

Department of the Interior
Office of the Assistant Secretary – Indian Affairs



Rights-of-Way on Indian Land
Proposed Rule - 25 CFR 169

Background

- Efforts to Improve Trust Land Management
 - 2011-2012 (Leasing)
 - Work on residential, business, wind and solar leasing regulations
 - Tribal consultations on draft and proposed
 - Final regulations (77 FR 72440) published December 2012
 - 2013-2014 (Rights-of-Way)
 - Workgroup of BIA and SOL drafted ROW revisions
 - Circulated for comment by all BIA Realty Officers
 - Proposed rule published June 17, 2014 (79 FR 34455)

Need for Revisions

- Current Rights-of-Way (ROW) regulations at 25 CFR 169
 - Published in 1968
 - Few sections updated in 1972, 1973, others in 1980
 - No updates since 1980
 - Rely on statutory authorities specific to type of ROW
 - Railroads
 - Telegraph and telephone lines
 - Impose specific requirements (e.g., no parallel ROW within 10 miles)

Proposed Rule

- Proposed regulations
 - Rely on general statutory authority for granting ROWs for all purposes
 - Simplifies – one set of requirements applies to all
 - No benefit lost by removing any specific statutory authority
 - Incorporate approaches taken in leasing regulations to streamline
 - Establish timelines for BIA review of ROW requests
 - Clarify processes for BIA review of ROW documents
 - Allow BIA disapproval only if BIA states a compelling reason
 - Defer to tribes on compensation amount for tribal land

Proposed Rule - Overview

- Subpart A – Purpose, Definitions, General Provisions
- Subpart B – Obtaining a Right-of-Way
- Subpart C – Term, Renewals, Amendments, Assignments, Mortgages
- Subpart D – Effectiveness
- Subpart E – Compliance and Enforcement
- Subpart F – Service Line Agreements

Proposed Rule - Overview

- **Subpart A – Purpose, Definitions, General Provisions**
- Subpart B – Obtaining a Right-of-Way
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Proposed Rule

Subpart A: Purpose, Definitions, General Provisions

- Adds definitions for several terms, including:
 - Abandonment
 - Assignment
 - Constructive Notice
 - Easement
 - Fractional Interest
 - Grant, Grantee
 - Immediate Family
 - Indian, Indian land
 - Map of definite location
 - Market value
 - Service line

Proposed Rule

Subpart A: Purpose, Definitions, General Provisions (cont'd)

- What land 169 applies to
 - Indian land
 - What happens if life estate on land
- Same general provisions as leasing regulations
 - When a ROW is needed
 - Whether tribes may contract or compact for ROW functions
 - What laws apply to ROWs
 - What taxes apply to ROWs
 - How BIA provides notice of ROWs
 - What decisions may be appealed; who is an “interested party”

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Proposed Rule

Subpart B: Obtaining a ROW

- No BIA approval required to survey land
- Application
 - Identify applicant, tract, ROW location, duration, and purpose, and who is responsible for permanent improvements to be constructed
 - Must include:
 - Legal description of ROW and parcels
 - Map of definite location signed by surveyor or engineer
 - Bond or alternative security
 - Record of consent
 - Valuation, if applicable
 - Corporate documentation, if applicable
 - Environmental and archeological reports

Proposed Rule

Subpart B: Obtaining a ROW

- Consent Requirements
 - Tribal land – Tribal consent required
 - Individually owned land – consent of owners of a majority interest
- BIA may grant ROW without consent if:
 - Owners are **so numerous**, it would be impracticable;
 - No substantial injury to land or any landowner;
 - Landowners are compensated; and
 - BIA provides 30-day notice of intent to all owners
- So numerous means:
 - 50 or more but less than 100 owners, where no one holds an interest greater than 10%
 - 100 or more co-owners

Proposed Rule

Subpart B: Obtaining a ROW

- Bond or alternative security (CD, irrevocable letter of credit, Treasury securities, surety bonds, assigned savings account) to cover:
 - Highest annual rent (unless one-time payment)
 - Estimated damages from construction of permanent improvements
 - O&M charges (if land located in irrigation project)
 - Restoration and reclamation of premises
- BIA may waive
 - For tribal land, BIA will defer to tribe's determination that waiver is in its best interest
 - For individually owned land, BIA may waive if owners of >50% of interests request and BIA determines in owners' best interest

Proposed Rule

Subpart B: Obtaining a ROW

- Compensation
 - Tribal land – BIA defers to tribe, if tribe submits authorization stating that it has determined compensation to be in its best interest; tribe may waive valuation
 - Individually owned Indian land
 - Market value required unless landowners waive and BIA determines waiver is in landowners' best interest
 - Valuation required unless:
 - Landowners waive or
 - Grantee will construct infrastructure improvements benefitting landowners and BIA determines it is in landowners' best interest

Proposed Rule

Subpart B: Obtaining a ROW

- Compensation (continued)
 - If one-time payment, due within 10 days of grant
 - Otherwise, grant must specify when due
 - Direct pay available if:
 - 10 or fewer landowners
 - All agree to direct pay
 - Their trust accounts are unencumbered

