



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

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National Policy Memorandum

Office of Trust Services
Division of Real Estate Services

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Title: Streamlining the Rights-of-Way and Business Lease Application Processes for Federally Funded Tribal Broadband Infrastructure Projects – Amendment 1

1. Purpose

The purpose of this memorandum is to extend NPM-TRUS-44: Streamlining the Rights-of-Way (ROW) and Business Lease Application Process for Bipartisan Infrastructure Law, Telecommunication, and Renewable Energy Projects, issued on April 15, 2022, for one additional year and includes additional funding opportunities and guidance. This memorandum establishes Bureau of Indian Affairs (BIA) policy for the efficient and effective processing of Rights-of-Way (ROWs) and Business Leases for projects funded by the National Telecommunications and Information Administration (NTIA)'s Tribal Broadband Connectivity Program (TBCP), Infrastructure Investment and Jobs Act (IIJA), and the Inflation Reduction Act (IRA). The BIA anticipates increased demand for broadband decisions because of the additional funding opportunities described in this policy. Increasing coordination, fostering collaborative relationships, and providing technical assistance and guidance on the ROW and lease processes are necessary components for accomplishing broadband infrastructure projects. The advancement of broadband infrastructure in Indian Country will require a multi-disciplinary approach as projects require environmental and appraisal reviews in the application for ROWs and leases.

Another key step in working with Tribes and individual Indian landowners is determining what sort of agreement may be sought for the broadband purpose and need. Consideration must be made for the development or build-out requirements for the various broadband initiatives the applicant may participate in. Furthermore, the BIA anticipates that most broadband projects may be a change of scope and use of an existing ROW rather than acquisition of a new ROW, for example, a change from copper wire to fiber optic. Therefore, this national policy memorandum also provides guidance related to typical operation and maintenance activities and uses that may require an amendment or assignment of a ROW. For changes to existing ROWs, applicants should have proof of a valid and existing ROW for broadband funding use purposes. Due to the increased need for broadband, current holders of ROWs who desire to expand or upgrade

existing facilities may need to research or may request the agency to research its title records for copies of ROWs. The agency may do so, but the burden to produce a valid right-of-way or assignment is on the applicant. Assignments may also be needed to be recorded or retroactively approved to ensure records are up to date on rights of way.

On lands that are 100 percent owned by the Tribe, the Tribe may have other avenues available to it for ROWs under 25 CFR 169.4 or for business leases under the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act).

Fixing America's Surface Transportation Act and IIJA

The Fixing America's Surface Transportation Act (FAST), Pub. L. No. 114-94, 129 Stat. 1312, was signed into law in 2015. Title XLI, Federal Permitting Improvement, codified at 42 U.S.C. 4370m et seq., referred to as "FAST-41," created a new governance structure, set of procedures, and funding authorities to improve the Federal project review and permitting process for "covered" infrastructure projects. FAST-41 is intended to facilitate good project management practices, ensure a high level of communication and collaboration, and provide transparency to achieve a high-quality, accountable, and effective project review and permitting process. One major element of FAST-41 is that it establishes procedures for coordination of Federal environmental reviews and authorizations for covered projects.

FAST-41 defines "covered projects" as any activity that requires environmental review or authorization by a federal agency involving construction of infrastructure in certain sectors, including but not limited to:

Renewable energy production, conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, mining, and carbon capture projects,

and that meets certain criteria.

On November 6, 2021, Congress passed the IIJA to provide substantial once-in-a-generation investment in the Nation's infrastructure. The signing of the IIJA by President Biden marked a new era of building a better America together. The investment in Indian Country is historic in its size – the largest ever investments in broadband, rail and transit, clean energy, and water, just to name a few – as well as the breadth of programs and sectors included in the law. The IIJA allocated funding to over 350 distinct programs across more than a dozen federal departments and agencies.

Title VIII, Section 70801, of IIJA specifically authorized the FAST-41 Federal Permitting Improvement Steering Council to consider best practices for enhancing early stakeholder engagement, including engagement with Native American stakeholders, to ensure that project sponsors and agencies identify potential natural, archeological, and cultural resources and locations of historic and religious significance in the area of a covered project.

Federal Communications Commission and Department of Commerce Opportunities

Two programs administered by the Federal Communications Commission (FCC) and the Department of Commerce's TBCP are likely to increase the need for ROW and business lease approvals for Tribal telehealth, distance learning, broadband affordability, and digital inclusion projects.

