

Why is the Department promulgating this rule?

In the past, the consular officer at the post where an alien was registered as a beneficiary of an immigrant visa petition was responsible for notifying the alien of the termination of the immigrant visa registration if the alien failed to pursue the application within one year after being notified that a visa was available. The consular officer based this notification on information received from the National Visa Center (NVC). Now, the NVC will make this notification directly to the alien.

How does this change affect the alien?

There is no change from the point of view of the alien. The alien still has the ability to apply for reinstatement of the immigrant visa registration. Such application should be sent to the National Visa Center and it will be forwarded to the consular officer at the post where the alien was registered, under the same conditions as before.

Regulatory Findings

Administrative Procedure Act

This regulation involves a foreign affairs function of the United States and, therefore, in accordance with 5 U.S.C. 553(a)(1), is not subject to the rule making procedures set forth at 5 U.S.C. 553.

Regulatory Flexibility Act/Executive Order 13272: Small Business

Because this final rule is exempt from notice and comment rulemaking under 5 U.S.C. 553, it is exempt from the regulatory flexibility analysis requirements set forth at sections 603 and 604 of the Regulatory Flexibility Act (5 U.S.C. 603 and 604). Nonetheless, consistent with section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. This regulates individual aliens who seek consideration for immigrant visas and does not affect any small entities, as defined in 5 U.S.C. 601(6).

The Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UFMA), Public Law 104-4, 109 Stat. 48, 2 U.S.C. 1532, generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of \$100 million or more by State, local, or tribal governments, or by the private sector. This rule will not result in any such expenditure, nor will

it significantly or uniquely affect small governments.

The Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign based companies in domestic and import markets.

Executive Order 12866

The Department of State has reviewed this final rule to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866 and has determined that the benefits of the final regulation justify its costs. The Department does not consider the final rule to be an economically significant action within the scope of section 3(f)(1) of the Executive Order since it is not likely to have an annual effect on the economy of \$100 million or more or to adversely affect in a material way the economy, a sector of the economy, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities.

Executive Orders 12372 and 13132: Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Nor will the rule have federalism implications warranting the application of Executive Orders No. 12372 and No. 13132.

Paperwork Reduction Act

This rule does not impose information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C., Chapter 35.

List of Subjects in 22 CFR Part 42

Aliens, Foreign officials, Immigration, Passports and Visas.

■ Accordingly, for the reasons stated in the preamble, Title 22 Part 42 is amended as follows:

PART 42—[AMENDED]

1. The authority citation for part 42 continues to read as follows:

Authority: 8 U.S.C. 1104; Pub. L. 105-277, 112 Stat. 2681-795 through 2681-801. Additional authority is derived from Section 104 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) Pub. L. 104-208, 110 Stat. 3546.

■ 2. Revise § 42.83(c) to read as follows:

§ 42.83 Termination of registration.

* * * * *

(c) *Notice of termination.* Upon the termination of registration under paragraph (a) of this section, the National Visa Center (NVC) shall notify the alien of the termination. The NVC shall also inform the alien of the right to have the registration reinstated if the alien, before the end of the second year after the missed appointment date if paragraph (a) applies, establishes to the satisfaction of the consular officer at the post where the alien is registered that the failure to apply for an immigrant visa was due to circumstances beyond the alien's control. If paragraph (b) applies, the consular officer at the post where the alien is registered shall, upon the termination of registration, notify the alien of the termination and the right to have the registration reinstated if the alien, before the end of the second year after the INA 221(g) refusal, establishes to the satisfaction of the consular officer at such post that the failure to present evidence purporting to overcome the ineligibility under INA 221(g) was due to circumstances beyond the alien's control.

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Dated: February 20, 2008.

Maura Harty,

*Assistant Secretary for Consular Affairs,
Department of State.*

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DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 171

RIN 1076-AD44

Irrigation Operation and Maintenance

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: The Department of the Interior, Bureau of Indian Affairs (BIA) is revising the regulation governing irrigation projects under its jurisdiction.

The purpose of the revision is to provide consistent administration; establish the process for updating practices, policies, and procedures for the administration, operation, maintenance, and rehabilitation of irrigation projects; and provide uniform accounting and recordkeeping procedures.

This regulation has also been rewritten in plain English as mandated by Executive Order 12866. It also addresses several issues that the prior regulation did not cover.

DATES: Effective March 31, 2008.

FOR FURTHER INFORMATION CONTACT: John Anevski, Chief, Division of Irrigation, Power and Safety of Dams, Office of Trust Services, Bureau of Indian Affairs, 1849 C Street, NW., Mail Stop 4655-MIB, Washington, DC 20240; Telephone (202) 208-5480.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Response to Comments
- III. Subpart-by-Subpart Analysis
- IV. Procedural Requirements

I. Background

This regulation is issued under the Secretary of the Department of the Interior's (Secretary) authority to administer Indian irrigation projects under 25 United States Code (U.S.C.) 381 *et seq.* This revised regulation clarifies prior regulatory language, in keeping with the "plain English" standard required by Executive Order 12866. In revising this regulation, redundant or unnecessary sections of the existing part 171 of Title 25 of the Code of Federal Regulations (CFR) were identified and deleted. New sections were also added to comply with the Inspector General's (IG) audit findings and to implement the provisions of the Debt Collection Improvement Act of 1996. For example, several IG audits, the most recent in 1996 (96-I-641), identified a management deficiency concerning full cost rates for operation and maintenance. Also, the Debt Collection Improvement Act established new procedures to manage moneys owed the Federal Government. This regulation addresses both of these issues.

The proposed revisions to 25 CFR part 171 were first published on July 5, 1996 (61 FR 35167). Based on the length of time that has passed and changes to the earlier proposed regulation, these proposed revisions were published for public comment on July 17, 2006 (71 FR 40450) with a 120-day public comment period that ended on November 14, 2006. The re-publication provided a fresh start to the rulemaking process for

this revision. Consultation meetings with the Indian tribes (Tribes) that may be impacted by this regulation were held on August 24 and 26, 2004, and May 10 and 12, 2005. These consultation meetings were held in accordance with Executive Order 13175. No additional consultation meetings with Tribes were requested or held during the public comment period.

II. Response to Comments

The Department solicited comments from all interested parties through its publication of the proposed regulation in the **Federal Register** on July 17, 2006 (71 FR 40450). In addition, prior to publication of the proposed regulation, the BIA held four tribal consultation meetings with affected Tribes on August 24 and 26, 2004, and May 10 and 12, 2005. These meetings were well-attended and the BIA received valuable input to help develop the proposed regulation as a result. Transcripts from those consultations were used in the development of the proposed regulation.

The Department received written comments from one individual and three tribes. The comments included both general and specific criticisms and suggestions. The comments were carefully reviewed by the regulation drafting team made up of BIA employees from Central Office and attorneys from the Office of the Solicitor. Depending on their merit, the Department accepted, accepted with revision, or rejected comments made on each part of the regulation. Some of the comments included copies of previously submitted comments which were related to earlier versions of the proposed regulation. Because the 2006 proposed regulation was significantly different from earlier versions, those earlier comments are not specifically addressed here; however, those earlier comments were carefully considered in developing the latest version of the regulation. As noted in the part-by-part analysis below, certain sections of the regulation have been clarified in direct response to comments. Additionally, some language has been deleted or added to provide for increased clarity and precision. Substantive comments are summarized below.

III. Subpart-by-Subpart Analysis

25 CFR Part 171—Irrigation Operation and Maintenance (O&M)

The purpose of this regulation is to provide consistent administration of irrigation projects under the jurisdiction of the BIA; establish uniform accounting and recordkeeping procedures for the assessment of irrigation O&M charges;

and establish the process for updating practices, policies, and procedures for the administration, operation, maintenance, and rehabilitation of Indian irrigation projects.

The various subparts of part 171 address the applicability of the regulation to individual irrigators; definition of relevant terms; the nature and scope of the irrigation service provided by the BIA; allowable uses of irrigation water; the responsibilities of irrigators and the BIA; assessments, billing, and collections; record-keeping and agreements between BIA and irrigators; and non-assessment status of lands within an irrigation project.

General Comments

Comment: Adequacy of Consultation

Several commenters expressed concern that there was not adequate formal consultation on the proposed regulation. Formal consultations were held on August 24, 2004 and May 12, 2005 in Phoenix, AZ and on August 26, 2004 and May 10, 2005 in Billings, MT. All affected Tribes were invited to attend each of the four formal consultation meetings, and all of the meetings were well-attended. The BIA indicated its willingness to host consultations for individual affected Tribes or additional consultations with groups of Tribes upon request. None of the affected Tribes requested additional consultation meetings. Two of the commenters stated that the Walker River Paiute Tribe was not notified of the consultation meetings and thus could not participate. However, BIA records indicate that the Walker River Paiute Tribe was notified of all four formal consultations meetings, and in fact, three representatives from the Walker River Paiute Tribe attended the May 12, 2005 consultation meeting held in Phoenix, AZ. One commenter noted that a water user meeting held on her reservation two months after publication of the proposed rule did not constitute adequate formal consultation. The meeting this commenter referred to was held on the Walker River Paiute Reservation on September 28, 2006. The purpose of water user meetings is for the local BIA irrigation project to consult with the project stakeholders on project-specific operations, maintenance, budget, rates, and related matters. This meeting was not held for the purpose of consulting with Tribes on the proposed revision to Part 171. One commenter noted that the consultations did not address project-specific operating guidelines and were therefore inadequate. Consultations were held for this proposed regulation. The

establishment of operating guidelines specific to the individual irrigation projects is distinct from this rule-making process. The BIA will be consulting with Tribes and water users in the development of individual project operating guidelines. No change was made to the regulation to address these comments.

