Comments of the National Congress of American Indians
Joint Tribal Workgroup on Trust Policies and Procedures

To: Honorable Kevin Gover, Assistant Secretary for Indian Affairs
Thomas Slonacker, Special Trustee for American Indians
Art Gary, Director of the BIA Trust Policy & Procedures Subproject
Attn: U.S. Forest Service (CAET)
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Missoula, MT 59807

Re: Comments on BIA Proposed Rules for Trust Management Reform:
Leasing/Permiting, Grazing, Probate and Funds Held in Trust

Dt: October 12, 2000

I. Introduction

At the request of Assistant Secretary Gover, the National Congress of American Indians has formed a workgroup of tribal government leaders to review, discuss and provide comments on proposed amendments to the trust management regulations noted above. The Intertribal Monitoring Association on Indian Trust Funds has worked closely with NCAI in facilitating the workgroup.

The tribal leadership of the Workgroup has consistently had very strong disagreements with the both the substance of these regulations and the fast-track, cursory process by which they are being promulgated. The proposed regulations will have a profound effect on the BIA's management of 54 million acres of Indian lands, on the administration of trust funds derived

management of 54 million acres of Indian lands, on the administration of trust funds derived from those lands and other trust resources, and nearly every aspect of economic development, agriculture, housing and land management within Indian Country. While the Workgroup has supported the initiative to improve these regulations, we have repeatedly requested a negotiated rulemaking or a consensus-based process that would meaningfully comply with Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments), and allow sufficient time to evaluate the consequences of the changes proposed in the regulations and to make proposals for addressing our concerns.

This Executive Order specifically states that federal agencies "*should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.*" Given the history of BIA mismanagement of Indian trust funds and trust assets, we believe that trust management reform efforts require an open, transparent, and consensus-based process that can be provided through a negotiated rulemaking. We do not believe that informal or "notice and comment" rulemaking is appropriate for this context because it allows the Bureau of Indian Affairs to continue its decades long history of ignoring its obligations to properly manage Indian trust assets, and to stonewall all tribal efforts to ensure that the agency properly accounts for and timely identifies, collects, invests, and distributes income due or held on behalf of tribal and Indian account holders.

We have attempted to engage in a meaningful dialogue with the BIA Office of Trust Policies and Procedures. In our view, the entire discussion of trust management regulations is premised on the Department's willingness to commit to certain trust responsibilities in the regulations. However, we have found that the Office of Trust Policies and Procedures is generally unwilling to engage in a discussion that would contemplate committing the Department to any responsibilities, and most often takes the role of arguing against any acceptance of responsibility by the Department in the regulations. Moreover we feel that we have had very little discussion with the actual decision makers on these regulations. Thus the dialogue with the Office of Trust Policies and Procedures has not been fruitful on most critical issues.

We have participated and observed in the tribal consultation process as it has occurred so far for these regulations and have found it to be ineffective and deficient for the scope and complexity of the regulations that you have proposed. Nor do we believe that the efforts of our workgroup have resulted in meaningful consultation. At every stage of the discussion between the tribal workgroup and the Department, the Department has been too focused on

its self-imposed timetables to consider the merits of our substantive proposals and has been willing to adopt only the most cosmetic changes. It has been very difficult to convince tribes to commit time and resources to a thoughtful revision of the proposed regulations when faced by this uncooperative attitude. Nor have we had the time and resources to gather together the numerous concerns about the proposed regulations and the way that they will affect the day-to-day interests of tribes and tribal members and the way the federal government interacts with us. Know that our efforts fall far short of the comprehensive review and rewriting that is needed before these regulations should be published.

Furthermore, we believe that the Department has predetermined their final decisions on many issues in the regulations, resulting in closed minds and sealed ears during the consultation process. We have been told many times by the Office of Trust Policies and Procedures that they are without the ability to change the initial policy decisions made by those above them. In our view, these initial policy decisions were based on an incomplete understanding of the issues, and were not in any fashion derived from a consultative process with tribal governments. In addition, the Department's current efforts to implement many of the proposed regulations even before there are finalized are strong evidence of its intent to disregard the comments of Indian tribes. For example, the proposed probate regulations create an entirely new scheme for processing Indian probate cases, for which there is currently no statutory or regulatory authority, and would create "Attorney Decision Makers" in the BIA realty offices who would be authorized to decide certain probate cases. The BIA has already hired 10 of these Attorney Decision Makers and is training them on the proposed regulation. We do not believe that the Department can fairly assess our comments to the proposed regulation if they have already committed the resources and hired the people. A significant number of other "proposed" decisions have been similarly pre-committed, put into effect through the BIA Manual or other directives, even though these policy decisions are supposed to be pending in the rulemaking. For example, they Department is currently prohibiting certain types of deposits into IIM accounts, prohibiting "assignments of income" from IIM accounts, and requiring a court order to put an account in "restricted" status. Although we have evidence that these decisions have been inappropriately pre-determined, it is also our sense that dozens of other issues, such as the unwillingness to consider creating regulations in the Pt. 115 regulations for an accounts receivable process, were similarly finalized long before the period of consultation began.

As a direct result of the Department's failure to meaningfully engage with Indian country, the proposed regulations are inadequate to address fundamental issues of Indian land and resource management, and have been drafted not to guide the Department's management of Indian trust lands and resources, but with an overriding concern for avoiding responsibilities

and diminishing the Department's trust obligations. Moreover, we find them to be poorly organized and reflecting a great lack of awareness of the issues that commonly arise in the course of management of Indian trust lands and the administration of Indian trust funds. The basic structure of these regulations must be revisited if they are to be of any value to the trust reform efforts. We would like to mention several substantive issues in the in the proposed regulations that have not been adequately addressed:

Collection and Enforcement- The most fundamental failure in the trust management system is the failure to monitor and enforce on uncollected trust funds from the sale or leasing of trust resources. There are no provisions in the draft regulations that deal with accounts receivable and the coordination between BIA and the OTFM. In addition, while we appreciate the existence of the new Subpart H on Lease Violations, we believe that its language is wholly inadequate. The provisions say that enforcement will begin "as soon as practicable." (162.22) These are not the standards for a trustee.

Self-Determination and Leasing - The leasing regulations have not been updated since 1961, during the termination era, and the new draft does little to address the current era of tribal self-governance. We believe that there should be a separate standards, consistent with federal law, for lease approval of certain tribally negotiated leases.

Direct Pay - The preamble to the regulations indicates that Interior may change its current proposal and eliminate direct pay from lessees to tribal landowners. All lease payments would be forced to go through the BIA system, but at the same time the BIA will begin to collect "as soon as practicable." We have had extensive discussions on this matter, and we can see no reason why a proper accounting cannot be accomplished simply through notice of the payment to the BIA. We are greatly concerned that the final regulations will adopt a policy against direct pay.

The Indian Agricultural Resource Management Act of 1994 - This Act dramatically changed the leasing system for Indian agricultural lands, and required the BIA to promulgate regulations within two

years. This was never done. The proposed regulations attempt to implement the Act, but do so in a confusing and incomplete manner. We have repeatedly suggested that agricultural leasing should be separated from other types of commercial leasing because of the separate statutory requirements, but the proposed regulations continue to mix all types of leasing together. We believe the leasing regulations should be reorganized, and then much better efforts need to be made to implement the Act.

Assignment of Income and Lending to Indian People - The draft regulations would remove the ability of an individual to make an assignment of income from a trust account for a loan. There is a great deal of concern that this change would damage the willingness of lenders to make loans in Indian country. Many tribes believe it will destroy tribal credit programs. Given the existing difficulties with using trust resources to secure lending, it is critical that this issue be properly addressed with the tribal leadership and coordinated with the lending institutions and tribal credit programs.

Court Order Required to Restrict an IIM Account - The proposed regulations would require a court order to put an account in "restricted" status in all instances. This is contrary to the current practice where an account holder who is disabled or in need of financial assistance can work with the BIA social workers and the Superintendent to place restrictions on an account. This change will require many elders to either endure the ordeal and embarrassment of a court hearing or forgo necessary assistance in managing their accounts. This change will also threaten elders and the disabled with a loss of federal benefits, because restricted accounts are not counted against eligibility for such benefits.

Restrictions on Funds that Can Be Deposited into a Trust Account – The proposed regulations would dramatically restrict the types of funds that can be deposited into a trust account. The trust fund regulation would prevent elders and the disabled from depositing their pension or disability checks into their IIM account. It would also prevent the use of IIM accounts for holding tribal per capita payments for minors. The regulation would also limit trust-to-trust

transfers. These changes are not required by law and seem unnecessarily harsh in their effects, especially given the inadequate banking services on most Indian reservations.

Given the scope and complexity of these issues and the dozens of other issues in the regulations that will require new drafting, we feel that Interior has proposed an unrealistic schedule for completing these regulations. Interior plans to publish final regulations by January 20, 2001, leaving only 3 months to review and summarize all comments, consider and respond to the comments, do considerable redrafting of the regulations, complete a review process through the Department of Interior, the Special Trustee and the Office of Management and Budget, and then put in a final form for the Federal Register. Given the holiday seasons and the various other pressures that will attend the election year and the end of the Clinton Administration, we do not believe that Interior can do justice to these complex regulations with that amount of time.

Also, while we recognize that these are only "proposed regulations," many of our concerns relate to matters that have been omitted from the proposals, or matters that will require significant redrafting and reorganization. We believe that the enormous time pressure will cause the Department to take too many shortcuts and avoid the issues that will involve an important policy decision, such as a commitment to a responsibility. Even if these omitted and redrafted issues make it into the final regulation; there will be no opportunity for tribal leaders to see them before the regulations become final. The proposed regulations are fundamental matters of federal trust policy reform, and the history of BIA trust mismanagement simply provides no basis for confidence that these matters will be adequately addressed. Regulations of this nature require an open, transparent process with tribal leadership before they become final rules.