On July 11, 2019, the Federal Communications Commission (FCC) released a Report and Order *In the Matter of Transforming the 2.5 GHz Band* (FCC 19-62; upheld on Reconsideration, FCC-20-183), in which the FCC adopted a priority window for Tribal Nations to obtain access to the 2.5 GHz band on rural Tribal lands. The application for the 2.5 GHz Rural Tribal Priority Window (Priority Window) opened February 3, 2020, and closed September 2, 2020. The FCC began to grant license applications in late 2020 and continues to grant new licenses as pending applications are reviewed. Though the program application window closed, projects are still being approved for funding. Tribes that are granted licenses under the Priority Window are subject to strict deadlines for building out broadband network infrastructure to serve 50 percent of the population in the license area within two years of receiving the license, and 80 percent of the population within five years. For many Tribes, their ability to successfully meet these deadlines and to retain these licenses is contingent on their ability to obtain ROWs for their telecommunications projects in a timely fashion.

The TBCP is nearly \$3 billion grant program and part of the Biden-Harris Administration's Internet for All Initiative. The TBCP is administered by the NTIA at the U.S. Department of Commerce. Eligible uses for the grant funds include "broadband infrastructure deployment" on Tribal lands, as defined by the NTIA. Grant recipients are required to expend awarded funds within one year of receiving them. Unexpended funds may be rescinded. The Secretary of Commerce has the authority to extend this deadline for infrastructure projects, under certain conditions; however, this is not mandatory. Division J, Title II of IJA also added \$2 billion more for broadband projects under the TBCP.

The Inflation Reduction Act (IRA)

The IRA, Pub. L. No. 117-169 (2022), provides Tribes with more than \$720 million in direct spending for a range of efforts addressing energy and climate resilience, including for drought relief and electrification. Tribal initiatives funded under the IRA will need ROWs and business leases for projects to reduce the impacts and effects of climate change. The IRA will promote job creation, as well as increased economic development opportunities for Tribes and Tribal members in the areas of Agriculture, Nutrition, and Forestry; Commerce, Science and Transportation; Energy and Natural Resources; Environment and Public Works; Homeland Security and Governmental Affairs. The IRA also extended, and enhanced many existing tax incentives, created new tax incentives, and provided funding to Tribal governments to meet their climate goals.

Business Lease and Rights-of-Way Regulations

The 2013 revision to 25 CFR Part 162 for business leases removed some of the barriers for Tribal economic development opportunities. It is the policy of the BIA, consistent with applicable laws, to support Tribal Nations in exercising their sovereignty to govern their lands and pursue economic self-sufficiency, conservation practices, and climate resiliency. The 2016 ROW regulations at 25 CFR Part 169 incorporated many streamlining policy initiatives. Both of these regulations established regulatory timeframes for processing and grant of a ROW and processing and approval of a business lease application by providing, to the maximum extent possible, deference to the Tribe's determination of documents needed. On Tribal lands it is necessary not only to maximize the use of federal funds, but also to provide Tribes with the maximum flexibility and economic development opportunities to leverage these programs for the benefit of their Tribal communities.

2. Scope

This policy applies to all BIA programs, offices, regions, and agencies involved in the ROW and Business Lease processes.

3. Policy and Procedures

It is the BIA's policy to comply with all Federal laws and regulations as well as Department of the Interior (DOI) policies regarding the processing of ROW and lease applications for Tribal infrastructure projects.

If an application package is received by the BIA, a review of the package must be made within five (5) business days as to whether the package is complete or not. Upon completion of the review, BIA will provide a written notice to the applicant either that the application is complete or identifying the missing application supporting documents.

BIA will implement the following additional steps to simplify and streamline the processing of ROW and lease applications that are part of, or related to, infrastructure:

A. ROW and Business Lease Applications on Tribal Lands Where Tribe Owns 100% of the Tract:

- 1) If the Tribe, or a Tribal utility, is the applicant, the Tribe does not need BIA approval of a ROW on Tribal land. 25 CFR § 169.4(b)(1) and 169.4(b)(3)(iii).
 - a) For leases, an independent legal entity owned and operated by a Tribe may have to obtain a lease from owners of the land before taking possession of the land (25 CFR § 162.005(a)(1)).
 - b) The Tribe, as an Indian landowner who owns 100 percent of the trust or restricted interests in a tract, does not need a lease to possess Tribal land (25 CFR § 162.005(b)(1)). As a result of the Land Buy Back Program, there may be allotted tracts of land where the Tribe owns 100 percent of the trust interests in the tract.

