



FINAL RULE: RIGHTS-OF-WAY ON INDIAN LAND

Available at: <http://www.bia.gov/WhoWeAre/AS-IA/ORM/RightsofWay/index.htm>

Frequently Asked Questions: Updated 03-10-2016

FREQUENTLY ASKED QUESTIONS: ROW FINAL RULE

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GENERAL

Why does the Bureau of Indian Affairs (BIA) regulate rights-of-way across Indian land?

The Department of the Interior holds approximately 56 million acres of land in trust for Indian Tribes and individual Indians. Congress has enacted laws requiring Departmental approval of rights-of-way across Indian lands.

Why is this rule needed?

Regulations to promote economic development in Indian country must reflect twenty-first century needs of tribal communities and foster tribal self-determination. This rule replaces regulations that were promulgated over 40 years ago and last updated over 30 years ago. The new rule reflects modern requirements for rights-of-way and the need for faster timelines and a more transparent process for BIA approval. This modernization will provide more certainty to Tribes and the public, thereby promoting economic development and Tribal self-determination.

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Final Rule: Rights-of-Way on Indian Land

What does this rule do?

This rule updates 25 CFR 169, Rights-of-Way on Indian Land, to:

- Streamline and clarify the process for BIA approval of right-of-way grants on Indian land;
- Support Tribal and allottee decisions regarding use of their land;
- Increase flexibility in compensation and valuations;
- Protect trust property.

How does this rule streamline the BIA approval process?

The rule streamlines the BIA approval process for rights-of-way by:

- Establishing deadlines for BIA action on submitted rights-of-way documents;
- Promoting certainty for right-of-way approvals unless BIA finds a compelling reason not to, based on certain specified findings;
- Eliminating the requirement for applicants to obtain BIA approval to access Indian land to survey it in preparation for a right-of-way application; and
- Promoting certainty by clarifying that BIA approvals of rights-of-way documents are effective on the date of approval, even if an administrative appeal is filed.

How does this rule clarify the process for obtaining rights-of-way on Indian land?

The rule clarifies the process for obtaining rights-of-way on Indian land by:

- Explaining when a use is a “service line” rather than a right-of-way;
- Delineating when a BIA-approved right-of-way is required;
- Clarifying when new, additional uses, known as “piggybacking,” require a new or amended rights-of-way;
- Defining what a renewal is and the process for obtaining one; and
- Specifying when BIA approval and landowner consent of amendments, assignments, and mortgages of rights-of-way is necessary and the process for obtaining approval.

What time limits does the rule establish for BIA action?

The rule requires that BIA issue a decision on a right-of-way grant within 60 days of receiving a complete application and a decision on an amendment, assignment, or mortgage of a right-of-way within 30 days of receiving an application. The rule provides that if action is not taken by these timelines, the applicant can elevate the matter to the BIA Regional Director, then the BIA Director.

How does this rule support landowner decisions regarding use of their Indian land?

The final rule requires Tribes and allottees be kept informed of potential right-of-way actions on their land; explicitly allows for landowners to negotiate with applicants for rights-of-way; and provides that BIA will defer, to the maximum extent possible, to Tribal and allottee decisions.

How does the rule increase flexibility in compensations and valuations?

For rights-of-way on Tribal land:

The rule promotes Tribal self-determination by ensuring that Tribes receive just compensation for rights-of-way on Tribal land, as determined by the Tribes themselves. Compensation may be in any amount the Tribe negotiates, or may be an alternative form of rental, such as in-kind consideration. The BIA will not require a valuation, if the Tribe provides documentation that the Tribe has determined the compensation is in its best interest.

For rights-of-way on individually-owned Indian land:

Compensation must be at least fair market rental, as determined by a valuation, unless:

- Grantee is a Tribal utility;
- Grantee is a utility cooperative and is providing a direct benefit to the Indian land; or
- Landowners waive or the grantee will construct infrastructure improvements on, or serving, the premises and BIA determines it is in the best interest of all landowners.

In addition, if BIA determines it is in the Indian landowners' best interest, then the grant may provide for alternative forms of rental or varying types of compensation.

How does this rule help protect Indian land?