We are also concerned about the statutory role that the Special Trustee for American Indians is to play in reviewing and approving these regulations. Under the American Indian Trust Fund Management Reform Act, the Special Trustee is to "oversee and coordinate reforms" within the Department of practices relating to the management and discharge of the Secretary's trust responsibility, and ensure that "reforms of the polices, practices and procedures" are effective, consistent and integrated. 25 USC 4041. This process of revising the regulations has been carried out under this statutory authority, yet the Special Trustee has not played any significant role in the process to date. The purpose of the Office of the Special Trustee is to ensure that there is independent and vigorous oversight within the Department of

the trust reform effort, and it is exactly this quality that we have found to be lacking in this process. Under the tight time schedule prescribed for finalizing these rules, we do not see how the Special Trustee will have any opportunity to fulfill his statutory obligations, nor how the advisory board established under the Reform Act to provide advice to the Special Trustee will be able to participate or provide any advice on whether the reforms in the proposed regulations are effective, consistent and integrated.

While we recognize that federal court oversight in the Cobell v. Babbitt case is prodding the Department to speed up the process of trust management reform, we believe the court will be sensitive to requests for time for consultation with tribal leadership and we would be willing to communicate with the court for that purpose. We have communicated with plaintiff's counsel in that case, and they agree that the Department should take adequate time for a deliberate and appropriate negotiated rulemaking process.

Finally, we believe that the pressure caused by the Cobell litigation is having an improper and negative impact on the proposed regulations that must be ameliorated through a more independent process for developing the rules. Trust policies and procedures must be designed for the benefit of the Indian beneficiaries and to guide the actions of Interior employees in administration of trust property. We have very serious concerns the pressures of the high-profile litigation have caused the BIA staff who are doing the drafting to attempt to avoid responsibility and diminish the government's trust responsibilities whenever possible. We believe that a more open consensus-based process would allow for candid and thorough discussions of the appropriate acceptance of responsibilities and the limitations of these responsibilities, within the context of the BIA's overall responsibility to work for the benefit of Indian people and to implement the federal policy of tribal self-determination.

We remain firmly convinced that the Department of Interior must initiate a consensus-based negotiated rulemaking process in order to identify and properly evaluate all of the issues that should be considered in these important regulations. We are attaching a resolution passed by our Workgroup to this effect.

II. General Structural Defects - Failure to Address Accounts Receivable and the Management Oversight of Trust Resources and Trust Funds

A discussion of Indian trust policies and procedures must begin with the fact that the United States, as a trustee, manages and administers trust property, resources and funds for both tribal and individual Indian trust beneficiaries. The underlying purpose of any trust is to

establish a legal arrangement whereby the trustee holds actual legal title over a trust asset and is obliged by law to keep, use and manage that property, and the funds derived from that property, for the benefit of another -- the beneficiary. When dealing with Indian trust or restricted property, ncluding land, water, minerals, timber, funds and hunting and fishing rights, the Department has generally the same responsibilities as would a private trustee. E.g., Mitchell v. United States, 463 U.S. 206 (1983); Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation, 792 F.2d 782, 794 (9th Cir. 1986); Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942) ("[U]nder a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of the Court" the United States "has charged itself with moral obligations of the highest responsibility and trust."

Beginning with this general construct, any proposed regulations regarding the United States' management and administration of trust funds should be an attempt to delineate the specific actions that the Department of Interior will take in specific circumstances during the management process to fulfill its trust obligations. Unfortunately, on the whole, these proposed regulations seem to be drafted not with the intent of guiding the proper fulfillment of the United States' trust obligations, but merely as cursory guidance to the beneficiaries and the lessees. The functioning of the trust management system remains shrouded and ill-defined. Moreover, the proposed regulations also seem to serve as an instrument to diminish and limit the trust duties that the United States owes to tribal and individual trust beneficiaries. In a trust, the party with duties is the trustee. Thus, any rules that govern the trust relationship should be drafted with the intent of guiding the manner in which the trustee will fulfill his duties. These proposed regulations simply do not do that.

The most glaring and most fundamental instance is the way the proposed regulations fail to deal with the primary source of failure in the trust management system, monitoring and enforcement on uncollected trust funds from the sale or leasing of trust resources. There has been far more money lost in the Indian trust system from payments that were never received than from mismanagement of funds after receipt. It is undeniable that collecting trust funds from the development of trust resources is a critical aspect of trust management. Yet there is no discussion in the government's proposed Part 115 on Trust Funds that deals with policies regarding collection. Indeed, there is no discussion of accounts receivables. The proposed Part 162 on leasing deals has only inadequate and summary provisions, that as we noted above, allow the Department to begin collection "as soon as practicable." These are not the standards for a trustee.

Who is responsible for verifying that payment has been received in the correct amount? Who will take action when a payment is missed or received in the wrong amount? What actions will the U.S. take within what time frame to enforce on a missed payment? Who will conduct inspections to ensure that royalties are being forwarded in the correct amount? What actions can a beneficiary take to trigger action if he or she is receiving less than full payment? None of these questions are answered or discussed anywhere in the proposed regulations. These are fundamental attributes that must be a part of any trust management system.

Our concerns on these matters relate to the overall architecture and staffing of the trust management system. Currently there is a hodgepodge of variously outdated and dysfunctional trust management systems across the BIA Regions and Agencies. The purpose of the BIA trust reform project is to create modern, uniform systems. Yet, the proposed regulations do little to address what the ultimate trust management systems will look like. The policies and procedures currently contemplated are being drafted in a vacuum, without a structural foundation of how the trust management system will operate. It is notable that this criticism, a lack of structural foundation, is exactly the same as has been leveled against the Department's development of the new computer system, the Trust Asset and Accounting Management System.

Our discussions with the Office of Trust Funds Management (OTFM) and the BIA Office of Trust Policies and Procedures have led us to the conclusion that many of these issues remain unresolved because of existing structural and management divisions within the Department of Interior, and a lack of coordination or integration. The responsibilities for performing tasks that are essential to trust management seem to fall between agencies and between job descriptions. Currently the BIA Realty offices hold the lease and know when the payments are due, but in many instances they do not know what payments have been received. The OTFM receives the payments, but they do not know what payments should have been received.

We have been assured that some day in the future the OTFM TFAS computer system will be compatible with the BIA TAAMS computer system, and that they will be able to print out an "exceptions report" that will show payments that were due but not received. However, no office seems to be responsible for running the "exceptions report" and no office seems to be responsible for taking action to notify the lessees and begin the process of collection. We believe that issues such as these must be specifically addressed within the proposed regulations.

We would urge that the BIA develop the overall structural, management and staffing framework for its trust management system as a part of the development of the regulations that will drive that system. We have reviewed the Feb. 2000 "Workforce Planning" document of the Trust Management Improvement Project. The current efforts are focused on maintaining and expanding existing offices and positions without ensuring that each of the obligations of the trustee to the Indian beneficiaries is accounted for. This is entirely backwards. We believe that an appropriate management structure should begin with an analysis of what obligations and services must be provided to Indian beneficiaries, and then structured to ensure that obligations are met, that offices work together, and that employees are held accountable for performing their duties. In this regard, we believe that the BIA should look toward private sector trust management systems and develop a system that is much more oriented toward the "customer" or the beneficiary.

In a private trust, each beneficiary is assigned a "trust officer." This trust officer is responsible for ensuring that all aspects of the trust are maintained, including collection of unpaid funds, inspection of trust resources, investments, distributions, maintaining records and ensuring that resources are put to productive use and highest value is received. In a large institution, the trust officer may delegate responsibilities and have assistance from various specialists, but the ultimate responsibility rests with one individual to ensure that the overall trust obligations are maintained. We believe that the BIA trust management system would benefit significantly from adopting elements of this approach.

Under a "trust officer" system there would be no doubt as to who was responsible for enforcing on unpaid debts, or for conducting inspections or any other matter. Regulations could be drafted that would clearly delineate the responsibilities of the trust officer and how the other branches of the trust management system would relate to the trust officer. For example, each beneficiary could be assigned a trust officer in their local agency office, such as the Superintendent or an employee of the Superintendent. The trust officer would maintain a caseload and his or her name would be attached to each tribal account, IIM account or other record of land or resources. The OTFM or other office could be directed to run an exceptions report on a daily basis, and then deliver the exceptions to each trust officer. The trust officer could be required to instigate collections enforcement within a specified period of time. This is the type of system that could provide accountability to the beneficiaries, and the type of system where specific regulations could be drafted that would guide the actions of the BIA employees. Under the current circumstances, when so little of the structure is specified, it is difficult to properly design regulations which will ultimately work to soundly manage trust funds.

For comparison, we would like to note the regulations that the United States uses for management of its own lands. The Bureau of Land Management (BLM) regulations for grazing management (43 C.F.R. Pt. 4100) make explicit and repeated reference to the "authorized officer" who is responsible for administering the grazing regulations. The authorized officer is responsible for overseeing all aspects of a grazing permit or lease, including collection of unpaid fees, and the grazing regulations are in large measure designed to direct the actions of the "authorized officer." In the administration of its own property, the U.S. finds it necessary to designate the employee who is ultimately responsible within the regulations, and we believe that the U.S. should adopt a similar management system for administration of trust property.

