

INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST



Findings and Recommendations:
Improving and Expediting the Process for Obtaining
Appraisals and Evaluations of Indian Trust Property

September 30, 2010

TABLE OF CONTENTS

Page

Summary of Findings and Recommendations 1

Purpose of Report and Methodology 2

I. STATUTORY, REGULATORY, AND ADMINISTRATIVE REQUIREMENTS RELATED TO VALUATIONS AND APPRAISALS..... 4

A. Federal Statutes and Regulations 4

 1. Sales of Indian Land 4

 2. Rights-of-Way Over Indian Land 8

 3. Surface Leases 8

 4. Agricultural Leases and Grazing Permits 9

 5. Timber Sales 10

 6. Minerals and Oil and Gas 11

 7. Miscellaneous Transactions and Laws of Limited Applicability 12

B. Administrative Practice and Guidance..... 13

II. ADMINISTRATION OF APPRAISALS AND VALUATIONS WITHIN DOI..... 14

A. Administrative Structure of Appraisals and Valuations 14

B. Substantive Appraisal Standards and Mechanics of Obtaining Appraisals and Valuations 15

 1. Substantive Appraisal Standards..... 15

 2. Mechanics of Obtaining Appraisals..... 17

III. ISSUES IDENTIFIED AND RECOMMENDATIONS..... 18

A. Delays in Obtaining Appraisals and Valuations 18

 1. Expand Previously Approved Waiver Authority to All Tribes and All BIA Regions 20

 2. Expand the Directive Implementing Section 2214 of ILCA 22

 3. Waive the Estimate of Value Requirement for Negotiated Sales and Leases between Indians 23

 4. Increase Authority to Waive Appraisal or Valuation Requirements for Transactions Involving Competitive Bids..... 25

B. Appraisals and Valuations Generally..... 25

 1. Sales of Indian Trust Property Should be Made Publicly Available Through a Searchable Database 26

 2. Underlying Appraisal Data and Work Files Should be Made Available Upon Request 27

 3. Establish a Written Policy for Tribes or Beneficiaries to Have Appraisals or Valuations Reopened or Corrected 28

 4. Develop Informational Handbooks or Written Materials on Appraisals and Valuations for Beneficiaries and Tribes..... 29

C. Establish an “Appraisal and Valuations Advisory Committee” to Explore Broader Policy Issues 30

Summary of Findings and Recommendations

Congress has recognized that the costs associated with appraising Indian lands is “one of the most significant impediments” to Indian land consolidation. An appraisal can serve as an important tool to inform an Indian tribe or Indian property owner of the value of trust property in many circumstances. Indian tribes and beneficiaries, however, continue to have questions and concerns on when an appraisal is required, the length of time it takes to obtain appraisals, and the effect of what many consider undue delay in obtaining appraisals on the underlying transactions.

As part of its FY 2010 Grant Agreement, the Intertribal Monitoring Association on Indian Trust (“ITMA”) agreed to facilitate outreach to Indian country on issues related to appraisals of Indian trust property and, if necessary or appropriate, make recommendations to the Office of the Special Trustee (“OST”) on desirable changes to federal laws or regulations.

ITMA found that the concern raised most often by Indian tribes and individual beneficiaries is the delay, or the perceived delay, in securing appraisals and evaluations. Tribes and beneficiaries also made common observations and raised concerns related to the transparency of the appraisal process and the inability to access information relating to appraisals.

In many cases, requirements that appraisals or other estimates of fair market value be prepared are imposed not by statutes but by regulations or administrative practice, which the Secretary of the Interior (“Secretary”) possesses authority to waive or modify. ITMA believes that some of the delay-related issues identified by tribes and beneficiaries might be minimized if the Department of the Interior (“DOI” or the “Department”) were to: (i) make available to all Bureau of Indian Affairs (“BIA”) regions waivers or exceptions to appraisal or valuation requirements that it has already granted; (ii) broaden its current policy that implements a provision of the Indian Land Consolidation Act that grants the Secretary authority to determine fair market value for sales of Indian land; (iii) pursue a waiver of the valuation requirement for negotiated sales and leases between Indian beneficiaries; and (iv) expand authority to waive appraisal or valuation requirements for transactions involving competitive bids.

In response to some of the common issues related to appraisals and valuations, ITMA makes several recommendations intended to better provide tribes and beneficiaries with information. Finally, ITMA recommends that the Department establish an advisory committee to examine policy-related issues related to appraisals and valuations.

Purpose of Report and Methodology

ITMA's Grant Agreement for FY 2010 provided that its appraisal outreach effort was to involve review and discussion of DOI's appraisal process for Indian trust property, developing recommendations for improving that process consistent with the Secretary's trust responsibility, and communicating issues to OST in a final report. As stated in the Grant Agreement, "[i]f necessary or appropriate, ITMA will make recommendations to OST for desirable changes in federal laws or regulations regarding appraisals for Indian trust assets or resources." This outreach responded to the numerous questions, comments, and other input relating to appraisals from tribal leaders and attendees at ITMA meetings. The subject of appraisals has been raised at most, if not all, ITMA meetings and conferences in recent years and has been a source of significant confusion and misunderstanding.

In addition to what is described in ITMA's Grant Agreement, ITMA also agreed, at OST's request, to provide input to assist OST in responding to a request by the House Committee on Appropriations. In the report accompanying the FY 2010 Interior, Environment and Related Agencies spending bill, the Committee stated:

Indian Tribes routinely experience lengthy delays in obtaining appraisals from the Department for transactions involving the conveyance of Indian trust lands. The Bureau of Indian Affairs is responsible for requesting appraisals and the Office of the Special Trustee is responsible for procuring the appraisals. Appraisals are required for Indian Tribes and individual Indians to sell, acquire or exchange interests in trust land. Delays in obtaining appraisals also delay these transactions, which negatively impacts Tribal economies. The Committee encourages the Office of the Special Trustee and the Bureau of Indian Affairs to reevaluate how appraisals are requested and prepared for Indian trust lands and provide recommendations to the Committee on how these delays can be minimized.¹

Accordingly, this report also includes recommendations to assist OST in responding to the Committee's request for recommendations. The House Report also included language and a separate directive to the Department as a whole to reevaluate the consolidation of appraisals of the Department's land management agencies for federal

¹ H.Rep. 111-180, 111th Cong.1st Sess. (2009), at 79.

land acquisitions.² Although this report is not intended to be used to respond to the Committee's more general directive to the Department, ITMA did receive significant input on issues related to the consolidation of the appraisal function from the BIA, which are discussed later in this report.

In preparing this report, ITMA facilitated a session on appraisals in May 2010 at the Affiliated Tribes of Northwest Indians' mid-year conference in Grand Ronde, Oregon. In addition to discussions with tribes and beneficiaries at ITMA meetings and listening conferences, ITMA also specifically consulted Indian tribes, Indian beneficiaries, Indian organizations, allottee groups, academics, and OST and BIA officials and staff. The tribal representatives consulted collectively represented seven different BIA regional offices.

Part I of this report provides an overview of the statutory, regulatory and administrative requirements related to appraisals and valuations of Indian trust property. Part II describes the administration of appraisals and valuations with the Department, and Part III describes issues identified by tribes and beneficiaries and ITMA's recommendations.

² In this regard, the House Appropriations Committee stated:

Consistent with the recommendations of GAO and the OIG at the time, in 2003 the Secretary consolidated the appraisal functions of the three Departmental land management agencies. Both GAO and the OIG have since documented that this improved the objectivity and quality of appraisals. Nevertheless, numerous problems exist that are an unacceptable barrier to communications, collaboration, and acquisition of lands for protection of our public lands, national wildlife refuges and national parks. Among the issues that appear to be causing this are loss of realty expertise in the bureaus, undue delays in the contracting of appraisals, and hesitancy to share information on the status of the appraisals with landowners The Committee directs the Department to revisit the appraisal services consolidation, to reconsider alternative organizational proposals, and to streamline the process so that appraisals, and ultimately, acquisitions, are completed in a timely manner while following all applicable guidelines and regulations.

