast on the peninsula and drove around the  
24 Quinault reservation. And it's just amazingly  
25 beautiful up here in this part of the country.

1 And you guys are obviously blessed in this part of  
2 the country. And that's kind of the spirit that  
3 we undertook this regulatory reform, was in  
4 recognition that these are your homelands. They  
5 are not the Bureau's lands. And you guys should  
6 have control over those homelands.

7 And in concert with this regulatory reform  
8 effort, we are also pushing legislation I'm sure a  
9 number of you are familiar with known as the  
10 Hearth Act, which would effectively allow tribes  
11 that wanted to opt in to assistance similar to  
12 what they use at Tulalip, where feds remove  
13 themselves also completely from the leasing  
14 process. So with this regulatory reform effort  
15 and support of the Hearth Act, we are putting a  
16 high priority on returning tribal control over  
17 tribal homelands.

18 So I look forward to our discussion today.  
19 Briefly, I'm going to run through an overview of  
20 the proposed regulation. It has significant  
21 differences from the draft regulation I know a  
22 number of you reviewed and consulted with last  
23 spring.

24 So after that, we'll just open the floor to  
25 comments and questions. I would ask that you

1 state your name and your tribe very clearly when  
2 you are making your comment. We have a court  
3 reporter here who is going to make sure that  
4 everything you say can and will be used against  
5 you.

6 You know, we're going to go back in February  
7 and lock ourselves in a room and read those  
8 comments and make adjustments to the proposed rule  
9 as necessary. So with that, we're going to try to  
10 be out of here by noon. And I mean unless the  
11 discussion goes longer.

12 MR. SIMPSON: And we just had someone else  
13 come in. I won't call him out by introducing him  
14 to you, I will let him introduce himself.

15 MR. DOSSETT: My name is John Dossett.

16 MR. NEWLAND: With that, if you want to  
17 start us running through the proposed rule.

18 So you see this has been a work in progress  
19 for a long time. Actually, a number of you are  
20 aware that this is -- the Department has taken  
21 shots at reforming its leasing regulations on a  
22 number of occasions in the past. We're committed  
23 to getting this done. We have spent the better  
24 part of the president's first term drafting what  
25 you see before you. We consulted with a number of

1           you last spring. I see a lot of familiar faces  
2           here. And we received a number of tribal  
3           comments. We broke them down into discrete  
4           comments on each particular provision. And when  
5           we did that, we had over two thousand comments to  
6           review.

7                     Steve Simpson and Liz Appel and a number of  
8           others were quite literally locked in a room for  
9           ten, twelve hours at a time last spring making  
10          adjustments based on those tribal comments. And I  
11          think the proposed rule that you have before you  
12          reflects the value that we place on tribal  
13          consultation. And a number of changes were made  
14          based upon the comments and recommendations from  
15          you.

16                    So those of you who are familiar with the  
17          current regulations know that there's basically  
18          two categories of leases, there's. Agricultural  
19          leasing and everything else. We have heard from a  
20          number of folks that this is inefficient. It  
21          makes it difficult for tribes.

22                    So one of the things we sought to do with  
23          these-- this proposed rule was to break leasing  
24          down into smaller subcategories that would  
25          hopefully make the review of -- the Bureau's

1 review of proposed leases more efficient. So we  
2 have -- now we'll have housing or residential  
3 leasing. We will have -- we will continue  
4 agricultural leasing. We are not reforming those  
5 leasing provisions at this time. We will have  
6 business leasing. And then wind and solar energy  
7 leasing.

8 You see before you some of the significant  
9 changes that we made to the draft rules that some  
10 of you may be familiar with based upon tribal  
11 comments. This is not all of them. These are  
12 some of the provisions. And I think those of you  
13 who read the proposed rule will be familiar with  
14 the other changes that will be made.

15 You see here, we have general provisions in  
16 the proposed rule. Kind of set up the road map  
17 for everything else. They will continue to apply  
18 to leases on Indian land. They will still require  
19 anyone who doesn't own a hundred percent of the  
20 interest to obtain a lease before taking  
21 possession.

22 Some of the other big changes we're making  
23 to permitting, the Bureau is not in the business--  
24 will be not be in the business anymore of  
25 reviewing or approving permits. We really have no

1 legal role to play with respect to permitting.  
2 That's exclusively tribal control.

3 You see in the residential sub part, here on  
4 this slide, is breaking out some of the key  
5 provisions with each of the new sub parts. The  
6 wind and solar energy. I'm sure there will be a  
7 lot of solar energy development here in northwest  
8 Washington. But you see some of those new  
9 provisions.

10 Here are the time lines. This is a key  
11 feature of the proposed rule. The time lines that  
12 we are timing this regulation for BIA review of  
13 leases, for residential leases, it's no more  
14 indefinite Bureau review. We have thirty days to  
15 review your residential lease and issue a  
16 determination. If there's-- if there's  
17 complexities with that lease, or if we're  
18 inundated, the Bureau will have the flexibility to  
19 work with you on an extension of that time frame,  
20 but it's important to note that these are  
21 enforceable time limits. You will have the right  
22 to bring enforcement action against the Bureau for  
23 delay if these time lines are not met. We are  
24 working with the director on trying to train our  
25 staff to make sure we hit these time lines.

1           These are the outer boundaries. We hope  
2           that 30 days for residential leasing doesn't  
3           become a matter of course. And we hope that  
4           Indian country holds our feet to the fire on this.  
5           We see business leasing, similar time of  
6           structure. Longer time lines to allow some more  
7           flexibility to review complex business deals or  
8           large developments. But, again, these time lines  
9           are outer boundaries of the time we can take to  
10          review.

11          Also notable are the provisions for  
12          subleases. Subleases grant an interest in land  
13          that is less than a full lease, which we should  
14          have already reviewed and approved. And if we do  
15          not hit our 30-day deadline for review of  
16          subleases, they automatically go into effect.

17          I would like to note that our draft rule  
18          contained a similar provision for mortgages. And  
19          based on tribal comment and comments from lenders  
20          who do business in Indian country, they found  
21          value in the BIA's approval of mortgages. So  
22          based on our consultation last year, we removed  
23          the automatic approval for leasehold mortgages,  
24          but would certainly invite comments on this  
25          provision in this consultation.

1           The current leasing regulations give the BIA  
2 a lot of latitude in deciding whether to approve  
3 or disapprove a lease, and we wanted to reframe  
4 the way we think about leasing, with the default  
5 mindset is that leases should be approved unless  
6 there is a compelling reason to disapprove.

7 Really kind of reframing the way that the Bureau  
8 looks at leasing we feel will have a positive  
9 effect in Indian country going forward.

10           You see some of the notable provisions for  
11 subleasing under the proposed rule. BIA consent  
12 or approval is not expressly required. It will be  
13 deemed to approve provisions if we don't hit our  
14 time lines.

15           MR. SIMPSON: And I would note the second  
16 provision here, the auto proposed rule with master  
17 leases and development plans is directly in  
18 response to tribal comments as well.

19           MR. NEWLAND: Here you see some of the  
20 provisions related to assignments. There is a  
21 change for business leasing and wind and solar  
22 leases that the lessee can assign the lease to  
23 other parties without BIA approval. This allows  
24 for things, again, like setting up multi-target  
25 business deals and developments.