The rule includes several provisions to better protect Tribes' and allottees' trust or restricted property, such as:

- Establishing guidelines for "reasonable" durations of rights-of-way on allottee land;
- Adding that a bond, insurance, or other security is required to be provided with the application, rather than a deposit;
- Clarifying when "piggybacking" requires a new or amended rights-of-way; and
- Setting out compliance and enforcement procedures for trespass, abandonment and non-use, and failure to make payments.

How does this rule clarify laws, and jurisdiction over land subject to rights-of-way?

The rule clarifies that the grant of a right-of-way has no effect on Tribal jurisdiction, and requires right-of-way grant documents to reserve Tribal jurisdiction. The rule also clarifies that rights-of-way are generally subject to Federal and Tribal law, but not State law. These provisions of the rule are intended to support Tribal self-determination and self-governance.

How does this rule address taxation?

The rule provides that, subject to applicable federal law, state and local taxation of improvements and activities on land subject to a right-of-way are prohibited. Tribes may tax such improvements and activities. BIA will not give tax advice.

What are some other significant improvements this rule makes to rights-of-way?

The rule also:

- Eliminates outdated requirements specific to different types of rights-of-way;
- Clarifies that a right-of-way grant may include provisions requiring the grantee to give a preference to qualified Tribal members, based on their political affiliation with the Tribe; and
- Allows for direct pay of rights-of-way where there are 10 or fewer landowners, and all landowners consent to direct pay.

EFFECTIVE DATE OF NEW RULE

When is this rule effective?

The final rule is effective on March 21, 2016, except that current assignees have until July 17, 2016 to provide BIA with documentation of past assignments that they continue to occupy on Indian land.

Is the final rule retroactive?

Procedural provisions of the final rule do apply to existing grants, except where there is a conflict with the grant or authorizing statute.

Non-procedural (i.e., substantive) provisions of the final rule do not apply retroactively.

If I already hold a right-of-way over or across Indian land on March 21, 2016, what provisions of the new rule apply to me?

If you hold a right-of-way over or across Indian land that was granted prior to March 21, 2016 (“preexisting grant”), all procedural provisions of the new rule apply to that grant. The only exception is that if the procedural provisions of the new rule conflict with the explicit provisions of the preexisting grant or statute authorizing the right-of-way document, then the provisions of the right-of-way grant or authorizing statute apply instead.

What are examples of procedural provisions?

Procedural provisions include, but are not limited to:

- Requirements to obtain landowner consent for amendments, mortgages, and assignments;
- Requirements for BIA approval of amendments, mortgages, and assignments;
- Tribal and BIA compliance and enforcement procedures.

What are examples of substantive (non-procedural) provisions?

Non-procedural provisions include provisions regarding essential terms of the right-of-way including:

- The duration of the right-of-way;
- The compensation established in the grant;
- Jurisdiction;
- Requirements for periodic reviews and adjustments of compensation; and
- Whether and how much bonding is required.

What is an example of a conflict between the procedural provision of the new rule and explicit provisions of the pre-existing right-of-way document?

The requirements to obtain landowner consent and BIA approval for mortgages are procedural provisions of the new rule. These regulatory requirements would conflict with explicit provisions of the preexisting right-of-way grant if the preexisting grant explicitly states that the grantee is authorized to mortgage the right-of-way without landowner consent or BIA approval. In that scenario, the explicit provisions allowing mortgaging of the right-of-way without landowner consent or BIA approval would apply, rather than the new regulatory provisions requiring landowner consent and BIA approval of mortgages.

My preexisting right-of-way grant states that the right-of-way is granted to “successors and assigns” – is that considered an explicit provision allowing assignments without further landowner consent or BIA approval?

Many preexisting right-of-way grant documents state that the right-of-way is granted to “successors and assigns.” BIA interprets that provision to be an explicit provision allowing for assignment of the right-of-way without landowner consent or BIA approval of the assignment; however, the assignee must comply with new regulatory requirements to provide documentation of the assignment to BIA.

My preexisting right-of-way grant is silent on assignments. Do I need to comply with the new rule’s requirements for obtaining landowner consent and BIA approval of assignments after March 21, 2016?

Yes. If your preexisting right-of-way grant is silent as to assignments, you must comply with the new rule’s requirements for obtaining landowner consent and BIA approval for any assignment you make after March 21, 2016.

If I submitted a request for a right-of-way prior to March 21, 2016, will BIA review the request under the old rule or new rule?