- c) The ROW or lease application, grant or lease document, map of definite location and any other Tribal broadband use agreements for project development with states and other Federal agency(ies) must be filed with the BIA for recording in the system of record, the Trust Asset and Accounting Management System (TAAMS) within 30 days of grant or approval.
 - d) A lease is not needed to possess Indian land if the applicant is a 25 U.S.C. 477 corporate entity that manages or has the power to manage the Tribal land directly under a federal charter or under a Tribal authorization (not under a lease from the Indian Tribe).
 - e) A ROW or lease is not needed if the applicant has entered into a contract or agreement that encumbers Tribal land under 25 U.S.C. 81.
- 2) If the applicant is a third party:
- a) The Tribe may exercise all the regulatory permissions, including negotiating for any payment amount, and asking the Secretary to waive the valuation and bond and insurance requirements.
 - b) For a ROW across tribal land, the applicant **must obtain tribal consent**, in the form of a tribal authorization and a written agreement with the tribe, if the tribe so requires, to a grant of right-of-way across tribal land. The consent document may impose restrictions or conditions; any restrictions or conditions automatically become conditions and restrictions in the grant. (25 CFR § 107(a)). The ROW grant could be utilized as one grant for all the tracts traversed by the ROW (25 CFR § 169.124(d)).
 - c) Approval of the lease or grant of the ROW must occur 60 days after making the determination that the application is complete.
 - d) The ROW or lease application, grant or lease document, map of definite location and any Tribal use agreement(s) connected to Tribal infrastructure and broadband project development agreements with states and other Federal agency(ies) must be filed with the BIA for recording in the official system of record, the Trust Asset and Accounting Management System (TAAMS) within 30 days of approval or grant.

B. ROW and Business Lease Applications for Allotted Lands

- 1) If the Tribe, or Tribal utility, or a third party is the applicant:
- a) The individual Indian owners may negotiate for any payment amount and may waive the valuation requirement.
 - b) The ROW may be approved for the negotiated amount per 25 CFR §169.112 and Business Leases per 25 CFR §162.421.
 - c) BIA will determine the number of owners of, and undivided interests in, a fractionated tract of Indian land, for the purposes of calculating the requisite consent based on BIA records on the date the application is submitted to the BIA (25 CFR § 169.107(c) and 25 CFR § 162.012(a)(5)).
 - d) If the Tribe already owns the majority of the interests, consent of the other fractional owners is not required, but the Tribe must notify the co-owners.

- e) Because of the regulatory timelines for approval, review of the application will occur immediately upon making the determination that the application is complete.

C. ROW Applications Crossing Over Multiple Tracts

- 1) Applicants may submit one ROW application with supporting documentation for multiple contiguous tracts if applicable.
- 2) BIA will issue one grant for all of the tracts traversed by the ROW for the infrastructure project if applicable.

D. Maintenance

- 1) ROW uses listed in 25 CFR 169.5(a) include the right to access the ROW to manage vegetation, inspect, maintain, and repair equipment, and conduct other activities that are necessary to maintain the ROW use.
- 2) Applicants may refer to a request to change technology from underground copper telephone line to underground fiber optic line as a “maintenance activity.” However, 25 CFR 169.127(c) identifies this as an example of a new use of a ROW that is within the same scope as the original ROW and not a maintenance activity.

E. New ROW Use Within or Overlapping an Existing ROW

- 1) Grantees may use all or a portion of an existing ROW for a use not specified in the original grant of the existing ROW only if it is within the same scope of the use specified in the original grant of the existing ROW.
- 2) If a grantee proposes to use all or a portion of an existing ROW for a use not specified and not within the same scope of the original ROW and the new use will not require ground disturbance, the grantee must request an amendment to the existing ROW.
- 3) If a grantee proposes to use all or a portion of an existing ROW for a use not specified and not within the same scope of the original ROW and the new use will require ground disturbance, the grantee must request a new ROW.
- 4) Applicants that are not the grantee of the ROW may need an assignment of an existing ROW or a new ROW.
- 5) In accordance with 25 CFR § 169.128, BIA may grant a new ROW within or overlapping an existing ROW if:
 - a. The applicant follows the procedures and requirements to obtain a new ROW; and
 - b. The ROW does not interfere with the use or purpose of the existing ROW and the applicant has obtained the consent of the existing ROW grantee. The existing ROW grantee may not unreasonably withhold consent.

F. Amendments

- 1) If the amendment changes the scope of the original ROW and the new use requires ground disturbance, the grantee will need to submit a new ROW application.
- 2) If the amendment changes the scope of the original ROW and the new use will not require any ground disturbance, the amendment can be reviewed and processed.
- 3) Review and verify any amendments requiring compliance with consent requirements in 25 CFR § 169.107.