1           Amendments. There was a lot of internal  
2 discussion and a lot of discussion in tribal  
3 consultation about how we were going to treat  
4 amendments and whether we were going to use a  
5 similar type of set up with amendments like we do  
6 with subleases. And what we had decided was an  
7 amendment is a fundamental change to the lease  
8 itself. And when you are altering the lease, the  
9 encumbrance of the trust asset, that we would  
10 still have to pursue to the Department's trust  
11 responsibility to maintain that approval  
12 authority.

13           Some other notable changes from the current  
14 practice with respect to rental requirements. And  
15 this is an area where we-- looking at leasing,  
16 really felt strongly about-- this is -- tribes a  
17 lot of times will lease tribal lands to tribal  
18 citizens or tribal business entities for nominal  
19 rent. And it was a very cumbersome process to go  
20 through the appraisal and valuation, you know,  
21 requirements for leasing tribal lands.

22           And, you know, we said tribes know best how  
23 to use their land and what their land is worth and  
24 what a business deal is going to mean, or a  
25 residential lease or a housing development is

1 going to mean in your communities. And the  
2 Department is going to defer to tribal judgment on  
3 rental valuation for leasing tribal lands.

4 Here you see some of the provisions on  
5 direct pay and periodic review and adjustments of  
6 the rental payments that lessees made to tribal or  
7 individual Indian landowners.

8 Improvements. We have got the folks from  
9 Chehalis here. Again, one of the center pieces of  
10 the proposed rule is how we treat improvements  
11 with respect to taxation. We know the case that's  
12 going on in Chehalis and other parts of the  
13 country where tribes are trying to do renewal  
14 energy development, and states and counties and  
15 townships are attempting to impose taxes on  
16 improvements on tribal lands. And we have put  
17 ourselves out there as a department in support of  
18 tribal economic development says that those are  
19 tribal assets. You should not be subject to state  
20 and local taxation.

21 Bonding and insurance. Not even anything  
22 approaching an expert on these issues. But I'll  
23 leave this slide up here for a moment for those of  
24 you who are experts to digest.

25 Here's a leasing for homesites on

1 individually owned and fractionated lands. You  
2 can see the difference in between the current  
3 regulations and what we have proposed. Fair  
4 market rental is a notable provision. We have a  
5 lot of comments on the consent provisions or  
6 percentages in the draft rule and folks wanting us  
7 to tinker with those. I do want to point out  
8 those are statutory limitations that we were  
9 working with within. We cannot change the  
10 statutory structure through these regulations. So  
11 we're kind of stuck with what we have.

12 And here's some more on the consent  
13 provisions. Again, this is a valuation for leases  
14 on homesites or individually owned land.

15 For those of you who know, there has been a  
16 lot of discussion on what the department is going  
17 to do, how the department is going to approach  
18 those individual landowners whose whereabouts are  
19 unknown, and what we're going to do with their  
20 right to compensation. For a number of reasons,  
21 and most importantly, the Department's trust  
22 responsibility to Indian landowners, we are not  
23 going to waive the right of those people whose  
24 whereabouts are unknown to receive compensation.  
25 I think the last thing we want to do is put people

1 in a position where they return to their tribal  
2 communities to find that people are taking  
3 possession of their lands, and they haven't been  
4 receiving compensation for that.

5 I know this makes it difficult to lease  
6 lands in areas where there's highly fractionated  
7 allotments, and people's whereabouts are unknown.  
8 But the Department has a trust responsibility to  
9 tribes and individual Indian landowners. But we  
10 are willing and actually encouraging people to  
11 submit comments and ideas on how we can make it  
12 easier to lease homesites on individually owned  
13 allotments where this situation happens.

14 And here's some of the features of our  
15 renewable energy sub part. Wind and solar energy.  
16 For wind energy, we're doing leasing. And BIA  
17 review of these activities will take place in two  
18 steps. The first is for assessments for people  
19 who are coming out and putting up towers to do  
20 resource assessments. And that will limit the  
21 scope of environmental review of those activities.  
22 And then going forward, if people want to have the  
23 resource and want to develop wind energy, they  
24 will do the full build out, and the BIA will do  
25 its environmental review of the entire project at

1 that time, instead of everything up front.

2 Here's our time line. We're going to be  
3 done with our in person face to face tribal  
4 consultation meetings next week. This is the  
5 first of three. We're hitting different parts of  
6 the country that we missed during our consultation  
7 on the draft rule. Thursday we're going to be in  
8 sunny Palm Springs, California. And then next  
9 week we're going to be in Rapid City, South  
10 Dakota. And then in February, as I mentioned at  
11 the outset, we're going to sit down, have a knock  
12 down, drag out at the department over reading  
13 through all the tribal comments, making any  
14 necessary changes.

15 We're pouring resources, man hours, person  
16 hours, a lot of money, a lot of time and effort  
17 into getting this done ASAP. And that's our  
18 commitment to Indian country. And frankly with  
19 all the blood, sweat, and tears that Stephen, Liz  
20 and I will put into this, we will be very sad if  
21 we don't get this done. I know a lot of you have  
22 been working on this a lot longer than many of us  
23 at the Department. So this is the time frame.  
24 And we're going to do everything in our power to  
25 meet it.

1           So you see here where you can submit your  
2           comments electronically. Those of you who have  
3           brought comments today, we will certainly take  
4           them. I would strongly encourage you to submit  
5           your comments electronically. It will go a long  
6           way for us to hit the time frame on the previous  
7           slide, parcel out the tribal comments, and let us  
8           review them in an efficient manner.

9           With that, let's review the proposed rule.  
10          At this time, Liz has the mic. And if you have  
11          comments that you want to make, now is the time to  
12          do it.

13          PANEL MEMBER: It's more of a question than  
14          a comment. When you began, you talked about  
15          segregating the residential from the business and  
16          the wind and solar. As you are looking at those  
17          comments, is that segregation carrying through the  
18          whole evaluation? And is it likely or possible  
19          that some parts of this would be approved and not  
20          others?

21          MR. NEWLAND: You mean of the final rule?

22          PANEL MEMBER: Right.

23          MR. NEWLAND: We're going forward with  
24          everything that you see that is before you in your  
25          packet. We're pushing it out. You know, we made

1 the decision very early on to set aside  
2 agricultural leasing, because there's some unique  
3 issues with that, and certainly on the radar for  
4 2013 and beyond.

5 MR. SIMPSON: Let me add to that. As Bryan  
6 said, there's some of us at the Department that  
7 have been working on this for a long time. Back  
8 in 2001, the first of my three times dealing with  
9 these regulations, we were going from the entire  
10 rule, redo the entire part. And when we were in  
11 the middle of dealing with the-- or writing the  
12 final regulations. Congress passed the new rule  
13 in 2000. And we didn't have time to figure out  
14 how that worked with everything. So we  
15 repromulgated the existing regulations as what is  
16 now sub part F.

17 There is nothing on the horizon that we know  
18 of that is going to be in the next six or eight  
19 months where Congress is going to make that big of  
20 a change. So we're expecting the law to remain  
21 the same. And with that, we're expecting to  
22 promulgate all of these.

23 PANEL MEMBER: Thank you. At this point,  
24 since you have 2,000 comments to review, I'll  
25 withhold comments.

1 MR. NEWLAND: We certainly want more tribal  
2 comments, because they have been instrumental in  
3 shaping what we have. And this is close to final  
4 product, but certainly looking for a lot of tribal  
5 Indian input.