We would also like to note the regulations that the Bureau of Land Management uses for management of grazing permits, and the process these regulations provide specific instructions to the "authorized officer" on the process for collecting unpaid fees at 43 CFR '4130.8-1(e):

> *Payment made later than 15 days after the due date shall include the appropriate late fee assessment. Failure to make payment within 30 days may be a violation of '4140.1(b)(1) and shall result in action by the authorized officer under "4150.1 and 4160.1-2.*

The cited sections go on to provide an administrative system for resolving payment issues and enforcing penalties, including trespass penalties. They provide that the authorized officer must include a demand for payment in any proposed decision. These are not fully present in the proposed BIA regulations we have been presented.

The Workgroup also strongly urges the BIA to develop specific regulations that impose the basic responsibilities and roles for maintaining an accounts receivable system. As noted above, the failure to collect payments has been the most significant source of failure in the Indian trust system, and the regulations are the appropriate place to ensure that action will be taken that payments are made timely and in the correct amount. We look forward to collaborating with the BIA and the OTFM in drafting these regulations.

III. Proposed Revisions to Part 162 – Surface Leasing Regulations

Outline for Reorganization of Proposed 25 C.F.R. 162 – Surface Leasing

The proposed regulations for surface leasing generally continue the "one size fits all" approach of the current regulations for all types of leases, though the new section on "Business Leases" is an organizational improvement. The Workgroup would like to make the following proposal for reorganizing the proposed regulations to provide separate standards and procedures for three categories of leases – (1) agricultural, (2) residential, and (3) business leases, with the business category to serve as a catch-all for any type of lease that is not agricultural or residential.

We feel very strongly that reorganization is needed to provide clarity among the distinct bodies of law and the vastly different practices among these three types of Indian land leasing. For example, the American Indian Agricultural Resources Management Act of 1993 (AIARMA) provides separate statutory standards for leasing of Indian agricultural lands with regard to the authorities of tribal governments, the rights of individual landowners and the terms and conditions of agricultural leases. The proposed regulations mix these agricultural land standards among the general provisions. The result is confusing to the reader, and has resulted in a number of technical errors that would be avoided if the agricultural provisions were in a separate subpart. In the area of residential leases, there are also specific Indian housing statutes and initiatives, such as the Native American Housing Assistance and Self-Determination Act and the Presidential One-Stop Mortgage Initiative, that significantly alter the law and policy landscape for residential leasing of Indian lands. (This section should clarify that its standards are for Indian housing only, and not for development of commercial non-Indian housing, which should fall under the business category.) Moreover, tribal government staff, tribal policy practitioners, and non-Indian entities who do business in Indian country are most often separately organized in the fields of agriculture, housing and business, and it would greatly assist their efforts if the leasing standards were well-organized into the subject areas in which they practice.

We would propose that the proposed Pt. 162 be reorganized into the following subparts:

Subpart A – Purpose and Definitions

Subpart B – General Lease Provisions and Requirements

General Provisions

Rent and Terms

Bonds and Insurance

Process for Obtaining a Lease (Subpart C in proposed)

Granting a Lease (Subpart D in proposed)

Subpart C – Agricultural Leases

Subpart D – Residential Leases

Subpart E – Business Leases

Subpart F – Compensation to Landowners

Subpart G – Administrative Fees

Subpart H – Lease Violations

Subpart I – Appeals

Subpart J – Non-Trust Interests

Subpart K – Valuation

Subpart L – Trespass

Subpart M – Records

Subpart N – Special Provisions for Certain Reservations

We would initially propose the following reorganization within the subparts. Further reorganization is likely to be necessary as the substance of the proposed regulations is revised:

Subpart C – Agricultural Leases

162.XX What types of leases are covered by this part?

162.5 How will the Secretary implement tribal laws on Indian agricultural lands?

162.6 What tribal policies will we apply for leasing on Indian agricultural lands?

162.7 May individual landowners exempt their land from tribal policies for leasing on Indian agricultural lands?

162.8 What notifications are required that tribal law applies to a lease on Indian agricultural land?

162.9 Who enforces the tribal laws pertaining to Indian agricultural land?

162.10 How is an agricultural lease obtained? (would differ for three subject areas)

162.11 Is an agricultural resource management plan required?

162.12 How will the Secretary decide whether to grant and/or approve a lease on Indian agricultural lands? (subsection 12 would differ for three subject areas)

162.13 What supporting documents must a potential lessee provide? (subsection 13 would differ for three subject areas)

162.26 Are there specific provisions that must be included in a lease? (subsection 26 would differ for three subject areas, see (c) and (f))

162.27 How long is a lease term? (subsection 27 would differ for three subject areas)

162.64 Must I negotiate with and obtain consent of all the Indian landowners of a fractionated tract for a lease other than an agricultural lease? (The intent of this section is conflicting as to whether it applies to agricultural lands or not. It should be clarified and placed in the appropriate section.)

162.71 Who may represent an individual Indian landowner in granting a lease? (This should also be separated into the agricultural and general subparts, see (7) and (8))

162.74 What requirements apply to an agricultural lease on fractionated tracts?

Subpart D – Residential Leases

162.XX What types of leases are covered by this part?

162.10 How is a residential lease obtained? (would differ for three subject areas)

162.12 How will the Secretary decide whether to grant and/or approve a residential lease on Indian lands? (subsection 12 would differ for three subject areas)

162.13 What supporting documents must a potential lessee provide? (subsection 13 would differ for three subject areas)

162.26 Are there specific provisions that must be included in a lease? (subsection 26 would differ for three subject areas, see (c) and (f))

162.27 How long is a lease term? (subsection 27 would differ for three subject areas)

162.21 May a residential lease by amended, modified, assigned, transferred or sublet? (see (c))

162.23 What factors does the BIA consider when reviewing a leasehold mortgage for a residential lease? (the leasehold mortgage provisions must be refined for housing purposes in order to facilitate home equity financing for tribal members)

162.30 What happens to improvements constructed on Indian lands when the lease has been terminated? (this section must also be refined for housing purposes)

Subpart E – Business Leases

162.80 What types of leases are covered by this part?

162.81 How is a business lease obtained?

162.82 What supporting documents must a potential lessee provide? (like subsection 13)

162.12 How will the Secretary decide whether to grant and/or approve a residential lease on

Indian lands? (subsection 12 would differ for three subject areas)

162.26 Are there specific provisions that must be included in a lease? (subsection 26 would differ for three subject areas, see (c) and (f))

162.27 How long is a lease term? (subsection 27 would differ for three subject areas)

Also, subsections .83 through .91 should be removed from the business leasing section and then substantially revised to fit in with the General Provisions subpart, or into the specific subject areas. Each of these subsections, .83 to .91, is somewhat duplicative and conflicting with other provisions in the General subpart. This would lead to confusion, particularly because of the provision in 162.80 stating that; "The regulations in this subpart also apply to leases made for those other purposes, if appropriate." For example, .83 on fair annual rental conflicts in part with Subpart K, subsection .152.

Approval Standards and Implementation of the Policy of Tribal Self-Determination in Indian Land Leasing

The BIA's proposed revisions to their Part 162 regulations are the most significant effort to update the Department's surface leasing regulations in at least four decades. The present regulations were promulgated in 1961, a few years after enactment of the first statute ever generally authorizing long-term leasing of trust and restricted Indian lands. Before 1955, except in rare and localized circumstances (for example, Salamanca and the congressional villages on the Seneca Nation's Allegany Reservation), surface leasing of Indian lands had been limited to 5- or 10-year periods, appropriate for agricultural leases, but not for commercial, residential, industrial and other uses promising major economic returns. In 1955, Congress passed a statute (now codified as 25 U.S.C. 415) allowing all tribes and individual Indians to lease trust and restricted lands for up to 25 years, with the possibility of an additional renewal term of 25 years (retaining shorter limits for agricultural leases). Amendments to the 1955 Act have allowed longer lease terms, usually up to 99 years, for over two dozen specified tribes. In 1970, Congress directed the Secretary to ensure "that adequate consideration has been given to" five factors in approving leases: (1) the relationship between the use of leased lands and the use of neighboring lands, (2) the height, quality and safety of any structures or other facilities to be constructed on the leased lands, (3) the availability of police, fire protection and other services on the lands, (4) the availability of judicial forums for criminal and civil cases arising out of activities on the leased lands, and (5) the effect of uses on the leased lands on the environment.

The 1955 statute and its regulations were written when termination was the dominant federal Indian policy. That unwise and discredited policy is enshrined at least in some respects in the current regulations, and at least vestigially in the revision. Most basically, the current regulations focus essentially on ensuring that the Indian lessor receives a "fair annual rental." (See current Section 162.5(b)). The basic conception is that long-term alienation of Indian land to non-Indian users is desirable so long as fair value is received. Under this conception, the Secretary's trust responsibility is fulfilled so long as financially unwise transactions are prevented. This views the trust responsibility exclusively as a sort of "spendthrift" trust, where the presumptively knowledgeable Secretary protects his less competent and sophisticated (even presumptively incompetent) wards from squandering their assets. But Indian land itself is not protected from conversion to non-Indian use so long as value is paid.

We believe this conception of the Secretary's trust responsibility both does too little and too much. It does too much because at a time when tribal governments have become much more sophisticated and after three decades of adherence to the tribal self-determination policy, requiring an independent review and approval of all tribal leasing decisions to ensure financial prudence seems both demeaning and unnecessary. We suggest that revision of the regulations should be animated by a conception of the proper role of the Secretary's approval power in the context of 21st century Indian policy. Specifically, we believe that tribes' short-term leasing decisions should not be second-guessed or controlled by the Secretary. But the conception of the trust responsibility in the old regulations also does too little because some long-term business leases can threaten the preservation of the tribal culture, society and polity in a way that shorter-term agrarian leases do not, both because the leases last longer and the uses of Indian land by the non-Indian lessees are more permanent, and because the basic purpose of the Secretary's trust responsibility is to preserve Indian trust lands so that tribal self-government and culture can exist.