Proposed Rule

Subpart B: Obtaining a ROW

- Compensation (continued)
 - Reviews and Adjustments
 - Tribal land – not required
 - Individually owned land – not required if:
 - Payment is one-time lump sum;
 - ROW duration is 5 years or less;
 - Grant provides for automatic adjustments; or
 - BIA determines it's in landowners' best interest

Proposed Rule

Subpart B: Obtaining a ROW

- Right-of-Way Grant Process
 - Upon receipt of application package, BIA ensures package is complete (see supporting documents required)
 - If incomplete, send letter identifying missing information
 - If complete:
 - Send letter acknowledging date of receipt of complete package; and
 - Review and issue decision within 60 days
- 60-day clock for BIA review only starts when package is **complete** (including any NEPA & valuation)
 - 60 days to issue a decision
 - If miss deadline, parties may file a notice to compel action

Proposed Rule

Subpart B: Obtaining a ROW

- BIA Approval
 - Limited grounds for disapproval
 - Required consents have not been obtained from parties
 - Requirements of regulations have not been met
 - Compelling reason to withhold approval to protect best interests of Indian landowners
 - Defer, to maximum extent possible, to Indian landowners' determination that a ROW is in their best interest
 - May not unreasonably withhold approval
- BIA may:
 - Grant one ROW for all of the tracts traversed by the ROW, or
 - Issue separate grants for one or more tracts traversed by the ROW

Proposed Rule

Subpart B: Obtaining a ROW

- The grant will:
 - Incorporate any restrictions/conditions set out in consents;
 - List restrictions/conditions set out in regulations, such as:
 - Grantee has no right to any products or resources to the land, unless otherwise provided by grant;
 - Grantee must construct and maintain the ROW in a professional manner consistent with industry standards;
 - Grantee must comply with all applicable laws and obtain all required permits;
 - Grantee must comply with due diligence requirements
 - Attach or incorporate by reference maps of definite location

Proposed Rule

Subpart B: Obtaining a ROW

- New use within or overlapping existing ROW
 - Must obtain a new ROW if:
 - Use is not specified in the original grant; or
 - Use is not within the same scope of the use specified in the original grant
- BIA will grant the new ROW if:
 - New ROW does not interfere with the use or purpose of the existing ROW; and
 - The existing ROW grantee consents.

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Proposed Rule

Subpart C: Term, Renewals, Amendments, Etc.

- ROW Term/Duration
 - Must be stated in grant
 - Tribal land – BIA defers to tribe's determination of term
 - Individually owned land – must be reasonable, depending on use based on these guidelines:
 - In perpetuity – railroads, public roads and highways, public and community water lines, public sanitary and storm sewer lines, water control and use projects
 - 50 years – electric power projects, plants, switchyards, lines
 - 30 years – telecommunication, broadband, fiber optic lines
 - 25 years with renewal option – access roads
 - 20 years – oil and gas pipelines, aviation hazard easements
 - Consistent with use – service roads and trails essential to ROW purpose, conservation easements

Proposed Rule

Subpart C: Term, Renewals, Amendments, Etc.

- ROW Renewal
 - BIA will renew if:
 - Original ROW allows for renewal and specifies compensation
 - Grantee attests there is no change in size, type, location, etc.
 - Landowners consent unless original ROW allows for renewal without landowner consent
- If there will be a change in the size, type, location, or duration of the ROW, the grantee must apply for a new ROW

Proposed Rule

Subpart C: Term, Renewals, Amendments, Etc.

- Amendments, Assignments, Mortgages
 - BIA Approval
 - Must approve within 30 days
 - Clock for BIA review only starts when package is **complete**
 - Send letter acknowledging date of receipt

Proposed Rule

Subpart C: Term, Renewals, Amendments, Etc.

- Amendment
 - BIA approval required
 - For a change to any ROW provision or to accommodate a change in location of permanent improvements to previously unimproved land within the ROW corridor
 - Not to correct legal description or other technical correction
- Landowner consent required
- BIA may disapprove only if:
 - Landowners did not consent
 - Grantee's sureties did not consent
 - Grantee is in violation of the ROW
 - Requirements in the regulations not met
 - Compelling reason to withhold approval in best interest of landowners

Proposed Rule

Subpart C: Term, Renewals, Amendments, Etc.

- Assignments
 - BIA approval required unless:
 - Original ROW allows assignments without approval; and
 - Parties provide BIA with a copy
 - Landowner consent required
- BIA may disapprove only if:
 - Landowners did not consent
 - Grantee's sureties did not consent
 - Grantee is in violation of the ROW
 - Assignee does not agree to be bound by the terms of the ROW
 - Requirements in the regulations not met
 - Compelling reason to withhold approval in best interest of landowners

Proposed Rule

Subpart C: Term, Renewals, Amendments, Etc.

