TESTIMONY
OF
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UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON
A PATH FORWARD: TRUST MODERNIZATION & REFORM FOR INDIAN LANDS

JULY 8, 2015

Chairman Barrasso, Vice Chairman Tester, and Members of the Committee, my name is Kevin Washburn and I am the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to present testimony for the Department for this oversight hearing titled "A Path Forward: Trust Modernization & Reform for Indian Lands."

One of the Obama Administration's highest priorities is to restore tribal homelands by taking lands into trust for tribes. Our work to restore Tribal lands was explicitly authorized by Congress in Section 5 of the Indian Reorganization Act of 1934. Under this authority, the Obama Administration has taken more than 300,000 acres of land into trust for tribes since 2009. Much remains to be done in this area, of course, and a clean Carcieri fix is a necessary requisite to providing land in trust for all tribes.

Of course the Administration's settlement of the Cobell lawsuit produced an expansive trust land initiative for tribes to ameliorate the problems associated with fractionated parcels of trust lands. In the legislation enacting the Cobell settlement, Congress authorized the Department to spend approximately $1.55 billion to consolidate fractionated trust interests. The Department has purchased the equivalent of roughly 900,000 acres of fractionated lands and restored it to tribes. These are historic efforts to modernize our relationship to tribes by correcting past mistakes in federal policy.

The Indian Reorganization Act

In 1887, Congress enacted the General Allotment Act. The General Allotment Act divided tribal land into 80- and 160-acre parcels for individual tribal members. The allotments to individuals were to be held in trust for the Indian owners for no more than 25 years, after which the owner would hold fee title to the land. So-called "surplus lands," that is, those lands that were not allotted to individual members, were taken out of tribal ownership and conveyed to non-Indians. Moreover, many of the allotments provided to Indian owners fell out of Indian ownership through tax foreclosures, particularly during the Great Depression.

The General Allotment Act resulted in an enormous loss of tribally owned lands, and is responsible for the current "checkerboard" pattern of ownership and jurisdiction on many Indian reservations. Approximately 2/3 of tribal lands, amounting to more than tens of millions of acres, were lost as a result of the land divestment policies established by the General Allotment Act and

various homestead acts. Moreover, prior to the passage of the General Allotment Act, many tribes had already endured a steady erosion of their land base during the removal period of federal Indian policy.

The Secretary of the Interior's Annual Report for fiscal year ending June 30, 1938, reported that Indian-owned lands had been diminished from approximately 130 million acres in 1887, to only 49 million acres by 1933. Much of the remaining Indian-owned land was considered "waste and desert." According to Commissioner of Indian Affairs John Collier in 1934, tribes had lost 80 percent of the value of their land during this period, and individual Indians realized a loss of 85 percent of their land value.

In light of the devastating effects on Indian tribes of its prior policies, Congress enacted the Indian Reorganization Act in 1934. Congress's intent in enacting the Indian Reorganization Act was three-fold: to halt the federal policy of allotment and assimilation; to reverse the negative impact of allotment policies; and to secure for all Indian tribes a land base on which to engage in economic development and self-determination.

The first section of the Indian Reorganization Act expressly discontinued the allotment of Indian lands. The next section preserved the trust status of Indian lands in perpetuity. In section 3, Congress authorized the Secretary of the Interior to restore tribal ownership of the remaining "surplus" lands on Indian reservations. Most importantly, in Section 5, Congress authorized the Secretary to secure and return tribal homelands by acquiring land to be held in trust for Indian tribes, and authorized the acquisition of land in trust for individual Indians. That section has been called "the capstone of the land-related provisions of the [Indian Reorganization Act]." Cohen's Handbook of Federal Indian Law § 15.07[1][a] (2005). The Indian Reorganization Act also authorized the Secretary to proclaim new reservations.

The United States Supreme Court has recognized that the Indian Reorganization Act's "overriding purpose" was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). Congress recognized that one of the key factors for tribes in developing and maintaining economic and political strength lay in the protection of each tribe's land base.