The preamble to the proposed regulations invites comments on implementing the self-determination policy with regard to approval of tribal leases. The language of the controlling statute, 25 USC 415, contains nothing that would prevent routine approval of tribal decisions on leasing. In fact the language seems to lend itself to routine approvals. The operative sentence is:

"Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to..." and then goes on to list five criteria.

Under the statute the Secretary exercises a limited approval function to ensure that the landowner has given adequate consideration to certain listed criteria. We would propose the following language as a starting point for considering an appropriate role for Secretarial approval of short-term tribal business leases. This language would serve as an additional option to the standard, and more traditional, approval process.

Under What Circumstances Will We Provide Routine Approval of Tribal Government Granted Leases?

We will routinely approve leases of 25 years or less in duration that have been negotiated and granted by a tribal government, provided the tribe submits the following information. Such leases shall be disapproved only if the information submitted indicates that approval of the lease would result in gross mismanagement. Such leases shall be approved within 15 days and failure to approve within that time period shall constitute approval.

1) a copy of the lease agreement that specifies the legal description of the land, all parties with an interest in the land, the proposed use of the land, the term of the lease, any money or other compensation to be paid under the lease, and any remedies upon breach of the lease;

2) an appraisal of the lease value from a qualified and independent appraiser, although an appraisal may be waived under appropriate circumstances;

3) a description of the lessee's qualifications and creditworthiness in performance of the lease;

4) a citation to the legal authority under which the United States may approve the lease;

5) any necessary environmental analysis including documentation needed to comply with 516 DM 6, Appendix 4, National Environmental Policy Act (NEPA) Revised Implementing Procedures, (For a copy of this directive, see the Bureau of Indian Affairs web site at: www.doi.gov/bureau-indian-affairs.html.) If required by law, include a record of consultation with appropriate authorities regarding, if applicable, environmental, endangered species, water quality, fish and wildlife, wetlands, transportation, air quality, cultural, historical value, hazardous waste, and toxic material issues;

6) a description of the tribal government's consideration of the relationship between the use

6) a description of the tribal government's consideration of the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

We would also propose that a separate standard be developed for routine approval of short-term agricultural leases on pre-approved forms, limiting the review to landowner signatures, valuation, and the completion of required documents. We would encourage more consultation with agricultural tribes and the Intertribal Agriculture Council on these matters.

For residential leasing, we believe that a standard should be developed that acknowledges that providing affordable homes in safe, healthy environments is an essential element in the role of the United States in helping tribes and their members improve their housing conditions and socioeconomic status. The standard should be referenced to the independent leasing authority for Indian Housing found in 25 USC 4211. The standard should also be designed to assist in the development of private housing finance mechanisms on Indian lands to achieve the goal of self-determination and economic self-sufficiency for tribes and their members, as prescribed under the Native American Housing Assistance and Self-Determination Act of 1994. For example, a tribe may wish to lease tribal land to a housing authority or to tribal members at below-market rates, or for a nominal amount such as one dollar, in order to provide land for housing and increase home ownership on the reservation.

We would also like to mention one of the criteria for lease approval that the Workgroup previously suggested for lease approvals that appears in somewhat garbled form in the proposed 162.12. Section 12 (b)(6) provides for the Secretary's consideration *of the tribe's assessment* of the impact of a lease on the preservation of tribal lands, culture, and tribal self-government. This would abdicate the Secretary's trust responsibility. We would like to clarify that this criteria should only be applied to very long-term leases of tribal lands that could imperil the tribal land base, such as a large strip mine on a small reservation, or a toxic waste dump. Certainly there are many circumstances where such leases should be approved, but in such cases, the Secretary has a trust responsibility to protect the future of the tribe and should directly consider "any impacts of the proposed lease on the preservation of the Indian community, the continued practice of Indian cultural activities and the exercise of tribal governmental authority on the leased lands and other nearby trust and restricted

lands.

The Workgroup also urges the Department to develop timelines for its approval processes that would be reflected in the approval standards. Too often, Indian leasing has suffered from the inability of the Department to review and approve leasing in a timely manner. In particular, financing is often dependent upon receiving approval within a reasonable time frame. Setting timelines in the regulations will serve as an important management tool for ensuring that BIA officials prioritize lease approvals and act in a timely manner.

Need for Direct Lease Payments

The BIA has requested comments on the need for continued direct payments of rent by lessees to Indian landowners. 65 Fed. Reg. at 43880. That need is critical for a number of Tribes and can be continued in a manner that is consistent with the American Indian Trust Fund Management Reform Act ("Trust Fund Reform Act"). Direct payments should be allowed for all Indian landowners who request it, regardless of whether a Tribe has chosen to contract for realty services under the Indian Self-Determination and Education Assistance Act ("Self-Determination Act").

Since at least 1961, the Interior Department has allowed Indian landowners, at their option, to receive lease payments directly from lessees. The existing regulation states in relevant part:

> Leases granted or approved under this part shall contain provisions as to whether payment of rentals is to be made direct to the owner of the land or his representative or to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

25 C.F.R. §162.5(f). Many Tribes and their members who own land have come to rely on this provision and receive direct rental payments.

Direct payments have several advantages to Indian landowners. First, for the majority of lease arrangements in which lessees make timely regular payments, the owner receives the rent as soon as possible. The owner has immediate access to that income, and can spend or invest the funds right away. Second, there are fewer chances for errors in delivery of the rent to the Indian landowner, because the owner knows how much is due and knows immediately whether full payment has been received. The funds never enter a large institutional accounting system, where the chances for error are much greater. Third, direct payments allow the

Indian landowner to maintain a one-on-one business relationship with the lessee, fostering an atmosphere of business partnership and allowing for direct dialogue when problems arise. Fourth, if the lessee fails to make a timely payment or otherwise breaches the lease, the Indian landowner knows it immediately and can contact a BIA realty officer to begin enforcement proceedings. Most Indian landowners are capable of knowing the amount of rent they should receive and calling the BIA when they do not receive it.

Direct payments may also allow for more productive operation of BIA realty offices. The time that would be spent on accounting for funds received and disbursed can be used for the more critical functions of reviewing and approving new leases and other land transactions that are essential to fostering economic development on Indian reservations. If those productivity gains can be realized, then Indian landowners benefit from expanded economic development as well.

There is no compelling reason to do away with the 40-year old policy of allowing direct lease payments. The Trust Fund Reform Act requires improved accounting for and reporting of trust fund balances, and adequate controls over receipts to and disbursements from trust fund accounts. No provision of the Act requires that all rentals owed to Indian landowners be deposited into BIA trust fund accounts. 25 U.S.C. §§4001-4061. The purpose of the Act was to overhaul the notoriously defective trust fund management system. The problems with that system are internal. They were not caused by the direct payment of rent to Indian landowners.

Congress has taken steps to require improvement of the trust fund management system, and the Office of Special Trustee has begun to implement changes to that system. As demonstrated by issues coming to light in the *Cobell* litigation, however, that system is not yet adequate to meet the needs of existing Indian trust fund beneficiaries.

Indian landowners rely on direct lease payments to bypass that defective system. Direct payment ensures that they do receive their rent or, if not, that they can pursue enforcement immediately. *It would be a breach of trust for the BIA to take away that option and require Indian landowners to participate in a defective trust fund system.* Even if the trust fund management system were completely functional, however, direct payment should be allowed because of the substantial benefits described above.

Accounting for Direct Lease Payments

The BIA also requested comment on "the Secretary's legal obligation as trustee to obtain the

information regarding payment history that is needed to perform the necessary accounting." Again, the Trust Fund Reform Act by its terms requires improved accounting for trust funds. It does not require that all rents be deposited into trust funds nor that the Secretary account for lease payments that are made outside the trust fund system.

It is important to remember that *accounting* is not the only aspect of the Secretary's trust responsibility to Indian tribes. The Secretary has a duty to help Indian tribes manage their land in a way that maximizes their beneficial interest in the property. That includes establishing systems that allow efficient land transactions and foster economic development on Indian trust land. Direct payment of rentals fosters economic development and the business acumen of Indian landowners. Diverting scarce agency resources from processing land transactions to an unnecessary accounting exercise does not.

Even if the Secretary deems it necessary to account for funds paid outside the trust fund system, however, there are several methods to accomplish that goal other than prohibiting direct payments. A relatively simple system would be to add a lease requirement that the lessee notify the BIA realty office by letter and copy of the check when a lease payment is made. A more secure system would be to provide the lessee with a book of coupons, with copies for the Indian landowner and the BIA realty office, to be submitted by the lessee with each payment. Perhaps accounting could also be accomplished electronically, by allowing wire transfer of lease payments to the Indian landowner' bank account, and simultaneous notification of the BIA by the transferring bank.

Of course discrepancies could arise between what the lessee sends to the Indian landowner and to the BIA realty office. As in the past, however, Indian landowners can be relied on to notify the BIA if they do not receive the proper rent. Leases could include right-to-audit clauses that would be triggered when an Indian landowner reports nonpayment to the realty office.

If necessary, any mistakes could be caught by the BIA sending an annual accounting of reported rents to the Indian landowner, with a notice to contact the realty office if any funds were not received. Lessees could also be notified that false reporting to the BIA will result in prosecution for wire or mail fraud or other criminal statutes protecting Indians. A few high profile prosecutions would prevent most abuses of the system.

All of these accounting options could be incorporated within the accounting systems being developed for the trust fund system. Notification of direct payments sent to Indian landowners could be recorded as easily as deposits into trust funds. An annual accounting for

reported direct payments could occur with the same ease as an annual accounting for trust fund receipts, earnings, and disbursements.