Comment: Timing of Issuance of Final Regulation

One commenter stated that the regulation should not be finalized until after the BIA proposes and discusses new project-specific operating guidelines. The commenter stated that studies should be undertaken to determine how the regulation will affect the BIA's ability to protect and manage Indian land and water. The establishment of project-specific operating guidelines is distinct from this rule-making process. This regulation will guide the development of the project-specific guidelines, not the other way around. The regulation will not affect the BIA's ability to protect and manage Indian land and water. These regulations are intended to enhance our ability to protect, manage, and operate irrigation projects by providing new mechanisms for projects to begin addressing long-standing irrigation issues. Additionally, the project-specific operating guidelines are intended to provide additional and more specific guidance for individual projects within the overarching regulations. Thus, it is necessary to finalize this proposed regulation first before developing the more detailed, project-specific operating guidelines. In response to the comment suggesting that BIA study the impact of these regulations prior to finalizing the rule, BIA's irrigation program and the existing proposed regulation have already been the subject of numerous studies, including General Accounting Office (GAO) reports and IG audits. The overall impact of the revisions to the regulation are relatively minor. Redundant or unnecessary sections were deleted. New sections were added to comply with the Debt Collection Improvement Act, better define what items should be included in project budgets for better rate setting, improve lands within the irrigation projects by using incentive agreements, and grant Annual Assessment Waivers when BIA cannot deliver water to farm units. No change was made to the regulation to address these comments.

One commenter noted that the Yakama Nation has a pending lawsuit in federal district court against the United States that questions the scope of BIA's authority to assess irrigation O&M

charges. The commenter urged the BIA to delay issuance of the regulation until that litigation is decided. The litigation referenced—*Confederated Tribes and Bands of the Yakama Nation v. United States*, No. CV-06-3032-LRS (E.D. Wash.)—was dismissed on procedural grounds in December 2006. The Yakama Nation's request for reconsideration was denied in February 2007. The Yakama Nation has served notice of appeal to the Ninth Circuit Court of Appeals purely on the procedural issues, and briefs were filed during the summer of 2007. If the courts were ever to address the substantive issues raised in the litigation it could be years until a judicial resolution would be obtained. Thus, the BIA does not believe it would be prudent to delay issuance of the regulation on that basis.

Comments: Plain English

Some commenters stated that the change to "plain English" oversimplified technical concepts and made the regulation vague and less precise, and therefore more difficult to understand, than the existing Part 171. While some commenters stated the regulation is too simple, other commenters asserted that the regulation was too complex and used too much "bureaucratic jargon." The proposed rule was written in "plain English" to comply with Executive Order 12866. Every attempt was made to make the regulation clear and easy to read, while not oversimplifying technical issues. The commenters did not provide any alternate language or suggestions for making this rule easier to understand. No change was made to the regulation to address these comments.

Comments: Small Business Regulatory Enforcement Fairness Act (SBREFA)

Several commenters expressed concern about the statement in the proposed regulation regarding the Small Business Regulatory Enforcement Fairness Act (SBREFA) and the potential for rate increases. The BIA stated that this regulation will not have an annual effect on the economy of \$100 million or more. Although Indian irrigation projects are significant components of reservation economy, this regulation will not significantly change the economy, productivity, or investment opportunities of State, local, or tribal governments or communities on the affected reservations. Nor will this regulation cause a major increase in costs or prices for consumers, individual industries, or governments. This regulation does not increase irrigation O&M assessment rates, and this regulation is not expected to result

in major increases in rates in the near future. However, there is a potential that this regulation could result in appreciable rate increases in the long-term. This regulation makes no change to the present method of establishing rates for irrigation projects. The regulation more clearly states the process the BIA has always used to calculate rates. The underlying statutory authority to charge irrigation O&M assessments remains unchanged under the regulation. No change was made to the regulation to address these comments.

Comments: BIA Authority To Assess Irrigation O&M Charges

Several of the commenters questioned the scope of the BIA's authority to charge irrigation O&M assessments. The comments came in various forms, some more general in nature and others more specific to other parts of the regulation, particularly subpart E—Financial Matters, Billing, and Collections. General and cross-cutting comments are addressed here, while more specific comments are addressed below under the appropriate headings.

One commenter seemed to believe that the regulation created new authority for the BIA to fully recover its O&M costs for Indian irrigation projects in a way that it previously could not. Under 25 U.S.C. 381 *et seq.*, the BIA is authorized to recover the full cost of operation and maintenance of its irrigation facilities. This underlying statutory authority to assess irrigation O&M charges remains unchanged under the proposed regulation. No change was made to the regulation to address these comments.

Two commenters read 25 U.S.C. 385 and the statutes it codifies to impose a requirement that the BIA first determine an individual's ability to pay irrigation O&M charges before setting rates and assessing charges. One of the commenters also suggested that the parcel of land on which the assessment is based must also have the ability to produce adequate income to pay irrigation O&M assessments. These comments misconstrue the Act of August 14, 1914 and 25 U.S.C. 385. The Secretary's authority to set O&M charges and collect irrigation assessments is not subject to a determination of an individual's ability to pay or the ability of a particular parcel of land to produce adequate income. The ability to pay language in both the 1914 Act and 25 U.S.C. 385 refers only to repayment of construction costs. No change was made to the regulation to address these comments.

Comments: Trust Responsibility

All of the commenters addressed the United States' trust responsibility to Indian tribes to some degree. Some questioned whether the regulation undermined the trust responsibility in any way, while others asserted a need for the regulation to expressly incorporate more safeguards to protect trust resources. Nothing in this regulation alters the BIA's responsibility regarding irrigation projects and related resources. Instead, this regulation addresses how the BIA administers its irrigation projects. Some commenters also asserted that there is a trust responsibility to provide irrigation service, and one commenter felt that such a trust responsibility required the BIA to charge Indian farmers a different (lower) rate than non-Indian farmers. The BIA does not have a trust obligation to operate and maintain its irrigation projects. See, e.g., *Grey v. United States*, 21 Cl. Ct. 285 (1990), aff'd, 935 F.2d 281 (Fed. Cir. 1991), cert. denied, 502 U.S. 1057 (1992). No change was made to the regulation to address these comments.

Comment: Protection of Trust Resources

One commenter stated that the regulation must incorporate safeguards to protect trust resources. 25 CFR 171.110 describes how the BIA will administer its irrigation facilities. Protection of trust resources is addressed by other statutes or regulations specific to the resource at issue. No change was made to the regulation to address these comments.

Comment: Impacts on the Flathead Indian Irrigation Project Turnover

One commenter expressed concern that the regulation could impact the transfer of operations and management of the Flathead Indian Irrigation Project. This regulation will have no impact on the transfer process, which is being undertaken pursuant to specific statutory authority. The terms and conditions of the transfer, which are currently being negotiated and developed, will address how the Flathead Indian Irrigation Project will be operated and managed after transfer. After transfer, this regulation will no longer apply to the Flathead Indian Irrigation Project because it will no longer be operated by the BIA. No change was made to the regulation to address these comments.

Comment: Impacts on Other Department Bureaus and Offices

One commenter stated that the regulation has the potential to impact the operation of the Bureau of Reclamation's Yakima Project. The

Bureau of Reclamation has reviewed this regulation. Changes to the BIA irrigation regulation will have no impact on the Yakima Project. No change was made to the regulation to address these comments.

Comment: Indian Lands in Probate

One commenter recommended that the regulation include an O&M assessment exemption for Indian lands in probate. There is currently a process in place to resolve assessment of O&M on lands in probate outside the scope of this regulation. The process is covered in 25 CFR Part 15, Probate of Indian Estates, and the BIA Irrigation Handbook, Section 12.3.7 Estates/Probates. No change was made to the regulation to address these comments.

Comment: Idle Lands on the Yakama Reservation

One commenter stated that the regulation must study how the proposed regulation would help alleviate the idle lands problem on the Yakama Reservation. The overall idle agricultural lands issue is a function of the BIA's Real Estate Services program. The regulation at 25 CFR 171.610 provides an avenue by which the BIA, at the project level, may provide incentives to help alleviate some of the idle lands issues. Furthermore, the BIA looks forward to working with Tribes to explore the various options available for addressing the longstanding idle lands issue, such as through the individual project operating guidelines. No change was made to the regulation to address this comment.

