

Department of the Interior
Bureau of Indian Affairs



**Training for Grantees, Potential Grantees, and
Owners of Indian Land
On New Rights-of-Way on Indian Land Rule
25 CFR 169**

Background

- BIA's Ongoing Effort to Improve Management of Trust Land
 - December 2012 : Residential, business, wind and solar leasing regulations published (77 FR 72440)
- Need for revisions to Rights-of-Way (ROW) regulations
 - Published in 1968; no updates for 35 years
 - Rely on specific statutory authorities & impose outdated requirements specific to type of ROW (e.g., for railroads, telegraph and telephone lines)

Background

- June 17, 2014: Proposed ROW rule published (79 FR 34455)
 - Tribal consultation sessions & public comment hearings held
 - Phoenix, AZ
 - Bismarck, ND
 - Teleconference
 - Atlanta, GA
 - Extended comment period closed November 28, 2014
 - Over 170 comment submissions received
 - **November 19, 2015: Final rule published (80 FR 72492)**
 - Preamble addresses all comments
 - In December 21, 2015 notice, original effective date extended to **March 21, 2016**

Final Rule – Overview

- Simplifies approach
 - Relies only on 1948 Act as statutory authority
- Streamlines approval process
 - Establishes timelines for BIA review of ROW requests
 - Eliminates requirement for BIA approval of access to survey
- Provides certainty in process
 - Clarifies processes for BIA review of ROW documents
 - Clarifies “service line” versus ROW
 - Allows BIA disapproval only if BIA states a compelling reason

Final Rule – Overview (continued)

- Supports landowner decisions regarding use of their land
 - Defers to Tribes on compensation amount for Tribal land and on the reasonableness of the duration of the right-of-way
 - Allows landowner negotiation of ROW terms
- Protects trust property
 - Prohibits “piggybacking”
 - Explicitly requires BIA approval and consent for assignments, amendments, mortgages of ROWs
 - Establishes guidelines for “reasonable” durations of rights-of-way on allotted land (generally, no ROWs in perpetuity)
 - Requires bond, insurance, or other security with application in lieu of deposit

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Final Rule

Subpart A: Purpose, Definitions, General Provisions

§§ 169.3 - 169.4;

- Rule applies to rights-of-way over or across Indian land and BIA land
 - Indian land includes trust or restricted land and Tribal and allotted land
- Rule does not apply if Tribe authorizes a right-of-way to a wholly owned Tribal entity over land the Tribe fully owns
 - If the Tribe owns only fractional interests in the land, the Tribal entity must obtain the consent of the owners of a majority interest in the land

Final Rule

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

§§169.8 - 169.13

- Same general provisions as new leasing regulations
 - When a ROW is needed
 - Whether Tribes may contract or compact for ROW functions (they may)
 - How BIA provides notice of ROWs to landowners
 - What decisions may be appealed; who is an “interested party”
 - What laws apply to ROWs
 - Effect of ROW grant on Tribal jurisdiction
 - What taxes apply to ROWs

Final Rule

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

§ 169.9

What laws apply to ROWs

- ROWs are subject to Federal law
- ROWs are subject to Tribal law
 - Except to the extent Tribal law is inconsistent with Federal law
- ROWs are generally **not** subject to State or local law

Final Rule

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

§ 169.10

Effect on Tribal Jurisdiction

- ROW grant will specify that it does not diminish
 - Tribe's jurisdiction over the land subject to, and any person or activity within, the ROW
 - Tribe's power to tax the land, any improvements on the land, or any person or activity within, ROW
 - Tribe's authority to enforce Tribal law of general or particular application on the land subject to and within the ROW as if there were no ROW grant
 - Tribe's inherent sovereign power to exercise civil jurisdiction over non-members on Indian land
 - The character of the land subject to the ROW as Indian country under 18 U.S.C. 1151.

