DEPARTMENT OF THE INTERIOR
OFFICE OF THE ASSISTANT SECRETARY-INDIAN AFFAIRS

RIGHTS-OF-WAY ON INDIAN LAND
Proposed Rule - 25 CFR 169

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(Original)
MS. APPEL: Good afternoon, everyone. We're going to get started, and maybe, Stan Webb may be joining us later.

My name is Liz Appel. I am the director of the Office of Regulatory Affairs, under the assistant secretary for Indian Affairs. With me I have Stephen Simpson, who's with our Office of the Solicitor, Division of Indian Affairs. And Stan Webb may be joining us later. He's with the Western Regional Office, he's a realty specialist there.

So you all should have received handouts. In your handouts, is a copy of the proposed rule that we're going to be discussing today and a little fact sheet on the proposed rule. And also is a copy of the presentation. So basically the plan is I'm going to run through the preparation to give an overview of the proposed rule on rights-of-way. And then we'll open it up for comments and questions. And this is tribal consultation, so if there are any tribal leaders, tribal representatives present, if you could, if they would speak first and if everyone would respect that, allowing them to speak first, then that would be best. So I will, as I said, first run through the presentation, and then we'll open it.

So we're here today to discuss a proposed
rule that was published in the Federal Register in June on addressing rights-of-way on Indian land. And this is part of a broader effort on behalf of the Department to improve the way the Department fulfills its trust management efforts. And these efforts started back in the early 2000s as part of a broader effort, but ultimately we focused on land management and updating the leasing regulations.

And in 2012, we updated those parts of the leasing regulations that addressed residential business and wind and solar leasing on Indian land. And by "Indian land," of course I mean land that is held, that the U.S. holds in trust or restricted status for Indian tribes or individual Indians.

So we held tribal consultations on both draft and proposed versions of the leasing regulations, and the regulations have evolved considerably during that time and they were finalized in December of 2012.

During those consultations and public meetings, we heard pretty often from people that rights-of-way should be the next, next focus for improving the land management regulations. So once we finalized the leasing regulations, we turned our attention to rights-of-way. And we had a work group of subject-matter experts to look at the rights-of-way regulations and draft some updates.
And we had had mostly realty officers from Bureau of Indian Affairs; Stephen Simpson, from the Office of the Solicitor; another, Jennifer Turner, from the Office of the Solicitor. And once that work group developed the draft, we distributed that draft throughout the Bureau of Indian Affairs, to all the realty officers. So this proposed rule really reflects the input of all of the bureau subject-matter experts.

So the proposed rule, as I said, was published in June. And the current right-of-way regulations -- they are at Part 169, of course, of the proposed rule; they will also be at 169 -- but they were published back in 1968. And they were updated a few times, but there haven't been any updates since 1980.

And the current, the current regulations really rely on specific statutory authorities that are different for each type of right-of-way, for railroads, telegraph lines, and back in even 1980, they may not have been considering the more advanced technology that we would want rights-of-way for now.

So the proposed regulations try to simplify the approach by relying on the general statutory authority for granting rights-of-way, at 25 USC 323, which I think is the 1948 Act. So as far as our legal team has determined, there's no benefit lost by removing the specific statutory CANYON STATE REPORTING (602)277-8882
But this is a proposed rule, and if anyone else identifies some specific benefit that will be lost by removing those specific statutory authorities, please comment on that.

Sorry, I'm not used to the desert air here.

Taking a step back, this is a proposed rule; this is not set in stone. We're here today because we want your comments. And we have a comment period open, so anything that I run through today, please, if you disagree, if you think that another approach is better, please let us know.

So, as I was saying, we had already been through the updates to the leasing revisions. Several of the policy approaches that we took in those leasing regulations, we've -- the work group has adapted to the rights-of-way and this proposed rule.

So, for example, the proposed rule establishes time lines for BIA to review requests for rights-of-way. It more clearly sets out the processes for BIA to review rights-of-way documents. It allows BIA to disapprove a right-of-way request, only in certain limited circumstances. And it defers to tribes on compensation, on the amount of compensation for tribal land.

So I'm going to try and really quickly run
through each of the subparts of the proposed rule.