Subpart A—General Provisions

One comment asked that the BIA retain 25 CFR 171.1(b) from the existing version of 25 CFR part 171, which provided authority for the Officer-in-Charge to waive portions of the regulations, particularly for small subsistence units and gardens. This provision was removed in order to avoid conflicts with Departmental Delegations of Authority and to provide consistent application of regulations across all irrigation projects. No change was made to the regulation to address these comments.

Three commenters had various suggestions, questions, or concerns with some of the definitions in Section 171.100. Those comments are addressed in the following paragraphs.

With regard to the definition of the *annual assessment waiver* and *carriage agreement*, one commenter stated that there was no reference to statutory authority for waiving annual O&M assessments or for *carriage agreements*.

In the "authority" portion of the regulation, located just above Subpart A in the **Federal Register** notice, the authorities for all components of the regulation are listed. 25 U.S.C. 381 *et seq.* provide statutory authority for an *annual assessment waiver* and for *carriage agreements*. No change was made to the regulation to address these comments.

One commenter asked whether Tribes will have any input into the determination of *farm unit* size, and another commenter asked where the BIA's definition of a *farm unit* is. Additionally, one commenter stated that the regulation fails to state what happens if a *farm unit* is subdivided. If the *farm unit* size is not defined in a project's authorizing legislation, it will be defined in the project-specific operating guidelines, and the BIA will be consulting with Tribes and water users in the development of these operating guidelines. With regard to subdivision of *farm units*, 25 CFR 171.225 describes what must be done to receive irrigation service to a subdivided *farm unit*. No change was made to the regulation to address these comments.

One commenter stated that an *incentive agreement* should allow for irrigation water delivery at no or reduced O&M cost for the period of time required to realize the full agricultural potential of the previously idle parcel. The commenter also added that he believed that BIA lacked authority to assess O&M if the parcel is not producing adequate funds to pay O&M. 25 CFR 171.610(a)(4) allows for the delivery of water under an incentive agreement, the terms of which would be described in the agreement. As discussed above, the law does not require the BIA to determine or consider either an individual's ability to pay or the economic viability of the irrigated parcel when setting irrigation O&M assessment rates. No change was made to the regulation to address these comments.

One commenter stated that the definition of *incentive agreement* should include a reference to the statutory authority for the concept. In the "authority" portion of the regulation, located just above Subpart A in the **Federal Register** notice, the authorities for all components of the regulation are listed. 25 U.S.C. 381 *et seq.* provide statutory authority for an *incentive agreement*. No change was made to the regulation to address these comments.

One commenter thought the definition of *incentive agreement* failed to adequately define "improve idle

lands.” In response to that comment, Section 171.610(a)(1) has been amended to include the language “* * * other activities that will improve idle lands to a condition that supports authorized use of delivered water.”

One commenter stated that where neither tribal nor individual water rights have been quantified, there can be no such thing as a *supplemental water*. Given that issue, the commenter was concerned with the legality of the concept of *supplemental water*. If a water duty has not been established for an irrigation project, then supplemental water does not apply at that irrigation project. No change was made to the regulation to address these comments.

One commenter thought the definition of *total assessable acres* should include special provisions for how O&M charges are assessed on the Toppenish-Simcoe Unit of the Wapato Irrigation Project. The BIA has specifically addressed this issue with the Yakama Nation by letter of June 2, 2006, from Michael Olsen, Principal Deputy Assistant Secretary-Indian Affairs to Honorable Louis Cloud. The BIA intends to include in the revised Project Operations and Maintenance Guidelines a provision substantially similar to the current 25 CFR 171.19(a)(2). Furthermore, project-specific provisions were removed from the regulation as part of the effort to create a consistent set of rules applicable to all BIA irrigation projects. No change was made to the regulation to address these comments.

The definition of *wastewater* concerned one commenter. The commenter stated that the regulation should require water users to control return flows. In response to this comment, both the definition of *wastewater* and the regulation at Section 171.230 have been amended accordingly.

One commenter stated that the BIA must specifically list each document referenced in Section 171.110. Section 171.110 references a broad array of laws, regulations, and policy documents too numerous to list. Furthermore, many of these items would be specific to individual irrigation project and thus would be inappropriate to reference in a regulation of general applicability. The same commenter also noted that the regulation should state where such documents could be obtained. A listing, along with copies of the pertinent documents, will be made available in the National Irrigation Handbook and the O&M guidelines specific to individual projects. To address this comment, Section 171.110(a) has been amended to reflect that copies of the

referenced items can be obtained from the irrigation project serving you.

Another commenter stated that his irrigation project is not safely or reliably operated or rehabilitated. The commenter asked when, under the proposed Section 171.110(a), his project would be rehabilitated. The physical state of the BIA's irrigation projects is directly related to BIA's historic inability to recover the full cost of operating and maintaining its irrigation projects. This regulation is intended to improve the BIA's cost recovery. No change was made to the regulation to address these comments.

One commenter stated that the consultation referenced in Section 171.110(b) is a mandatory trust responsibility and that consulting only when appropriate or when time allows is insufficient. Consultation with Indian tribes is a government-wide policy, not a trust responsibility per se. As stated in the proposed rule, the BIA will consult with the Tribes and the BIA agrees that consultation is possible and desirable. No change was made to the regulation to address these comments.

A number of commenters expressed concern about Section 171.125, which addresses appeals of the BIA's decisions on irrigation projects. The regulation as proposed was unclear and potentially in conflict with the 25 CFR Part 2. Section 171.125(b) has been amended to address these comments, provide clarity, and ensure consistency with the appeals process set forth in 25 CFR Part 2.

Subpart B—Irrigation Service

One commenter suggested that the regulation provide some authority to enable tiered O&M assessment rates on irrigation facilities to enable the projects to set rates based on quantity of water delivered to farm units. Rates for irrigation O&M are based on the cost of providing irrigation service, not on water quantity. Nothing in these proposed regulations prohibits individual projects from establishing various rates consistent with section 171.110. No change was made to the regulation to address these comments.

With regard to Section 171.230, one commenter stated that the BIA should pay for the cost of improvements on Indian lands to make drainage water collection systems adequate. Where adequate funds exist to improve irrigation infrastructure, the BIA will make improvements. No change was made to the regulation in response to this comment. However, Section 171.230 has been amended in response to comments regarding the definition of *wastewater* in Section 171.100.

Subpart C—Water Use

One commenter expressed concern that allowing the BIA to provide leaching service under Section 171.305 may not be a beneficial use under some water right decrees, tribal water codes, or water use statutes. The commenter expressed a similar concern with regard to the BIA's authority to deliver domestic water and stock water under Section 171.310. Another commenter stated that the BIA was required to deliver domestic and stock water to the Walker River Paiute Tribe pursuant to a court decree. This regulation takes into consideration water rights and related considerations under Section 171.205, which states that “[t]he amount of water you receive will be based on your request, your legal entitlement to water, and the available water supply.” Furthermore, Section 171.110 describes how BIA will administer its irrigation facilities, which is by enforcing the applicable statutes, regulations, water rights decrees, and similar legal requirements, which may mandate “not” delivering leaching water or permitting delivery of domestic or stock water in some cases. No change was made to the regulation to address these comments.

One commenter stated that Section 171.305(a)(3) is a departure from the status quo, contrary to practices necessary in some cases to rehabilitate idle land within an irrigation project, and inconsistent with the law. The regulation is not a departure from the status quo. Under former Section 171.17 and now under Sections 171.545 and 171.550, irrigation services are not provided until the annual O&M assessment is paid or there is an approved payment plan in place. The regulation accounts for rehabilitation of idle land. Section 171.610(a)(4) allows for the delivery of water under an incentive agreement, the terms of which could include delivery of water for the purposes of leaching without charge. Section 171.305(a)(3) is consistent with existing law. As discussed elsewhere in these responses to comments, the law does not require the BIA to determine or consider either an individual's ability to pay or the economic viability of the irrigated parcel when setting irrigation O&M assessment rates. The BIA has the authority to deny irrigation service if O&M charges are not paid. No change was made to the regulation to address these comments.

Subpart D—Irrigation Facilities

One commenter stated that the BIA had no legal authority for Section 171.400(b) because the BIA has a trust

responsibility to provide adequate irrigation infrastructure, including necessary private structures to allow access to irrigation water. The commenter added that, at the least, the BIA must engage in consultation before any structures are built. As noted above, the operation and maintenance of irrigation projects is not a trust responsibility. The BIA is committed to engaging in meaningful tribal consultation when appropriate. If the circumstances warrant tribal consultation, the BIA will consult with the affected tribe(s). No change was made to the regulation to address these comments.

One commenter objected to Section 171.400(c) to the extent it suggests that the BIA can bill tribal members for costs relating to trust or Indian-owned fee land within an irrigation project. Section 171.400, in its entirety, describes who is responsible for structures on a BIA irrigation project. Section 171.405 describes the process through which an individual or group must go through to become responsible for an irrigation project structure "which is under a written agreement between you and us." No change was made to the regulation to address these comments.