6 PANEL MEMBER: I've got sort of a mixed  
7 policy and legal question.

8 MR. NEWLAND: Sorry. Can you --

9 MR. HARTU: My name is Phil Hartu. I'm with  
10 the Cowlitz Indian Tribe. The issue I guess that  
11 some of the legal commentators and people are  
12 talking about I guess is the BIA, the deemed  
13 approved actions or inactions, or whether that's  
14 an action or not. A lot of these regulations you  
15 have some time frames where you can make a  
16 decision to approve it, or if you don't do  
17 anything, it's deemed approved. What-- I guess as  
18 a fairly governmental action, for a tribe that has  
19 to borrow money or come in with a lease, it would  
20 be better to have something.

21 If you are supposed to do-- take an action  
22 within 30 days, if you approve the lease, it seems  
23 to be a better business practice that you have  
24 done something other than have to go to the banks  
25 or your partners or having to tell the courts,

1 well, yes, the Interior Department looked at this,  
2 and it's deemed approved because they didn't do  
3 anything.

4 MR. NEWLAND: That's something that we have  
5 talked about throughout this entire process. And,  
6 again, one of the things that we're doing in  
7 concert with this push is retraining. And we're  
8 talking about how to do that. And just because a  
9 sublease will be allowed to go into effect does  
10 not mean that we are not going to try to review it  
11 and get an approval out there.

12 But for a lot of subleases, especially on  
13 residential for residential use, I mean, people  
14 can't-- some people are subleasing housing for one  
15 year from year to year. And they cannot have the  
16 Bureau sitting there for a year taking the time to  
17 review those. We certainly understand where you  
18 are coming from.

19 MR. SIMPSON: On the legal end, we also--  
20 you'll see that the deemed approved is limited now  
21 to subleases and amendments. And the draft rule,  
22 we had deemed approved for leasehold mortgages and  
23 assignments as well.

24 And we got a lot of comments from tribes.  
25 We got comments from HUD. It said exactly what

1           you are saying, that lenders weren't going to like  
2           that. And it was-- they wanted something  
3           definite, that we had actually taken an action.  
4           So that's in fact why we don't have deemed  
5           approved anymore for assignments and for  
6           mortgages. And also why we don't have extensions  
7           for those.

8           You know, if you remember the time line  
9           slide, those were the two areas where the Bureau  
10          can't get an extension longer than 30 days, or  
11          longer than the initial period. And it's to try  
12          and work with the lenders and the people who are  
13          really looking at these mortgage and financings  
14          much more than we are. And we recognize that. So  
15          we want to make that-- make our portion of that  
16          process as quick and easy and definitive as  
17          possible.

18          PANEL MEMBER: The goal will be that an  
19          action is taken other than just, you read the  
20          newspaper, and somebody in the Interior Department  
21          said we got those in the mail and we forgot to do  
22          something with them. We don't know whether we're  
23          going to approve this or not, but it's deemed  
24          approved, so we don't care anymore.

25          So more certainty that you have looked at

1           it. And if you didn't do it. You didn't do it on  
2           purpose so you know they were going to be  
3           approved.

4                   MR. SIMPSON: Right.

5                   MR. CHESNIN: Hairy Chesnin, general counsel  
6           for the upper Skagit Indian tribe. First I would  
7           like to say, particularly out here in the  
8           northwest, the northwest region and the Puget  
9           sound agencies do a great job of supporting tribes  
10          with respect to realty issues. That's also a  
11          plus. I think the proposed regulations are an  
12          excellent recognition of achievements of the  
13          tribes out here in terms of their ability to  
14          manage their own affairs on these critical issues.

15                  The second thing I would point out, is  
16          taking a look at 162.415(c) -- and I must confess  
17          to having been intimately involved in the Chehalis  
18          matter as well. I'm only concerned that certain  
19          non Indian government entities will still try to  
20          find a way to run the language here. And what I  
21          would suggest to the committee is that it includes  
22          a reference, not only to the lease itself, besides  
23          the improvements, not only the lease itself, but  
24          the FFME, the personal property.

25                  During the Chehalis discussions, there were

1 references to, well, we might have gone--  
2 references to going against the value of the  
3 personal property, which of course impacts the  
4 value of the operation and would undercut the idea  
5 that the improvements are nontaxable.

6 There's case law in Washington about leases  
7 from public entities, leases from public entities  
8 and the 90 percent test. And of course that goes  
9 against the ability of small tribes to enter into  
10 alternative leasing arrangements for their benefit  
11 and as a result of their own sovereign decisions.  
12 And, again, it would have the effect of driving  
13 potential economic development, which allows  
14 diversification away from gaming, driving that out  
15 of the reach of particularly small tribes.

16 So I would urge, when you look at  
17 162.415(c), you take a look at some kind of a  
18 parenthetical or some kind of expansion of that  
19 language. The language is excellent. But I think  
20 that that will be-- I hate to say that, but there  
21 will be lawyers out there parsing the language and  
22 looking for a way to still try to get into court  
23 to tax tribes.

24 MR. NEWLAND: Thank you very much for that  
25 comment. What we're trying to do here, we

1 recognize that this regulation isn't airtight  
2 protection for Indian country. It's our best  
3 effort here. We certainly recommend or encourage  
4 or request that you submit proposed language to  
5 our consultation -- still up there -- email.

6 And this is, again, one of the center pieces  
7 of this proposed rule. And your comment will be  
8 debated over cold pizza.

9 MR. SIMPSON: Is that a promise that we get  
10 cold pizza?

11 MR. NEWLAND: Anybody else?

12 MR. GOODMAN: Ed Goodman. I just wanted to  
13 follow up on the deemed approved comment or  
14 question. I notice that the deemed approved  
15 process says deemed approved except to the extent  
16 that it's inconsistent with the sublease or  
17 amendments inconsistent with federal law. And I  
18 wonder if that's an exception that kind of devours  
19 the deemed approved process. Because what does it  
20 mean to have something that's deemed approved, but  
21 holding back something to say that it's not fully  
22 approved because there may be pieces of what's  
23 been submitted that can't be approved?

24 MR. NEWLAND: That's a great comment. And  
25 prior to you bringing that up, when we first were

1 working on this type of regime for subleasing, one  
2 of the things we were looking at is very similar  
3 language, and a lot more money at stake usually  
4 than something like a residential lease.

5 I believe at that point, it would become a  
6 matter of-- in terms of, you know, how -- the  
7 extent it does comply with the master lease or  
8 federal law would be a matter of dispute between  
9 the parties of the lease itself for the most part.

10 And, again, we are not looking to just have  
11 our folks in our field offices throw up their  
12 hands and say we're not going to review subleases  
13 because it will just automatically go into effect,  
14 but we also wanted to have a mechanism for relief  
15 when there was inaction or delay.

16 MR. SIMPSON: And knowing that we had-- we  
17 were doing these deemed approved, or allowing for  
18 that, we wanted to make sure that something large  
19 that we really should have caught didn't slip  
20 through the cracks. That-- so you'll also see  
21 that there's a provision in the proposed  
22 regulations that allows that-- that says that any  
23 provisional lease or sublease or any other  
24 document that violates federal law will be  
25 considered a violation of the lease and of the

1 regulations. So that we can take the-- in  
2 consultation with the tribe, we can pursue  
3 cancellation or other remedies.