Acquisition of land in trust is essential to tribal self-determination. Tribes are sovereign governments and trust lands are a primary locus of tribal authority. Indeed, many federal programs and services are available only on reservations or trust lands. The current federal policy of tribal self-determination is built upon the principles Congress set forth in the Indian Reorganization Act and reaffirmed in the Indian Self-Determination and Education Assistance Act**.** Through the protection and restoration of tribal homelands, this Administration has sought to live up to the standards Congress established eight decades ago and indeed to reinvigorate the policies underlying the Indian Reorganization Act.

Most tribes lack an adequate tax base to generate government revenues, and many have few opportunities for economic development. Trust acquisition of land increases opportunities for economic development and helps tribes generate revenues for public purposes.

The benefits to tribes are many. For example, trust acquisitions provide tribes the ability to enhance housing opportunities for their citizens. Trust acquisitions also are necessary for tribes to realize the tremendous energy development capacity that exists on their lands. Trust acquisitions also allow tribes to grant certain rights-of-way and enter into leases necessary for tribes to negotiate the use and sale of their natural resources. Additionally, trust lands provide the greatest protections for many communities who rely on subsistence hunting and agriculture that are important elements of tribal cultures and life ways.

Though the General Allotment Act was enacted and then repudiated long ago, tribes continue to feel the devastating effects of the policy that divided tribal lands, allotted parcels to individual tribal members and provided for the public sale of any surplus tribal lands remaining after allotment. Taking land into trust can address those negative effects.

The Department of the Interior's Fee-to-Trust Regulations

The Secretary has delegated the power to take land into trust to the Assistant Secretary – Indian Affairs. For most applications, the power is further delegated to officials in the Bureau of Indian Affairs (BIA). When the Department acquires land in trust for tribes and individual Indians under the Indian Reorganization Act, the Department must use discretion following careful consideration of the criteria for trust acquisitions in the Department's regulations at 25 C.F.R. Part 151 (151 Regulations), unless Congress mandates that the Department acquire the land in trust. These regulations have been in place since 1980, and have established a clear and consistent process for evaluating fee-to-trust applications that considers the interests of all affected parties.

The 151 Regulations establish clear criteria for trust acquisitions. The Secretary or her delegate must consider additional criteria in acquiring land that is outside of a tribe's existing reservation, rather than within, or contiguous to, its existing reservation. Taking land into trust is an important decision, not only for the Indian tribe or individual Indian seeking the determination, but for the local community where the land is located. For example, the transfer of land from fee title to trust status may have tax and jurisdictional consequences that must be considered before a discretionary trust acquisition is completed.

The Part 151 process is initiated when a tribe or individual Indian submits a request to the Department to have land acquired in trust. The regulations require that an applicant submit a written request describing the land to be acquired and other information. Once a request arrives at the BIA agency or regional office, it is entered into the BIA's Fee-to-Trust Tracking System. The request is reviewed to determine whether all information has been submitted and whether there are additional steps needed to complete the application. The BIA works with the applicant to complete the application.

The regulations require that an application for fee-to-trust contain the following:

- a written request stating that the applicant is requesting approval of a trust acquisition by the United States of America;

- identification of applicant(s);
- a proper legal land description;
- the need for acquisition of the property;
- purpose for which the property is to be used; and
- a legal instrument such as a deed to verify applicant's ownership.

In addition, Tribal applicants must also submit the following:

- Tribal name as it appears in the Federal Register;
- statutory authority; and,
- if the property is off-reservation, a business plan and location of the subject property relative to state and reservation boundaries.

An individual Indian applicant is also required to submit the following: evidence of eligible Indian status, acreage of trust or restricted Indian land already owned by the applicant, and information or statement from the applicant addressing the degree to which the applicant needs assistance in handling its affairs.