One commenter asked that Section 171.405 be removed. The commenter stated that authorizing individuals to take control of irrigation project structures could interfere with the property rights of individuals or tribes owning property underlying the irrigation project facilities and could lead to unequal treatment between water users on a project. The BIA disagrees. One commenter believed that Sections 171.405 and 171.410 contradicted Section 171.415 and, accordingly, suggested that the regulation should be revised to require the BIA to protect the irrigation facilities from encroachment. Section 171.405 provides that authorization to take control of a structure requires a written agreement with the BIA. Revocable encroachment permits do not transfer ownership. The requirement of a written agreement qualifies the ability of an individual to build or assume responsibility of a structure. Such written agreements will ensure that individual property rights are not infringed upon. The BIA has determined that there are no inconsistencies in these sections, especially when examined in concert with the definition of *obstruction* in Section 171.100. No change was made to the regulation to address these comments.

Subpart E—Financial Matters

One commenter expressed concerns that under Section 171.500, BIA would abuse its authority and add unreasonable costs into the calculation of its irrigation rates because the rates are based on cost estimates rather than actual costs. The commenter was particularly concerned about the potential for fraud, waste, and error. The commenter also asked how the public can obtain irrigation project cost information used to calculate rates. The Secretary of the Interior has previously determined under the existing Section 171.1(f) "that rates will be based on a carefully prepared estimate of the cost of the normal O&M of the project." Furthermore, because O&M assessment rates are set a year in advance to give adequate notice to irrigators, it is necessary to calculate the proposed rates based on an estimate of the costs for the upcoming year. These figures are typically indexed based on actual costs from previous years. There is opportunity for the public to comment on the proposed rates published annually in the **Federal Register** before they become final. Actual costs of operation and maintenance activities are available from the irrigation facility servicing your farm unit. No change was made to the regulation to address these comments.

One commenter thought that Section 171.500(a) included a number of costs that should not be used in calculating rates. The commenter feared that inclusion of items such as depreciation, acquisition costs, and other costs would lead to unreasonably high and unjustifiable rates. The BIA has established rates based on the average per acre cost of all activities involved in delivering irrigation water and maintaining facilities. This regulation does not change that practice; rather, it more specifically identifies those items included in determining the annual costs. Actual costs of O&M activities are available from the irrigation facility servicing your farm unit. No change was made to the regulation to address these comments.

Two commenters stated that the BIA should calculate O&M assessments based on an individual farmer's ability to pay under 25 U.S.C. 385, 386a, and 389. Under these statutes, the Secretary's authority to set O&M charges is not subject to a determination of an individual's ability to pay. As stated above in these responses, the "ability to pay" provision included in 25 U.S.C. 385 refers only to repayment of construction costs. 25 U.S.C. 385 codifies several separate provisions

taken from the Act of August 1, 1914, Public Law 63-160, 38 Stat. 582, 583 (1914). In addition to authorizing the Secretary to set and assess O&M rates on irrigation projects, the 1914 Act also appropriated a lump sum of money to use for construction of irrigation projects. The second provision of 25 U.S.C. 385, regarding reimbursement of construction costs where Indians have the ability to pay, only applies to the construction money appropriated in the 1914 Act and does not relate to the Secretary's O&M rate-setting authority. 25 U.S.C. 386a refers only to construction charges and is not applicable to this regulation, which only addresses O&M charges. 25 U.S.C. 389 authorizes the Secretary to investigate whether non-Indians have the ability to pay irrigation charges. Based on the outcome of such an investigation, the Secretary has discretion to adjust irrigation charges, but nowhere does the law require that an individual's ability to pay be factored into the irrigation rate-setting process. No change was made to the regulation to address these comments.

Two commenters stated that Sections 171.500 and 171.505 violated the BIA's trust responsibility to Indians. As stated above, the operation and maintenance of BIA irrigation projects is not a trust responsibility. See, e.g., *Grey v. United States*. With regard to comments about protection of trust resources that might be affected by the operation and maintenance of irrigation projects, the proposed regulation in no way changes the BIA's responsibility regarding irrigation projects and related resources. No change was made to the regulation to address these comments.

One commenter suggested that the amount of any rate increase should be limited from year-to-year to no more than the rate of inflation. Because the actual cost of O&M may or may not coincide with inflation, this regulation does not limit O&M rate increases to annual inflation rates. No change was made to the regulation to address these comments.

One commenter objected to Section 171.505(d), which provides that some projects may charge a minimum O&M assessment. The commenter objected to owners of small fractionated parcels being charged for irrigation service and recommended, at a minimum, that this section not apply to trust or allotted land. The commenter also claimed there was no legal basis for the minimum charge concept and stated that the BIA cannot charge O&M assessments where the land is not producing adequate funds to pay O&M assessments. This provision only applies to irrigation

projects that establish a minimum assessment. The authority to establish a minimum charge is inherent in the Secretary's statutory authority to charge O&M assessments on Indian irrigation projects. See 25 U.S.C. 381 *et seq.* Contrary to the assertion of the commenter, the BIA can charge a minimum O&M assessment regardless of the whether the land produces adequate funds to pay the assessment. No change was made to the regulation to address these comments.

One commenter noted that Section 171.510 failed to specify which irrigation projects distribute supplemental water. Such information will be available in the project-specific operating guidelines. This information was purposefully left out of the regulation because it is potentially subject to change at individual projects as water rights are determined and settled. No change was made to the regulation to address these comments.

Section 171.515 prompted one commenter to state that the BIA needs to send bills to the water users before the irrigation season starts so that farmers have an adequate amount of time to pay. Because each irrigation project sends out its own bills, this comment is most appropriately directed to the individual irrigation projects. No change was made to the regulation to address these comments.

One commenter objected to Section 171.540. No rationale was provided for the objection. To conform to the Debt Collection Improvement Act of 1996, collection of the information specified in the regulation is necessary. No change was made to the regulation to address these comments.

One commenter objected to Section 171.545 because it does not account for whether the Indian-owned land produces adequate funds to pay the O&M charges. As discussed above, the BIA can charge a minimum O&M assessment regardless of the whether the land produces adequate funds to pay the assessment. The BIA does not consider an individual's ability to pay or the ability of the land to produce adequate funds when it sets O&M rates and charges assessments. No change was made to the regulation to address these comments.

One commenter suggested that water users should be notified individually through the mail of all proposed rate changes instead of through the **Federal Register** as is provided in Section 171.565. It would not be practical for the BIA to notify each of its water users individually, nor is such notice required by law. No change was made to the regulation to address these comments.

Several commenters expressed concern about Section 171.575, in which the proposed regulation stated that the BIA could change O&M rates without first notifying irrigators if uncontrolled costs arose. Commenters were concerned that the proposed language was overly broad and should be limited to emergency situations when structural failures threatened property, public safety, or the ability of the BIA to deliver water to a majority of an irrigation project. In response to these concerns, Section 171.575 has been revised to provide for special assessments only when urgencies arise. Rates cannot be changed without notice. Special assessments are now defined in the regulation at Section 171.100. The term "urgency" is defined in Section 171.100 as "a situation that we have determined may adversely impact our irrigation facilities, operation, or other irrigation activities; affect public safety; damage property or equipment."

Subpart F—Records, Agreements, and Other Matters

One commenter raised concerns about Section 171.610. The comments are addressed above in the discussion of *incentive agreements* under Section 171.100. No change was made to the regulation to address this comment.

Subpart G—Non-Assessment Status

One commenter objected to Section 171.705 because it places the burden on the land owner to apply for an annual assessment waiver. The commenter stated that Section 171.705 is unfair because the United States, as trustee, is placing a burden on the trust beneficiary to seek relief from O&M charges. The purpose of Section 171.705 is to help address the problem of areas of an irrigation project within the constructed works where, for whatever reason, water cannot be delivered. The annual assessment waiver provides a mechanism for waiving the O&M assessment, eliminating the need for an expensive and time-consuming process to appeal a bill which has already been issued. It also provides an incentive for an irrigation project to repair or rehabilitate infrastructure to obtain assessment monies. Additionally, it would provide relief to the water user during the time it takes for lands to be re-designated to Temporarily or Permanently Non-Assessable status if so warranted. With regard to the notion of unfairness based on a trust relationship, as stated above, the operation and maintenance of BIA Irrigation Projects is not a trust responsibility.

IV. Procedural Requirements

A. Review Under Executive Order 12866

This regulation updates an existing regulation and is not a significant rule under Executive Order 12866.

(1) This regulation will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. This is an existing regulation that is being updated and revised to implement the Inspector General's audit findings and the Debt Collection Improvement Act of 1996.

(2) This regulation will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The irrigation projects impacted by these revisions are solely owned by the BIA and no other agency provides supplemental services or is impacted by the operation of these projects.

(3) This regulation does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. The user fees or assessments that the BIA establishes at each irrigation project to recover its costs will eventually be impacted as the BIA reviews its rates and strives to implement full cost rates.