G. Assignments

- 1) If the assignment is a result of a corporate merger, acquisition, or transfer by operation of law, then the assignee is excluded from these requirements, except that the assignee needs to provide an original copy of the assignment for recording (25 CFR 169.207(c)), and it must be recorded within 30 days.
 - a. The grant of easement or Tribal Resolution should be reviewed to identify if the assignment still requires consent even if it meets the corporate merger, acquisition, or transfer by operation of law regulatory criteria.
- 2) Review the original ROW for express assignment language and applicability. Identify if the existing ROW language “expressly states” (direct and distinctly stated) that the grantee can assign the grant and under what conditions. If the existing language does not contain such language, the approval of the assignment must follow the regulations.
- 3) Verify that the grantee/assignee has: complied with the conditions of the grant; provided the BIA with a notice of any violations, if any; submitted a new bond; and obtained landowners’ consent, and possible compensation requirements, prior to BIA approval and recording.

H. Partial Assignments

- 1) Realty staff will review the purpose of the partial assignment and/or determine if a ROW application should be submitted. A partial assignment may be used to authorize another third party to utilize an existing, approved grant of easement under certain conditions (25 CFR § 169.127(a)). A partial assignment of ROWs will be reviewed and processed using the same standard assignment procedures discussed above.
- 2) Review if the partial assignment’s purpose/use is consistent with the original grant of easement’s purpose/use. If it is identified that the partial assignment purpose is different and requires any ground disturbance, Realty staff will notify the assignee to obtain a new ROW.
- 3) Review the grant of easement to identify any conditions and/or obligations that are reoccurring such as payment, and if applicable, ensure the partial assignment addresses if the assignor (grantee) or assignee is the responsible party.
- 4) Confirm that the partial assignment of a ROW adequately identifies the segment of the ROW that is being assigned for recordation purposes.

I. Providing Copies of ROW and Lease Documents and/or Title research

- 1) It is very important to verify the purpose of the original grant through examination of the original documents to confirm existing grant stipulations regarding amendments or assignments.
- 2) Grants for ROWs approved under 25 CFR Part 169 are provided to applicants. Therefore, applicants who operate and maintain ROWs should have original grants of ROWs. However, agencies may discover that current holders of ROWs may have difficulty referencing approved ROWs for the BIA to identify and to provide guidance upon.
- 3) If BIA's reasonable search of existing ROWs yields no records and the applicant is unable to also provide proof of an existing ROW approved under 25 CFR 169, the applicant may need to make a new application for ROWs
- 4) Tribes and Individual landowners may request copies of ROWs or leases that cross the lands they have an ownership interest in.
- 5) Companies or third parties requesting copies of ROWs or leases may need to be directed to make a request under the Freedom of Information Act (FOIA) where appropriate.

4. Roles and Responsibilities


- A. Director, BIA (DBIA)** is responsible for ensuring that appropriate organizational arrangements, resources, and personnel are available to implement and maintain the BIA's Realty program. The DBIA serves as the Senior Accountable Official for this program and has primary responsibility for implementing and executing BIA programs in accordance with statute, regulation, and Departmental policy.
- B. Deputy Bureau Director (DBD), Field Operations, BIA** is responsible for overseeing the Regional Directors (RDs) and disseminating policy relevant to the regions.
- C. DBD, Office of Trust Services (OTS), BIA** is responsible for ensuring that statutory and regulatory timetables for ROW and lease applications are met, and that guidance is available to regional and BIA agency staff tasked with processing ROW and lease applications; initiating periodic program reviews of regional and agency programs; and assisting in the development and dissemination of trust resource policy to the RDs.
- D. Division Chief, Division of Real Estate Services (DRES), OTS** is responsible for overall policy and guidance development within the division, including establishing Realty program policies and standards to comply with statutory and regulatory requirements; day-to-day oversight of the Realty program; ensuring technical assistance and training is provide to BIA regions as needed; conducting program reviews; and managing BIA's federal reporting requirements as they relate to the Realty program.
- E. Regional Director (RD)** serves as the Senior Accountable Official for the Realty program in their respective region and is responsible for reviewing and acting on any ROW and lease applications that are not otherwise delegated to the BIA agency level. An

RD is responsible for ensuring that policy guidance is available and followed by regional and agency staff.

F. BIA Agency Superintendent is responsible for managing their respective organization's Realty program compliance in day-to-day operations and coordinating reviews of ROW and lease applications. Superintendents are responsible for implementing Realty responsibilities at the appropriate level as re-delegated by the DBD Field Operations or RD. Such delegation will only be made when the BIA agency or program office has appropriate expertise on staff or are otherwise readily available.

G. Regional Realty Officer is responsible for reviewing ROW and lease applications that are not otherwise tasked to the BIA agency level and providing technical assistance throughout this process to the appropriate Superintendent as needed.

Approval

Darryl LaCounte  Digitally signed by Darryl LaCounte
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4/18/23

Darryl LaCounte
Director, Bureau of Indian Affairs

Date