4 MR. NEWLAND: Just one more brief comment.  
5 I don't want to monopolize the conversation here.  
6 But we're not looking to have the Department kind  
7 of advocate its trust responsibility but this is a  
8 shift in the Department's mindset. You know,  
9 these types of decisions over tribal land use  
10 belong with the tribal governments. And we're  
11 going-- or the Indian landowners. And we're going  
12 to look to them to monitor and control the use of  
13 their lands. And this is a provision that we feel  
14 facilitates that. But we're certainly not looking  
15 to throw up our hands and just walk away from the  
16 trust responsibility.

17 MS. SMITH: I'm glad to hear you're not  
18 going to throw up your hands and walk away from  
19 that trust responsibility. And I guess that leads  
20 up to my question. I apologize for being late.

21 MR. SIMPSON: Can you give us your name?

22 MS. SMITH: My name is Laurie Ann Smith.  
23 I'm with the Nez Perce tribal housing authority.  
24 And I guess what my question is, even after the 30  
25 days when the lease is deemed approved, is BIA

1 going to continue to at least review the documents  
2 in case there is some type of conflict with rules  
3 or regulations? Or do they just let it go  
4 through, and nobody ever looks at it?

5 MR. NEWLAND: Yes to your first question.

6 MR. HARTU: Again, this is Phil Hartu. I  
7 don't have a question about this. I just have  
8 some federal officials here that are going to be  
9 going back to Washington, DC and implementing some  
10 new rules and regulations that when we talked  
11 about the trust responsibility to the tribes, we  
12 also want to make sure that when you're back in  
13 Washington, DC that you have adequate funding for  
14 the regional offices, the superintendents. So if  
15 there has to be appraisals, surveys, or all the  
16 things in the little checklists that the feds  
17 have, there's adequate funding for the offices and  
18 the agencies to complete the requirements that you  
19 have in here.

20 Like I said, I think most tribal officials  
21 know and leaders know that things can be shut down  
22 because you have to have an appraisal or we had to  
23 do this or that. So make sure that there's  
24 adequate funding to make these regulations work in  
25 the time frame that you have done, because many

1 times the time frames aren't done because you  
2 don't have adequate resources to complete the job.

3 MR. NEWLAND: That's a great comment. Thank  
4 you. One of the things that we have been mindful  
5 of in developing this is how to make our leasing  
6 program work with what we're faced with. And we  
7 certainly know that you put your money where your  
8 mouth is. And if we want the trust and tribal  
9 control of leasing to be a priority, we have to  
10 make sure to do that. I appreciate your comment.

11 MR. HARTU: Or give the tribes the  
12 opportunity to do those services themselves,  
13 self-determination and sovereignty.

14 MR. NEWLAND: Do we have anyone else want to  
15 bring up any parts of the rule?

16 PANEL MEMBER: Yeah. I had a quick question  
17 on 162.446. How will the BIA decide whether to  
18 approve an amendment to a business lease? The  
19 third thing, when it says you will only disapprove  
20 a business lease if -- it says, we find a  
21 compelling reason to withhold our approval in  
22 order to protect the best interest of the Indian  
23 landowners. I was wondering if you could expound  
24 what you understand compelling to mean.

25 MR. NEWLAND: I'll let Stephen take a shot

1 at that. But that's the trust responsibility  
2 subsection. I'll call it that. I don't want to--  
3 I don't want to get in trouble again by saying  
4 what is and what is not compelling. But that is  
5 the one where we say, we look at this, and say,  
6 are we going to damage somebody's right to seek  
7 value from their land.

8 MR. SIMPSON: I think that's the key to it.  
9 You know, you will hear lawyers say all the time,  
10 and I say it all the time, every lawyer in this  
11 room says it all the time, we know it when we see  
12 it. But in this case, that's especially true. We  
13 won't know what a compelling reason is until we  
14 actually get one.

15 But Bryan's right, this is -- you know, you  
16 see where we're headed here. You know, we have  
17 got protections on the consent. And we have got  
18 the violation. You know, we want to make sure  
19 that the lessee is not some scum bag out there  
20 that's not going to do what they need to do. But  
21 I think the point when of the -- of this whole  
22 provision is to make sure that we're only-- rather  
23 to say, look, the default here is approval. So  
24 we're trying to narrow down why we would  
25 disapprove.

1           And it's not just that we think that there  
2           might be a best interest determination here. But  
3           rather that there's a compelling reason to say,  
4           no, no, this is, you know, this is something big,  
5           a big deal that we have to disapprove for this,  
6           because it's going to be a big problem for the  
7           landowner.

8           Again, it's more to emphasize that the  
9           default here is approval. But that we still have  
10          to look after the best interest of the landowner.  
11          Make sure it is protected.

12          PANEL MEMBER: Just follow up on that. I  
13          wonder. I mean, the language you just used  
14          obviously is not the language you're going to  
15          include, the scum bag --

16          MR. SIMPSON: No, they are all legal terms  
17          of art that we don't put in regulations.

18          PANEL MEMBER: I missed that class. But is  
19          it possible for the Bureau to consider at least  
20          putting in some examples for purposes of  
21          illustration. Even if you don't want to capture  
22          the entire universe, to understand what you are  
23          trying to do, but at least to illustrate what the  
24          Bureau might be looking at. At least give some  
25          clarity when you are looking at that particular

1 exception.

2 MR. NEWLAND: You know, I would encourage  
3 you to submit some language yourself. I think  
4 that, again, when you're-- for the lawyers and the  
5 nonlawyers in the room, when you're drafting  
6 statutes or ordinances or regulations, you don't  
7 want to be too complete, because you can't capture  
8 everything. And you do want to build in some  
9 flexibility for our professionals to do their job.

10 MR. SIMPSON: We can take a look at that.  
11 We also don't want to set up a situation where we  
12 will have a lessee's lawyer come in and say, well,  
13 that's not a compelling reason, because it's not  
14 on your list.

15 PANEL MEMBER: It could be included but not  
16 limited to.

17 MR. SIMPSON: Exactly.

18 MS. ECHO HAWK: Good morning. Lael Echo  
19 Hawk here on behalf of Spokane Tribe. If you were  
20 to include something like that, I understand  
21 limitations within the regulation, but it might be  
22 something that you could include in the preamble  
23 to the rule. That might help illustrate what  
24 those compelling reasons were and perhaps examples  
25 from the past. That might be helpful to the

1           tribe.

2                   MR. NEWLAND: Thank you.

3                   MR. BOHNEE: Gary Bohnee. My comments are  
4 specifically related to the homesite lease  
5 provisions. And it's the view of the community  
6 who's been working with the Bureau for several  
7 years now on a particular problem we're having in  
8 the community in getting homesite leases approved  
9 under the current regulatory situation now. And  
10 we feel that it further exacerbates the problem  
11 with the proposed regulations. And so on behalf  
12 of the community, we have talked about this  
13 internally. I'm getting to the question, is this  
14 an all or none regulatory package? We prefer that  
15 not move forward with the homesite leases.

16                   I guess a little bit of background with  
17 respect to the lease issue for allotted lands.  
18 Prior to the or within the last two years, and I  
19 guess it's fair to say after the Cobell decision,  
20 we were having approved 40 to 50 homesite leases a  
21 year over the last couple of years. That's down  
22 to about ten or less a year, because of the  
23 requirement, the hundred percent consent  
24 requirement, the bonds that are being proposed in  
25 the new package.

1           And so we think it further exacerbates that,  
2           the facilitation of homesites on allotted lands.  
3           And a couple of the things that I'll mention that  
4           are in the regulations. Section 162.320, 162.334,  
5           some of the issues that are raised, the appraisal  
6           costs will increase delay in the homesite process.  
7           Obviously, homeowners are now required to -- or  
8           someone will be required to undertake an  
9           appraisal. We don't know, is that going to be the  
10          Bureau? Will that be the tribe? Probably not.  
11          I'm sure it will fall back on the homeowner.