(4) This rule does not raise novel legal or policy issues. No new authorities or policies are being established.

B. Review Under the Regulatory Flexibility Act

The Department of the Interior certifies that this regulation will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial Regulatory Flexibility Analysis is not required because Indian tribes are not considered to be small entities for purposes of this Act.

C. Review Under the Small Business Regulatory Enforcement Fairness Act (SBREFA)

This regulation is not a major regulation under 5 U.S.C. 804(2), the SBREFA. This regulation:

(1) Does not have an annual effect on the economy of \$100 million or more. The total revenue stream for the operation and maintenance of all BIA irrigation projects is approximately \$25 million annually. This is below the \$100 million threshold.

(2) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, state, or

local government agencies, or geographic regions. These revisions establish a procedure for identifying full cost rates for BIA irrigation projects. This is not expected to cause major increases in the near future. However, there is a potential that this could result in appreciable rate increases in the long-term for those served by BIA irrigation projects.

(3) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. BIA irrigation projects are generally small and have minimal impacts on the economy. The projects are not in competition with other entities since they are located on reservations that are under the purview of the Department of the Interior, Bureau of Indian Affairs.

D. Review Under the Unfunded Mandates Reform Act

This regulation does not impose an unfunded mandate on state, local, or tribal governments or the private sector of more than \$100 million per year. The regulation does not have a significant or unique effect on state, local, or tribal governments or the private sector. The BIA irrigation projects are located on reservations that are under the purview of the Department of the Interior, Bureau of Indian Affairs. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Review Under Executive Order 12630

In accordance with Executive Order 12630, the regulation does not have significant takings implications. The regulation revisions do not deprive the public, state, or local governments of rights or property. A takings implication assessment is not required.

F. Review Under Executive Order 13211

In accordance with Executive Order 13211, this regulation does not have a significant effect on the nation's energy supply, distribution, or use. The revision to 25 CFR part 171 will have no adverse effects on energy supply, distribution, or use (including a

shortfall in supply, price increases, and increase use of foreign supplies). This regulation impacts irrigation projects that have little or no energy supply issues.

G. Review Under Executive Order 13132

In accordance with Executive Order 13132, the regulation does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment because they will not interfere with the roles, rights, and responsibilities of states.

H. Review Under Executive Order 12988

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this regulation does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

I. Review Under the National Environmental Policy Act (NEPA)

This regulation does not constitute a major Federal action significantly affecting the quality of the human environment and no detailed statement is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370(d)).

J. Review Under Executive Order 13175

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and 512 DM 2, we have identified potential effects on Indian trust resources and they are addressed in this rule. Consultation meetings have been held with the affected Tribes. Accordingly:

- (1) We have consulted with the affected Tribes.
- (2) We have consulted with Tribes on a government-to-government basis and the consultations have been open and candid so that the affected Tribes could fully evaluate the potential impact of the rule on trust resources.
- (3) We have considered tribal views in the final regulation.
- (4) We have not consulted with the other bureaus and offices of the

Department about the potential effects of this regulation on Indian Tribes. Other Department bureaus and offices are not affected by this rule.

The BIA irrigation projects are vital components of the local agricultural economy of the reservations on which they are located. To fulfill its responsibilities to the Tribes, tribal organizations, water user organizations, and the individual water users, the BIA communicates, coordinates, and consults on a continuing basis with these entities on issues of water delivery, water availability, costs of administration, operation, maintenance, and rehabilitation. This is accomplished at the individual irrigation projects by project, agency, and regional representatives, as appropriate, in accordance with local protocol and procedures. The BIA Central Office held four consultation meetings for Tribes and tribal members. Consultation meetings were held on August 24, 2004 and May 12, 2005 in Phoenix, Arizona, and on August 26, 2004 and May 10, 2005 in Billings, Montana.

K. Review Under Paperwork Reduction Act of 1995

These regulation revisions affect the collection of information, which has been approved by the Office of Information and Regulatory Affairs, Office of Management and Budget, under the Paperwork Reduction Act of 1995 with the OMB Control Number 1076–0141, expiring August 31, 2009.

The Bureau of Indian Affairs operates 15 irrigation projects that provide irrigation services to the end user. The information we collect enables us to properly bill for the services we provide by collecting information that identifies the individual responsible for paying the costs of the services. Some of the information is needed to satisfy the requirements of the Debt Collection Improvement Act of 1996. The table addresses the services available, the number of users, the burden for each, as well as the yearly total and the sections in the rule that apply to the collection items.

Service	CFR section 171	Hourly burden to respondent per request	Number of respondent requests annually	Total annual burden hours	Salary per hour (\$20) × all respondent requests = annual cost burden
Requesting irrigation service	200/600	0.5	26,156	13,078	\$261,560
Subdividing a farm unit	225	4	1	4	80
Requesting leaching service	305	1	40	40	800
Requesting water for domestic or stock purposes	310	.3	474	142	2,840
Building non-government structures in BIA rights-of-ways	405	3	67	201	4,020
Installing a fence on BIA property or rights-of-ways	410	1.5	52	78	1,560

Service	CFR section 171	Hourly burden to respondent per request	Number of respondent requests annually	Total annual burden hours	Salary per hour (\$20) × all respondent requests = annual cost burden
What information must be provided for billing purposes ...	530	0.2	500	100	2,000
Requesting payment plans on bills	550	2	126	252	5,040
Establishing a carriage agreement (carrying third party water through our facilities to your lands)	605	1	3	3	60
Negotiating an irrigation incentive lease with the BIA	610/615	6	21	126	2,520
Requesting annual assessment waiver	710/715	1	135	135	2,700
Annual totals	27,575	14,159	\$283,180

We estimate that we service 6,539 users who submit information about 27,575 times a year. We estimate the total annual hourly burden to be 14,159 at an estimated cost of \$283,180. The users mainly request water to be turned on or turned off. Users are not required to maintain records, but may do so for business purposes. The information they submit is for the purpose of obtaining or retaining a service, namely delivery of irrigation water. While we do require personal information for the purpose of adhering to the controlling laws and regulations, we protect the information under the Privacy Act.

Comments on this information collection can be made at any time and sent to the BIA Information Collection Clearance Officer, 625 Herndon Parkway, Herndon, VA 20171. Please note that comments about the burden are separate from comments on the rule. If you wish to withhold personal information, such as your name, you must state this prominently at the beginning of you comments. We will honor your request to the extent that the law allows.

List of Subjects in 25 CFR Part 171

Indians—lands, Irrigation.

Dated: January 22, 2008.

Carl J. Artman,

Assistant Secretary—Indian Affairs.

■ For the reasons set out in the preamble, the Department of the Interior, Bureau of Indian Affairs, is revising part 171 of Title 25 of the Code of Federal Regulations to read as follows:

PART 171—IRRIGATION OPERATION AND MAINTENANCE

Subpart A—General Provisions

Sec.

- 171.100 What are some of the terms I should know for this part?
- 171.105 Does this part apply to me?
- 171.110 How does BIA administer its irrigation facilities?

- 171.115 Can I and other irrigators establish representative organizations?
- 171.120 What are the authorities and responsibilities of a representative organization?
- 171.125 Can I appeal BIA decisions?
- 171.130 Who can I contact if I have any questions about these regulations or my irrigation service?
- 171.135 Where do I submit written information or requests?
- 171.140 Information collection.

Subpart B—Irrigation Service

- 171.200 How do I request irrigation service from the BIA?
- 171.205 How much water will I receive?
- 171.210 Where will BIA provide my irrigation service?
- 171.215 What if the elevation of my farm unit is too high to receive irrigation water?
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Subpart C—Water Use

- 171.300 Does BIA restrict my water use?
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- 171.400 Who is responsible for structures on a BIA irrigation project?
- 171.405 Can I build my own structure or take over responsibility of a BIA structure?
- 171.410 Can I install a fence on a BIA irrigation project?
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- 171.420 Can I dispose of sewage, trash or other refuse on a BIA irrigation project?

Subpart E—Financial Matters: Assessments, Billing, and Collections

- 171.500 How does BIA determine the annual operation and maintenance assessment rate for the irrigation facility servicing my farm unit?
- 171.505 How does BIA calculate my annual operation and maintenance assessment?
- 171.510 How does BIA calculate my annual operation and maintenance assessment if

- supplemental water is available on the irrigation facility servicing my farm unit?
- 171.515 Who will BIA bill?
- 171.520 How will I receive my bill and when do I pay it?
- 171.525 How do I pay my bill?
- 171.530 What information must I provide BIA for billing purposes?
- 171.535 Why is BIA collecting this information from me?
- 171.540 What can happen if I do not provide this information?
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- 171.550 Can I arrange a Payment Plan if I cannot pay the full amount due?
- 171.555 What additional costs will I incur if I am granted a Payment Plan?
- 171.560 What if I fail to make payments as specified in my Payment Plan?
- 171.565 How will I know if BIA plans to adjust my annual operation and maintenance assessment rate?
- 171.570 What is the **Federal Register** and where can I get it?
- 171.575 Can BIA charge me special assessments?