The BIA must take several internal steps necessary to assess the application. These include determining whether the land is located within, or contiguous to, the applicant's reservation, and whether the trust acquisition is mandated by existing law or falls within the Department's discretion to take lands into trust. The BIA must assess whether the land is currently under the tribe's jurisdiction and, if not, whether there are any additional responsibilities the BIA would assume if the fee land were taken into trust. Finally, the BIA may also need to determine whether the property lies within the Indian tribe's approved Land Consolidation Plan.

The BIA requires additional information if a tribe seeks to have land acquired in trust not located within or contiguous to its reservation. The BIA will request a business plan if the land is to be used for economic development. If the land is within the reservation of another Indian tribe, the applicant must receive written consent from the other tribe's governing body if the applicant does not already own a fractional trust or restricted fee interest in the property to be acquired. If the land is off-reservation, the BIA must examine the proximity to the applicant's reservation.

Once an applicant has submitted sufficient information, the BIA mails notification letters to the state, county, and municipal governments having regulatory jurisdiction over the land, and requests written comments on the proposed acquisition. Prior to making a decision on each discretionary acquisition, the Department must evaluate the application pursuant to each of the factors identified in the regulations at 25 CFR § 151.10 (on-reservation) and 25 C.F.R. § 151.11 (off-reservation). One of the eight (8) factors considered is the applicant's need of for additional land.

The BIA must also comply with the requirements of the National Environmental Policy Act (NEPA) and Departmental environmental review requirements in making its determination. The NEPA requires the BIA to disclose and analyze potential environmental impacts of taking land in trust and, depending on the type of NEPA review required, may affords the public an opportunity to review and provide comments on those impacts.

In November 2013, the Department published new regulations governing decisions by the Secretary to approve or deny applications to acquire land in trust. Fee-to-trust decisions are subject to administrative and judicial review under the Administrative Procedures Act.

A lot of misinformation has been repeated about this fee-to-trust process. It is a lengthy and time-consuming process in which many applications fail. Formal disapproval is rare because applicants often withdraw an application if the standards cannot be met. Moreover, many applications languish for years as the applicant and the BIA seek to address issues that arise in BIA review or public comment.

Trust Modernization Through Implementation of the Land Buy-Back Program

The mistakes made by Congress and the federal government in the Allotment Era are very difficult to rectify today. The Land Buy-Back Program for Tribal Nations (Buy-Back Program) is an important initiative designed to alleviate the impacts of fractionation and expand tribal sovereignty. For example, the Buy-Back Program has transferred the equivalent of more than 270,000 acres of land to the Oglala Sioux Tribe. In the short term, much of the money paid to obtain the interests will be spent in tribal communities. In the long-term, transferring millions of acres of land to tribes will ultimately strengthen each tribal community and generate economic benefits to those communities. Tribal acquisition of fractionated lands will "unlock" those lands for tribes, making them available to support economic development to benefit tribal members.

The *Cobell* Settlement became final on November 24, 2012. Since then, we have engaged in government-to-government consultation on our plans for implementation – with consultations in Minneapolis (January 2013); Rapid City (February 2013); Seattle (February 2013) – and held numerous meetings with tribes and inter-tribal organizations.

We continue working diligently to implement the Buy-Back Program. Since November 24, 2012, we have:

- Sent offers to more than 86,000 landowners exceeding $1.5 billion.
- Transferred land to tribal trust ownership for 18 tribes, totaling nearly 900,000 acres through purchases from willing sellers.
- Paid over half a billion dollars to Indian landowners across the United States.
- Entered into cooperative agreements with at least 20 tribes
- Hired 59 full-time employees and expended approximately $29 million of the overall implementation/administrative portion of the fund; some of these expenditures included one-time, up-front costs, such as the Trust Commission, mapping, and equipment.