Final Rule

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

§ 169.11

What taxes apply to ROWs

- Subject only to applicable Federal law:
 - Permanent improvements in a ROW, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State;
 - Activities under a ROW grant are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State; and
 - The ROW interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State.
- Improvements, activities, and ROW interests may be subject to taxation by the Tribe

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Final Rule

Subpart B: Service Line Agreements

§ 169.51

- No ROW is required for service lines, but a service line agreement must be filed with BIA
- Service Line Definition:
 - Utility line running from a main line that is used only for supplying telephone, water, electricity, gas, internet service, or other utility service to a house, business, or other structure
 - In the case of a power line, a service line is limited to a voltage of 14.5 kv or less, or a voltage of 34.5 kv or less if serving irrigation pumps and commercial and industrial uses
- If what you call a “service line” does not meet this definition, then a ROW is required

Final Rule

Subpart B: Service Line Agreements

§§ 169.53 - 169.56

- Service line agreements
 - Should address:
 - Mitigation of any damages during construction; and
 - Restoration of the premises at the termination of agreement
 - Must be signed by landowners
 - No valuation is required, but landowners are free to negotiate for compensation
 - Must file a copy of the agreement and a plat or diagram with BIA within 30 days after signing
 - Note: BIA does not “approve” the agreement, but will record the agreement in its land title and records office

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Subpart C: Obtaining a ROW

§§ 169.101(b), 169.102

- Surveying in preparation for requesting a ROW
 - No BIA approval required to survey land
 - Landowner consent is required (directly contact landowners for permission to access the land)
 - The local BIA agency can provide you with a list of landowners and contact information

Final Rule

Subpart C: Obtaining a ROW

§§ 169.101(b), 169.102

- Application

- Identify applicant, tract, ROW location, purpose, and duration, and who owns and is responsible for permanent improvements associated with the ROW
- Required supporting documentation:
 - Legal description of ROW and associated parcels
 - Map of definite location
 - **Bond or alternative security** (see next slide)
 - **Record of notice to all landowners** (see later slides)
 - **Record of landowner consent** (see later slides)
 - **Valuation, if applicable** (see later slides)
 - Corporate documentation, if applicable
 - Environmental and archeological reports
 - Statement that proposed use is in conformance with Tribal law, if required

Final Rule

Subpart C: Obtaining a ROW

§ 169.103

- Bond, insurance, or alternative security examples include:
 - CD
 - Irrevocable letter of credit
 - Treasury securities
 - Surety bonds
 - Assigned savings account
- BIA may waive security requirement if:
 - For Tribal land, Tribe determines that waiver is in its best interest
 - For individually owned land, owners of the majority of the interests request and BIA determines in owners' best interest

Final Rule

Subpart C: Obtaining a ROW

§ 169.103

- Bond, insurance, or alternative security amounts must cover:
 - Highest annual rent (unless one-time payment)*
 - Estimated damages from construction of permanent improvements
 - Estimated damages and remediation costs from any potential release of contaminants, explosives, hazardous material or waste
 - O&M charges (if land located in irrigation project)
 - Restoration and reclamation of premises

*Even if no security is required to cover the highest annual rent, because compensation is a one-time payment, security is still required to cover the remaining estimated damages and costs.

Final Rule

Subpart C: Obtaining a ROW

§§ 169.106 - 169.107

- Record of Notice
 - You must provide notice of the ROW to **all** the Indian landowners
- Record of Landowner Consent
 - Consent of the owners of a majority interest is required
 - If a Tribe owns any fraction of the land, then Tribal consent required
 - BIA may grant ROW without consent if ALL of the following:
 - Owners are so numerous (50 or more co-owners)
 - No substantial injury to land or any landowner
 - All landowners are adequately compensated
 - BIA provides 60-day notice of intent to all owners and provides landowners with 30 days to object

Final Rule

Subpart C: Obtaining a ROW

§§ 169.106 - 169.107

- Record of Landowner Consent (continued)
 - BIA will provide a template consent form, but landowners may add in their own terms
 - The restrictions and conditions set out in consents will become part of any ROW grant BIA ultimately issues

Final Rule

Subpart C: Obtaining a ROW

- Valuation & Compensation

§ 169.110

- Negotiate with Tribe and landowners on acceptable compensation
 - **BIA does not establish a ceiling on compensation amount**
- **For interests owned by the Tribe**, BIA will defer to the Tribe on what compensation is owed and whether a valuation is needed
 - As long as Tribe submits authorization stating that it has negotiated compensation, waives valuation, and determined compensation and waiver to be in its best interest
- **For individually owned interests**, a valuation and fair market rental are generally required, unless an exception applies
 - BIA may accept valuation prepared by a third-party if:
 - BIA determines it complies with USPAP & DOI policies; or
 - Another Federal agency prepared the valuation