Subpart F—Records, Agreements, and Other Matters

- 171.600 What information is collected and retained on the irrigation service I receive?
- 171.605 Can I establish a Carriage Agreement with BIA?
- 171.610 Can I arrange an Incentive Agreement if I want to farm idle lands?
- 171.615 Can I request improvements to BIA facilities as part of my Incentive Agreement?

Subpart G—Non-Assessment Status

- 171.700 When do I not have to pay my annual operation and maintenance assessment?
- 171.705 What criteria must be met for my land to be granted an Annual Assessment Waiver?
- 171.710 Can I receive irrigation water if I am granted an Annual Assessment Waiver?
- 171.715 How do I obtain an Annual Assessment Waiver?
- 171.720 For what period does an Annual Assessment Waiver apply?

Authority: 25 U.S.C. 2; 25 U.S.C. 9; 25 U.S.C. 13; 25 U.S.C. 381; Act of April 4, 1910, 36 Stat. 270, as amended (codified at 25 U.S.C. 385); 25 U.S.C. 386a; Act of June 22,

1936, 49 Stat. 1803 (codified at 25 U.S.C. 389 *et seq.*).

Subpart A—General Provisions

§ 171.100 What are some of the terms I should know for this part?

Annual Assessment Waiver means a mechanism for us to waive your annual operation and maintenance assessment under certain specified circumstances.

Annual operation and maintenance assessment means the charges you must pay us for our costs of administration, operation, maintenance, and rehabilitation of the irrigation facility servicing your farm unit.

Annual operation and maintenance assessment rate means the per acre charge we establish for the irrigation facility servicing your farm unit.

Assessable acres (see *Total assessable acres*).

Authorized use means your use of water delivered by us that supports irrigated agriculture, livestock, Carriage Agreements or other uses defined by laws, regulations, treaty, compact, judicial decree, river regulatory plan, or other authority.

BIA means the Bureau of Indian Affairs within the United States Department of the Interior.

Bill means our statement to you of the assessment charges and/or fees you owe the United States for administration, operation, maintenance, rehabilitation, and/or construction of the irrigation facility servicing your farm unit.

Carriage Agreement means a legally binding contract we enter into:

- (1) To convey third-party water through our irrigation facilities; or
- (2) To convey our water through third-party facilities.

Construction assessment means the periodic charge we assess you to repay us the funds we used to construct our irrigation facilities serving your farm unit that are determined to be reimbursable under applicable statutes.

Customer means any person or entity to whom we provide irrigation service.

Ditch (see *Farm ditch* or *Service ditch*).

Due date means the date printed on your bill, 30 days after which your bill becomes past due.

Facility (see *Irrigation facility*).

Farm ditch means a ditch or canal that you own, operate, maintain, and rehabilitate.

Farm unit means the smallest parcel of land for which we will establish a delivery point. Farm unit size is defined in the authorizing legislation for each irrigation facility, or in the absence of such legislation, we will define the farm unit size.

I, me, my, you, and your means all interested parties, especially persons or entities to which we provide irrigation service and receive use of our irrigation facilities, such as irrigators, landowners, leasees, irrigator organizations, irrigation districts, or other entities affected by this part and our supporting policies, manuals, and handbooks.

Idle lands means lands that are not currently farmed because they have characteristics that limit crop production.

Incentive Agreement means a written agreement between you and us that allows us to waive your annual operation and maintenance assessment, when you agree to improve idle lands and we determine that it is in the best interest of our irrigation facility.

Irrigation bill (see *Bill*).

Irrigation district (see *Representative organization*).

Irrigation facility means all structures and appurtenant works for the delivery, diversion, and storage of irrigation water. These facilities may be referred to as projects, systems, or irrigation areas.

Irrigation service means the full range of services we provide customers, including but not limited to administration, operation, maintenance, and rehabilitation of our irrigation facilities.

Irrigation water or *water* means water we deliver through our facilities for the general purpose of irrigation and other authorized purposes.

Irrigator (see *Customer*).

Landowner means a person or entity that owns fee, tribal trust, and/or individual allotted trust lands.

Leaching Service means our delivery of water to you at your request for the purpose of transporting salts below the root zone of a farm unit.

Lessee means any person or entity that holds a lease approved by us on lands to which we provide irrigation service.

Must means an imperative or mandatory act or requirement.

My land and *your land* mean all or part of your farm unit.

Obstruction means anything permanent or temporary that blocks, hinders, impedes, stops or cuts off our facilities or our ability to perform the services we determine necessary to provide service to our customers.

Organization (see *Representative organization*).

Past due bill means a bill that has not been paid within 30 days of the due date stated on your bill.

Permanently non-assessable acres (PNA) means lands that the Secretary of the Interior has determined to be permanently non-irrigable pursuant to the standards set out in 25 U.S.C. 389b.

Representative organization or *organization* means a legally established organization representing your interests that confers with us on how we provide irrigation service at a particular irrigation facility.

Service(s) (see *Irrigation service*).

Service area means lands designated by us to be served by one of our irrigation facilities.

Service ditch means a ditch or canal which we own, administer, operate, maintain, and rehabilitate that we use to provide irrigation service to your farm unit.

Soil salinity means soils containing high salt content that limit crop production.

Special assessment means a charge to cover the uncontrolled cost arising from an urgency on an irrigation facility.

Structures (see *Irrigation facility*).

Subdivision means a farm unit that has been subdivided into smaller parcels.

Supplemental water means water available for delivery by our irrigation facilities beyond the quantity necessary to provide all project customers requesting water with the per-acre water duty established for that project.

Taxpayer identifying number means either your Social Security Number or your Employer Identification Number.

Temporarily non-assessable acres (TNA) means lands that the Secretary of the Interior has determined to be temporarily non-irrigable pursuant to the standards set out in 25 U.S.C. 389a.

Total assessable acres means the total acres of land served by one of our irrigation facilities to which we assess operation and maintenance charges. The *Total assessable acres* within the service area of an irrigation facility do not include those acres of land that are designated PNA or TNA, nor those acres of land granted an Annual Assessment Waiver.

Trust or *restricted land* or *land in trust* or *restricted status* (see definitions in 25 CFR 151.2).

Urgency means a situation that we have determined may adversely impact our irrigation facilities, operation, or other irrigation activities; affect public safety; or damage property or equipment.

Wastewater means surface runoff and subsurface drainage from your farm unit from water delivered by us that exceeds irrigation requirements.

Water (see *Irrigation water*).

Water delivery is an activity that is part of the irrigation service we provide to our customers when water is available.

Water duty means the amount of water, in acre-feet per acre, necessary

for full-service irrigation. This value is established by decree, compact, or other legal document, or by specialized engineering studies.

Water user (see *Customer*).

We, us, and our means the United States Government, the Secretary of the Interior, BIA, and all who are authorized to represent us in matters covered under this part.

§ 171.105 Does this part apply to me?

This part applies to you if you own or lease land within an irrigation project where we assess fees and collect monies to administer, operate, maintain, and rehabilitate project facilities.

§ 171.110 How does BIA administer its irrigation facilities?

(a) We administer our irrigation facilities by enforcing the applicable statutes, regulations, Executive Orders, directives, Indian Affairs Manual, the Irrigation Handbook, and other written policies, procedures, directives, and practices to ensure the safe, reliable, and efficient administration, operation, maintenance, and rehabilitation of our facilities. Such enforcement can include refusal or termination of irrigation services to you. Copies of the above listed items may be obtained from the irrigation project serving you.

(b) We will cooperate and consult with you, as appropriate, on irrigation activities and policies of the particular irrigation facility serving you.

§ 171.115 Can I and other irrigators establish representative organizations?

Yes. You and other irrigators may establish a representative organization under applicable law to represent your interests for the particular irrigation facilities serving you.

§ 171.120 What are the authorities and responsibilities of a representative organization?

(a) A legally established organization representing you may make rules, policies, and procedures it may find necessary to administer the activities it is authorized to perform.

(b) An organization must not make rules, policies, or procedures that conflict with our regulations or any of our other written policies, procedures, directives, and manuals.

(c) If this organization collects operation and maintenance assessments and construction assessments on your behalf to be paid to us, it must pay us all your past and current operation and maintenance and construction assessment charges before we will provide irrigation service to you.

§ 171.125 Can I appeal BIA decisions?

(a) You may appeal our decisions in accordance with procedures set out in 25 CFR Part 2, unless otherwise prohibited by law.

(b) If you appeal an irrigation bill, you must pay the bill in accordance with subpart E before we will provide irrigation service to you. If you prevail on appeal, any overpayment will be refunded to you.

§ 171.130 Who can I contact if I have any questions about these regulations or my irrigation service?

Contact the local irrigation project where you receive service or want to apply for service. If your questions are not addressed to your satisfaction at the local project level, you may contact the appropriate BIA Regional Office.

§ 171.135 Where do I submit written information or requests?

Submit written information to us or make request of us in writing at the irrigation project servicing your farm unit.