Land-Buy-Back Program: Lessons Learned

The Buy-Back Program is an effort of significant scope and complexity, which has great importance to Indian Country. No effort this massive and complex could proceed without mistakes and course corrections. However, as we continue to implement the Buy-Back Program, we have incorporated lessons learned, best practices, and tribal feedback to enhance the overall

effectiveness of the Program's implementation strategy. We have heard from tribes on a number of issues, including the cooperative agreement process, scheduling, and reporting on both the expenditure of administrative costs and the acceptance of offers on reservations. Many features of the Buy-Back Program have come as a direct result of tribal consultation and informal feedback from tribal leaders, such as the need for a minimum base payment to sellers and provision of indirect costs.

The Land Buy-Back Program is an important step in trust modernization which seeks, in some ways, to turn back the clock on the allotment era.

Trust Modernization in the Fee-to-Trust Regulations for Alaska

Section 5 of the Indian Reorganization Act (IRA), as amended, authorizes the Secretary of the Interior (Secretary) to acquire land in trust for individual Indians and Indian tribes in the continental United States and Alaska. 25 U.S.C. 465; 25 U.S.C. 473a. For several decades, the Department's regulations at 25 CFR part 151, which establish the process for taking land into trust, have included a provision stating that the regulations in part 151 do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its members (the "Alaska Exception"). 25 CFR 151.1. The Department, just over half a year ago, finalized a rule deleting the Alaska Exception, thereby allowing applications for land to be taken into trust in Alaska to proceed under the part 151 regulations. The Department retains its usual discretion to grant or deny land-into-trust applications and makes its decisions on a case-by-case basis in accordance with the requirements of part 151 and the IRA.

As noted above, Section 5 of the IRA authorizes the Secretary, in her discretion, to acquire land in trust for Indian tribes and individual Indians. 25 U.S.C. 465; Cohen's Handbook on Federal Indian Law section 15.07[1][a], at 1030 (2012 ed.). In 1936, Congress expressly extended Section 5 and other provisions of the IRA to the Territory of Alaska. Act of May 1, 1936, Public Law 74-538, section 1, 49 Stat. 1250 (codified at 25 U.S.C. 473a).

Thirty-five years later, in 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), Public Law 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. 1601 et seq.), "a comprehensive statute designed to settle all land claims by Alaska Natives." Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 523 (1998). The Act revoked all but one of the existing Native reserves, repealed the authority for new allotment applications, and set forth a broad declaration of policy to settle land claims. See 43 U.S.C. 1618(a), 1617(d), and 1601(b). However, the statutory text of ANCSA did not revoke the Secretary's authority, under Section 5 of the IRA as extended by the 1936 amendment, to take land into trust in Alaska.

A number of recent developments, including a pending lawsuit, caused the Department to look carefully at its policy on land into trust in Alaska. See Akiachak Native Cmty v. Salazar, 935 F. Supp. 2d 195 (D.D.C. 2013). Most significantly, the Indian Law and Order Commission, formed by Congress to investigate criminal justice systems in Indian Country, brought to light the shocking and dire state of public safety in Alaska Native communities and made specific recommendations to address these challenges. Indian Law and Order Commission, "A Roadmap

For Making Native America Safer: Report to the President and Congress of the United States," at 33-61 (November 2013). The Commission's report expressly acknowledged that "a number of strong arguments can be made that [Alaska fee] land may be taken into trust and treated as Indian country" and "[n]othing in ANCSA expressly barred the treatment of former [Alaska] reservation and other Tribal fee lands as Indian country." Id. at 45, 52. Moreover, the Commission recommended allowing these lands to be placed in trust for Alaska Natives. See id. at 51-55. Likewise, the Secretarial Commission on Indian Trust Administration and Reform was established by former Secretary of the Interior Ken Salazar to evaluate the existing management and administration of the trust administration system, as well as review all aspects of the federal-tribal relationship. Report of the Commission on Indian Trust Administration and Reform, at 1 (Dec. 10, 2013). This Commission endorsed the earlier findings and likewise recommended allowing Alaska Native tribes to put tribally owned fee simple land into trust. Id. at 65-67.