Final Rule

Subpart C: Obtaining a ROW

§ 169.112

Exceptions for individually owned Indian land

- Valuation required unless:
 - ALL the landowners waive; or
 - BIA waives because:
 - Grantee is a utility cooperative providing a direct benefit to the Indian land; or
 - Grantee is a Tribal utility; or
 - Grantee will construct infrastructure improvements and BIA determines that waiver is in the landowners' best interests
- Fair market value required unless:
 - Grantee is a utility cooperative providing a direct benefit to the Indian land;
 - Grantee is a Tribal utility; or
 - Landowners waive right to FMV and BIA determines that waiver is in the landowners' best interests
- FMV for non-consenting landowners required unless (same 3 conditions as for waiver of valuation exist)

Final Rule

Subpart C: Obtaining a ROW

§§ 169.111, 169.113

- Compensation Reviews and Adjustments
 - Tribal land
 - No compensation review or adjustment required by BIA, but Tribe may require as a negotiated term of the grant
 - Individually owned land
 - Review of the compensation must occur at least every 5th year
 - 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

Final Rule

Subpart C: Obtaining a ROW

§§ 169.115 - 169.116

- Due date for compensation
 - If compensation is a one-time payment, the grantee must make the payment by the date BIA grants the right-of-way (unless the grant states otherwise)
 - If compensation is not a one-time payment, the grant must specify when payments are due
- Payments go to BIA unless direct pay is available.
 - Direct pay to landowners available if:
 - Their trust accounts are unencumbered
 - 10 or fewer landowners
 - All landowners agree to direct pay

Final Rule

Subpart C: Obtaining a ROW

§ 169.123

BIA Review of Your Right-of-Way Request

- Upon receipt of application package, BIA ensures package is complete
 - If incomplete, BIA sends you a letter identifying missing information
 - If complete:
 - BIA sends you a letter acknowledging the date of BIA received the complete package; and
 - BIA will review and issue decision within 60 days
 - 60-day clock for BIA review only starts when package is **complete** (see next slide)
 - If BIA misses the deadline, parties may file a notice to compel action

Final Rule

Subpart C: Obtaining a ROW

§ 169.123

- A complete application package includes:
 - Required application contents (see earlier slide)
 - Accurate legal description of ROW and associated parcels
 - Map of definite location
 - Bond or alternative security (if not waived by BIA)
 - Record of notice to all landowners
 - Record of landowner consent
 - Valuation, if applicable
 - Corporate documentation, if applicable
 - Environmental (CATEX, EA, or EIS) and archeological reports
 - Statement that proposed use is in conformance with Tribal law, if required by the Tribe

Final Rule

Subpart C: Obtaining a ROW

§ 169.124

- BIA Approval of Request
 - 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
 - BIA will defer, to maximum extent possible, to Indian landowners' determination that a ROW is in their best interest
 - BIA 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

Final Rule

Subpart C: Obtaining a ROW

§ 169.125

- The ROW Grant will:
 - Incorporate any restrictions/conditions set out in consents;
 - List restrictions/conditions set out in regulations, such as:
 - 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
 - Tribe maintains existing jurisdiction
 - Attach or incorporate by reference maps of definite location

Final Rule

Subpart C: Obtaining a ROW

§ 169.127

- New use within or overlapping existing ROW
 - Must obtain an amendment or 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
- If new use requires no ground disturbance → Apply for amendment
- If new use requires ground disturbance → Apply for new ROW
 - 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
 - Grantee is in compliance

Final Rule

Subpart C: Obtaining a ROW

§ 169.128

- If grantee wants to allow someone else to conduct the new use
 - If use within scope of grant (e.g. underground telephone line being used for an underground fiber optic line):
 - Then grantee must obtain an assignment to authorize the new user
 - If use not within scope of grant (e.g. a pipeline being used for a road):
 - Then the new user must request a new ROW within or overlapping the existing ROW for the new use

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Subpart D: Duration, Renewals, Amendments, etc.

§ 169.201

- Term/Duration

- Limited to time periods stated in grant
- Tribal land – BIA defers to Tribe's determination that the duration is reasonable
- Individually owned land – must be reasonable, depending on use based on these guidelines:
 - 20 years – oil and gas pipelines, aviation hazard easements
 - 50 years – for ROW for all other purposes, inclusive of the initial term and any renewals
 - Other durations if:
 - Benefits Indian landowners
 - Required by another Federal agency
 - Crosses Tribal land and Tribe negotiated for a different duration
 - Conservation easements must be a reasonable duration

Final Rule

Subpart D: Duration, Renewals, Amendments, etc.