The first, addressing the purpose, definitions. In an effort to make the rule more transparent, the proposed rule includes a lot of new definitions. It also sets out specifically what Part 169 applies to and what happens if there's a life estate on the land.

Then some of the general provisions that are in the updated leasing regulations are also included in this proposed rule regarding when a right-of-way is needed, whether tribes can contract or compact the right-of-way functions, what laws and taxes apply, and how BIA provides notice of the rights-of-way and what decisions can be appealed and who qualifies as an interested party in those appeals.

So obtaining the right-of-way, the first pretty significant change the proposed rule makes to the process is removing the requirement for BIA to approve surveys on Indian land. So when a right-of-way applicant is preparing their application for the right-of-way, they need to survey, they no longer need to go to the two tiers of BIA review. They'll still need to get approval from the land owners to access the land and survey the land, but there will be no BIA approval required. So the only BIA approval will be part for the actual right-of-way.
So the right-of-way application contents are set out in the proposed rule. And one of the new things is a bond or alternative security, rather than just a deposit, so we will talk about that.

The consent requirements, tribal consent is required for tribal land. And under the general statutory authority, consent of the owners of the majority interest in the land is required for individually owned land. And there are certain circumstances in which BIA can grant the right-of-way without consent under the statute, if the owners are so numerous that it would be impracticable to obtain the consent, that BIA can consent on behalf of them.

And the regulation tries to clarify when that would be appropriate by defining "so numerous" to mean 50 or more but less than 100 owners, where no owner or single owner holds an interest greater than 10 percent or where there are 100 or more co-owners. And those numbers, that definition comes from AIPRA, from the definition of highly fractionated land.

So the bond or alternative security can be a CD, an irrevocable letter of credit, treasury securities, security bond, and even an assigned savings account. And that bond has to cover the highest annual rent, the estimated damages from construction of permanent improvements in the right-of-way. If the land is in an

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irrigation project, it has to include operation of
maintenance charges, and the bond must cover restoration and
reclamation of the premises.

There are certain circumstances in which BIA
can waive the requirement for a bond or security. And where
it's tribal land, BIA is going to defer to the tribe, if the
tribe determines that a bond is not needed. For
individually owned land, BIA can waive only if owners of the
majority of the interest request and there's a best-interest
determination.

For compensation, another significant change
is that BIA is going to defer to the tribe on what the
adequate compensation is. And the tribe may also waive the
valuation for individually owned land. Market value is
still required, unless BIA determines a waiver is in the
landowners' best interest.

And valuation is also required, unless all
the landowners waive or the grantee will construct
infrastructure improvements that benefit the landowners.
And, again, BIA makes the determination that it's in the
landowners' best interest. And that provision also mirrors
what is in the new leasing regulations.

Compensation, if it's a one-time payment, is
due within ten days of the grant or whenever the grant
specifies that it's due. Direct pay is available under the
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proposed rule only under limited circumstances where there are ten or fewer landowners and they all agree and their trust accounts are unencumbered, and that's real for administrative efficiency.

Reviews and adjustments, the proposed rule addresses whether there must be compensation reviews or adjustments.

There's Stan. Stan, feel free to come on up.

For tribal land, reviews and adjustments are not required, unless the tribe indicates that they would like for them to be required.

For individually owned land, they are not required under certain circumstances, for example, if the payment is in a lump sum, if the right-of-way duration is just for five years or less, if the grant provides for automatic judgments, or if BIA makes that best-interest determination.

So I mentioned that BIA is going to have time lines. When BIA receives an application package, BIA first is going to review it to make sure it's complete, and that means with all the supporting documents, including the environmental documents.

If it's incomplete, BIA will notify the applicant that it's incomplete. If it's complete, BIA will send a letter acknowledging the date of the receipt.
within 60 days, BIA must review and issue a decision on that right-of-way application.

So the date, the letter acknowledging the date of receipt is so that everybody knows what the start date is and, ultimately, when the due date is for BIA to make that decision. So the 60-day clock, I think I mentioned, begins only when the package is complete. So that includes any NEPA or valuation documents. And if BIA misses the deadline, then the parties can file a notice to compel action.

There are limited grounds for BIA to disapprove a right-of-way application. If the consents haven't been obtained or another requirement of the regulations hasn't been met or if there's some other compelling reason to withhold approval in the best interest of the landowners. But, overall, BIA is going to defer, as much as possible, to the landowners' determination that the right-of-way is in their best interest and may not unreasonably withhold approval.