§ 171.140 Information collection.

The information collection requirements contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1076-0141. This information collection is specifically found in 25 CFR Sections 171.200, 171.225, 171.305, 171.310, 171.405, 171.410, 171.530, 171.550, 171.600, 171.605, 171.610, 171.615, 171.710, 171.715. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Subpart B—Irrigation Service

§ 171.200 How do I request irrigation service from the BIA?

(a) You must request service from the irrigation facility servicing your farm unit.

(b) Your request must contain at least the following information:

- (1) Your full legal name;
 - (2) Where you want service;
 - (3) The time and date you want service to start;
 - (4) How long you want service;
 - (5) The rate of water flow you want, if available;
 - (6) How many acres you want to irrigate; and
 - (7) Any additional information required by the project office responsible for providing your irrigation service.
- (c) You must request supplemental water in accordance with the project

guidelines established by the specific project providing your irrigation service.

§ 171.205 How much water will I receive?

The amount of water you receive will be based on your request, your legal entitlement to water, and the available water supply.

§ 171.210 Where will BIA provide my irrigation service?

(a) We will provide service to your farm unit at a single delivery point that we designate.

(b) At our discretion, we may establish additional delivery points when:

(1) We determine it is impractical to deliver water to your farm unit from a single delivery point;

(2) You agree in writing to be responsible for all costs to establish an additional delivery point;

(3) You pay us our costs prior to our establishing an additional delivery point; and

(4) Any work accomplished under this section does not disrupt our service to other customers without their written agreement.

(c) We may establish your delivery point(s) at a well head.

§ 171.215 What if the elevation of my farm unit is too high to receive irrigation water?

(a) We will not change our service ditch level to provide service to you.

(b) You may install, operate, and maintain your own facilities, at your cost, to provide service to your land:

(1) From a delivery point we designate; and

(2) In accordance with specifications we approve.

§ 171.220 What must I do to my farm unit to receive irrigation service?

You must meet the following requirements for us to provide service:

(a) Put water we deliver to authorized uses;

(b) Make sure your farm ditch has sufficient capacity to carry the water we deliver; and

(c) Properly operate, maintain, and rehabilitate your farm ditch.

§ 171.225 What must I do to receive irrigation service to my subdivided farm unit?

In order to receive irrigation service, you must:

(a) Provide us a copy of the recorded plat or map of the subdivision which shows us how the irrigation water will be delivered to the irrigable acres;

(b) Pay for any extensions or alterations to our facilities that we approve to serve the subdivided units;

(c) Construct, at your cost, any facilities within your subdivided farm unit; and

(d) Operate and maintain, at your cost, any facilities within your subdivided farm unit.

§ 171.230 What are my responsibilities for wastewater?

(a) You are responsible for your wastewater.

(b) Wastewater may be returned to our facilities, but only at locations we designate, in a manner we approve, and at your cost.

(c) You must not allow your wastewater to flow or collect on our facilities or roads, except at locations we designate and in a manner we approve.

(d) If you fail to comply with this section, we may withhold services to you.

Subpart C—Water Use

§ 171.300 Does BIA restrict my water use?

(a) You must not interfere with or alter our service to you without our prior written authorization; and

(b) You must only use water we deliver for authorized uses. We may withhold services if you use water for any other purpose.

§ 171.305 Will BIA provide leaching service to me?

(a) We may provide you leaching service if:

(1) You submit a written plan that documents how soil salinity limits your crop production and how leaching service will correct the problem;

(2) We approve your plan in writing; and

(3) Your irrigation bills are not past due.

(b) Leaching service will only be available during the timeframe established by your irrigation facility.

(c) We reserve the right to terminate this service if we determine you are not complying with paragraph (a) of this section.

§ 171.310 Can I use water delivered by BIA livestock purposes?

Yes, if we determine it will not:

(a) Interfere with the operation, maintenance, or rehabilitation of our facilities;

(b) Be detrimental to or jeopardize our facilities;

(c) Adversely affect the water rights or water supply; or

(d) Cause additional costs to us that we do not agree to in writing.

Subpart D—Irrigation Facilities

§ 171.400 Who is responsible for structures on a BIA irrigation project?

(a) We may build, operate, maintain, rehabilitate or remove structures, including bridges and other crossings, on our irrigation projects.

(b) We may build other structures for your private use during the construction or extension of an irrigation project. We may charge you for structures built for your private use under this section, and we may require you to maintain them.

(c) If we require you to maintain a structure and you do not do so to our satisfaction, we may remove it or perform the necessary maintenance, and we will bill you for our costs.

§ 171.405 Can I build my own structure or take over responsibility of a BIA structure?

You may build a structure on our irrigation facility for your private use or take responsibility of one of our structures, but only under a written agreement between you and us which:

(a) Relieves us from any future liability or responsibility for the structure;

(b) Relieves us from any future costs incurred for maintaining the structure;

(c) Describes what is granted by us and accepted by you; and

(d) Provides that if you do not regularly use a structure for a period of time that we have determined, or you do not properly maintain and rehabilitate the structure, we will notify you in writing that:

(1) You must either remove it or correct any unsafe condition;

(2) If you do not comply with our notice, we may remove the structure and you must reimburse us our costs; and

(3) We may modify, close, or remove your structure without notice due to an urgency we have identified.

§ 171.410 Can I install a fence on a BIA irrigation project?

Yes. Fences are considered structures and may be installed in compliance with § 171.405.

§ 171.415 Can I place an obstruction on a BIA irrigation project?

No. You may not place obstructions on BIA irrigation projects.

(a) If you do so, we will notify you in writing that you must remove it.

(b) If you do not remove your obstruction in compliance with our notice, we will remove it and we will bill you for our costs.

(c) We can remove your obstruction without notice because of an urgency we have identified.

§ 171.420 Can I dispose of sewage, trash, or other refuse on a BIA irrigation project?

No. Sewage, trash, or other refuse are considered obstructions and must be removed in accordance with § 171.415.

Subpart E—Financial Matters: Assessments, Billing, and Collections

§ 171.500 How does BIA determine the annual operation and maintenance assessment rate for the irrigation facility servicing my farm unit?

(a) We calculate the annual operation and maintenance assessment rate by estimating the following annual costs and then dividing by the total assessable acres for your irrigation facility:

(1) Personnel salary and benefits for the facility engineer/manager and employees under their management or control;

(2) Materials and supplies;

(3) Vehicle and equipment repairs;

(4) Equipment costs, including lease fees;

(5) Depreciation;

(6) Acquisition costs;

(7) Maintenance of a reserve fund

available for contingencies or emergency costs needed for the reliable operation of the irrigation facility infrastructure;

(8) Maintenance of a vehicle and heavy equipment replacement fund;

(9) Systematic rehabilitation and replacement of project facilities;

(10) Contingencies for unknown costs and omitted budget items; and

(11) Other costs we determine necessary to properly perform the activities and functions characteristic of an irrigation facility.

(b) Annual operation and maintenance assessment rates may be lowered through the exercise of our discretion when items listed in (a) of this section are adjusted pursuant to our authority under 25 U.S.C. 385, 386a and 389.

(c) If you subdivide your farm unit, you may be subject to a higher annual operation and maintenance assessment rate, which we publish annually in the **Federal Register**.

(d) At projects where supplemental water is available, the calculation of your annual operation and maintenance assessment rate may take into consideration the total estimated annual amount to be collected for supplemental water deliveries.

§ 171.505 How does BIA calculate my annual operation and maintenance assessment?

(a) We calculate your annual operation and maintenance assessment by multiplying the total assessable acres of your land within the service area of

our irrigation facility by the annual operation and maintenance assessment rate we establish for that facility.

(b) We will not assess lands that have been re-classified as either permanently non-assessable (PNA) or temporarily non-assessable (TNA) or lands that have been granted an Annual Assessment Waiver.

(c) If your lands are under an approved Incentive Agreement, we may waive your assessment as described in the Incentive Agreement (See § 171.610).

(d) Some irrigation facilities may charge a minimum operation and maintenance assessment. If the irrigation facility serving your farm unit charges a minimum operation and maintenance assessment that is more than your assessment calculated by the method described in subpart (a) of this section, you will be charged the minimum operation and maintenance assessment. We provide public notice of any minimum operation and maintenance assessments annually in the **Federal Register** (See § 171.565).

§ 171.510 How does BIA calculate my annual operation and maintenance assessment if supplemental water is available on the irrigation facility servicing my farm unit?

(a) For projects where supplemental water is available, and you request and receive supplemental water, your assessment will include two components: a base rate, which is for your per-acre water duty delivered to your farm unit; and a supplemental water rate, which is for water delivered to your farm unit in addition to your per-acre water duty.

(b) We publish base and supplemental water rates annually in the **Federal Register**. The base and supplemental water rates are established to recover the costs identified in Section 171.500(a) of this Subpart.