Finally, an Indian landowner always has the option not to take direct payments and to accept the advantages, if any, of the BIA trust accounting system. Those advantages and the risks of accepting the direct payment option could be explained at the outset. The landowner can then make an informed decision whether to assume the risk of an incomplete accounting in exchange for the benefits of direct payment. Likewise if a problem with direct payment arises during the course of a lease, then the lease can be amended. It is unlikely that lessees will care to whom they send the rent.

The BIA should not eliminate the benefits of direct lease payments for Indian landowners to resolve an accounting issue that can easily be resolved by other means.

The BIA also requested comment on whether the Self-Determination Act should be the sole method of allowing direct payment of lease rentals in the future. Certainly an Indian tribe that contracts or compacts under the Self-Determination Act for management of the BIA realty office or leasing function must be allowed to provide for direct payment to Indian landowners. The fundamental purpose of the Self-Determination Act -- to allow Indian communities to provide formerly federal services in a way that is more responsive to the needs and desires of those communities -- would be thwarted otherwise.

The Self-Determination Act should not be the sole method of allowing direct lease payments. For a variety of reasons, many tribes choose not to contract for certain federal functions under the Self-Determination Act. That choice in itself is a sovereign decision that Indian tribes have the right to make. For the reasons set forth above, Indian tribes and other Indian landowners need the option to receive direct payment of lease rentals, whether or not the Tribe is prepared to take over the realty office. Even if the Trust Fund Reform Act does require additional accounting procedures, adequate alternatives can be implemented to preserve the direct pay system.

These comments are submitted in response to the BIA's specific requests on these issues. In addition to requesting comments, however, the BIA has stated in no uncertain terms:

> Many tribes and individuals have expressed a desire that the current practice of allowing direct payments of lease income to Indian landowners be continued under this part. *The BIA recognizes the utility of direct payments and does not propose*

to alter the practice at this time.

65 Fed. Reg. at 43880 (emphasis added). We thank the BIA for this commitment to maintain the current practice.

That commitment resulted in a collective sigh of relief from concerned Tribes and individuals. As a result they may focus on other parts of the regulation and not comment on the direct payment issue. Regardless of the scope of comments, however, Tribes and individuals who have spoken in the previous consultation process have the right to hold the BIA to its word. Such a clear statement of intent in the proposed rulemaking would be extremely misleading if the BIA should decide to change the direct payment practice in the final rule. Any last minute change could only be viewed as a breach of the rulemaking requirements of the APA and the trust responsibility.

In conclusion, allowing direct payment of rents to Indian landowners fosters self-reliance and economic development in Indian communities. Direct payment is fully consistent with the Secretary's trust responsibilities. The Trust Fund Reform Act does not require accounting for funds that pass outside the trust fund system. Requiring unnecessary accounting will divert scarce BIA staff resources from more important functions. Even if additional accounting procedures are needed, however, they can and should be accomplished without eliminating the direct payment option on which Indian landowners have come to rely.

Proposal for Lease and Trespass Enforcement in Proposed Pt. 162

The Workgroup is encouraged by the provisions in the proposed Part 162 that would strengthen the enforcement of lease violations, trespass, and failure to pay rent on Indian lands. However, we do not believe the proposed provisions go far enough. Once again we would like to note the regulations that the U.S. Government uses for management of its own lands under the supervision of the Bureau of Land Management for grazing permits and leases. These regulations provide specific instructions on the process for collecting unpaid fees, permit violations and trespass at 43 CFR 4130 to 4170.

The cited sections provide an administrative system for resolving payment issues and enforcing penalties. It is notable that under the BLM regulations, the failure to pay rent more than 30 days past the due date is eligible for treatment as a trespass. The BLM provides that the authorized officer must include a demand for payment in any proposed decision. None of these are present in the proposed BIA regulations we have been presented.

In addition, we believe that the BIA regulations must define an accounts receivable system and the roles of the BIA and the OTFM in ensuring that appropriate action is taken to ensure that payments are made timely and in the correct amount. The following are specific suggestions in Pt. 162 for strengthening enforcement of leases and collection of lease payments.

Subpart A – General Lease Provisions and Requirements

.33 When is a lease payment late?

Comment: This subsection should be stricken. There is no reason to provide a fifteen day grace period for making late payment. The preceding subsection, .32, adequately explains that a lease payment is due by the date specified in the lease.

.34 Will a lessee be notified when a lease payment is ~~due~~ late?

Strike all and insert: The BIA will send written notice to a lessee that a payment is late within 15 days of a missed due date, specifying the amount of the payment, the penalties for late payment, and the address to which the payment should be delivered.

Comment: The Workgroup does not believe that it is a wise use of limited BIA resources to provide written notice prior to each due date stating when the next lease payment is due. The lease document itself adequately informs the lessee of the schedule of payments. In addition, it is our understanding that the BIA intends to develop a system of coupon books for lease payments, which would provide additional notice to lessees.

.36 What will the BIA do to collect lease payments that are not made in accordance with the terms of a lease?

Failure to make payment in accordance with the terms of a lease will be enforced against the lessee as a lease violation under subpart H of this part. Failure to make payment within 30 days of the due date may be enforced as a trespass under subpart L of this part. Upon a failure by the lessee to pay rent, an Indian landowner may take any action authorized under the lease, and may notify the BIA for enforcement action.

Subpart H -- Lease Violations

.120 What lease violations are addressed by this subpart?

This subpart addresses violations of lease provisions other than trespass, such as failing to pay rent or damaging leased property. Trespass is addressed under Subpart L of this part.

.121 How will the Secretary enforce compliance with lease provisions?

When reasonable grounds exist to believe that the lessee is violating lease provisions, the Secretary ~~may~~ will enter the leased premises, consistent with provisions in the lease, at any reasonable time with or without prior notice to determine whether there has been a violation of the lease provisions and to protect Indian trust assets. Whether or not reasonable grounds exist, the Secretary may also conduct periodic inspections of leased Indian property without prior notice, and will do so as necessary to protect and preserve Indian trust assets from loss, damage, unlawful alienation, waste and depletion. The Secretary will coordinate its efforts to redress lease violations with tribal government law enforcement to the extent that the lease violation also constitutes a violation of tribal law.

.122 What happens if a violation of the lease occurs?

If we determine that a violation of the lease has occurred, based on facts known to us, ~~as soon as practicable~~ within ten days we will notify the lessee ~~and~~ , the sureties of the violation, and the Indian landowner by certified mail- return receipt requested. This notice will include an explanation of the violation.

.123 What will a written notice of violation contain?

The written notice will provide the lessee with ten days from the receipt of the notice to:

(a) Cure the violation and notify us that the violation is cured;

(b) Explain why we should not cancel the lease; or

(c) Request in writing additional time to complete the corrective actions, setting forth the reasons why immediate corrective action is not possible. If additional time is granted, we may require that you take certain corrective actions immediately.

.125 What happens to a bond if a violation occurs?

We may apply the bond to remedy the violation, in which case we will require you to submit a replacement bond of an appropriate amount. ~~Our decision setting the amount of the appeal bond may not be appealed.~~

.126 What happens if you do not cure a lease violation?

(a) We will:

(1) issue a written determination to cancel the lease if the violation is not cured. The decision letter will contain:

(i) An explanation why we are canceling the lease;

(ii) An order to vacate the property;

(iii) Notice of the right to appeal under part 2 of this chapter;

(iv) An order to pay delinquent rentals, damages, and other charges; and

(v) A requirement to post an appeal bond if applicable

(2) Notify all interested parties, including the Indian landowners, in writing ~~as soon as practicably possible~~ within ten days, by certified mail-return receipt requested, of our determination to cancel a lease.

(b) We may require you to post an appeal bond in an amount determined by us. The amount of the appeal bond will be the amount of damages, and additional rentals expected to accrue

amount of damages, and additional rentals expected to accrue during the settlement of the appeal. Our decision setting the amount of the appeal bond may not be appealed.

.127 ~~If you do not cure a violation;~~ What may an Indian landowner do to ensure that lessees are complying with the lease?

(a) If at any time during the duration of a lease term the lessor discovers a violation of the lease may have occurred, the lessor can notify the Secretary. Upon such notice, the Secretary will commence immediate investigative action.

~~(a)~~ (b) If a violation is not cured within the required time frame, the lessor may exercise rights under the lease, including a right of entry, if any, or request that we cancel the lease.

~~(b)~~ (c) If a lease authorizes termination according to tribal or other law, or provides for the resolution of certain types of disputes through alternative dispute resolution methods, the lease provisions will govern in place of this part.

.128 Can the Secretary take emergency action without prior notice if the leased premises are being damaged?

Yes. If the lessee or someone in the lessee's control causes or contributes to a ~~severe~~ substantial harm to the premises, the Secretary may take appropriate emergency action, ~~in consultation~~ with the Indian landowner's consent. Under this section, substantial harm means loss, destruction or defacement of the property worth greater than $500. The Secretary's emergency action could be:

(a) initiating action to cancel the lease;

(b) Requiring immediate cessation of the activity resulting in the harm;

(c) Ordering the lessee to vacate the premises immediately; and

(d) Taking legal action as may be appropriate, including seeking emergency judicial action.

Subpart K – Trespass

.160 What is trespass?

Under this part, trespass is any unauthorized occupancy, use of, or action on Indian ~~agricultural and governmental~~ lands. The following are some examples of trespass:

(o) Failure to make payment within 30 days of the due date or otherwise violating the terms and conditions of a lease may be considered a trespass.

.166 What actions does the BIA take against trespassers?

~~If the trespasser fails to comply with the corrective action specified by us, w~~ We may take one or more of the following actions, as appropriate:

(a) Seize, impound, sell or dispose of unauthorized livestock or other property involved in the trespass. We may keep such seized property for use as evidence.