If you submitted a request for a right-of-way prior to March 21, 2016, you may choose to:

- Withdraw the document and resubmit after March 21, 2016, in which case all provisions of the new rule will apply to your request; or
- Proceed without withdrawing, in which case:
 - BIA will review the application under the regulations in effect at the time of your submission; and
 - Once BIA grants the right-of-way, the procedural provisions of new rule apply except that if the procedural provisions of this part conflict with the explicit provisions of the right-of-way grant or statute authorizing the right-of-way document, then the provisions of the right-of-way grant or authorizing statute apply instead. Non-procedural provisions of this part do not apply.

ASSIGNMENTS

I have a right-of-way on Indian land that I received through an assignment. What should I do by July 17, 2016?

If you are the assignee of a right-of-way over or across Indian land and you are unsure whether BIA has a record of your assignment, you should contact your local BIA agency to ensure that BIA has a record of your assignment.

How do I contact the local BIA agency?

Your local BIA agency can be found by first choosing your region, then your agency at this website: <http://www.bia.gov/WhoWeAre/RegionalOffices/index.htm>.

What documentation must I provide to BIA?

If BIA does not have a record of your assignment, you should provide documentation of the assignment or some other documentation demonstrating that you have the right to occupy the right-of-way on Indian land. If possible, you should provide the chain of title showing all assignments from the original grant from BIA to your assignment. If that documentation is not available, you may submit an affidavit with any other known or readily discoverable information regarding the assignment and chain of title.

What are the consequences if I fail to ensure BIA has documentation of the assignment?

If BIA does not have a record demonstrating that you have the legal right to occupy Indian land, you risk BIA pursuing an enforcement action against you for trespass.

What if I do not have documentation showing the chain of title authorizing my possession of a right-of-way?

If you do not have documentation showing the full chain of title authorizing your possession of a right-of-way, provide the local BIA agency with the information you do have and provide a sworn affidavit explaining the circumstances. BIA may require you to apply for a new right-of-way if it has no record of the original grant or the term of the original grant has expired.

Are there any exceptions to the requirement to obtain landowner consent and BIA approval for assignments?

If the assignment is the result of a corporate merger, acquisition, or transfer by operation of law, you do not need landowner consent or BIA approval of the assignment; however, you must provide a copy of the assignment and supporting documentation to BIA (and to the Tribe, for Tribal land) within 30 days of executing the assignment so that BIA may record the assignment in the Land Title and Records Office. Likewise, if the new right-of-way authorizes assignments without approval, you must only provide a copy of the executed assignment to BIA within 30 days of the assignment to allow for recording in the Land Title and Records Office.

Is there a standard form for assignments or standard requirements that must be included in the assignment document?

There is no required form for assignments, but BIA may provide you with a template form. Regardless of whether a form is used, each assignment should clearly state that the assignee agrees to be bound by the terms of the right-of-way grant.

Is compensation required for assignments?

The regulations do not require compensation for assignments, but if landowner consent of the assignment is required, the landowners may choose to require compensation.

Can an assignment be for a partial interest?

Yes. Nothing in the regulations prohibits an assignment of part of a right-of-way grant.

SERVICE LINES VERSUS RIGHTS-OF-WAY

Must I obtain a right-of-way to construct a service line branching off another service line?

A service line is a utility line running from a main line, transmission line, or distribution line that is used only for supplying telephone, water, electricity, gas, internet service, or other utility service to a house, business, or other structure. See § 169.51. If there is an existing service line, and you want to construct another service line branching off from it, the existing service line becomes a main line for which a right-of-way grant is needed. You may either:

- Obtain a right-of-way grant for the existing service line (which is now a main line) and file a service line agreement for the new service line; or
- Construct the new service line all the way back to the original distribution line under a service line agreement.

Is a fracking line a service line?

A fracking line does not meet the definition of a service line, because it is not a utility line running from a main line used only to supply utility service to a single structure. See § 169.51.

INFORMATION FOR LANDOWNERS

How do I know if there is a right-of-way on my land?

BIA provides each landowner with quarterly reports of all the rights-of-way over and across the landowner's land and their expiration dates. Review your report to see if there are any rights-of-way on your land. If you need assistance reviewing your report or if you have not received a report but believe there are rights-of-way on your land, please contact your local BIA agency.

What if someone is on my land, but doesn't have a right-of-way or other authorization to be there?