In light of those urgent policy recommendations, the Department carefully reexamined the legal basis for the Secretary's discretionary authority to take land into trust in Alaska under Section 5 of the IRA. In particular, the Department reviewed the statutory text of ANCSA and other Federal laws and concluded that the Secretary's authority was never extinguished. Congress explicitly granted the Secretary authority to take land into trust in Alaska under the IRA and its amending legislation. Although Congress, through the enactment of ANCSA and other laws, repealed other statutory provisions relevant to Alaska Native lands, it has never passed any legislation that revokes the Secretary's authority to make trust land acquisitions in Alaska, as codified in 25 U.S.C. 473a and 25 U.S.C. 465.

In sum, ANCSA left these provisions and the Secretary's resulting land-into-trust authority in Alaska intact. Thus, the Secretary retains discretionary authority to take land into trust in Alaska under Section 5 of the IRA. Due to pending litigation, the Department is currently not engaged in taking land into trust. However, repealing the Alaska exception is an important step in trust modernization over the long term for Alaska Natives.

Trust Modernization in Surface Leasing Regulations for Indian Lands

The Department of the Interior currently holds approximately 56 million acres of land in trust for Indian tribes and individual Indians. As trustee of those lands, the Department must ensure that the lands are protected, and that they are used for the benefit of the tribes and individual Indians for whom they are held. Congress has enacted laws that require the Department to approve leases on Indian lands. The Department's regulations are intended to implement its trust responsibility under those laws.

During its first term, the Obama Administration believed it was necessary to reform the surface leasing regulations because the Department's existing regulations were originally adopted 50 years ago, and were ill-suited to the modern needs of Indian tribes and individual Indians in using their lands for housing, economic, and wind & solar energy development. When President Obama took office in 2009, the existing regulations did not impose timelines for the Department to complete its review of leases, often resulting in delays in approving leases, amendments, subleases, mortgages, and assignments. They did not make a distinction between leases for single-family residences and large business developments – meaning the Department reviewed

leases under a "one-size fits all" structure. As a result, a lease for a single-family residence might take years to approve. Finally, the leasing regulations required the Department to heavily scrutinize and sometimes second-guess the judgment of Indian landowners in the development of their own lands.

The final regulations enacted by the Obama Administration, which took effect in early 2013, streamlined the leasing process by imposing timelines on the Department for reviewing leases: up to 30 days for residential leases, and up to 60 days for business leases and wind & solar energy leases. The new regulations distinguish between residential, business, and wind & solar energy leases, and establish separate processes for review. They also permit the automatic approval of subleases and amendments to existing leases if the Department fails to act within the review timeframe. The new regulations eliminate the requirement for Department approval of "permits" for activities on Indian lands, and defer to the judgment of tribes and individual Indians on land use (and rental rates) in most instances. The regulations establish a new, streamlined process for the development of wind & solar energy projects on Indian lands.

Another important aspect of the new leasing regulations is that they seek to address the troubling problem of dual taxation of reservation economic activity, which discourages (or inhibits) economic development. Leases approved by the BIA carry a federal pre-emption of state taxation of activities conducted under the lease.

The Department anticipates that the regulations will increase homeownership on Indian lands, by streamlining the process for the approval of leases, subleases, and mortgages. The regulations also streamline leasing for small businesses and commercial developments on Indian lands, promoting private investment in businesses in Indian communities. By establishing a streamlined process for wind & solar energy resource assessment and development, the regulations remove significant obstacles to wind & solar energy development on Indian lands. Finally, by addressing the dual taxation, the regulations foster (or promote) a friendlier business environment on tribal lands so that tribes will be able to attract economic development.

These regulations are an important part of a broader agenda to reform and improve the management of Indian lands across the United States. The Department's regulations govern the process of how it reviews and approves leases on Indian lands. The regulations overhaul a process that was antiquated and ill-suited for modern development needs on Indian lands.