(b) Assess penalties, damages, and costs under section 162.172.

.172 What are the penalties, damages and costs payable by trespassers on Indian land?

(h) Trespassers shall not be authorized to make use of the public lands administered by the Department of Interior until any amount found to be due under this section has been paid. The Secretary may take action to cancel or suspend grazing or other authorizations or to deny approval of applications for grazing or other use until such amounts have been paid. The proposed decision shall include a demand for payment.

Specific Comments on Pt. 162

In addition to the more global comments addressed above, the Workgroup has a number of comments on provisions throughout Pt. 162.

We would like to raise two issues of plain language that are found throughout this proposed rule. Many people, even attorneys, confuse the terms lessee/lessor. We believe it would reduce confusion and reduce costly mistakes if the terms landowner and tenant were used consistently throughout the regulation. In addition, the word "you" is used throughout to refer to potential lessees. Because there are three parties involved in leasing, the trustee, the landowner, and the tenant, the use of pronouns such as "you" tend to confuse the reader.

.4 Do tribal laws apply to leases?

Tribal laws will apply to leases of Indian land under the jurisdiction of the tribe enacting such laws, unless those tribal laws are ~~inconsistent with~~ prohibited by applicable federal law.

.9 Who enforces tribal laws pertaining to Indian agricultural lands?

Comment: This subsection should be rewritten to comport with 25 U.S.C. 3713(c) regarding concurrent jurisdiction.

.14 Must a lease be recorded?

Comment: It is unclear to us why only leases in excess of one year must be recorded. If a one-year lease has the capacity to be renewed by the parties repeatedly, the absence of recording the lease could lead to problems if the BIA has no record of this encumbrance.

.18 Is there a standard lease form?

Comment: We believe that the regulations should contemplate the development of lease forms by tribal governments that could be approved by the BIA, creating a process for expedited and routine approvals of the final leases.

.21-.25 Housing Issues

The provisions in subsections .21 through .25 will have a significant and possibly very negative impact on Indian Housing. We have previously proposed that residential leasing matters be separated into their own Subpart in order to clearly treat issues relating to assignments, subletting, and leasehold mortgages in a manner separate from business leasing. The Workgroup would urge the Department to consult with the specialists in Indian Housing from the tribes, advocacy organizations, lenders and governmental entities, to ascertain the impact of these regulations on mortgage lending and issues related to overlap of federal agency authority.

The provisions on subletting should be studied more carefully with regard to agricultural, residential, and commercial leasing. While authorization for subletting is necessary for residential leasing and some types of commercial leasing, it may be inappropriate for agricultural leasing. The provisions on assignments of leasehold interests should require that the assignee be fully capable of performing all leasehold obligations.

.26 Are there specific provisions that must be included in the lease?

(b) should be deleted. This provision reflects an outdated statutory provision from the termination era, and there is no reason today that a lease should not delay or prevent the issuance of a fee patent, or that this should be mechanically repeated in the regulations.

.27 How long is a lease term?

(b) should clearly separate the authority for 50 year lease terms for Indian Housing for found in 25 USC 4211, and place this in the separate section for residential leasing. This section should also clarify whether the "consent of both parties" is required for the renewal term under the provisions of 25 U.S.C. 415.

(d) the American Indian Agricultural Resources Management Act specifies a lease term of

not to exceed 10 years – not 5 years as stated in the proposed rule – and allows leases of up to 25 years where substantial investment is required. The ten year lease term is very important for Department of Agriculture lending programs.

.38 Does the BIA accept partial payment for a lease payment due?

The proposed regulations should be modified to more clearly permit the acceptance of partial payments. Since these regulations will have the force and effect of law, they can be written to say in plain English that:

"Acceptance of any partial payment, or the negotiation of any instrument representing partial payment, of any obligation to pay arising from the lease on these regulations does not constitute a satisfaction and accord of the entire obligation. The Bureau explicitly reserves the right to exercise all rights and remedies available under law or these regulations, including cancellation of the lease or asserting a landlord's lien to collect the full amount due, including penalties and interest."

Sometimes lessees are simply unable to make full payment on a timely basis, and the landowner should not be deprived of such money as in available until full payment can be made. When a lessee is in bankruptcy, the bankruptcy court often authorizes partial payments on accounts, and if these are not accepted, the Indian creditor will always go to the end of the line and risk receiving no payment at all.

.39 May a lessee make a lease payment in advance of the due date?

The Workgroup can see no reason to prohibit payments in advance of the due date. If a lessee chooses to make a balloon payment on a commercial lease, and this payment will work to the benefit of the Indian landowner, it may be a violation of the trust responsibility for the BIA to refuse to accept it. If there is some particular type of wrongdoing or coercion that occurs with advance payments for agricultural leases, these provisions should be more narrowly tailored to agricultural leases and the particular circumstances where the abuse occurs.

.43 What forms of payment are acceptable to the Secretary?

This section must be amended to allow payment by personal or business checks. The BIA is well aware that on many rural reservations there are severely limited banking services, and it will pose a great difficulty and extra expense to agricultural and residential leasing if payments

must be made by money order or cashier's check. We believe that it may be a breach of the trust obligation to refuse to accept a personal or business check in satisfaction of a lease payment.

.44 When required under a lease, how will the BIA adjust the lease payment?

(a) should be modified with the additional language "or as provided in the lease."

.49 Is interest paid on a cash performance bond?

We believe that the U.S. government must pay interest when it holds a cash performance bond. By holding cash in the U.S. Treasury the federal government borrows less money, and thus receives the same benefit as if interest were accruing. We believe that it is impermissible for the trustee to benefit from the trust in this manner. The interest should not be held in trust, but should be paid to the lessee at the close of the lease, thus reducing the cost of the transaction for both the landowner and the lessee.

.61 How do I acquire a lease on Indian land?

This subsection goes too far in stating: "We must approve all leases of Indian land in order for the leases to be valid." For example, tribal corporations incorporated under Section 17 of the Indian Reorganization Act may lease without Secretarial approval. We believe that this statement is unnecessary for this section and should be deleted.

.62 How do I acquire a lease through negotiation?

(a) refers to Sections 162.60 (b) and (c) when there are no such provisions in the proposed regulation.

.64 Must I negotiate with and obtain the consent of all of the Indian landowners of a fractionated tract for a lease other than an agricultural lease?

This subsection is very confusing in that it refers to agricultural and non-agricultural leases simultaneously. For agricultural leasing, the provisions for obtaining the consent of the landowners are spelled out in the AIARMA, and should be reflected in the agricultural section of the rule.

For non-agricultural leasing, provisions requiring the affirmative consent of all landowners are

too onerous. Much Indian land is held in fractionated ownership with multiple joint tenants. The Workgroup believes that in order to prevent waste, reduce idle land acreage and ensure income, this provision should refer to the statutory authority for leasing of inherited allotments found in 25 USC 380. This provision allows the Secretary to lease allotted lands when they are not in use by any of the heir landowners and the heirs have not been able to agree upon a lease for a three month period. As a starting point for discussion, you may with to consider the following language:

"The Superintendent shall have authority lease restricted allotment lands when the land is not in use by any of the heir landowners, and the heirs have not been able during a three month period to agree upon a lease by reason of the number of heirs, their absence from the reservation, or for other cause. Notice of the intention to lease the land must be mailed to each landowner in writing, and when necessary by other means reasonably designed to result in actual notice. Landowners must have at least three months to file written objections and develop alternative leasing proposals."

.67 Must Indians who own Indian land obtain a lease before using this land for their purposes?

This section still requires Indians owning an undivided interest in a tract with multiple owners to obtain a lease to use the tract. This is contrary to law. Each joint tenant has the right to full use and enjoyment of the land so long as he or she does not interfere with the rights of the co-tenants. It is critical that the BIA not erect obstacles to an Indian owner's use of Indian lands. If this section is intended to facilitate leasing of unused lands under 25 USC 380, it should be more narrowly tailored to address those situations where a single possessor is blocking an attempt to lease the land.

.72 May an emancipated minor grant a lease on his or her own Indian land?

We can see no justification for preventing an emancipated minor for leasing his or her land. Given the status of fractionated lands in Indian country, this provision will also pose practical problems. If an emancipated minor cannot act on his or her own behalf, then there is no one who can act, and the land is likely to lay idle and fail to produce income.

.74 What requirements apply to an agricultural lease on fractionated tracts?

This subsection appears to be inconsistent with the AIARMA.

.180 Who owns records associated with this part?

This provision must be amended to ensure that Indian tribal governments have full and unconditioned access to records regarding lands and resources on their reservations and within their tribal government jurisdiction. Access to such records is absolutely necessary for a tribal government for effective self-governance and self-determination in accordance with federal Indian policy. Moreover, the AIARMA clearly provides for concurrent tribal jurisdiction over leasing matters under their jurisdiction, and the ability to enforce their own tribal laws against trespassers and on other matters. A failure to provide access to land ownership records would clearly frustrate the purposes of the AIARMA.

Finally, it is a fundamental principle of the government-to-government relationship that the federal government must provide access to relevant information that is within the jurisdiction of the tribal government. Please see the attached resolution from NCAI on this topic.

IV. Proposed Revisions to Part 166 – Grazing Regulations

The proposed Pt. 166 regulations on Grazing parallel the proposed Pt. 162 regulations in many important respects. As a result, many of the comments that we have provided above apply to leasing on grazing lands and the provisions under Pt. 166. We would request that the Department review and revise the grazing regulations in conjunction with our comments on Pt. 162.