H.Rep. 111-180, 111th Cong.1st Sess. (2009), at 79. This directive was adopted by the full House of Representatives in October 2009. See H.Rep. 111-316, at 78. DOI's Office of the Inspector General responded to this directive in a report transmitted to the Assistant Secretary – Policy, Management and Budget, in December 2009. See *Evaluation Report on the Department of the Interior's Appraisal Operations*, Office of the Inspector General, U.S. Department of the Interior, Rep. No. WR-EV-OSS-0012-2009.

I. STATUTORY, REGULATORY, AND ADMINISTRATIVE REQUIREMENTS RELATED TO VALUATIONS AND APPRAISALS

A. Federal Statutes and Regulations

ITMA has been unable to locate any federal statute that generally requires that appraisals be prepared for transactions involving Indian trust property. Statutes that govern the conveyance or alienation of Indian trust property, however, often require that Indian landowners receive “fair market value” for conveyances of interests in Indian trust property. Some statutes explicitly require appraisals for specific transactions or categories of transactions.

In contrast to most federal statutes, regulations promulgated by the Department are generally more specific with respect to fair market value and appraisal requirements. For example, regulations pertaining to the sale or transfer of title of trust or restricted lands generally require the preparation of an appraisal. Regulatory requirements for appraisals and valuations generally vary depending on the type of transaction and the resource involved.

The Secretary possesses the general authority to waive or make exceptions to any regulation contained in chapter I of title 25 of the Code of Federal Regulations. The pertinent provision allows the Secretary to “to waive or make exceptions to his regulations as found in chapter I of title 25 CFR in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians.”³ All of the BIA regulations are included in chapter I of title 25, so this authority extends to most, if not all, regulations regulated to Indian affairs that the BIA has promulgated. As explained in Part III(A)(i) below, the Secretary has administratively approved waivers or exceptions to appraisal and valuation requirements in several instances.

1. Sales of Indian Land

The Indian Land Consolidation Act (“ILCA”)⁴ provides the primary statutory authority for the sale and exchange of interests in Indian trust or restricted lands. Congress enacted the ILCA in 1983 in response to the increase in the undivided fractionation of title to Indian trust lands. The ILCA has been amended several times since it was enacted. Congress made significant changes to the law in 2000 and in 2004, with the enactment of the American Indian Probate Reform Act (“AIPRA”).⁵ As

³ 25 C.F.R. § 1.2.

⁴ 25 U.S.C. §§ 2201-2221.

⁵ See *Estate of Tyrrell S. Willcox*, 43 IBIA 197, 199 n.4 (2006).

stated in the ILCA, the policy of the United States is “to encourage and assist the consolidation of [Indian trust] land ownership” where the transfer of beneficial interest occurs between individual Indians or between individual Indians and the tribe exercising jurisdiction over the land involved in the transaction.⁶

ILCA imposes a general “fair market value” requirement on purchases of trust or restricted lands by Indian tribes. The Act provides Indian tribes the authority to purchase, “at not less than fair market value” and with the requisite consent of the owners of the interests, (a) trust or restricted land within the boundaries of the tribe’s reservation; or (b) land that is otherwise subject to the jurisdiction of the tribe.⁷

Interestingly, ILCA does not contain a provision that imposes an explicit fair market value requirement on sales of trust or restricted lands between individual Indians. A determination of fair market value for such sales, however, could arguably be implied by Section 2216 of ILCA. That provision provides that for (a) sales, (b) exchanges, or (c) conveyances by gift deed or for no or nominal consideration of Indian lands between Indians and between Indians and Indian tribes *for less than fair market value*, the Indian selling, exchanging, or conveying must be provided with an “estimate of the value of the interest.”⁸ Thus, there is a general statutory requirement that sales and exchanges in interests of Indian land (or conveyances by gift deed) by Indians for less than fair market value require at least an “estimate of the value” of the interest.

Under the 2000 amendments to ILCA and the AIPRA amendments, the “estimate of value” requirement may be waived in certain circumstances. An Indian selling, exchanging, or conveying by gift deed or for no or nominal consideration an interest in land for less than fair market value may waive the estimate of value in the following two instances:

- (1) when the conveyance is to an Indian who is the owner’s spouse, brother, sister, lineal ancestor, lineal descendant, or collateral heir.⁹ This change was intended to clarify that the Secretary was not required to conduct a formal appraisal for gift deeds and similar conveyances¹⁰; and

⁶ 25 U.S.C. § 2216(a).

⁷ 25 U.S.C. § 2204(a).

⁸ 25 U.S.C. § 2216(b)(1)(A)(ii) (emphasis added).

⁹ 25 U.S.C. § 2216(b)(1)(B)(i).

¹⁰ See S. Rep. No. 106-361, at 21 (2000).

- (2) when the conveyance is to an Indian co-owner (does not need to be related) of the land or to the Indian tribe with jurisdiction over the parcel of land, where the grantor owns a fractional interest that represents 5 percent or less of the parcel.¹¹

The AIPRA amendments to ILCA added a new provision to allow for partitions of parcels of highly fractionated land. The effect of this provision, codified as amended at 25 U.S.C. § 2204(c), is to allow an individual Indian or tribal co-owner of a parcel of highly fractionated Indian land to buy out all co-owners and consolidate 100 percent of the interest in the parcel. “A parcel of highly fractionated Indian land” is a parcel that (a) has at least 50 but less than 100 co-owners and no single owner owns more than 10 percent of the entire parcel; or (b) has 100 or more co-owners.¹² ILCA further requires that co-owners be provided notice when the appraisal is completed, and be allowed to comment on the appraisal, in addition to other procedural safeguards and qualifications.¹³ For these partitions by sale, ILCA explicitly requires an appraisal.¹⁴

Separately, AIPRA requires the preparation of an appraisal when interests of a decedent’s estate are purchased at probate. Prior to the sale of such interests, AIPRA requires the Secretary to appraise the interest and provide eligible purchasers with notice.¹⁵

The ILCA does not define the terms “estimate of the value” or “fair market value,” and these terms are referenced throughout the Act. In the AIPRA amendments to ILCA, however, Congress included a new provision to provide the Secretary with flexibility in determining fair market value in administering the Act. That provision states:

Establishing fair market value

For purposes of this chapter, the Secretary may develop a system for establishing the fair market value of various types of lands and improvements. Such a system may include determinations of fair market value based on appropriate geographic units as determined by the

¹¹ 25 U.S.C. § 2216(b)(1)(B)(ii).

¹² 25 U.S.C. § 2201(6).

¹³ 25 U.S.C. §§ 2204(c)(F), (G), and (H).

¹⁴ 25 U.S.C. § 2204(c)(E).

¹⁵ 25 U.S.C. § 2206(o)(4).

Secretary. Such a system may govern the amounts offered for the purchase of interests in trust or restricted land under this chapter.¹⁶

The legislative history of this section makes clear that Congress was concerned about the costs of appraising Indian lands.¹⁷ The provision is broad in that it allows the Secretary, at least for purposes of the ILCA, to “employ a system” for establishing fair market value which may, or may not, include geographic considerations. The only restriction on the “system” that the Secretary may employ is Congress’s recognition that the section “does not give the Secretary license to adopt arbitrary land values based on speculation; obviously the procedures established by the Secretary must be rational and not produce arbitrary results.”¹⁸ Most importantly, and as noted in the Committee Report, Congress specifically intended this provision to address the high costs of obtaining appraisals for sales of Indian trust lands:

As the Committee has considered options for facilitating transactions involving trust and restricted lands, it is clear that the costs associated with appraising lands is one of the most significant impediments to the consolidation of these interests. For example, if an Indian wishes to exchange his interest in land with another Indian, each of the parcels of land may be appraised to ensure that Secretary is not violating his trust obligation by approving the transaction. Such appraisals may cost hundreds or over one thousand dollars for each parcel, even if each interest to be exchanged is worth only a fraction of that cost. If the Secretary had to acquire a full appraisal before acquiring each interest under Section 213, the cost of appraisals would probably exceed the cost of the acquired interests.¹⁹

In enacting AIPRA in 2004, Section 2214 provides the Secretary with a potentially powerful tool for establishing “fair market value,” a term that is often referenced but seldom defined.²⁰

¹⁶ 25 U.S.C. § 2214.