12           And of course you had mentioned previously,  
13          these are statutory requirements with respect to  
14          consent. So we believe that going beyond the  
15          requirements by a hundred percent of the allotted  
16          landowners, we believe the ILCA standard of  
17          51 percent is fair and would ask that that-- you  
18          consider that as well.

19           I guess, going further, as we walk this out,  
20          what happens with respect to eviction and trespass  
21          action when there's default on a homesite lease?  
22          Who would undertake that process? How would that  
23          be done? The community currently is a  
24          self-governance community. So we have the realty  
25          program. And if this process is going to be the

1           tribe or the tribal departments, you know, they  
2           would have to go to Indian families and say you  
3           are no longer-- you can't live on your own land,  
4           because you are not paying rent to your brothers  
5           or sisters or whoever it might be.

6                     And we also believe then reasonable five  
7           year rental adjustments, that provision is  
8           unreasonable, as well as the bonding and insurance  
9           requirements. We have been talking to various  
10          individuals who are familiar with the bonding  
11          process. And it seems as though the requirements  
12          for families or individuals looking to get the  
13          required bonds are very onerous. There's a lot of  
14          financial, I guess, requirements involved in  
15          obtaining the particular bonds. So that it  
16          appears another step for the landowner, at least,  
17          is one that is very onerous.

18                    And then just, I guess one more, I guess  
19          philosophically in the way Indian families look at  
20          the use of their own land, and kind of where we're  
21          going in this direction, is just conflicts with, I  
22          guess, long standing traditions of homeownership  
23          within Indian country. And just particularly, I  
24          guess, within the community, the issue of -- the  
25          current issue we're having with leases that -- or

1 homesites that were approved through the Bureau  
2 going back to the 1970s, and currently, owners who  
3 are unable to get the lease approved, not for -- I  
4 guess, you know, not for-- because it was their  
5 fault, you know. They had gone through the  
6 process at the time that was mandated at the  
7 Bureau. But for some reason, paper work was lost  
8 or whatever.

9 We have been told, at least preliminarily  
10 from the western region, that the new requirements  
11 would be imposed on those older leases. So we  
12 would -- I guess, one comment would be to perhaps  
13 go back and look at the situation of  
14 grandfathering in the leases that go back many,  
15 many years.

16 And so, I guess, just in general, also I  
17 would like to reference a resolution that was  
18 passed by the National Congress of American  
19 Indians in Portland. And in a sense, it  
20 encapsulates this pretty clearly. In the  
21 resolution, it references that homesite leasing  
22 for Indian families is not a commercial venture.  
23 Instead it is basic need and must be viewed in--  
24 and must not be viewed in economic or business  
25 terms.

1           I think those are two provisions that  
2 encapsulated what we're trying to achieve in the  
3 community. And I guess to just to close and say  
4 that, again, I'm sure there will be a larger  
5 contingent than myself in Palm Springs. So I'm  
6 sure you will hear the same message.

7           MR. NEWLAND: I really appreciate those  
8 comments. I have been heavily involved in on  
9 working on addressing a lot of the issues that you  
10 raised. One of the things -- I'm glad you brought  
11 it up. Leasing fractionated land is very  
12 difficult. And it's time consuming. And there's  
13 a lot of problems. It's not really of the tribe's  
14 making.

15           But, again, I want to reiterate that we  
16 have-- we also-- the Department has a trust  
17 responsibility to those individual Indian  
18 landowners, regardless of whether or not their  
19 whereabouts are unknown. And this is something  
20 that we consciously decided after a lot of  
21 discussion, recognizing that will make it more  
22 onerous in places like Salt River.

23           But what we'd also like is help from Indian  
24 country in determining how we value that land, how  
25 we come up with the value. I know a lot of the

1 hang ups are in the appraisal process. And, you  
2 know, honestly, there's just a lot of delays with  
3 the appraisal process. And we would certainly  
4 welcome comments on how to improve the way that we  
5 value those lands to come up with a fair market  
6 rental.

7 We've also worked with Salt River and other  
8 tribes on reforms for people to waive their  
9 consent to leasing, or waive their consent to the  
10 fair market rental to make the process go faster.  
11 And we would certainly welcome any other ideas.  
12 But I think at this point, again, I want to  
13 reiterate that the Department is not going to step  
14 in and waive somebody's right to receive  
15 compensation for their land on their behalf.

16 PANEL MEMBER: I'm over here. On the  
17 performance bonds, I think it's section 162.324.  
18 So it's page 73.799 under subsection C. It says  
19 the lease must-- we may adjust the security bond  
20 performance requirements at any time to reflect  
21 changing conditions.

22 So if we're going to make those adjustments,  
23 is there any way that you would be open to  
24 having-- I mean, that sounds very one sided.  
25 We're going to make a change. Is there any way to

1 involve the parties to that, so they might have  
2 some say? I think there's a sixty day notice. It  
3 seems that's pretty much a one sided  
4 determination.

5 MR. SIMPSON: What section are you looking  
6 at?

7 PANEL MEMBER: 335. And it just says to  
8 represent changing conditions. I wonder if  
9 there's something more concrete than that.

10 MR. SIMPSON: We can consider putting a  
11 consultation requirement in there. It's probably  
12 good. The changing conditions, I think-- we  
13 haven't discussed this. We may be able to put  
14 some more information in the preamble. Again,  
15 following on the earlier suggestion.

16 Basically what we're talking about is  
17 changing economic conditions. If the lessee is--  
18 if there's changing conditions with the lessee,  
19 such as they may not be as financial stable as  
20 they once were or something like that.

21 MS. BOVEHER: Sorry. Amy Boveher. On the  
22 part we're just talking about regarding the  
23 compensation and coming up with -- I guess, you're  
24 open to suggestions regarding what compensation,  
25 whether it be monetary, and I think the there was

1 a comment in here regarding-- it was under the  
2 homesites on individually owned fractionated  
3 lands. And the part where if you can't-- we have  
4 this problem at Muckleshoot where you have divided  
5 interests. People want to live on their own land.  
6 They don't want to have to pay rent and so forth.  
7 But there's a trust responsibility to the other  
8 owners that can't be found.

9 At Muckleshoot, we have been very active  
10 with the planning department in helping get the  
11 owners who do want to develop the property, who  
12 can be found, to sit down and get some sort of  
13 conceptual design done, and then, you know,  
14 getting the infrastructure, preliminary  
15 engineering done. I know that costs money. And  
16 some tribes may not have the funding to do that.  
17 But I think that's something that could be  
18 provided. Tribes or individuals can apply for it.

19 But that piece, the infrastructure is not  
20 cheap. And some of these individuals who come in  
21 and apply for a lease, just them applying for the  
22 lease and bringing in the infrastructure is going  
23 to be more value than their dollar and fifty cents  
24 that they are going to get from the lease payment.  
25 Even for a 99 year lease, you know, you are

1 looking at a hundred dollars. Or they can have  
2 infrastructure brought into their allotment, which  
3 could in the future -- if they wanted to go build  
4 on the property, they could do so.