§ 169.202

- ROW Renewal
 - Renewal = an extension of the duration with no other changes
 - BIA will renew if ALL of the following are met:
 - The renewal does not exceed the maximum term
 - Original ROW allows for automatic renewal and specifies compensation
 - Grantee attests there is no change in size, type, or location, etc.
 - The original term has not ended
 - No uncured violations exist regarding the regulations in this part or the grant's conditions or restrictions
 - 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

Final Rule

Subpart D: Duration, Renewals, Amendments, etc.

§§ 169.204 - 169.206

- Amendments

- An amendment is required to change any provision of a ROW grant. If the change is a material change, BIA may require a new application.
- Landowner consent is required for amendments
 - Except that: you may request BIA amend a ROW to make administrative changes without meeting consent requirements as long as you provide landowners with written notice.
- BIA Approval
 - Must approve within 30 days
 - Clock for BIA review only starts when package is **complete**
 - BIA will send you a letter acknowledging date of receipt
 - BIA may disapprove only for reasons listed in regulations

Final Rule

Subpart D: Duration, Renewals, Amendments, etc.

§§ 169.207 - 169.209

- Assignments
 - Landowner consent required unless grant expressly allows for assignments without consent
 - BIA approval
 - Required unless:
 - Original ROW allows assignments without approval; and
 - Parties provide BIA with a copy within 30 days of the assignment
 - BIA may disapprove only for reasons listed in regulations
 - Assignments resulting from corporate merger, acquisition or transfer by operation of law require only providing BIA (and Tribe for Tribal land) with a copy within 30 days

Final Rule

Subpart D: Duration, Renewals, Amendments, etc.

§§ 169.210 - 169.212

- Mortgages of Rights-of-Way
 - Landowner consent required, unless mortgaging without consent is expressly allowed
 - BIA approval required
 - BIA has 30 days to approve/disapprove
 - BIA may disapprove only for reasons listed in regulations

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Subpart E: Effectiveness

§§ 169.301 - 169.302

- 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
 - You must provide BIA with a copy for recording

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Final Rule

Subpart F: Compliance and Enforcement

§ 169.402

- BIA may investigate compliance with a ROW
- BIA will promptly initiate investigation if an Indian landowner notifies that a specific violation has occurred
 - May enter the right-of-way to ensure compliance:
 - At any reasonable time, upon reasonable notice; and
 - Consistent with any notice requirements under applicable Tribal law and applicable ROW documents
 - Tribe with jurisdiction may investigate compliance consistent with Tribal law

Final Rule

Subpart F: Compliance and Enforcement

§ 169.403

- Negotiated remedies for ROWs
 - You and landowner may agree to certain remedies for violations
 - Tribal land
 - The negotiated remedies must be stated in the Tribe's consent to the ROW grant
 - BIA approval of the termination is not required
 - Secretary (BIA) approves grant subject to negotiated remedies including Tribe's right to terminate without BIA action
 - The termination is effective without BIA cancellation
 - The Tribe must provide BIA with written notice of the termination

Final Rule

Subpart F: Compliance and Enforcement

§ 169.403

- Negotiated remedies for ROWs, cont'd
 - Individual Indian landowners
 - May negotiate remedies, so long as the consent also specifies the manner in which those remedies may be exercised
 - If the negotiated remedies provide one or both parties with the power to terminate the grant:
 - BIA concurrence with the termination is required
 - BIA will record the termination in the LTRO
- Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to BIA, as specified in the ROW grant.

