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”
Proposed Rule - Overview

- Subpart A – Purpose, Definitions, General Provisions
- **Subpart B – Obtaining a Right-of-Way**
  - Subpart C – Term, Renewals, Amendments, Assignments, Mortgages
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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

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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

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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.
Proposed Rule - Overview

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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, avigation hazard easements
    • Consistent with use – service roads and trails essential to ROW purpose, conservation easements

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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

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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

August 2014
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 - Overview

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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
• 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
• 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
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