5 That's just a suggestion. I know that we  
6 have been able to be very active with our  
7 landowners in Muckleshoot to do this for them. We  
8 don't have a hundred percent consent. In most  
9 cases, we do have majority consent to move forward  
10 with these projects. But it comes down to some of  
11 those ownerships, realize those people can't be  
12 found, and realize the other 49 percent do need to  
13 be compensated. But the fact that these people  
14 who are at Muckleshoot want to develop their  
15 property should not have to pay those other  
16 owners, because they are not taking responsibility  
17 for their property. And the compensation is the  
18 infrastructure. If that person wants to come back  
19 and develop their property or utilize their land,  
20 you know, they can do so. There's a lot there  
21 ready for them to build, and or the value of the  
22 property has increased because the infrastructure  
23 has now been brought into the property.

24 That's my suggestion on the whole  
25 compensation factor. I have argued this a lot for

1 people. And I still don't think it's right that  
2 they have to pay rent to live on their own land.

3 MR. NEWLAND: Thank you very much for that  
4 comment. I just want to note that we all are  
5 working-- every one of us who has worked on this  
6 rule understands -- most of us are familiar with  
7 Indian country. We all understand the frustration  
8 that you just described and the folks at Salt  
9 River are describing. People haven't been in our  
10 community for 20 years, but they are a landowner,  
11 why. Should we have to look out for them? This  
12 is unfortunately the reality or the problem that  
13 we live with.

14 And the Department -- I don't know that  
15 anybody wants the Department to just walk away  
16 from its trust responsibilities, even where it is  
17 inconvenient. But I appreciate your comments.  
18 Again, we know the problem. We're well aware of  
19 the problem at Salt River. And we are very open  
20 minded on solutions. So I would encourage you to  
21 submit them.

22 Any more questions, comments?

23 MR. GOODMAN: Thank you. This is Ed  
24 Goodman. Again, I wanted to focus specifically on  
25 the residential leasing provisions, and

1 particularly, the interplay those provisions have  
2 with tribes and tribal designated housing entities  
3 that are running tribal housing programs under  
4 another statutory regulatory scheme, the Native  
5 American Assistance self-determination acts.

6 And our clients submitted a number of  
7 comments in the first go around to address this  
8 issue. I know a number of changes have been made  
9 to try and make that regulatory statutory  
10 framework fit a bit better with what you are  
11 trying to do here, but I don't think the fit still  
12 is complete. And I think even with the newly  
13 revised draft, there's still going to be a number  
14 of problems that are imposed on tribal housing  
15 programs.

16 And we'll be submitting some more detailed  
17 comments with suggestions. But I want to just ask  
18 a few questions now about a couple of those  
19 provisions that are in the newly proposed rule.  
20 And one of those -- one of the key ones is the  
21 provision that would exempt subleases for housing  
22 for public purposes from the approval process,  
23 which I think is a key step forward. However,  
24 there's three conditions that are set out in that  
25 provision. And this is 162.351(b), where those

1 exceptions are set out. And it basically stated  
2 the Bureau will not be required to approve a  
3 sublease for housing for public purposes, so long  
4 as three conditions are met. One is that the  
5 master lease must expressly provide that BIA  
6 approval is not required. Second is that the BIA  
7 must have approved a general plan for development  
8 for that parcel. And the third is that the BIA  
9 must have approved a sublease form and a rent  
10 schedule for that parcel.

11 Those three requirements seem still  
12 significantly at odds with what tribal housing  
13 programs and tribal designated housing entities  
14 are doing, which is a self-determination  
15 framework, both statutory and regulatory, giving  
16 the tribes and their housing entities a lot of  
17 flexibility to provide low income housing for  
18 native Americans.

19 In particular, we're not sure what it means  
20 to have a general plan of development approved by  
21 the Bureau. That's something that HUD used to be  
22 in the business of. And that authority was taken  
23 away from HUD and given to the tribes. And now  
24 another federal authority would be stepping in to  
25 approve the development for tribal lands.

1           And secondly, the approval of a sublease  
2 form means the Bureau would be approving the low  
3 income lease where there are requirements for what  
4 can be in those leases. In particular, the rent  
5 schedule is a problem, because the statute  
6 regulations impose specific limitations on the  
7 rent that can be charged to low income persons.

8           So we will be submitting specific comments.  
9 But I wanted to get your thoughts on what it means  
10 to have a general plan of development and what the  
11 idea behind the BIA approving a rental schedule  
12 was.

13           MR. SIMPSON: This is a similar provision  
14 that we have proposed in 2004 and gotten comments  
15 on. And, again, as I said, this is-- we actually  
16 got a lot of comments from the housing counsel and  
17 from HUD that this provision should be in here.  
18 So not necessarily the criteria, but rather that  
19 if there is a master lease and there's subleases,  
20 they shouldn't have to revert the subleases. The  
21 criteria are largely to make sure that we are  
22 still-- again, this goes back to the abiding trust  
23 responsibility that, you know, it's not-- it's not  
24 that we're going to-- that we want to be overly  
25 paternalistic about all of this, but we want to

1 make sure that the tribal housing authority is  
2 using its land in a reasonable manner.

3 There is some thought as to exactly how this  
4 is going to be developed. And that there's-- that  
5 the tribe is protected in terms of the subleases  
6 and in terms-- you know, rent schedule is-- we  
7 understand that this is not a money making venture  
8 for the tribe by any means, but that there's still  
9 some compensation going through. You will see in  
10 the business regulations that there's business  
11 leasing regulations. There's a very similar  
12 provision intended for shopping centers,  
13 industrial parks, office buildings, that kind of  
14 thing.

15 If there should be differences between the  
16 business context and this one, we would welcome  
17 ideas for changes in the language to make this fit  
18 your situation better.

19 MR. NEWLAND: To your point, on this  
20 provision and a number of others in the  
21 residential, we had a number of discussions from  
22 folks at the housing authority, that because of  
23 conditions that you raised, we went through a  
24 number of comments on this provision. And we went  
25 back to the drawing board to figure out how to

1 make those programs mesh together better. But,  
2 again, we welcome your comments.

3 PANEL MEMBER: If I might address them real  
4 quickly. And we'll do it again in the written  
5 comments. When you say the purpose of having a  
6 rent schedule is to insure that some income comes  
7 back, under NAHASDA, there is a strict limitation  
8 on the amount of rent. It's a 30 percent rule.  
9 The tribe or the housing authority cannot charge  
10 more than 30 percent of the income of the  
11 individual. The rent can't be set at some dollar  
12 amount, because it's going to fluctuate based on  
13 the income of the tenant. If there's a rent  
14 schedule, we would automatically be in conflict  
15 with that.

16 As far as the general plan for development,  
17 insuring that the property is being put to  
18 reasonable use -- under NAHASDA, the housing  
19 authority has to submit an Indian housing plan  
20 each year to HUD, which has to be approved by the  
21 tribe before it's submitted to HUD saying what  
22 it's going to do with the HUD dollars on the  
23 property that it's purchased or is using applying  
24 those HUD dollars. So there's already a mechanism  
25 in place for a tribal review and ultimately a

1 review by another federal agency.

2 So the general plan of development would  
3 pose a second burden on the housing authority, on  
4 the tribes that are developing housing, and may be  
5 inconsistent. I just want to point those out.

6 MR. NEWLAND: Thank you.

7 PANEL MEMBER: I just follow -- Ed brought  
8 up some good points. Your BIA regulations -- if  
9 the tribe had a tribal housing authority that  
10 operated housing, not in a trust land, not on a  
11 trust reservation, BIA regulations wouldn't apply,  
12 would they? If the tribe is operating under HUD  
13 regulations?