¹⁷ S. Rep. No. 106-361, at 21.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Section B-3 of UASFLA provides an overview of significant court decisions relating to “market value,” most of which are in the context of eminent domain cases. For example, UASFLA states that “[m]arket value is to be determined with reference to the property’s highest and best use, that is: The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future. . . .” UASFLA, § B-3 (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)).

BIA regulations require an appraisal prior to sale or transfer of title of trust or restricted Indian lands. The regulations are set forth at 25 C.F.R. Part 152, and section 152.24 contains a general appraisal requirement:

152.24 Appraisal.

Except as otherwise provided by the Secretary, an appraisal shall be made indicating the fair market value prior to making or approving a sale, exchange, or other transfer of title of trust or restricted land.

On its face, 25 CFR § 152.24 makes the appraisal requirement subject to the authority of the Secretary. This regulation and the regulations at part 152 were promulgated in 1973, long before the ILCA in 1983 or the 2000 and 2004 amendments to ILCA.

2. Rights-of-Way Over Indian Land

The statute authorizing the Secretary to approve rights-of-way over Indian lands, 25 U.S.C. § 325, does not include a valuation or appraisal requirement, but rather requires “such compensation as the Secretary shall determine to be just.” BIA regulations, however, contain both valuation and appraisal requirements:

Except when waived in writing by the landowners or their representatives ... and approved by the Secretary, the consideration for any right-of-way granted or renewed under this part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate. The Secretary shall obtain and advise the landowners of the appraisal information to assist them (the landowners) in negotiations for a right-of-way or renewal.²¹

3. Surface Leases

The general statutory authority for the Secretary to approve surface leases of Indian trust or restricted lands was originally enacted by Congress in 1955 and is now codified at 25 U.S.C. § 415. Section 415 contains no explicit statutory requirement that the Secretary ensure Indian beneficiaries receive fair market value in approving leases. In 1970, Congress amended the statute to direct that the Secretary ensure “that

²¹ 25 C.F.R. § 169.12.

adequate consideration has been given” to five factors in approving leases, none of which relate to valuation.²²

BIA leasing regulations, set forth at 25 CFR Part 162, include provisions relating to valuations. The regulations prescribe that except as otherwise provided in the regulations, “no lease shall be approved or granted at less than the present fair annual rental.”²³ The Department is currently developing a new subpart to the Part 162 regulations to address leases for the evaluation and development of wind and solar resources on Indian land.²⁴

4. Agricultural Leases and Grazing Permits

The American Indian Agricultural Resource Management Act (“AIARMA”),²⁵ which was enacted in 1993, specifically governs leasing of Indian agricultural lands. AIARMA authorizes the Secretary to “lease or permit agricultural lands to the highest responsible bidder at rates less than the Federal appraisal after satisfactorily advertising such lands for lease when, in the opinion of the Secretary, such action would be in the best interest of the Indian landowner.”²⁶

The general leasing regulations at 25 C.F.R. Part 162 also contain specific provisions, under authority of the AIARMA, for agricultural leases. For agricultural leases, the regulations, like the statute, also provide for alternative valuation methods. 25 C.F.R. § 162.211 states:

What type of valuation or evaluation methods will be applied in estimating the fair annual rental of Indian land?

(a) To support the Indian landowners in their negotiations, and to assist in our consideration of whether an agricultural lease is in the Indian landowners’ best

²² Those factors are: (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. *See* 25 U.S.C. § 415(a).

²³ 25 C.F.R. § 162.604(b).

²⁴ *See* Status Report to the Court Number Forty-One (Report) (Aug. 2, 2010), at 25, *available at* http://www.doi.gov/ost/cobell/QuarterlyReports/Quarterly_41.pdf.

²⁵ 25 U.S.C. §§ 3701-3746.

²⁶ *Id.* at § 3715(b).

interest, we must determine the fair annual rental of the land prior to our grant or approval of the lease, unless the land may be leased at less than a fair annual rental under § 162.222(b) through (c) of this subpart.

(b) A fair annual rental may be determined by competitive bidding, appraisal, or any other appropriate valuation method. Where an appraisal or other valuation is needed to determine the fair annual rental, the appraisal or valuation must be prepared in accordance with USPAP.

Separate BIA regulations governing grazing permits, codified at 25 C.F.R. Part 166, also implement AIARMA and similarly allow for valuation methods short of a site specific appraisal:

An appraisal can be used to determine the rental value of real property. The development and reporting of the valuation will be completed in accordance with the Uniform Standards of Professional Appraisal Practices (USPAP). If an appraisal is not desired, competitive bids, negotiations, advertisements, or any other method can be used in conjunction with a market study, rent survey, or feasibility analysis developed in accordance with the USPAP.²⁷

5. Timber Sales

The National Indian Forest Resources Management Act (“NIFRMA”)²⁸ governs forest management activities on Indian lands. NIFRMA directs that “the Secretary shall undertake forest land management activities on Indian forest land.”²⁹ The term “forest land management activities” includes, among other things, appraisals.³⁰ BIA regulations implementing the NIFRMA, however, provide the Secretary with flexibility in obtaining valuations for timber. The regulations generally prescribe that forest products “shall be appraised and sold at stumpage rates not less than those established by the Secretary.”³¹ This prescription is subject, however, to the Secretary’s authority to

²⁷ 25 C.F.R. § 166.401.

²⁸ 25 U.S.C. §§ 3101-3120.

²⁹ 25 U.S.C. § 3104.

³⁰ 25 U.S.C. §§ 3103(4)(F), (G).

³¹ 25 C.F.R. § 163.14(e).

allow sales for less than the appraised value to Indian owners “who have been duly appraised as to the value.”³²

6. Minerals and Oil and Gas

A number of federal statutes and regulations apply to oil and gas and mineral leases on Indian lands and a detailed explanation is beyond the scope of this report.³³ The BIA, Bureau of Land Management (“BLM”), Minerals Management Service (“MMS”),³⁴ Office of Surface Mining Reclamation and Enforcement, Office of Minerals Evaluation, and other federal agencies all have roles in transactions relating to these resources. Generally, these laws and their implementing regulations provide more flexibility to Indian tribes and Indian beneficiaries in determining the value of their resources. For oil and gas leases, for example, MMS regulations allow Indian tribes to utilize alternative valuation methods for royalty purposes, but only if tribe and MMS “jointly agree to the valuation methodology.”³⁵ The preamble to the final rule establishing this regulation explained:

MMS is confident that tribes can negotiate independently with lessees. Consistent with the Secretary’s trust responsibility, MMS will review and approve agreements for alternate valuation methodologies that are negotiated by the tribe and do not breach the trust responsibility of the Secretary. MMS will take a more active role in negotiations between lessees and allottee lessors.³⁶

³² 25 C.F.R. § 163.14(d).

³³ See, e.g., Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq. (provides DOI authority to oversee oil and gas operations on federal land); Mineral Leasing Act for Acquired Lands of 1947, 30 U.S.C. § 351 et seq. (extended the DOI authority over oil and gas operations to federal acquired lands); Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21 et seq. (generally governs mineral development); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 et seq. (sets forth BLM’s responsibilities with respect to oil and gas development); Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a-g (provides for leasing of minerals on tribal lands); and the Indian Mineral Development Act of 1982, 25 U.S.C. § 2102 et seq. (provides for tribes to enter into energy development agreements with DOI approval).

³⁴ On June 18, 2010, the Secretary changed name of MMS to the “Bureau of Ocean Energy Management, Regulation, and Enforcement” pursuant to Secretarial Order 3302. Because the existing regulations still refer to MMS, however, that name is used in this report.

³⁵ 30 C.F.R. § 206.170(c).

³⁶ See *Amendments to Gas Valuation Regulations for Indian Leases*; 64 Fed. Reg. 43,506, 43,508 (Aug. 10, 1999).