(c) If your project has established a supplemental water rate, and you request and receive supplemental water, we will calculate your total annual operation and maintenance assessment by adding the following two totals: (1) The total assessable acres of your land within the service area of our irrigation facility multiplied by the annual operation and maintenance assessment rate we establish for that facility; and (2) the actual quantity of supplemental water you request and we agree to deliver (in acre-feet) times the supplemental water rate established for that facility.

§ 171.515 Who will BIA bill?

(a) We will bill the landowner, unless:

(1) The land is leased under a lease approved by us, in which case we will bill the lessee, or

(2) The landowner(s) is represented by a representative organization that collects annual operation and maintenance assessments on behalf of its members and the representative organization makes a direct payment to us on your behalf.

(b) If you own or lease assessable lands within a BIA irrigation facility, you will be billed for annual operation and maintenance assessments, whether you request water or not, unless otherwise specified in § 171.505(b).

§ 171.520 How will I receive my bill and when do I pay it?

(a) You will receive your bill in the mail at the address of record you provide us.

(b) You should pay your bill no later than the due date stated on your bill.

(c) You will not receive a bill for supplemental water. You must pay us in advance at the supplemental water rate established for your project published annually in the **Federal Register**.

§ 171.525 How do I pay my bill?

(a) You can pay your bill by:

(1) Personally going to the local office of the irrigation facility authorized to receive your payment during normal business hours;

(2) Depositing your payment in an authorized drop box, if available, at the local office of the irrigation facility; or

(3) Mailing your payment to the address indicated on your bill.

(b) Your payment must be in the form of:

(1) Check or money order in the mail or authorized drop box; or

(2) Cash, check, or money order if you pay in person.

§ 171.530 What information must I provide BIA for billing purposes?

We must obtain certain information from you to ensure we can properly bill, collect, deposit, and account for money you owe the United States. At a minimum, this information is:

(a) Your full legal name;

(b) Your correct mailing address; and

(c) Your taxpayer identifying number.

§ 171.535 Why is BIA collecting this information from me?

(a) As part of doing business with you, we must collect enough information from you to properly bill and service your account.

(b) We are required to collect your taxpayer identifying number under the authority of, and as prescribed in, the Debt Collection Improvement Act of 1996, Public Law 104–134 (110 Stat. 1321–364).

§ 171.540 What can happen if I do not provide this information?

We will not provide you irrigation service.

§ 171.545 What can happen if I don't pay my bill on time?

(a) We will not provide you irrigation service until:

(1) Your bill is paid; or

(2) You make arrangement for payment pursuant to § 171.550 of this part.

(b) If you do not pay your bill prior to the close of business on the 30th day after the due date, we consider your bill past due, send you a notice, and assess you the following:

(1) Interest, as required by 31 U.S.C. 3717. Interest will accrue from the original due date stated on your bill.

(2) An administrative fee, as required by 31 CFR 901.9.

(c) If you do not pay your bill prior to the close of business of the 90th day after the due date, we will assess you a penalty, as required by 31 CFR 901.9(d). Penalties will accrue from the original due date stated on your bill.

(d) We will forward your past due bill to the United States Treasury no later than 180 days after the original due date, as required by 31 CFR 901.1, "Aggressive agency collection activity."

§ 171.550 Can I arrange a Payment Plan if I cannot pay the full amount due?

We may approve a Payment Plan if:

(a) You are a landowner and your land is not leased;

(b) You certify that you are financially unable to make a lump sum payment;

(c) You provide additional information we request, which may include information identified in 31 CFR 901.8, "Collection in installments"; and

(d) You sign our Payment Plan containing terms and conditions we specify.

§ 171.555 What additional costs will I incur if I am granted a Payment Plan?

You will incur the following costs:

(a) An administrative fee to process your Payment Plan, as required by 31 CFR 901.9.

(b) Interest, accrued on your unpaid balance, in accordance with § 171.545.

§ 171.560 What if I fail to make payments as specified in my Payment Plan?

(a) We will discontinue irrigation service until your bill is paid in full;

(b) You will be in default, you will be assessed an administrative fee, and your debt will be immediately forwarded to the United States Treasury in accordance with the Debt Collection Improvement Act of 1996 (Pub. L. 104–134).

(c) You will be ineligible for Payment Plans for the next 6 years.

§ 171.565 How will I know if BIA plans to adjust my annual operation and maintenance assessment rate?

(a) We provide public notice of our proposed rates annually in the **Federal Register**.

(b) You may contact the irrigation facility servicing your farm unit.

§ 171.570 What is the Federal Register and where can I get it?

(a) The **Federal Register** is the official daily publication for Rules, Proposed Rules, and Notices of official actions by Federal agencies and organizations, as well as Executive Orders and other Presidential Documents, and is produced by the United States Government Printing Office (GPO).

(b) You can get publications of the **Federal Register**:

(1) By going on the World Wide Web at <http://www.gpo.gov>;

(2) By writing to the GPO, Superintendent of Documents, P.O. Box 371954, Pittsburgh, Pennsylvania 15250-7954; or

(3) By calling GPO at (202) 512-1530.

§ 171.575 Can BIA charge me a special assessment?

Yes. We will make every reasonable effort to avoid charging special assessments. However, if we determine that we have a significant uncontrolled cost due to an urgency, we may charge you a special assessment. We will only charge special assessments when there are inadequate project funds available, including any emergency reserve funds held by the project.

The special assessment rate will be calculated by dividing the total uncontrolled cost, or some portion of that cost, by the total number of assessable acres. Your individual special assessment will be equal to the special assessment rate multiplied by the number of assessable acres in your farm unit.

Subpart F—Records, Agreements, and Other Matters

§ 171.600 What information is collected and retained on the irrigation service I receive?

We will collect and retain at least the following information as part of our record of the irrigation service we have provided you:

- (a) Your name;
- (b) Delivery point(s) where service was provided;
- (c) Beginning date and time of your irrigation service;
- (d) Ending date and time of your irrigation service; and

(e) Amount of water we delivered to your farm unit.

§ 171.605 Can I establish a Carriage Agreement with BIA?

(a) We may agree in writing to carry third-party water through our facilities to your lands not served by our facilities if we have determined that our facilities have adequate capacity to do so.

(b) If we determine that carrying water in accordance with paragraph (a) of this section is jeopardizing our ability to provide irrigation service to the lands we are required to serve, we will terminate the Agreement.

(c) We may enter into an agreement with a third party to provide service through their facilities to your isolated assessable lands.

(d) You must pay us all administrative, operating, maintenance, and rehabilitation costs associated with any agreement established under this section before we will convey water.

(e) We will notify you in writing no less than five days before terminating a Carriage Agreement established under this section.

(f) We may terminate a Carriage Agreement without notice due to an urgency we have identified.

§ 171.610 Can I arrange an Incentive Agreement if I want to farm idle lands?

We may approve an Incentive Agreement if:

(a) You request one in writing at least 90 days prior to the beginning of the irrigation season that includes a detailed plan to improve the idle lands, which contains at least the following:

(1) A description of specific improvements you will make, such as clearing, leveling, or other activities that will improve idle lands to a condition that supports authorized use of delivered water;

(2) The estimated cost of the improvements you will make;

(3) The time schedule for your proposed improvements;

(4) Your proposed schedule for water delivery, if necessary; and

(5) Justification for use of irrigation water during the improvement period.

(b) You sign our Incentive Agreement containing terms and conditions we specify.

§ 171.615 Can I request improvements to BIA facilities as part of my Incentive Agreement?

Yes. You may request and we may agree to make improvements as part of your Incentive Agreement that we determine are in the best interest of the irrigation facility servicing your farm unit.

Subpart G—Non-Assessment Status

§ 171.700 When do I not have to pay my annual operation and maintenance assessment?

You do not have to pay your annual operation and maintenance assessment for your land(s) within the service area of your irrigation facility when:

(a) We grant you an Annual Assessment Waiver; or

(b) We grant you an Incentive Agreement which may include waiving your annual operation and maintenance assessment; or

(c) Your land is re-designated as permanently non-assessable or temporarily non-assessable.

§ 171.705 What criteria must be met for my land to be granted an Annual Assessment Waiver?

For your land to be granted an Annual Assessment Waiver, we must determine that our irrigation facilities are not capable of delivering adequate irrigation water to your farm unit. Inadequate water supply due to natural conditions or climate is not justification for us to grant an Annual Assessment Waiver.

§ 171.710 Can I receive irrigation water if I am granted an Annual Assessment Waiver?

No. Water will not be delivered in any quantity to your farm unit if you have been granted an Annual Assessment Waiver.

§ 171.715 How do I obtain an Annual Assessment Waiver?

For your land to be granted an Annual Assessment Waiver, you must:

(a) Send us a request in writing to have your land granted an Annual Assessment Waiver;

(b) Submit your request prior to the bill due date for the year for which you are requesting the Annual Assessment Waiver; and

(c) Receive our approval in writing.

§ 171.720 For what period does an Annual Assessment Waiver apply?

Annual Assessment Waivers are only valid for the year in which they are granted. To obtain an Annual Assessment Waiver for a subsequent year, you must reapply.

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