- Mortgages
 - BIA approval required
 - Landowner consent required
- BIA may disapprove only if:
 - Landowners did not consent
 - Grantee's sureties did not consent
 - Grantee is in violation of the ROW
 - Assignee does not agree to be bound by the terms of the ROW
 - Requirements in the regulations not met
 - Compelling reason to withhold approval in best interest of landowners

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Proposed Rule

Subpart D: Effectiveness

- ROW documents are effective upon BIA approval
 - Even if an appeal under 25 CFR 2 is filed
- BIA will record ROW documents in LTRO immediately following approval
 - If no BIA approval required, grantee must provide BIA with a copy for recording
 - Tribe must record
 - Grant on tribal land for a tribal utility that is not a separate legal entity
 - Grant on tribal land under a special act of Congress authorizing grants without BIA approval

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Proposed Rule

Subpart E: Compliance and Enforcement

- BIA may investigate compliance with a ROW
 - Enter the leased premises to ensure compliance:
 - At any reasonable time, upon reasonable notice; and
 - Consistent with any notice requirements under applicable tribal law and applicable ROW documents
- Promptly initiate investigation if an Indian landowner notifies that a specific violation has occurred

Proposed Rule

Subpart E: Compliance and Enforcement

- Negotiated remedies for ROWs
 - Must be included in landowners' consent to ROW grant
 - If the grant provides one or both parties with the power to terminate the ROW
 - Tribal land - BIA approval is not required and termination is effective without BIA cancellation, but landowners must notify BIA so that BIA can record the termination
 - Individually owned land – BIA approval required to ensure consent
- Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to BIA, as specified in the ROW grant

Proposed Rule

Subpart E: Compliance and Enforcement

- ROW grant may provide that tribe will address violations and specify how disputes will be resolved
 - BIA is not bound by decisions made in such forums, but defers to ongoing actions or proceedings, as appropriate, in deciding whether to exercise available remedies
 - In the absence of actions or proceedings or if it is not appropriate for BIA to defer to them, follow the procedures on the following slides

Proposed Rule

Subpart E: Compliance and Enforcement

- If violation (other than nonpayment):
 - Promptly send grantee a notice of violation
 - Send to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land
 - Notice of violation
 - Require grantee to do one of the following within 10 business days of the receipt:
 - Cure and notify BIA (and tribe for tribal land)
 - Dispute determination that a violation occurred
 - Request additional time to cure

Proposed Rule

Subpart E: Compliance and Enforcement

- If failure to pay rent in time and manner required by grant:
 - Send grantee a notice of violation promptly following:
 - Date payment was due, if BIA collects
 - Date BIA received actual notice of nonpayment from landowners
 - Send copy to tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land
 - Notice of violation
 - Require grantee to provide adequate proof of payment

Proposed Rule

Subpart E: Compliance and Enforcement

- If grantee does not cure a violation or provide adequate proof of payment by the deadline:
 - Consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:
 - BIA should cancel the ROW grant;
 - Landowners will use any remedies available under the grant;
 - BIA should invoke other remedies available (e.g., collect bond)
 - Grantee should be given additional time to cure

Proposed Rule

Subpart E: Compliance and Enforcement

- Following consultation, BIA may take action
 - BIA does not have to cancel the grant or give any further notice to the grantee before taking action to recover unpaid compensation
 - BIA may invoke any remedies available to it under the ROW
 - BIA action will be consistent with 25 U.S.C. 4137, as applicable
- To cancel:
 - Send grantee a cancellation letter within 5 business days of decision
 - Send a copy of the cancellation letter to the tribe for tribal land, and provide actual or constructive notice to individual landowners

Proposed Rule

Subpart E: Compliance and Enforcement

- The cancellation letter:
 - Explain the grounds for cancellation
 - State amount of any unpaid rent or late payment charges due
 - Notify the grantee of right to 25 CFR 2 appeal
 - Order the grantee to vacate within 31 days, if no appeal
 - Order the grantee to take any other action deemed necessary to protect the Indian landowners
- Cancellation effective 31 days after the grantee receives a cancellation letter or 41 days from the date BIA mailed the letter, whichever is earlier, unless appeal is filed

Proposed Rule

Subpart E: Compliance and Enforcement

- Cancellation for Abandonment or Non-Use
 - May cancel 30 days after mailing notice to grantee for:
 - Nonuse of ROW for consecutive 2-year period for the purpose for which ROW was granted
 - Abandonment of ROW (grantee affirmatively relinquishes ROW)

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Proposed Rule

Subpart F: Service Line Agreements

- Service Lines
 - Utility line running from a main line that is used only for supplying owners or authorized occupants, or authorized users of land, with telephone, water, electricity, gas, internet service, or other home utility service
 - No definitive capacity limitation

Proposed Rule

Subpart F: Service Line Agreements

- No ROW grant required for service lines BUT:
 - Service line agreement should address:
 - Mitigation of any damages during construction; and
 - Restoration of the premises at the termination of the agreement
 - Agreement must be signed by landowners
 - No valuation is required
 - Parties must file a copy of the agreement and a plat or diagram with BIA within 30 days after signing
 - BIA will record in LTRO

Comments Due

- Comments on the proposed rule are due: **August 18, 2014**
- Email is preferred method to submit comments:
 - E-mail: consultation@bia.gov
- Next steps
 - Review comments, make changes as appropriate
 - Publish a final rule in the Federal Register
 - Final rule will not become effective for at least 30 days after publication