For example, our major suggestions with regard to implementing tribal self-determination in the approval standards for leasing, direct pay, and enforcement of lease provisions, trespass and collection of rent are all applicable to Pt. 166 as well. In addition, all grazing leases fall under the statutory authority of the AIARMA and extra effort should be made to ensure that the grazing regulations are fully consistent with that statute. We would encourage that the Department give strong consideration to comments submitted by tribal governments who have grazing interests and the Intertribal Agriculture Council, and would also encourage more consultation with tribal leaders on these matters.

V. Part 115 Trust Funds Regulations

Overview

After reviewing the draft and engaging in discussions with the BIA and the Office of Trust Funds Management, the Workgroup has very serious concerns about the BIA's purposes for

proposing these regulations. In large measure it seems that the underlying goal of these proposed regulations is to diminish the government's trust responsibilities rather then to guide how the United States carries our the trust duties it owes to Indian trust beneficiaries

As we discussed earlier, the proposed regulations fail to deal with the primary source of failure in the trust management system; monitoring and enforcement on uncollected trust funds from the sale or leasing of trust resources. The regulations do not identify how accounts receivable will be reconciled or who will be responsible for taking action when a payment is missed or received in the wrong amount. As we noted above, we believe that the Part 115 regulations must be modified to address this key issue as a part of a general revisioning of the trust management system and the interrelationship between resource management regulations and the trust funds regulations.

We are appreciative of the efforts to affirmatively state in the purposes section that the purpose of these proposed regulations is to guide the Secretary in fulfilling its trust duties. With this purpose in mind, the regulations should be essentially a road map as to how the DOI acts in certain specific context. However, these regulations suffer from fundamental architectural problem -- they are not drafted as if they apply to a trust. The drafting operational framework should be -- this is a trust like any other trust. The trust duties any other trustee would owe a beneficiary should be the ones the United States owes Indian beneficiaries.

The Workgroup would suggest that the following matters be specifically addressed in the proposed Pt. 115 regulation:

> **What are the responsibilities of the OTFM and the BIA in managing and accounting for Indian trust funds?**
>
> The OTFM and the BIA will coordinate in maintaining a system of accounts receivable.
>
> The OTFM will ensure payments are made, and the BIA will ensure that enforcement and collection occurs on delinquent payments.
>
> The OTFM will ensure that trust funds are invested to ensure maximum return consistent with federal law

The OTFM will notify Indian landowners when a payment has not been received

The OTFM will protect the assets of account holders in a manner consistent with the trust relationship and applicable law.

The BIA and the OTFM will coordinate in maintaining records of all transactions related to a tribal or IIM account.

The OTFM will ensure that distributions are timely and accurately made to account holders.

Loss of Services to Older and Disabled Tribal Members, and Loss of Protections Against Creditors

On these issues, please refer to the attached memorandum by Columbia Legal Services, which specializes in providing services to elders and disabled tribal members regarding IIM accounts, federal benefits and protection against creditors. In summary, under current regulations, IIM accounts can be "restricted" or "supervised" to protect the funds of minors, the elderly, or others who have difficulty managing their own funds or are at risk of financial exploitation. The current system allows flexible planning for disbursements, and for deposit and supervision of other funds, such as federal benefit or pension checks. A great deal of the existing framework for exemption of trust payments from eligibility for public benefits rests upon the ability to place trust funds in "supervised" status.

Under the proposed rules, the administrative process for declaring an adult to be "in need of financial management assistance" would be removed, and a court order would be required along with the appointment of a guardian. These much more onerous requirements are simply inappropriate for many elders and disabled people who simply want some assistance with their accounts and do not wish to go through a court proceeding and have a guardian appointed. It is also culturally unacceptable for many Indian people. As a result, many tribal elders will lose the protection of their assets, and many tribal members and their families will lose eligibility for federal and state benefit and health care programs. Money in a restricted IIM account does not count against the maximum resource or asset limits for many benefit programs. The same money held by a guardian or in a private bank can be 100% countable. The proposed rules make it harder to keep money in a restricted account. In addition to requiring guardianships, the proposal forbids the deposit of Social Security or retirement payments in IIM accounts. By limiting the use of restricted accounts, the new rules would subject many vulnerable Native people to exploitation and a loss of needed benefits. The

subject many vulnerable Native people to exploitation and a loss of needed benefits. The attached comments propose to reinstate the administrative process for finding adults "in need of financial management assistance."

In this regard, the proposed regulations seem to be animated by an exceedingly narrow and technical view of the trust management responsibility that does not integrate the overall responsibility to work for the benefit of Indian people and tribes. As a result the BIA's proposal would have exceedingly harsh results for elder and disabled IIM account holders, and would generally restrict the ability of the BIA to perform a number of very useful functions that it currently provides to Indian tribes and Indian people.

The Bureau's proposed rule would also allow the BIA to expropriate IIM funds to pay any type of court judgment, even a debt to the Bureau itself, as well as child support and federal taxes. The proposals raise serious issues of federal trust responsibility, interference with tribal government functions, and neglect of vulnerable tribal members. They should be shelved or significantly rewritten to insure continued protection and respect for tribal elders and the disabled.

Types of Funds that Can Be Deposited in an IIM Account

As we noted above, the proposed rule would also sharply limit the type of funds that can be placed in an IIM account. First, the regulations would only allow trust to trust transfers of tribal trust per capita payments into "existing" IIM accounts. 115.102(d)(2). This would prevent opening new accounts for minors. We do not believe that this is in accordance with law. 25 USC 177a clearly provides authority for the Department to distribute tribal trust per capita payments to tribal members, and this is a practice that has been ongoing for many decades. It is an abnormally strained reading of this statute to determine that these per capita distributions of tribal trust funds are no longer trust funds and thus not eligible for opening an IIM account. This provision must be changed. We also have concerns that the regulations would prevent the practice of allowing elders and the disabled from depositing their pension or disability checks into their IIM account. These changes are supported by no provision of law that has been cited to the Workgroup, and seem unnecessarily harsh in their effects.

Impacts on Tribal Lending Programs

Sec. 115.371-.383 on "Encumbered Accounts" could greatly limit the ability of tribes to finance loans to tribal members. A significant number of tribal governments operate lending programs for the benefit of the members, who are often without other sources of credit. Such

loans are most often financed by the borrower's assignment of trust income to repay the loan. Such as assignment would be defined as an "encumbered account" as defined in Sec. 115.002 of the proposed regulations. The definition says that an "encumbered account" exists where "an individual Indian beneficiary of trust property whose income from trust property is paid directly to the Secretary and some portion of the proceeds are obligated to third parties by court order or voluntary contractual agreements that have been approved by the Secretary." The problem is that Sec. 115.377 would revise the existing regulations to provide that "The Secretary may recognize an assignment of income . . . [only] for health care emergencies . . . " It is our sense that this revision will make it very difficult for most tribal lending programs to continue to function and would deprive many tribal members of access to lending. There is also some lack of clarity, in that 115.385(3) would seem to allow for assignments of income that are secured under the Indian Finance Act. We would strongly urge that the limitation in 115.377 be removed.

Stolen Checks

Section 115.322 (b) deals with stolen checks. A trustee is under an affirmative obligation to ensure that money reaches the beneficiary. But Section 115.322(b) would relieve the government of that burden. 115.331(b) provides that if a check is stolen and cashed by someone other than the beneficiary, and the beneficiary does not notify the trustee within one year, the beneficiary "will not receive a new check and the money will not be redeposited into your account." We object to this provision because beneficiaries often do not receive their quarterly statements, and may have no way to know that they did not receive a check. In addition, we believe that the time period to notify the trustee should be extended to the applicable statute of limitations for enforcement on fraudulently endorsed checks.

Claims Against Third Party

These regulations do not raise the issues of enforcement of claims by the trustee against third parties. Of course, such enforcement is a fundamental duty of a trustee. An appropriate provision addressing that issue must be included.

VI. Probate Regulations

The trust management system depends upon the ability of the Department of Interior to accurately and timely determine heirs and approve wills for trust property. The inability of the

BIA and the Office of Hearings and Appeals (OHA) to remain current in probate adjudication results in unreliable ownership information that further delays and complicates the distribution of income as well as actions such as leasing. The significant backlog of probate cases that has persisted for many years is one of the chronic factors in the malfunctioning of the Indian trust property system.

Under the current system, the BIA realty offices are required to provide heirship information to the Administrative Law Judges (ALJ) of the OHA within 90 days of the notification of the death an individual owning trust property (43 CFR Part 4), but have had insufficient resources to comply and have a large and significant backlog of cases that require processing. The OHA holds an automatic hearing, and has the responsibility for deciding the cases. OHA has for the most part kept pace with the cases they received. However, it is anticipated that there will be a large increase in the probate caseload, due to BIA increases in staffing and efforts to prepare cases and because of the ongoing growth in fractionation of ownership and the number of heirs. As a result, the current level of staffing within OHA will be inadequate to handle the increasing number of probate adjudications.

The Workgroup is strongly supportive of efforts to improve the effectiveness of the probate system and remove the probate backlog. Increasing BIA staff and speeding up the preparation of cases are certainly well warranted. In addition, it makes sense to anticipate the increase in adjudications and create an efficient system to handle the adjudication of the cases.

The BIA probate proposal would implement several fundamental changes. First, the regulations would establish "Attorney Decision-Maker" positions in the BIA to decide Indian probate cases without holding hearings. Upon notification of a death, a BIA "Probate Specialist" would gather information, prepare the probate case file, and evaluate the case under fixed criteria. The criteria would be used to distinguish cases that must go to an ALJ for hearing from those which could be decided in an expedited fashion by a BIA Attorney Decision-Maker without a hearing. In the expedited cases, the notices would inform parties that the BIA has an expedited procedure to probate estates without a hearing, but any interested party may elect to have the estate probated by an ALJ. Subsequent to a decision by an Attorney Decision-Maker, any interested party would have another opportunity to request a hearing by an ALJ.