Regulations implementing leasing requirements for minerals other than oil and gas are analogous in that they allow the Secretary to approve leases by tribes and Indian beneficiaries for less than the established royalty rates “if it is determined to be in the best interest of the Indian mineral owner.”³⁷

7. Miscellaneous Transactions and Laws of Limited Applicability

A number of miscellaneous statutes or statutes of limited applicability contain provisions relating to valuation or appraisals. These include at least the following:

- 25 U.S.C. § 488 authorizes the Secretary of Agriculture to make and insure loans to Indian tribes to acquire lands or interests therein with the tribe’s reservation or within certain communities in Alaska. An appraisal is required in determining fair market value of land purchased with proceeds of this loan program if the Secretary of Agriculture elects to reduce the unpaid principal balance of the loan.³⁸

- The Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501-505, includes a provision that provides a preference to the Secretary to purchase interests in lands, including Indian lands, for Indians or tribes.³⁹ Purchases made under this provision must be “at a fair valuation to be fixed by the appraisement satisfactory to the Indian owner or owners.”

- Another law authorizes the Secretary, subject to the Federal Property and Administrative Services Act of 1949, to “sell and convey ...at not less than their appraised value,” certain parcels where the sale will “serve tribal interests.”⁴⁰ Still another provision, codified at 25 U.S.C. § 294, authorizes the Secretary in certain instances to sell and convey abandoned day or boarding school plants or abandoned agency buildings on Indian lands “at not less than their appraised value.”

A number of other miscellaneous statutes included throughout title 25 of the U.S. Code contain language that require, or required, as the case may be, appraisals for specific transactions involving Indian trust property. In most cases, these laws, which are scattered throughout title 25 of the U.S. Code, relate to the termination or restoration of Indian tribes or Indian lands and required appraisals to effectuate the transaction or series of transactions.

³⁷ 25 C.F.R. §§ 211.43(b) and 212.41(b).

³⁸ 25 U.S.C. § 493.

³⁹ 25 U.S.C. § 502.

⁴⁰ 25 U.S.C. § 190.

B. Administrative Practice and Guidance

Most of the specific guidance related to appraisals and valuations is in the form of memoranda and other written directives from BIA, OAS, or Department officials. An October 31, 2000, memorandum from former Deputy Commissioner - Indian Affairs M. Sharon Blackwell to all Regional Directors describes the Department's current policy on when appraisals and valuations of Indian trust property will be required. That memorandum states:

A team of Bureau appraisal and realty staff reviewed and analyzed the existing regulations and policies governing trust asset transactions. The team has concluded that no change to the existing appraisal and valuation requirements is needed since the existing regulations and policies properly define the Secretary's trust responsibility. This is ensured by requiring approval of trust transactions with estimates of fair market value or fair annual rent.

Based on the recommendations of the team, I reaffirm the requirement that all trust asset transactions have estimates of fair market value or fair annual rental and direct you to guarantee that this action is taken. It is incumbent upon you, the trust asset program staff and Regional Appraiser to work cooperatively to define the proposed transaction and identify the appropriate scope and purpose of each valuation. The Secretary's trust responsibly can only be met when the use of these criteria are sustained.

(emphasis added). This memorandum and several other memoranda and policies related to appraisals and valuations issued from 1999 to 2005 was reaffirmed in a May 1, 2007, memorandum from the National Business Association's ("NBC") Deputy Chief Appraiser to Regional Appraisers.

In addition to this administrative guidance, some parts of an older document, the BIA Real Estate Appraisal Handbook, continue to be in effect.⁴¹

⁴¹ See <http://www.bia.gov/WhatWeDo/Knowledge/Directives/BIAM/index.htm>, for an explanation of the (Historic) Bureau of Indian Affairs Manual ("BIAM"), of which the Real Estate Appraisal Handbook was a part. The BIA website explains that the BIAM chapters are in the process of being transferred to a new Indian Affairs Manual, but that, "In cases where a BIAM Part/Chapter has not been replaced by an IAM Part/Chapter, the BIAM technically still applies." *Id.* A note accompanying the Real Estate Handbook at 52 BIAM states that "[s]ome of the Real Estate IAM Chapters have yet to be updated," which apparently means that some parts of the Real Estate Appraisal Handbook continue to be in effect. *Id.*

II. ADMINISTRATION OF APPRAISALS AND VALUATIONS WITHIN DOI

A. Administrative Structure of Appraisals and Valuations

The administration of appraisals and valuations for Indian trust property, and for the Department as a whole, has changed significantly during the past decade. Prior to 2002, the BIA, through OAS, employed its own staff to perform appraisals and valuations of Indian trust property. In March 2002, OAS, together with the appraisal and valuation services it provided, was transferred to OST.⁴² According to BIA and OST officials, the primary reason for this transfer was a concern about the independence of appraisers and the potential for third parties that may have an interest in the outcome of an appraisal to unduly influence appraisers' professional judgment.

In November 2003, the Secretary consolidated the appraisers from BLM, the Bureau of Reclamation ("BOR"), the National Park Service ("NPS"), and the Fish and Wildlife Service ("FWS").⁴³ These personnel were consolidated in a new office, the Appraisal Services Directorate ("ASD"). According to the Government Accountability Office, this consolidation occurred "to insulate appraisers from institutional pressure, having them report to, and receive performance evaluations from, other appraisers, rather than realty specialists responsible for completing land transactions within their respective land management agencies."⁴⁴ OAS, however, was not affected by this Secretarial Order.

When the ASD was created, it was situated within and reported to the National Business Center ("NBC"), another entity within DOI. The Secretary established NBC in 1999 "to provide general administrative and management services and systems across [DOI] and to other Federal Agencies."⁴⁵ NBC provides financial management, human resources, acquisition, aviation, administrative operations, and information technology

⁴² See Secretarial Order 3240 (March 12, 2002) ("realign[ing] the Indian lands valuation and appraisal functions from the Bureau of Indian Affairs (BIA) to [OST]").

⁴³ See Secretarial Order 3,251 (Nov. 11, 2003).

⁴⁴ U.S. Government Accountability Office, *Interior's Land Appraisal Process: Actions Needed to Improve Compliance with Appraisal Standards, Increase Efficiency, and Broaden Oversight*, at 2 (GAO-06-1050) (Sept. 2006).

⁴⁵ See The National Business Center Strategic Plan FY 2008 – FY 2012, at 1, available at http://www.nbc.gov/organization/pdf/NBC_Strategic_Plan_2008_2012.pdf.

services on a fee-for-service basis to its agency customers, which include both DOI and non-DOI agencies and bureaus.⁴⁶

Beginning October 1, 2004 and pursuant to a Memorandum of Understanding executed between OST and NBC, NBC assumed management responsibilities for the OAS, with the Chief Appraiser for NBC overseeing OAS. In October 2008, OST made the decision to not renew this Memorandum of Understanding.

In August 2006, DOI formed the Office of Minerals Evaluation (“OME”) to perform mineral evaluations and market analyses of minerals in support of the valuations and appraisals prepared by OAS for sales of Indian land. The OME also provides mineral evaluation services for other federal agencies within the Department.

In May 2010, the Secretary moved the ASD from NBC and organized it as the “Office of Valuation Services” within the Department’s Office of Policy, Management and Budget.⁴⁷ This move came in response to a recommendation in a December 2009 report of the DOI Inspector General, which responded to the Congress’s directive that the Department revisit the 2003 appraisal services consolidation. That report found, among other things, that the NBC “did not provide timely support and services” to the ASD and that “NBC’s contracting process is a constant source of frustration to ASD and the [DOI] bureaus.”⁴⁸

Today, following its decision not to renew its MOU with NBC in 2008, OAS reports directly to the Special Trustee for American Indians. OAS continues to utilize NBC for procurement assistance.