Trust Modernization in Tribal Leasing Laws Under the HEARTH Act

The Department worked closely with both houses of Congress to support passage of the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act in 2012. Under the HEARTH Act, tribes may choose to develop their own leasing regulations to implement their own leasing programs. The HEARTH Act and our newly revised leasing regulations each provide tribes with greater control over leasing of their land. The Department has worked diligently to implement the HEARTH Act in the spirit of tribal self-determination by encouraging the development and submission of Tribal HEARTH Act laws. The Department has approved such laws for 20 tribes, empowering each of these tribes to exercise greater control of its economic destiny.

The HEARTH Act of 2012 (the Act) makes a voluntary, alternative land leasing process available to tribes, by amending the Indian Long-Term Leasing Act of 1955, 25 U.S.C. 415. The Act authorizes tribes to negotiate and enter into agricultural and business leases of tribal trust lands with a primary term of 25 years, and up to two renewal terms of 25 years each, without the approval of the Secretary of the Interior. The Act also authorizes tribes to enter into leases for residential, recreational, religious or educational purposes for a primary term of up to 75 years without the approval of the Secretary. Participating tribes develop tribal leasing regulations, including an environmental review process, and then must obtain the Secretary's approval of those regulations prior to entering into leases. The Act requires the Secretary to approve tribal regulations if the tribal regulations are consistent with the Department's own leasing regulations at 25 CFR Part 162 and provide for an environmental review process that meets requirements set forth in the Act.

As the Department explained in the preamble to the updated final leasing regulations, the Federal government has a strong interest in promoting economic development, self-determination, and tribal sovereignty on tribal lands. 77 FR 72,440, 72,447–48 (December 5, 2012). Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, preempts State and local taxation of permanent improvements on trust land. Confederated Tribes of the Chehalis Reservation v. Thurston County, 724 F.3d 1153, 1157 (9th Cir. 2013) (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)). In addition, as explained in the preamble to the revised leasing regulations at 25 C.F.R. Part 162, Federal courts have applied a balancing test to determine whether State and local taxation of non-Indians on the reservation is preempted. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). The Bracker balancing test, which is conducted against a backdrop of "traditional notions of Indian self-government," requires a particularized examination of the relevant State, Federal, and tribal interests.

While that discussion occurred in the context of federal lease approvals, the strong Federal and tribal interests against State and local taxation of improvements, leaseholds, and activities on land leased under the Department's leasing regulations apply equally to improvements, leaseholds, and activities on land leased pursuant to tribal leasing regulations approved under the HEARTH Act. Congress's overarching intent was to "allow tribes to exercise greater control over their own land, support self-determination, and eliminate bureaucratic delays that stand in the way of homeownership and economic development in tribal communities." 158 Cong. Rec. H. 2682 (May 15, 2012). The HEARTH Act was intended to afford tribes "flexibility to adapt lease terms to suit [their] business and cultural needs" and to "enable [tribes] to approve leases quickly and efficiently." Id. at 5–6.

Assessment of State and local taxes would obstruct these express Federal policies supporting tribal economic development and self-determination, and also threaten substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy. See Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (determining that "[a] key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on Federal funding"). The additional costs of State and local taxation have a chilling effect on potential lessees, as well as on a tribe that, as a result, might refrain from exercising its own

sovereign right to impose a tribal tax to support its infrastructure needs. See id. at 2043–44 (finding that State and local taxes greatly discourage tribes from raising tax revenue from the same sources because the imposition of double taxation would impede tribal economic growth).

Just like BIA's surface leasing regulations, tribal regulations under the HEARTH Act pervasively cover all aspects of surface leasing. See Guidance for the Approval of Tribal Leasing Regulations under the HEARTH Act, NPM-TRUS-29 (effective Jan. 16, 2013) (providing guidance on Federal review process to ensure consistency of proposed tribal regulations with Part 162 regulations and listing required tribal regulatory provisions). Furthermore, the Federal government remains involved in the tribal land leasing process by approving the tribal leasing regulations in the first instance and providing technical assistance, upon request by a tribe, for the development of an environmental review process. The Secretary also retains authority to take any necessary actions to remedy violations of a lease or of the tribal regulations, including terminating the lease or rescinding approval of the tribal regulations and reassuming lease approval responsibilities. Moreover, the Secretary continues to review, approve, and monitor individual Indian land leases and other types of leases not covered under the tribal regulations according to the Part 162 regulations. For these reasons, we have adopted the Bracker analysis from the preamble to the surface leasing regulations, 77 FR at 72,447–48, in the context of the HEARTH Act.