The Workgroup has several comments regarding the new probate process described in the revised 25 CFR Part 15: Probate of Indian Estates. First, we object to the major change in the process which gives the BIA attorney decision makers and probate specialists the

authority to probate Indian estates without the opportunity for a hearing regarding the distribution of the estate. Second, if the BIA decides to implement this major change in the probate process, we have several specific concerns regarding the process.

Objections to the removal of an automatic hearing in the probate process

We perceive two major problems with the elimination of the automatic hearing in the probate process. First, the removal of the automatic hearing deprives potential heirs of the opportunity to be heard. This raises legal questions under the Administrative Procedure Act, the Fifth Amendment of t he Constitution and the BIA's trust responsibility to potential Indian heirs. Second, the BIA faces practical problems with the institution of a default no hearing system, especially with probate decisions being made at both the BIA and OHA.

Under the current statutory mandate regarding the distribution of estates of individual Indian allottees, the Secretary of the Interior is required to hold a formal adjudication of the estate under 25 U.S.C. § 372 where the Indian does not have a will. The statutory language of 25 U.S.C. §372 says:

> When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, **upon notice and hearing**, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decisions shall be subject to judicial review to the same extent as determinations rendered under section 373 of this title.

The Administrative Procedure Act requires an actual hearing where a statute requires "notice and hearing" under 5 U.S.C. §554, 556 and 557. Although different tests have been used by the courts to determine when a formal adjudication process is required, the statutory language requiring notice and hearing mandate APA procedures. Under the proposed probate process, there is no requirement that a hearing will be held where an Indian allottee dies without a will. The lack of an actual hearing in the proposed process is in direct conflict with APA "notice and hearing" requirements.

Another concern under the APA is the potential bias of BIA attorney decision makers. Currently, the OHA provides a hearing before a neutral and life-tenured ALJ for all Indian

probates. Under the proposed system however, there is great potential for the attorney decision makers to be biased, and to be subject to removal for decisions which are against BIA's will. Practically speaking as well, there is a need for independent decision makers who are not subject to supervision in the performance of substantive duties. There is no APA compliance without the impartial, non-controlled decision-making officials.

Even if these APA concerns can be curtailed, the proposed probate process is in conflict with the substantive due process requirements of the Fifth Amendment. The Fifth Amendment states, "[n]o person shall be … deprived of life, liberty, or property, without the due process of law…." The courts have been clear that where an individual property right is at stake, the most expansive process must be given the individual before depriving them of the property. *See Goldberg v.* Kelly 397 U.S. 254 (1970). At minimum, the Fifth Amendment requires a hearing prior to the deprivation of a property interest. By allowing attorney decision makers within the BIA to make distribution decisions, the BIA is proposing to eliminate any hearing from the process. Giving potential heirs the opportunity to request a hearing does not supercede the need for a hearing to determine whether or not potential heirs should receive property in the distribution of an Indian estate.

There is an inherent conflict of interest within the BIA by allowing attorney decision makers to make decisions in the probate of Indian estates. The current role of the BIA in the probate process is to prepare the probate package with the assistance of potential heirs. The BIA's general trust responsibility to Indians makes it impossible to also serve as a neutral decision maker in the probate process. The BIA, if nothing else is to act as a guardian to Indians. How can the BIA make a neutral non-bias decision in the distribution of an Indian estate where potential heirs are both Indians and non-Indians?

Another aspect of the BIA's general trust responsibility to Indians is the BIA's responsibility to protect the interests of individual Indians. The probate hearing currently conducted in every probate of an Indian estate affords potential heirs the opportunity to be heard. This opportunity may seem miniscule and unnecessary in many probate cases, but it is extremely important to the potential heirs involved. As the BIA is well aware, Indian traditions and decisions are often made orally. By limiting potential Indian heirs' opportunity to participate in the probate process to a written notice, the BIA is really just excluding them from the process altogether. This is particularly true where an Indian has cultural and literacy hurdles to overcome. Providing individuals with notice that a decision is going to be made and that they can request a hearing simply is not enough of an opportunity to be heard. We are not sure how this new probate process is to fulfill the BIA's trust responsibility to Indians, when written notice of the decision to probate an estate many not even reach many Indians.

Although the BIA has recently reaffirmed its commitment to fulfilling its trust responsibility to Indians and the proposed changes to the probate process are designed to reduce the current backlog in Indian probates, the BIA is ignoring the importance of the probate hearings to individual Indians. The BIA is also ignoring that Indian culture is passed down orally, not on paper. Excluding individuals from the process of the distribution of trust and restricted estates does not fulfill the BIA's responsibility to protect Indian interests.

The current automatic probate hearing system was developed because the BIA recognized that, "oral hearings were the preferred vehicle due to literacy and transactional limitations among the service population." We fail to see how this new process is guaranteeing that the BIA is fulfilling its "moral obligations of the highest responsibility and trust" to Indians by potentially or actually excluding Indians from the probate process.

We see two practical problems with eliminating the automatic hearing in Indian probates. First, often times, certain facts simply are not known or discovered until the probate hearing occurs. Sometimes, important facts are missed when the BIA probate specialist or clerk prepares the probate package. As one ALJ has noted, "it can never be predicted with any degree of certainty which cases will develop legal or factual issues for the first time at the hearing when the family members appear to testify." The automatic hearing gives the ALJ the opportunity to remedy these discrepancies by speaking with potential heirs about the facts of a case. If the default system is to not hold a hearing, then these discrepancies will alter the outcome of the probate.

Another practical concern is that both BIA and OHA will be issuing Indian probate decisions. It is inconceivable to the Workgroup how these decisions are going to be consistent, even with extensive communication and cross training between the agencies, which will add to the administrative burden of both agencies.

Particular Areas of Concern

If BIA determines that it can overcome these general challenges to the proposed probate process, there are several specific problems with the proposed process:

First, the proposed §15.203 and 15.206 do not provide little certainty to BIA employees and potential heirs as to when a probate should or will be referred to OHA. The Workgroup would propose that BIA work to develop more objective criteria for such determinations, like the value of the estate or the number of interested parties. We also question whether the BIA probate specialists will receive adequate training to properly determine where a probate

package should be sent. This a huge change from the current function of probate specialists at the BIA, where currently BIA probate employees serve an administrative function, and now they will also be performing a decision making function.

Second, based on the BIA's past mismanagement of Indian trust assets and the BIA's new commitment to fulfilling its trust responsibility, the Workgroup believes that a mandatory audit should be performed prior to the distribution of an estate. Without this mandatory audit, it is possible to probate a deceased Indian's estate without knowing what the true value of the assets involved are. This issue should be at the forefront of the BIA's trust reform initiative. As BIA strives to fulfill its trust responsibility, it must not perpetuate the existence of mismanagement by probating estates without doing an accounting on the estate.

The twenty days given a potential heir to object to the attorney decision maker's choice to probate the estate under 25 C.F.R. §15.204(b) is entirely too short to be meaningful, and seems to be punitive in nature. Practically speaking, within twenty days, many Indians may not even receive the notice, let alone have an opportunity to read and understand it or object. This period must be extended to allow time for the notice to get to individuals and to give individuals the opportunity to comprehend what it is saying, and to respond if they wish. Furthermore, the notice being sent should be sent via certified mail, return receipt requested, to insure that individuals are actually receiving the notice. The notice must also contain the name, address and telephone number of the BIA probate specialist who submitted the probate package so the individual can contact that office if they have questions or difficulties regarding the notice. Furthermore, the notice should provide other meaningful and useful information like the property being distributed, and whether or not the BIA has discovered a will for the person.

Under §15.205(a), whose responsibility is it to send a letter to the potential heirs? Is it the probate specialist's who prepared the package or the attorney decision maker and OHA's responsibility?

The Workgroup has raised great concerns regarding proposed §15.104. It has been uniformly stated that $1000 is insufficient for burial services, and this amount should be raised. While a variety of numbers and formulas for determining an appropriate amount have been discussed, we believe that there are too many diverse circumstances and traditions among the tribes to set a hard number in the regulations. We believe that the Superintendent should have some discretion to release more or less money from a decedent's account depending upon the amount of money in the account and the local customs for funeral services. We also have concerns about the ability of the BIA to pay for funeral expenses

directly to the funeral service provider in a timely fashion, and the requirement of a signed affidavit for each expense. The regulations should contemplate BIA paying a family member upon showing of a receipt for the payment of funeral expenses.

The draft regulations give creditors and other claimants certain rights they do not have under state probate laws and fail to protect the estate and the heirs from unnecessary depletion. The allotment statutes require that trust allotments be maintained, and passed to heirs, free of any charge or encumbrance whatever. 25 U.S.C. §§ 348, 349, 354. Income from such lands is also not liable for payment of any debt without prior Secretarial approval. 25 U.S.C. § 410. *See also, Running Horse v. Udall,* 211 F.Supp. 586 (D.D.C. 1962); *Estate of John Joseph Kipp*, 8 IBIA 30, 39 n. 8 and *dissent*. 15.303 has no cut off date for making claims against the estate; 15.305 gives the government a priority for payment of its claims that is not authorized by law. There also should be homestead, spouse or family allowances with priority over other claims in order to provide protection for families.

Creditors get unwarranted protection in 15.308, which allows the estate to remain open for up to 5 years in order to keep paying the creditors while the heirs receive nothing. This is without precedent in probate law and is contrary to the protections provided to a non-Indian heir under state law, much less an heir that is supposedly protected by a trustee. Moreover, it will be almost impossible to generate income on property that can be leased for no more than two years. See proposed Pt. 162.

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