14 MR. SIMPSON: If it's not on trust land, BIA  
15 regulations do not apply.

16 PANEL MEMBER: Thank you.

17 MR. NEWLAND: Do we have any other comments  
18 or questions? Anyone else? We can take our break  
19 early. Whatever you want.

20 Let's take a break for 15 minutes and come  
21 back at 10 after by that clock.

22 (Recess taken.)

23 MR. NEWLAND: We're going to sprint to the  
24 finish here. I do want to-- something was brought  
25 up to me over the break about what these

1 regulations mean with respect to BIA land. And I  
2 did want to have Stephen here to clarify what we  
3 mean by that, because the regs are not trying to  
4 say that the tribal land is BIA land.

5 MR. SIMPSON: No. They are different. We  
6 also refer to BIA land as government land.  
7 Basically what that is, is the property that  
8 agencies are sitting on if they are not on trust  
9 land. It's land that the United States  
10 government -- for instance, the land that the main  
11 interior building sits on in Washington, as  
12 opposed to trust land or restricted land.

13 Basically we don't have procedures for  
14 leasing or for permitting. And this is where we  
15 actually do do permits-- anywhere else for that  
16 land, for the land that the government owns that  
17 is not trust or restricted land.

18 And, again, this is basically where the  
19 agencies are in some places, where detention  
20 facilities are, schools, that kind of thing. And  
21 so this is not-- it's just sort of an add on to  
22 these regulations. It has, you know-- while  
23 tribes may be interested in what we're doing on  
24 that land, it is not an infringement on your land  
25 or on your sovereignty or anything like that.

1 It's just us dealing with our little housekeeping  
2 stuff over to the side.

3 MR. NEWLAND: Thanks, Steve. All right.  
4 Let's get back into it. I appreciated a lot of  
5 the discussion in the first session about  
6 residential leasing. And I'm not trying to limit  
7 what we talk about, but we haven't heard much  
8 about business, the business sub part.

9 I'm curious if anybody has any thoughts on  
10 that. Again, we want to get as many comments as  
11 possible in the recognition that we're government,  
12 and we're very far from perfect so you can help  
13 get these regs to where they can work best for  
14 you. Certainly, again, at this time, we want to  
15 get comments on any and all the parts,  
16 particularly the business leasing parts.

17 MR. GOODMAN: Ed Goodman. This is a comment  
18 specific to the business lease, but it's in the  
19 general section that pertains to all leases. It's  
20 162.024. It concerns the documentation to be  
21 submitted with any kind of a lease that needs  
22 approval.

23 And we submitted comments on this  
24 previously. The concern is that by submitting  
25 documents to the Bureau, they then become

1 available for FOIA disclosures. And that's  
2 obviously a concern when, in particular, through a  
3 business lease where there's potentially trade  
4 secret information or other information that the  
5 tribe would like to keep confidential or the  
6 business partners would like to keep confidential.

7 I'm wondering for the concept as you're  
8 proposing to do with the improvements where you  
9 put in some language that attempts to  
10 pre-emptively give an argument against taxation,  
11 if it's possible to include in the regulations  
12 language that would identify documents that are  
13 submitted as falling under a FOIA exemption is the  
14 question.

15 MR. SIMPSON: That's a good question. We  
16 know that-- I mean, this sort of has a checkered  
17 history, as you may or may not know. Under the  
18 Clammath decision in the Supreme Court, we have  
19 been informed that despite the trust  
20 responsibility, information submitted by tribes  
21 does not follow under the deliberative process  
22 regulation in FOIA. On the other hand, we do have  
23 a decision out of the Tenth Circuit in the  
24 business leasing context where we withheld at the  
25 request of the tribe terms of the lease itself in

1 fact from tribal members, in addition to from the  
2 state and other folks, and under exemption four,  
3 confidential and proprietary information, and that  
4 was upheld by the Tenth Circuit.

5 We could certainly mention in-- probably  
6 don't want to be citing court decisions in the  
7 regulations. We could certainly mention in the  
8 preamble that that-- that line of case law exists  
9 to help tribes with that with that point and to  
10 help the Bureau with remembering that point.

11 PANEL MEMBER: If I could just have a quick  
12 follow up. Is it possible to include in the regs  
13 a process whereby the Bureau will consult with the  
14 tribe before it turns over any document under a  
15 FOIA request to give the tribe the opportunity  
16 to--

17 MR. SIMPSON: That's actually in the FOIA  
18 regs, 43 CFR part 2. We can consider writing a  
19 cross reference.

20 MR. NEWLAND: Everybody spoken their piece  
21 on the proposed leasing regulations?

22 MR. DOSSETT: Hi. My name is John Dosset,  
23 general counsel of the National Congress of  
24 American Indians, Gary. Bohnee from Salt River  
25 pointed out the NCAI resolution earlier. I wanted

1 to reiterate NCAI's support for that resolution.

2 One thought to consider is to do this. As I  
3 was looking at some of these things, it seems like  
4 some of these issues could be taken care of within  
5 the terms of the lease rather than within the  
6 regulations, and giving you more flexibility with  
7 how you deal with some of these issues. For  
8 example, bonding was raised. It may be in some  
9 areas, it's not possible or feasible for  
10 individuals to get bonds. If latitude could be  
11 allowed for the terms of the lease to deal with  
12 that rather than putting it in the regs. Or  
13 another example is like a rent schedule or some of  
14 these other things.

15 Once you put it in the regs -- my experience  
16 with the solicitor's office, once you put it in  
17 the regs, they are going to be like, where's the  
18 rent schedule. And you have got to have all these  
19 things. If you maybe erred on the side of leaving  
20 it up to the lease terms, that way -- it's very  
21 different leasing land in the areas around Phoenix  
22 versus rural areas. Different parts of the  
23 country. Give people more flexibility.

24 The second comment I wanted to raise was an  
25 old one in terms of enforcement of leases. I

1 think you may be familiar with the water wheeling  
2 case that went through the Ninth Circuit recently.  
3 Colorado River Indian tribes had a great deal of  
4 difficulty enforcing a lease, evicting a hold over  
5 tenant who eventually became a trespasser. Some  
6 of the difficulties they had were jurisdictional.  
7 They were on the California side of the border of  
8 the PL280 jurisdiction. The tribe is on both  
9 sides. So there's a provision -- I think it's  
10 162.464 -- that deals with enforcement. And  
11 pretty much just says the BIA will do all other  
12 appropriate actions.

13 I was wondering if there might be something  
14 saying that the BIA will coordinate with the  
15 appropriate law enforcement for evictions.  
16 Because that was the problem that Colorado River  
17 Indian tribes ran into, was just figuring out  
18 who's supposed to evict this guy and who has the  
19 authority to do it.

20 And then the last issue I thought I would  
21 mention is the compelling reason for denying the  
22 approval of a lease. One-- I guess one area we  
23 wanted to point out is the problem of non Indian  
24 residential leasing. In particular, some long  
25 term non Indian residential leases have basically

1           become permanent establishments within  
2           reservations. Duroville is a good example. They  
3           are now under federal court order prohibiting the  
4           BIA from every evicting the non Indian residents  
5           that live there. And in essence, it becomes a de  
6           facto sale of Indian land. I guess I'm not saying  
7           that a tribe could never do one, but that may be  
8           something you want to look carefully at, because  
9           the Bureau's long term experience with non Indian  
10          residential leasing has been a negative one for  
11          tribes.