In sum, the Federal and tribal interests weigh heavily in favor of preemption of State and local taxes on lease-related activities and interests, regardless of whether the lease is governed by tribal leasing regulations or Part 162. We have published notice of each HEARTH Act approval in the Federal Register so that state and local taxation authorities and the public will be aware of the preemption of taxation of business activity under approved tribal leasing regulations.

As of July 3, 2015, the following tribes have HEARTH Act approval of their tribal leasing regulations.

- February 1, 2013 HEARTH Act Approval of Federated Indians of Graton Rancheria business leasing regulations March 14, 2013 HEARTH Act Approval of Pueblo of Sandia business leasing regulations
- April 11, 2013 HEARTH Act Approval of Pokagon Band of Potawatomi Indians residential leasing regulations
- November 10, 2013 HEARTH Act Approval of Ak-Chin Indian Community business leasing regulations
- November 10, 2013 HEARTH Act Approval of Santa Rosa Band of Cahuilla Indians business leasing regulations
- November 10, 2013 HEARTH Act Approval of Citizen Potawatomi Nation business leasing regulations
- December 10, 2013 HEARTH Act Approval of Ewiiaapaayp Band of Kumeyaay Indians business leasing regulations
- December 13, 2013 HEARTH Act Approval of Kaw Nation business leasing regulations
- April 4, 2014 HEARTH Act Approval of Jamestown S'Klallam Tribe business leasing regulations

- April 4, 2014 HEARTH Act Approval of Dry Creek Rancheria Band of Pomo Indians business leasing regulations
- April 8, 2014 HEARTH Act Approval of Wichita and Affiliated Tribes business leasing regulations
- April 8, 2014 HEARTH Act Approval of Mohegan Tribe of Indians of Connecticut business leasing regulations
- September 23, 2014 HEARTH Act Approval of Agua Caliente Band of Cahuilla Indians business leasing regulations
- January 8, 2015 HEARTH Act approval of Seminole Tribe of Florida business and residential ordinances
- January 22, 2015 HEARTH Act Approval of Cowlitz Indian Tribe business leasing regulations
- January 28, 2015 HEARTH Act Approval of Oneida Indian Nation business leasing regulations
- February 4, 2015 HEARTH Act Approval of Ho-Chunk Nation business, residential and agricultural leasing regulations
- June 3, 2015 HEARTH Act Approval of Absentee Shawnee Tribe of Oklahoma business leasing regulations
- June 4, 2015 HEARTH Act Approval of Rincon Band of Luiseno Mission Indians business leasing regulations

Trust Modernization in Rights-of-Way Regulations for Indian Lands

The current regulations governing rights-of-way across Indian land were promulgated more than 40 years ago and last updated more than 30 years ago. As such, they are ill-suited to the modern requirements for rights-of-way and the need for faster timelines and a more modern and transparent processes for BIA approval. The Department proposed changes to the current rights-of-way regulations about a year ago and we extended the comment period multiple times for a comment period that lasted more than five months. We are in the final stages of reviewing the comments submitted under the extended comment period noticed in the Federal Register on November 4. During the public comment period, we received approximately 175 comment submissions on the proposed rule and hosted four Tribal consultation sessions.

This proposed rule would update 25 CFR 169, Rights-of-Way on Indian Land, to streamline the process for obtaining BIA approval and ensure seamless consistency with the recently promulgated leasing regulations. The proposed rule would increase the efficiency and transparency of the BIA approval process, increase flexibility in compensation and valuations, and support landowner decisions regarding the use of their own trust land.