B. Substantive Appraisal Standards and Mechanics of Obtaining Appraisals and Valuations

1. Substantive Appraisal Standards

The Secretary requires all individuals that prepare appraisals of Indian trust property to be licensed as state Certified General Appraisers.⁴⁹ In addition, appraisers must adhere to two standards in preparing appraisals: (a) the Uniform Standards of

⁴⁶ *Id.* at §§ 3.1-3.7.

⁴⁷ See Secretarial Order No. 3300 (May 21, 2010).

⁴⁸ See *Evaluation Report on the Department of the Interior’s Appraisal Operations*, Office of the Inspector General, U.S. Department of the Interior, Rep. No. WR-EV-OSS-0012-2009.

⁴⁹ Memorandum from Director, Office of Management and Administration, to Area Directors regarding “Payment of Appraiser Fees” (July 8, 1999).

Professional Appraisal Practice (“USPAP”), and (b) the Uniform Appraisal Standards for Federal Land Acquisitions (“UASFLA”).⁵⁰

USPAP is the generally accepted standard for appraisal practice in the United States. USPAP was established in 1989 by the Appraisal Standards Board of the Appraisal Foundation. The Appraisal Foundation is a private, non-profit corporation formed in 1987 by the appraisal industry and, through its Appraisal Standards Board, is responsible for maintaining and updating the USPAP. Congress adopted USPAP for use in most federally related real estate transactions in 1989.⁵¹ In March 1992, the Office of Management and Budget (“OMB”) issued OMB Bulletin 92-06, which instructed all Federal agencies to “prepare real estate appraisal and appraiser review reports in accordance with written and approved agency standards consistent with the Uniform Appraisal Standards of [USPAP] sections I - II ...” In 2005, USPAP was extended by regulation to all federal agencies.⁵²

State appraisal certification or licensing entities, not the Appraisal Foundation, enforce USPAP standards, so interpretation and application of USPAP may vary among the jurisdictions.⁵³ Therefore, appraisers must implement the USPAP standards in a manner consistent with the interpretations of their applicable state licensing/certification agencies in the jurisdiction where the property being appraised is located.

The other standard, UASFLA, was originally developed in 1971 by the Interagency Land Acquisition Conference, an organization composed of representatives of federal agencies that acquire land that is chaired by the U.S. Department of Justice. UASFLA was developed “for use by appraisers to promote uniformity in the appraisal of real property among the various agencies acquiring property on behalf of the United States.”⁵⁴

⁵⁰ Memorandum from Director, Office of Trust Responsibilities, to Area Directors (Jan. 6, 1999). UASFLA is accessible at the Department of Justice’s website at <http://www.justice.gov/enrd/land-ack/yb2001.pdf>.

⁵¹ See Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (P.L. 101-73, Aug. 9, 1989). Section 110 of that Act requires that, at a minimum, all appraisals made in support of “federally related transactions” be in writing and conform to the uniform standards promulgated by the Appraisal Foundation.

⁵² See 49 C.F.R. Part 24.

⁵³ UASFLA § D-1g.

⁵⁴ UASFLA (2000 ed.), at 1.

2. Mechanics of Obtaining Appraisals

For tribes that have not contracted or compacted the appraisal function, the main steps for obtaining an appraisal⁵⁵ are as follows:

- (1) the tribe or Indian beneficiary office submits a request for an appraisal or valuation to the BIA;
- (2) the BIA consults with the tribe or the beneficiary, advises them of scheduling, anticipated delivery dates, and the option to procure and submit their own appraisal if they so choose;
- (3) the BIA superintendant transmits the completed appraisal request to OAS;
- (4) if OAS does not perform the appraisal in-house, it is (a) assigned to an OAS appraiser that is already under contract with OAS, or (b) a requisition package is prepared and the appraisal is put out for bid;
- (5) once completed, the appraisal is transmitted to OAS, where a review appraiser is assigned to review the appraisal and ensure compliance with applicable standards;
- (6) if the review appraiser determines that the appraisal is satisfactory, the appraisal is transmitted to the BIA.⁵⁶

For the tribes that have contracted or compacted appraisals, the process is identical except that in lieu of the first four steps above, the tribe begins the process at step five by transmitting a completed appraisal to OAS.⁵⁷ If beneficiaries or tribes opt to procure and submit their own appraisals instead of relying on OAS, OAS will provide them with

⁵⁵ USPAP makes a distinction between an “appraisal” and an “appraisal report.” According to USPAP, an appraisal is an opinion of value, while an appraisal report is the document used to communicate the results of an appraisal to the client. See USPAP standards 1 and 2. For purposes of this report and for simplicity, however, the two terms are used interchangeably.

⁵⁶ Flow Chart, Internal Appraisals, Office of the Special Trustee, Office of Appraisal Services (June 22, 2009 draft).

⁵⁷ Flow Chart, Contracted or Compacted Appraisals, Office of the Special Trustee, Office of Appraisal Services (June 22, 2009 draft).

a sample scope of work and a list of recommended appraisers.⁵⁸ All appraisals must be approved by OAS as the Department considers this an inherently federal function.⁵⁹

III. ISSUES IDENTIFIED AND RECOMMENDATIONS

A. Delays in Obtaining Appraisals and Valuations

Nearly all persons and entities consulted in the preparation of this report identified delay as the overriding issue with receiving appraisals to effectuate transactions involving Indian trust property. The causes and impact of these delays vary. Some tribes and individuals have opted to pay for their own appraisals to avoid what they expect to be unacceptable delays based on past experience.

For both individuals and tribes, delays in obtaining appraisals often make a transaction less likely to be consummated. For example, one beneficiary described a scenario involving an attempt to sell land that included timber. After being informed that a timber cruise on the subject land would be significantly delayed due to staff and workload constraints, the family contracted directly with a private appraiser whose work was acceptable to OAS. The ultimate cost of the appraisal was more than \$4,000 and, at the time of the appraisal, the Indian tribe with jurisdiction over the land had expressed interest in purchasing the land. By the time the appraisal had been approved by the review appraiser six months later, however, the timber market had declined precipitously and the tribe was no longer interested in purchasing the land. In need of the proceeds of the sale, the family reduced the asking price by more than \$150,000, but was still unable to secure a buyer. The land has yet to be sold.⁶⁰

Several Indian tribes recounted similar anecdotes when awaiting appraisals of tribal trust property and cited its impact on on-reservation economic development. The notion that procedural requirements to effectuate Indian trust property transactions, such as valuations or appraisals, can unnecessarily delay those transactions has received increased attention of late. For example, legislation is pending in the U.S. Senate that would require the Secretary to review and approve, or disapprove, appraisals conducted

⁵⁸ Flow Chart, Landowner Provided Appraisals, Office of the Special Trustee, Office of Appraisal Services (Feb. 26, 2009).

⁵⁹ Memorandum from Director, BIA, to all Regional Directors regarding “Review of Land Appraisals by the Office of Appraisal Services” (Oct. 6, 2005).

⁶⁰ According to OST, OAS is required to utilize BIA personnel to conduct timber cruises and cannot contract directly for this service. Because OAS cannot control the BIA’s workload, this often results in appraisal requests to OAS being delayed. Similarly, tribes that have contracted or compacted BIA forestry programs are responsible for providing timber appraisals to OAS, which might also contribute to delay depending on the tribes’ workload.

by or for Indian tribes for energy activities on Indian lands within 30 days of receipt of the appraisal.⁶¹ According to Senate staff, this provision was included in the legislation because of concerns from tribes and tribal organizations that delays in obtaining valuations and appraisals are hindering renewable energy projects.

Most tribes and beneficiaries consulted in the preparation of this report attributed the cause of what they considered delay to two factors: (a) a general lack of government resources, staff, and capacity; and (b) the involvement of multiple government agencies in the appraisal process. With respect to the former, some tribes and beneficiaries pointed to the lack of BIA staff to prepare and process appraisal requests as a factor. Others questioned the competence of the BIA staff with which they relied to prepare the appraisal requests. A number of beneficiaries and some tribes commented that BIA realty staff needed additional training in processing appraisal requests. Two tribes that compacted the appraisal function and another that has not but pays for its own appraisals pointed to a shortage of OAS review appraisers as a cause of the delay they experienced.