12                 NCAI is also planning to submit comments on  
13          these issues, as well as the issue of tribal  
14          preference. So there's-- I know the Navaho Nation  
15          is having some issues right now with the DOC. And  
16          I think tribes would be interested-- there's  
17          already a provision in there for tribal law should  
18          be followed. But it may be helpful if they were a  
19          little more specific about tribal preference laws.  
20          And their applicability to businesses.

21                 MR. SIMPSON: That would be very useful.  
22          Your comments on all of those would be very  
23          useful. And as you know, there is a big issue  
24          with tribal preference. And largely it came to  
25          the floor while we were working on these

1 regulations, but about the same time -- got really  
2 hot about the same time as we were actually  
3 publishing. So it would be-- it's an area that we  
4 don't deal with in the regulations right now, but  
5 we appreciate your comments on. Because we know  
6 it's very important to tribes, and it's very  
7 important to the Department as well.

8 On the hold overs and evictions, we would  
9 also appreciate your comments on those. The point  
10 about coordinating with local law enforcement, and  
11 especially tribal law enforcement, is a very good  
12 one. We are a little limited-- one of the reasons  
13 we haven't gotten very specific in these  
14 regulations or previous regulations on this point,  
15 as you know, we're limited in our ability to  
16 administratively prosecute trespass. The  
17 authority we have is only on Indian agricultural  
18 land or on any forest land.

19 And so it's-- it makes it hard for us, for  
20 the Bureau to go out and actually prosecute a lot  
21 of the-- a lot of what we are able to do is try to  
22 convince the United States Attorney's Office to go  
23 after trespassers in court, which we have a spotty  
24 record in managing to convince them to--

25 PANEL MEMBER: I thought it might be

1 helpful-- these regulations out in the field, they  
2 are used by superintendents, and they are trying  
3 to figure out, what do we do here? And some  
4 direction about coordinating with whether it's  
5 federal or tribal or in some instances state law  
6 enforcement. Some direction about directing them  
7 to coordinate with law enforcement would be  
8 helpful.

9 MR. NEWLAND: Thank you for that. Part of  
10 that, again, is also going to be how we administer  
11 these regulations once they are promulgated in  
12 developing proper protocols and things like that.  
13 I would welcome language on that.

14 Just so you know, and others in the room,  
15 the leasing regulations are part of a larger  
16 agenda. We have undertaken to reform how the--  
17 how the Department approaches its Indian lands  
18 policy. And we are also looking at-- or working  
19 on developing trespass regulations, grazing  
20 regulations, agricultural leasing regulations.  
21 And we have work groups that are discussing,  
22 working on those right now. The leasing was the  
23 most ready to send out the chute. But we know  
24 that trespass, in particular, is a huge issue.  
25 And leasing doesn't mean much if you can't enforce

1 it. So I appreciate that.

2 Any other comments?

3 PANEL MEMBER: I guess I would second that--  
4 a question, since the Interior Department and the  
5 BIA have sent these out, have you received  
6 comments from other federal agencies in regards to  
7 the leasing requirements and their concerns  
8 ability long term leases? Because I know in the  
9 Interior Department, some of your own agencies  
10 conflict with each other on land management,  
11 property, who owns what, or if it violates the  
12 Endangered Species Act or Clean Water Act, or some  
13 other issues.

14 So I'm curious in the Interior Department,  
15 if you had other comments that are adverse to  
16 these regulations.

17 MR. NEWLAND: We have received comments, but  
18 the Department is of one mind in pushing these  
19 forward.

20 PANEL MEMBER: So it's not going to be held  
21 up by the National Park Service or the Fish and  
22 Wildlife?

23 MR. SIMPSON: No. We have gotten helpful  
24 comments from the Department of Energy on some of  
25 the renewable regulations and asked them for more

1 information on some of their comments. We have  
2 also gotten and continue to get extremely helpful  
3 comments from HUD on the residential portion.

4 PANEL MEMBER: Specifically interested on  
5 the residential leases. Have you had any comments  
6 from the Treasury Department or the IRS?

7 MR. SIMPSON: We had one on the draft regs.

8 MR. NEWLAND: We have discussed with  
9 Treasury and IRS. We have had discussions about  
10 this.

11 PANEL MEMBER: My question would be, you're  
12 going to be able to go forward with your regs  
13 without any interference or objection from other  
14 federal agencies.

15 MR. SIMPSON: We don't anticipate any. You  
16 never know. These regulations also before they  
17 were published in the federal register have to be  
18 reviewed. Liz decided our phone call with them  
19 was probably one of the best most productive phone  
20 calls we have had with the Office of Management of  
21 Budget. And they are very much in support of  
22 these regulations as well.

23 MR. NEWLAND: What he said. Any other  
24 comments?

25 MR. DENNEY: Now that the Office of Hearing

1 and Appeals doesn't approve houses, does that  
2 affect the leasing and appraisals for this  
3 regulation? Office of Hearing and Appeals does  
4 not include structures attached to the land as--  
5 they say it's personal property.

6 MR. SIMPSON: Yeah. There are some-- what  
7 she's referring to-- and for purposes of our court  
8 reporter, can you give your name.

9 MR. DENNEY: Sorry. Dale Denney, the Makah  
10 realty officer.

11 MR. SIMPSON: Thank you. What you are  
12 referring to is, for the other folks in the room,  
13 is a series of recent BIA decisions -- I think  
14 there are two -- where there have been  
15 discussions-- there's been discussions about  
16 whether a house on trust land is itself trust  
17 property. The decisions so far before the board  
18 have been, or from the board have been that there  
19 was nothing in the records to indicate that that  
20 house is in trust. So it's not so much that the  
21 board has ruled that houses are not in trust, or  
22 that houses are in trust, or rather there's  
23 nothing before them to prove that it is.

24 We have been -- in development of these  
25 regulations, the lawyers from the solicitor's

1 offices that are working these cases are the same  
2 lawyers, at least in some cases, who are working  
3 these regulations. There was a discussion of  
4 resources earlier. We have so few lawyers working  
5 on trust issues at headquarters that we're doing  
6 both. And we're in continual consultation with  
7 each other and making sure that the regulations  
8 are consistent all the way across.

9 MR. NEWLAND: Any more questions or  
10 comments, thoughts, ideas? All right. Well, we  
11 will look forward to the written submissions. And  
12 I promise that-- Bryan Newland promise that they  
13 will get read by me. And by Stephen and Liz. Liz  
14 does a lot of the work with your written comments  
15 and organizing them so that the rest of us can go  
16 through them in an as efficient manner as  
17 possible.

18 I appreciate the discussion today. A lot of  
19 new issues were raised that we are going to mull  
20 over when we sit back down and do the final  
21 tinkering before this thing goes final. But this  
22 does have the full support of the secretary, the  
23 assistant secretary, and the federal government.  
24 And we're going forward with these. And hopefully  
25 with your input, the final product works for you

1 and makes it easier to do the things that you all  
2 want to do with your own homelands to build homes  
3 for your citizens, to develop small businesses,  
4 tribal commercial enterprises on your own lands  
5 and do it successfully.

6 So with that, again, I want to thank you.  
7 For those of you who are going to join us in Palm  
8 Springs on Thursday, we have called ahead to all  
9 the local golf courses. They are not taking tee  
10 times during consultation, so you have to come.

11 Thank you very much. Safe travels to all of  
12 you. And I look forward to reading your comments.

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