The proposed rule would change the BIA approval process for rights-of-way to:

- Eliminate the requirement for applicants to obtain BIA approval to access Indian land to survey it in preparation for a right-of-way application;
- Specify the process for obtaining BIA approval of rights-of-way documents on Indian land;
- Impose time limits on BIA to act on submitted rights-of-way documents;

- Establish that BIA must approve right-of-way documents absent compelling justifications otherwise; and
- Clarify that BIA approvals of rights-of-way documents are effective on the date of approval, even if an administrative appeal is filed.

The proposed rule would require BIA to issue a decision on a right-of-way grant within 60 days of receiving an application and would require BIA to issue a decision on an amendment, assignment or mortgage of a right-of-way within 30 days of receiving an application. The proposed rule would also add an administrative process so that if BIA fails to meet these timelines, the applicant may elevate the matter to the BIA Regional Director, then the BIA Director.

The proposed rule would provide a different approach to compensation depending on whether the land is tribal land or individually-owned Indian land.

- For rights-of-way on tribal land: Compensation may be in any amount the tribe negotiates, or may be an alternative form of rental, such as in-kind consideration, and BIA will not require a valuation, as long as the tribe provides documentation that the tribe has determined the compensation is in its best interest. The BIA will not require a periodic review of the adequacy of the compensation for rights-of-way on tribal land.

- For rights-of-way on individually-owned Indian land: Compensation must be at least as high as fair market rental unless the landowners execute a written waiver and BIA determines the waiver to be in the landowners' best interest. The BIA will also require a valuation, unless all the landowners execute a written waiver or the grantee will construct infrastructure improvements on, or serving, the premises and BIA determines it is in the best interest of all landowners. In addition, if BIA determines it is in the Indian landowners' best interest, then the grant may provide for alternative forms of rental or varying types of compensation. No periodic review of the adequacy of rent or rental adjustment is required if payment is a one-time lump sum, the right-of-way duration is five years or less, the grant provides for automatic adjustments, or BIA determines it is in the best interest of the landowners not to require a review or automatic adjustment.

The proposed rule would make the following change to compliance with and enforcement of rights-of-way:

- Restrict BIA's right of entry to reasonable times and upon reasonable notice, consistent with notice requirements under applicable tribal law and right-of-way documents;

- Provide that, in the event of a violation, BIA will defer to ongoing actions or proceedings provided for in the right-of-way grant's negotiated remedies, as appropriate;

- Provide that BIA will provide a copy of the notice of violation to the tribe for tribal land, and will provide constructive notice to Indian landowners for individually owned Indian land;

- Require BIA to consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, to determine what action to take if the grantee does not cure a violation within the requisite time period.

The proposed rule would also make the following changes:

- Eliminate outdated requirements specific to different types of rights-of-way;

- Clarify that a right-of-way grant on Indian land may include provisions requiring the grantee to give a preference to qualified tribal members, based on their political affiliation with the tribe;

- Clarify which laws and taxes apply to rights-of-way approved under 25 CFR 169;

- Add that a bond is required to be provided with the application, rather than a deposit; and

- Clarify when a BIA grant of a new right-of-way on Indian land is required or an existing right-of-way may be amended.

Conclusion

The Obama Administration has developed a strong legacy of trust modernization in major efforts to correct historical mistakes in allotment and provide tribes significant land bases upon which they exercise sovereignty. It has also modernized land leasing by the BIA, and with the help of Congress, land leasing regulated by tribes. It has also eliminated dual taxation in these contexts, a major step for trust modernization. Finally, it has worked to update its right-of-way regulations. Still, much work remains to be done in the Executive branch, in reforming programs and services affecting Indian tribes, and in Congress, in enacting a Carcieri fix.

We will continue to work with Members of this Committee, Congress, and our trust beneficiaries, the tribes, to clarify and fulfill our trust obligation, through our existing authorities to acquire land in trust on behalf of all tribes, and to discharge our responsibilities in accordance with the law and our regulations.

This concludes my prepared statement. I will be happy to answer any questions the Committee may have.