Bureaucracy was another issue raised. One tribe noted that having both OST and BIA involved in the appraisal process — neither with line authority over the other and each with separate budget and workload demands — inherently stymies efficiency and quick action. The lack of line authority was a particular problem because BIA agency staff often has varied and competing priorities from their respective agencies, yet are responsible for generating and transmitting appraisal requests to OST.

An appraisal request is not “in the system” until a request is received from the BIA, so the delay experienced by tribes and beneficiaries in some cases is attributable to the BIA’s delay in preparing and transmitting the request to OST. For example, one tribal land office official whose tribe was served by a BIA agency that served two other Indian tribes reported that the agency had a practice of waiting until it had received a sufficient number of appraisal requests from the three tribes before completing and transmitting the requests to OST.

Tribes and beneficiaries both observed that in order to ensure that they are able to receive appraisals in time to meet firm deadlines, they often had to make repeated telephone calls to regional office officials. One tribal realty official, while acknowledging the realty demands of her own tribe, had concerns that such reprioritization of requests had a constant ripple effect of delaying the delivery dates of other pending appraisal requests from other tribes or beneficiaries.

⁶¹ See Indian Energy Parity Act of 2010, S. 3752, 111th Cong., 2d Sess. (2010).

Tribes and beneficiaries also reported challenges locating appraisers with experience working with the federal government. These challenges were even more acute when trying to locate appraisers with experience with Indian trust property.

Indian tribes that ITMA consulted with in the preparation of this report that had contracted or compacted appraisals generally seemed more satisfied that they were able to receive appraisals in timeframes they considered acceptable. Personnel from these tribes also felt that because the tribes contracted directly with the appraisers, they were in a position to have more direct communication and be in a better position to evaluate the appraisers' work. One tribal realty office established its own database of comparables that they provide to contract appraisers to assist in the valuations which has resulted, in the tribe's view, in improved and timelier appraisals.

Given this input, the key to reducing or eliminating the real or perceived delay recounted above is to reduce the scope of transactions for which an appraisal or valuation is required or, alternatively, allow tribes and beneficiaries to waive the requirement in appropriate instances. Reducing the scope of transactions would free up additional resources to ensure that transactions where appraisals are desirable and required can be completed more quickly.

1. Expand Previously Approved Waiver Authority to All Tribes and All BIA Regions

The Secretary has waived appraisal and valuation requirements on several occasions for BIA regions or specific Indian tribes utilizing the general regulatory waiver authority in 25 C.F.R. § 1.2. For example, in 2007, the Secretary waived the regulatory requirement for appraisals for rights-of-way for the Navajo Nation and Navajo landowners in certain instances:

The appraisal requirement in 25 C.F.R. § 169.12 is deemed waived when the landowner upon which the right-of-way will be located waives compensatory consideration and the right to be provided with information as to the fair market value of the right-of-way and:

- The utility/roadway provided is either a federal or tribal government agency or enterprise or energy cooperative;
- The individual owner will directly benefit from the utility line/roadway;
- The utility line/roadway serves a school, hospital, housing development or other tribal facility that benefits the community;

- The landowner who waives consideration is the tribe or individual owner; or
- The health and safety of the individual owner will be enhanced by the installation of the utility line/roadway.⁶²

The waiver also provides the BIA with prospective authority to waive the appraisal requirement for rights-of-way upon a determination that it is in the best interest of the landowner and the waiver is not due to undue influence or fraud.⁶³ Waiver authority for rights-of-way has also been extended to the Southern Ute Tribe, among others.

The Department has also granted an exemption for the Eastern Band of Cherokee Indians, which is articulated in a 2004 memorandum from the Director of the BIA:

By memorandum dated October 31, 2000, the Deputy Commissioner of Indian Affairs reaffirmed the longstanding requirement that all trust asset transactions be supported by an appraisal or other evaluation of value ... Effective on the date of this memorandum, this requirement shall not be applicable to any possessory interest lease of the Eastern Band Cherokee tribal lands duly granted by Eastern Band Cherokee Indians ... and subsequently submitted to the Bureau of Indian Affairs for approval pursuant to 25 U.S.C. § 415(a) and 25 C.F.R. Part 162, *provided that*: (i) such lease is accompanied by documentation evidencing the determination of the Tribe's Business Committee that the consideration paid for the subject lease constitutes fair annual rental of the possessory interest at issue and (ii) following Bureau review of such documentation, the Bureau affirmatively accepts and adopts the Tribe's determination of fair annual rental.⁶⁴

(emphasis in original). Although the memorandum did not describe this authority as a waiver pursuant to 25 C.F.R. § 1.2, the validity of this memorandum was reaffirmed in 2007.

⁶² See Memorandum from Director, Bureau of Indian Affairs, to Assistant Secretary — Indian Affairs regarding “Request to Waive or Make an Exception to 25 CFR § 169.12” (attachment to memo) (June 6, 2007).

⁶³ *Id.*

⁶⁴ Memorandum from Director, Bureau of Indian Affairs, to BIA Directors and Regional Offices regarding “Approval of Eastern Band of Cherokee Possessory Interest Leases: Determination of Fair Annual Rental” (June 30, 2004).

A number of Indian tribes indicated that they would immediately benefit if they or their BIA regions were granted the same or similar authority to waive appraisals as have been approved for the Navajo Nation and other tribes. These tribes either were awaiting appraisals or were in the process of initiating appraisal requests for rights-of-way involving public utilities and roads that would provide needed access across Indian lands.

ITMA recommends that the Department compile all previously approved waivers of appraisal and valuation requirements and distill them in a single, written policy that will be applicable to all tribes and all BIA regions. In the short term, this would provide similarly situated Indian tribes and beneficiaries with some measure of relief for the delay that many claim that they continue to experience.

2. Expand the Directive Implementing Section 2214 of ILCA

Unlike for leases, rights-of-ways, or other conveyances of Indian trust property, a federal statute, ILCA, requires a determination of fair market value prior to the sale, exchange and other transfer of title of Indian land. As noted in Part I(A) above, Section 2214 of the ILCA grants the Secretary authority to “develop a system” for establishing fair market value for Indian land and improvements.⁶⁵ As originally enacted in 2000, this provision applied only to the Indian Land Consolidation program under section 2212 of the Act. With the passage of AIPRA, however, Congress eliminated this restriction and made the provision applicable to the ILCA as a whole.⁶⁶

Citing Section 2214 as authority, OST issued a directive in January 2010 that established a policy for valuations provided for the Indian Land Consolidation Program (“ILCP”).⁶⁷ The directive prescribes that “[i]t is the policy of OST” to comply with USPAP and UASFLA “when establishing fair market value of real property to be used by the [ILCP].”⁶⁸ The directive further states that the appraisal methodologies and

⁶⁵ 25 U.S.C. § 2214.

⁶⁶ S. Rep. No. 108-264, 108th Cong. 2d Sess. (2004), at 65.

⁶⁷ See *Policy on Appraisal Methodology and Techniques for Valuations Prepared for the Indian Land Consolidation Program*, 120 OM 1 (Jan. 19, 2010). Subject to available funds, the ILCP purchases fractionated interests in Indian lands from willing Indian sellers in an effort to reduce the costs of administering these interests.

⁶⁸ *Policy on Appraisal Methodology and Techniques for Valuations Prepared for the Indian Land Consolidation Program*, at § 1.3.

reporting options may include, but are not limited to, market studies, project appraisal reports, and mass appraisals, all of which are provided for in USPAP.⁶⁹

ITMA recommends that OST consider expanding this directive to include two concepts. First, ITMA recommends that the policy delegate authority for developing new systems of establishing fair market value to OAS regional appraisers. The rationale is that certain regions will have or will oversee tribes that have particularized expertise with certain resources, such as coal or oil and gas (Southwest or Navajo Regions) or timber (Northwest Region). Delegating this authority while requiring, of course, approval by the Special Trustee prior to implementation, would encourage regions to be proactive in developing alternative valuation systems for resources for which they have this particularized expertise.