Final Rule

Subpart F: Compliance and Enforcement

§§ 169.403

- ROW grant may provide that the Tribe will address violations and may 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 Tribal actions or proceedings, or if it is not appropriate for BIA to defer to them, BIA will follow the procedures on the following slides

Final Rule

Subpart F: Compliance and Enforcement

§ 169.404(b)

- If violation (other than nonpayment):
 - BIA will promptly send grantee a notice of violation
 - Will also send to the Tribe for Tribal land, or provide constructive notice to Indian landowners for individually owned Indian land
 - Notice of violation will 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

Final Rule

Subpart F: Compliance and Enforcement

§ 169.404(c)

- If failure to pay compensation in time and manner required by grant:
 - BIA will send grantee a notice of violation promptly following the date payment was due
 - BIA will send copy of such notice to Tribe for Tribal land, or provide constructive notice to Indian landowners for individually owned Indian land
 - Notice of violation will require grantee to provide adequate proof of payment

Final Rule

Subpart F: Compliance and Enforcement

§ 169.405

- If grantee does not cure a violation or provide adequate proof of payment by the deadline:
 - BIA will 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 wish to 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

Final Rule

Subpart F: Compliance and Enforcement

§ 169.405(b)

- 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 take action to recover any unpaid compensation even though we cancel the grant.
- To cancel:
 - BIA will send grantee a cancellation letter within 5 business days of decision
 - BIA will send a copy of the cancellation letter to the Tribe for Tribal land, and provide actual or constructive notice to individual landowners

Final Rule

Subpart F: Compliance and Enforcement

§ 169.405(c)

- The cancellation letter will:
 - Explain the grounds for cancellation
 - State amount of any unpaid compensation or late payment charges due
 - Notify the grantee of right to a 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.

Final Rule

Subpart F: Compliance and Enforcement

§ 169.408

- Cancellation for Abandonment or Non-Use
 - BIA may cancel a ROW grant 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 – see new definition of “abandon”)

Final Rule

Subpart F: Compliance and Enforcement

§ 169.410

- “Holdovers”
 - BIA may treat unauthorized possession of Indian land as a trespass
 - If a grantee remains in possession after the expiration, termination, or cancellation of a ROW, and
 - Grantee is not accessing the land to perform reclamation or other remaining grant obligations
 - BIA will communicate with the landowners to determine whether to treat the unauthorized possession as a trespass

Final Rule

Subpart F: Compliance and Enforcement

§ 169.410

- “Holdovers” (continued)
 - BIA may take action to recover possession and pursue additional available remedies
 - Unless the parties have notified BIA in writing that they are engaged in good faith negotiations to renew or obtain a new ROW
 - The holdover time will be charged against the new term

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- **Effective Date**

Effective Date

- The final rule becomes effective on **March 21, 2016**
 - Final rule applies to all ROWs issued on or after 3/21/2016
 - If ROW granted before 3/21/2016
 - **Procedural provisions** of final rule apply, unless they conflict with explicit provisions in the grant or authorizing statute (then that explicit provision of grant/authorizing statute applies)
 - Examples of procedural provisions:
 - Requirements to obtain landowner consent and BIA approval for assignments, amendments, and mortgages
 - Enforcement provisions
 - Recordation requirements

Effective Date (continued)

- If ROW application pending as of 3/21/2016
 - Applicant may choose to withdraw and resubmit
 - Applicant may choose to proceed under old rule, then:
 - BIA reviews application under rule (and application requirements) in effect at time of submission and
 - Once BIA grants the ROW, **procedural provisions** of the final rule apply, unless they conflict with explicit provisions in the grant or authorizing statute (then that explicit provision of grant/authorizing statute applies)
 - » (See prior slide for examples of procedural provisions)

Effective Date (continued)

- Examples of **non-procedural/substantive provisions** that will not apply to ROWs approved prior to, or pending as of, 3/21/16
 - Requirements for determination of compensation (not compensation itself), compensation reviews or adjustments
 - Jurisdiction
 - Duration of the right-of-way
 - Bond requirement
- To the maximum extent possible, BIA will interpret any ambiguous language in the right-of-way document or statute to be consistent with the final rule

Effective Date (continued)

- Past assignments
 - For any assignments completed before 3/21/2016, the current assignee must by 07/17/2016, either:
 - Provide BIA with documentation of past assignments; or
 - Notify BIA it needs an extension and explain reason
- Under old and new rule, BIA may pursue trespass for anyone found to be occupying Indian land without proper authorization
 - ROW grant of easement
 - Documentation of assignment or other documentation explaining that you are the assignee

Questions?

- Contact information for BIA regions & local agencies:
 - <http://www.bia.gov/WhoWeAre/RegionalOffices/index.htm>
- Sharlene Roundface, Chief, Division of Realty, BIA
Sharlene.Roundface@bia.gov
(202) 208-3615