Contact your local BIA agency if you believe someone is trespassing on your land.

What if a grantee is violating the terms of the right-of-way?

If you have information that the grantee is violating the terms of the right-of-way, contact your local BIA agency.

DURATION

Will BIA allow for rights-of-way grants in perpetuity if the purpose of the right-of-way is for the benefit of the community?

The final rule provides that BIA will defer to the Tribe's determination as to what right-of-way duration is reasonable on Tribal land, so if the Tribe determines a right-of-way in perpetuity is reasonable on Tribal land, BIA will defer to that determination. For individually owned Indian land, BIA will look to the durations listed in the final rule as guidelines for what duration is reasonable. Under those guidelines, BIA will consider a right-of-way with a term beyond 50 years if it would benefit the Indian landowners or the tribe has negotiated for a different duration and the right-of-way crosses Tribal land.

What happens if the right-of-way for my pipeline has expired?

If you are a grantee whose right-of-way has expired, you must obtain a new right-of-way or seek permission to access the land to remove existing infrastructure.

What happens if my right-of-way has expired but I continue to occupy the right-of-way while negotiating for a new right-of-way grant?

Generally, if you are a "holdover" (meaning you remain on the premises following expiration of a right-of-way grant), you are considered to be in trespass. However, if the parties have notified BIA in writing that they are engaged in good faith negotiations to renew or obtain a new right-of-way, BIA may forgo taking action to recover possession. See § 169.410.

Is the time a holdover time charged against the new term?

Yes, the time the grantee spends negotiating for a new right-of-way after expiration of the old right-of-way is charged against the term of the new right-of-way. See § 169.410.

NOTICE

What is actual notice versus constructive notice?

Actual notice means notice directed to a specified individual by mail or in person. Constructive notice means notice by publication in a local newspaper, posting at a central location, and/or announcements at local events or on local radio.

Does the rule provide for actual notice or constructive notice?

The final rule provides for actual notice to landowners in every instance except when BIA issues a notice of violation to the grantee. In that case, BIA provides constructive notice to the individual Indian landowners of the notice of violation. See § 169.404(b)-(c). (Note that BIA consults with landowners, where feasible, if the grantee does not cure the violation and provides all landowners with actual notice if BIA cancels the right-of-way grant. See § 169.405).

CONSENT

Is Tribal consent required for a right-of-way?

If the Tribe owns any interest in the land, Tribal consent is required for the right-of-way.

What if the Tribe obtains an interest after BIA has received an application for the right-of-way?

The ownership, for the purposes of consent, is calculated as of the date the applicant submits an application. So if a Tribe did not own an interest at that time, then no Tribal consent was required.

Is the AIPRA “sliding scale” applicable to rights-of-way?

The final rule implements the general authority for rights-of-way in the 1948 Act, which requires only that the owners of the majority interest in the land consent to the right-of-way. BIA relies on the “sliding scale” for consent in the American Indian Probate Reform Act (AIPRA) amendments to the Indian Land Consolidation Act are generally not applicable.

APPRAISALS AND COMPENSATION

Is a valuation or compensation required if the grantee is a utility cooperative providing a direct benefit to the Indian land or a Tribal utility?

Compensation is not required if the grantee is a utility cooperative providing a direct benefit to the Indian land or a Tribal utility, and BIA may waive a valuation.

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May landowners waive the right to compensation?

Landowners may waive the right to compensation and BIA may determine the waiver is in their best interest, but any landowner who does not waive their right must receive fair market value. A valuation is required so that landowners know the amount of compensation they are waiving, unless 100% of the landowners waive their right to compensation.

SPECIFIC CIRCUMSTANCES

What happens if the land is severely “checkerboarded” (comprised of Federal land, State land, fee land, and Indian land)?

To the extent your right-of-way will be over or across Indian land, you must obtain a right-of-way by following the final rule.

Do temporary water lines need a right-of-way grant?

If you are person or legal entity who is not an owner of the Indian land, then you must obtain an approved right-of-way grant under the final rule to go over and across Indian land, with a water line or otherwise.

What if I have a right-of-way on land, and the land is then acquired into trust (becomes Indian land)?

Usually, land is acquired into trust subject to existing rights-of-way. Check the transaction documents and contact your local BIA agency to determine whether the transaction affected your right-of-way.