Second, the policy should formally establish a grant program, pilot project, or other authority that provides Indian tribes or tribal organizations with resources to develop alternative valuation methods under Section 2214. Precedent already exists for such a program. ITMA is informed that OST provided funding to the Quinault Tribe to develop a mass appraisal system for timber. According to an individual familiar with that program, however, the project has been slowed by the BIA Northwest Regional Office's alleged unwillingness to work with the project participants to provide access to ownership data on the parcels included in the pilot. To avoid this situation, any expansion of the current directive in this regard should require the cooperation of all government entities involved in the appraisal process.

3. Waive the Estimate of Value Requirement for Negotiated Sales and Leases between Indians

As previously noted, ILCA imposes a general requirement that for sales, exchanges, and conveyances for no or nominal consideration (or gift deeds), the seller or grantor must be provided with an estimate of value, which can be waived by the grantor in writing in limited instances. Those instances include where the grantor gift deeds land to certain family members or conveys land to an Indian co-owner or a tribe where the grantor owns five percent or less of the parcel.

These exceptions aside, an estimate of value (or an appraisal, under existing regulations at 25 C.F.R. § 152.24) is still generally required for negotiated sales or exchanges of land between Indians, including to family members. It is also required for gift deeds from an Indian grantor to another Indian to whom the grantor is not related. All individual Indians and allottee groups that were consulted in the preparation of this

⁶⁹ *Id.*

report agreed that the estimate of value requirement should be waivable for these transactions as well.

The most direct way to effectuate this change would be to amend the ILCA statute to broaden the current exception. This could be accomplished rather simply and discretely by striking language in 25 U.S.C. § 2216(b)(1)(B), as illustrated below:

(B) Waiver of requirement

The requirement for an estimate of value under subparagraph (A) may be waived in writing by an owner of a trust or restricted interest in land either selling, exchanging, or conveying by gift deed for no or nominal consideration such interest—

(i) to any **Indian** person who is the owner's spouse, brother, sister, lineal ancestor, lineal descendant, or collateral heir; or

(ii) ~~to an Indian co-owner or~~ to the tribe with jurisdiction over the subject parcel of land, where the grantor owns a fractional interest that represents 5 percent or less of the parcel.

Striking the above language would broaden the exception to apply to sales, exchanges, and conveyances for no or nominal consideration (or gift deeds), to any Indian person, not just certain family members. This would allow these transactions to proceed without any valuation requirement if grantor consents in writing. Short of amending the statute, the Secretary could promulgate a definition of “estimate of value” for purposes of this section.

Providing for a waiver of the valuation requirement for non-agricultural surface leases where both the lessor and the lessee are Indians could be effectuated administratively. Again, the general surface leasing statute, 25 U.S.C. § 415, does not impose a valuation requirement and the requirement for fair market value that does exist is imposed in the regulations.⁷⁰ Utilizing the authority to waive or make exceptions to regulations in 25 C.F.R. § 1.2, the Secretary could issue a directive implementing this change.

In contrast to sales or leases between Indians, one beneficiary expressed concern about the prospect of allowing this type of waiver authority for sales or leases by Indians to tribal governments. Tribal governments, the beneficiary noted, would have greater influence and bargaining power in a negotiation for a sale or lease than would an

⁷⁰ See 25 C.F.R. § 162.604(b).

individual Indian. This would be especially true if the tribal government was making a concerted effort to acquire the land for economic development or other purposes.

4. Increase Authority to Waive Appraisal or Valuation Requirements for Transactions Involving Competitive Bids

One tribal land official, whose tribe generates approximately 60 appraisal requests annually, noted that where a lease is advertised for competitive bid, the winning bid, for practical purposes, establishes the value. The preparation of an appraisal, which in the official's experience typically occurred after the high bidder was selected, was superfluous.

For agricultural leases, the AIARMA statute already allows the Secretary to “lease or permit agricultural lands to the highest responsible bidder at rates less than the Federal appraisal after satisfactorily advertising such lands for lease, when, in the opinion of the Secretary, such action would be in the best interest of the Indian landowner.”⁷¹ Regulations governing rights-of-ways on BLM land also provide precedent for allowing fair rental value to be determined through competitive bidding.⁷² As previously noted and as demonstrated by the exception for the Eastern Band of Cherokee Indians discussed above, the appraisal and valuation requirements for non-agricultural leases can be modified administratively.

Some transactions, of course, may not be amendable to valuation in this manner. For Indian tribes, however, that are proficient in advertising leases or permits — or for Indian landowners who are satisfied with the price they receive from winning bidders — providing flexibility to waive the valuation requirement would free up resources and allow for the transactions to be completed in a more expeditious fashion. For non-agricultural surface leases, such a change could be effectuated by the Secretary under the waiver authority in 25 C.F.R. § 1.2.

B. Appraisals and Valuations Generally

ITMA received a significant feedback from beneficiaries and tribes regarding the transparency of the appraisal and valuation process, access to underlying appraisal data

⁷¹ *Id.* at § 3715(b). The implementing regulations impose an additional requirement that the use of competitive bids and other methods be used “in conjunction with a market study, rent survey, or feasibility analysis developed in accordance with the USPAP.” 25 C.F.R. § 166.401.

⁷² See 43 CFR § 2803.1-3 (2003 ed.), which authorized competitive bidding for “site type right-of-way grants such as for wind farms, communication sites, etc.” These regulations were rewritten and superseded in 2005. See 70 FR 21,058 (Apr. 22, 2005).

and work files, and the ability to take corrective action on appraisals they consider erroneous or incomplete. Recommendations addressing these concerns are discussed below.

1. Sales of Indian Trust Property Should be Made Publicly Available Through a Searchable Database

Nearly all beneficiaries consulted in the preparation of this report agreed that making information on the sales of Indian trust property publicly available in an easily searchable, accessible form, such as a searchable website, would be immensely beneficial to Indian landowners and tribal economies generally.

For the Indian landowners' perspective, having a searchable database to ascertain the sales price of Indian land on their respective reservations would facilitate and strengthen local markets for Indian land. For prospective purchasers, this information would assist in locating properties, obtaining financing, and other purposes. For prospective sellers, it could be used as a planning tool. Individuals noted that having the ability to retrieve this information is long overdue given that similar information for off-reservation land or fee land within reservation boundaries is generally accessible through local government websites.

Tribal personnel also noted the benefits of such a database. For tribes with active land acquisition programs, one commentator noted that having such a database would assist tribal planners and economic development professionals in locating properties for acquisition.

For purposes of avoiding issues implicated by the Privacy Act of 1974,⁷³ the sales data made publicly available could exclude any personally identifiable information about the owner or owners and still provide value. Basic information such as the location of the parcel, a description of the resources on the parcel, the sales price, and perhaps the total number of owners would appear to be permissible disclosures under

⁷³ See 5 U.S.C. § 552a. Subject to several exceptions, the Privacy Act prohibits federal agencies from disclosing “any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.” *Id.* at § 552(b). To qualify as a Privacy Act “record,” the information must identify an individual. Some federal circuit courts have interpreted the term “record” more broadly than others, but it is generally accepted that the “record” disclosed must include at least some personally identifiable information about a person to fall within the Privacy Act. See, e.g., *Tobey v. NLRB*, 40 F.3d 469, 471 (D.C. Cir. 1994) (to qualify as a “record,” the information “must both be ‘about’ an individual and include his name or other identifying particular.”)

the Privacy Act. Individuals interested in purchasing land that is adjacent to or near a property that is available in the database could themselves approach the landowners (or have the tribal or BIA realty offices inform the owners) that a potential buyer exists. The BIA's existing Trust Asset and Accounting Management System ("TAAMS") would likely be a good start for developing this type of database and making it publicly available online.

2. Underlying Appraisal Data and Work Files Should be Made Available Upon Request

Several beneficiaries and Indian tribes expressed frustration that they are not allowed to access the underlying data or documentation of appraisals. Tribes identified several instances, such as where it is apparent or suspected that an appraiser may not have been aware of comparable sales of recent Indian trust property transactions, that would necessitate reviewing an appraiser's work file. For direct service tribes or instances where a beneficiary does not opt to pay for their own appraisal, OAS will either utilize staff appraisers or contract directly with a private appraiser to prepare the appraisal. In these instances, the Indian tribe or beneficiary is not a "client" for the appraisal and, according to OST officials, will generally not have access to the information.

USPAP imposes record-keeping obligations on appraisers and requires that appraisers maintain and retain work files for appraisals and appraisal reviews.⁷⁴ It is understandable, perhaps even expected, that beneficiaries or tribes that intend to utilize appraisals in negotiations would desire access in some cases to the underlying data to assist them in making informed decisions.

Regardless of whether or not the beneficiary or the tribe is the "client," not making this information available at their request would appear inconsistent with trust principles.⁷⁵ USPAP contains its own confidentiality requirements that generally proscribe sharing appraisal information with anyone other than the client without the client's consent.⁷⁶ Once an appraisal has been reviewed and approved by OAS, however, it is transmitted back to the BIA. According to OST officials, whether or not the underlying data or work files can be made available to Indian beneficiaries is ultimately the BIA's decision. Effectuating this change might be as simple as requiring the BIA to identify Indian beneficiaries or tribes as intended users of an appraisal report when it submits the appraisal request to OAS.

⁷⁴ See USPAP, Ethics Rule – Record Keeping.

⁷⁵ See Restatement (Second) of Trusts § 173, and Restatement (Third) of Trusts § 82.

⁷⁶ See USPAP, Ethics Rule – Confidentiality.

3. Establish a Written Policy for Tribes or Beneficiaries to Have Appraisals or Valuations Reopened or Corrected

Both beneficiaries and tribal personnel consulted in the preparation of this report expressed concern that no policy currently exists for a beneficiary or a tribe to request a correction or reopening of an appraisal. Some concerns identified by beneficiaries and tribes include the following:

- Appraisal reports indicate that Indian landowners had been interviewed when, in fact, they had not been;
- Appraisals listed the same parcel as a comparable sale at two wildly different values;
- Appraisals do not consider tribal land use or zoning regulations in valuing property, such as tribal wilderness areas, which undermines the integrity of the valuation;
- Appraisals consider only the underlying land value and not improvements to the land; and
- Appraisers subcontract their work, in some cases multiple times, to individuals or entities without the requisite expertise.

Some or all of the examples cited above may be the result of the inexperience or good faith error of the appraiser in question, as opposed to being representative of Department or OAS policies or practices. For example, both the USPAP and UASFLA explicitly require appraisers to consider improvements and applicable land use and zoning laws in valuations.⁷⁷ Nonetheless, if beneficiaries or tribes identify what turn out to be valid discrepancies in appraisals, a written policy should be established to address

⁷⁷ For example, UASFLA provides:

Market value is to be estimated at the time of valuation considering the property in its condition and situation at that time; if at that time, the property was subject to zoning restrictions, that factor must be considered in evaluating the property. Because property is to be valued in light of its highest and best use, zoning regulations are of critical importance because they restrict the uses to which the property may lawfully be devoted.

UASFLA § B-23 (footnote citations omitted). Similarly, USPAP Standards Rule 1-3 requires an appraiser to identify and analyze the effect on use and value of existing land use regulations, reasonably probable modifications of such land use regulations, economic supply and demand, the physical adaptability of the real estate, and market area trends, and develop an opinion of the highest and best use of the real estate.

these circumstances. Although some tribes reported success working informally with BIA and OAS staff to address these issues, other tribes and beneficiaries did not.

A written policy might also serve as a diagnostic tool for OAS to the extent that tribes or beneficiaries seek to reopen appraisals on the basis of errors or discrepancies that are widespread throughout one or more regions.

4. Develop Informational Handbooks or Written Materials on Appraisals and Valuations for Beneficiaries and Tribes

Many Indian beneficiaries commented about a general lack of information available to them about what appraisals are, what methods and standards may be applied by appraisers, how they can or should use appraisal reports, and what their rights are should a variety of contingencies arise. Beneficiaries involved with negotiations of rights-of-way with energy companies expressed grave concerns about the manner and the timeliness in which they received appraisal and valuation information. The availability of written materials that are in a format that laypersons can understand would better communicate this information and shape expectations for beneficiaries at the outset.

Indian tribes also observed a lack of readily available written information. Some noted that their primary source of information on appraisals, whether appraisal requirements or an update on the status of a particular request, was calling their regional office. For example, one tribal realty officer was unaware that in submitting an appraisal to OAS for review by a review appraiser, the delivery date provided by OAS was subject to negotiation. Outlining these issues, perhaps in question and answer format, would also assist tribes in maximizing efficiencies and managing expectations.

Finally, written guidance could also assist in keeping both OST and the BIA informed as to the other entity's deadlines and otherwise "on the same page." For example, some Indian tribes and beneficiaries noted that neither they nor the BIA staff have any idea how long an appraisal is valid. One beneficiary indicated that, while waiting for a regional solicitor to approve a ground lease that took the solicitor longer than expected, they were informed that the appraisal they had obtained had "expired" and would have to be redone. USPAP provides that the "shelf life" of appraisals is determined by market conditions and if the applicable market has changed, the entire appraisal must be prepared anew.⁷⁸ In contrast, the BIA Appraisal Handbook, portions of which remain in effect, allowed for appraisals that were "made considerably in advance of the date of negotiation" to be "reviewed and brought up to date to reflect

⁷⁸ See USPAP, Advisory Opinion 3 ("[W]hen a client seeks a more current value or analysis of a property that was the subject of a prior assignment, this is not an extension of that prior assignment that was already completed – it is simply a new assignment.")

current market conditions.”⁷⁹ Clarifying this issue and providing guidance on when a transaction must be completed to avoid having to redo an appraisal would assist the BIA in prioritizing its workload.

C. Establish an “Appraisal and Valuations Advisory Committee” to Explore Broader Policy Issues

Several issues raised by tribes and beneficiaries implicate broader policy considerations that are beyond the scope of this report but nonetheless warrant further examination. These issues include at least the following –

- whether responsibility for appraisals should be returned to the BIA or whether OST, or some other single entity, should consolidate and assume full responsibility for all aspects of requesting and preparing appraisals for Indian trust property;
- real or perceived conflicts of interests in the appraisal process, specifically for mineral and oil and gas valuations where other agencies within DOI, such as BLM or MMS, play a role;
- whether the Department should, as a matter of policy, refocus its resources for appraisals and valuations to transactions that involve higher risk to Indian beneficiary or to tribes;
- whether allowing existing authorities, such as the authority of Crow Indians, to lease and generally manage their land without BIA approval under certain conditions,⁸⁰ or whether the owner managed trust provision in AIPRA⁸¹ should be expanded to other beneficiaries;
- Whether OAS should have dedicated staff to perform timber appraisals and mineral evaluations without having to rely on other entities within DOI to provide these services.

For example, the first issue, whether appraisals should be moved back to BIA or whether the current structure should be changed, has generated considerable commentary that would benefit from further analysis. Some tribes and beneficiaries

⁷⁹ See 52 BIAM 1.3E, *available at* <http://www.bia.gov/idc/groups/public/documents/text/idc-000439.pdf>.

⁸⁰ Under the special Crow Statutes (Acts of May 26, 1926 Sec. 1 and March 15, 1948), parcels owned by up to five competent Crow Indians may be leased without the Secretary’s approval.

⁸¹ 25 U.S.C. § 2220.

consulted in the preparation of this report indicated that appraisals should never have been moved from the BIA, while others did not believe OAS's move to OST, for practical purposes, changed anything.

ITMA recommends that the Department establish an "Appraisals and Valuations Advisory Committee" to examine, collect data, and develop further recommendations on these and other issues related to valuations of Indian trust property. ITMA recommends that the workgroup be composed of representatives from at least the following: Indian tribes, individual Indians, tribal organizations, the Appraisal Foundation, OST, BIA, the private sector trust industry, the Department of Justice, and the Administration.