BIA, the proposed rule clarifies that BIA has the discretion, where there are multiple tracts traversed by the right-of-way, BIA may grant one right-of-way for all of those tracts or issue separate grants for separate tracts or groups of tracts.

The right-of-way grant will incorporate any CANYON STATE REPORTING (602) 277-8882
restrictions or conditions that are in the consent, and
there are certain conditions that the regulations set out
that will also be included in the grant. And the grant will
also incorporate maps of definite location.

So as far as a new use, this is what this
slide is addressing, piggybacking. The proposed rule tries
to clarify how BIA is going to approach piggybacking of
rights-of-way. So if there's a new use within or
overlapping an existing right-of-way, the proposed rule
would require a new right-of-way if the original grant
doesn't specify that new use or if the new use is not within
the same scope of the use that the original grant specifies.

So, in other words, new right-of-way is not
required and you may piggyback if the new use is within the
same scope of use that the original, is specified in the
original grant. So BIA will grant the new right-of-way if
the new right-of-way does not interfere with the use or
purpose of the existing right-of-way and the existing
grantee consents.

So subpart C addresses the term and then
renewals and amendment. The right-of-way term must be
stated in the right-of-way grant, and BIA is going to defer
to the tribe's determination as to what an appropriate term
is.

For individually owned land, the term must be
reasonable depending on the use. And the proposed rule sets out some guidelines as to what may be appropriate terms for various types of rights-of-way.

And we're particularly interested in your comments on these, whether these terms are appropriate.

BIA will renew an original right-of-way, if the original allows for renewal and specifies what the compensation will be and the grantee attests that there's no change in the size, type, or location, so it's a true renewal. And, of course, if the landowners consent.

But the proposed rule would allow the original right-of-way to allow for renewal without landowner consent. And if there's a change, that there's going to be a change in the size, type, location, or duration of the right-of-way, then the grantee has to apply for a new right-of-way, rather than a renewal.

The proposed rule sets out the processes for amending or assigning or mortgaging a right-of-way and basically sets another timeline for BIA approval. The timeline in each of these instances is 30 days, rather than 60 days for the original right-of-way. Again, the clock starts when BIA receives the complete package for review.

BIA approval of an amendment is required for any change to a right-of-way to accommodate a change in the location of a permanent improvement, if the change in
location to previously unimproved land is within the
right-of-way corridor. But if you're amending a
right-of-way grant just to correct a legal description or
make another technical correction, then a full amendment
isn't required, an approval.

Landowner consent is required for amendments,
and BIA may only disapprove under certain limited
circumstances.

For assignment, BIA approval is required to
assign any right-of-way, unless the original right-of-way
allows assignments without approval, and the parties provide
BIA with a copy of the assignments so the BIA knows at all
times who the grantee is. And landowner consent is also
required. And, again, there are limiting grounds on which
BIA may disapprove an assignment.

BIA approval is required for mortgages, and
landowner consent is required. And there are limited
grounds for disapproval or mortgaging a right-of-way grant.

Right-of-way documents are effective as soon
as BIA approves them, even if an appeal under the
administrative appeal provision is filed. And BIA will
record the right-of-way documents in the Land, Title, and
Records Office immediately following approval.

If there is no BIA approval required, the
grantee still has to provide BIA with a copy for recording.
And the tribe has to record any grant for tribal utility that’s not a separate legal entity, for example, or a grant on tribal land under a special act of congress that authorizes grants without BIA approval.

BIA may investigate compliance with the right-of-way and enter the premises to ensure compliance at any reasonable time, upon reasonable notice, and consistent with any notice requirements under tribal law and under the right-of-way documents, if the right-of-way documents impose restrictions. And BIA will promptly investigate if a landowner notifies BIA of a specific violation of the right-of-way.

Rights-of-way may include negotiated remedies. They would be included in the landowners' consent to the right-of-way grant and if the grant provides one or both parties with the power to terminate the right-of-way for tribal land or BIA approval. But for individually owned land, BIA has to approve. And these negotiated remedies may be in addition to or instead of the cancelation remedy that BIA already has.

The right-of-way grant can also provide that the tribe will address violations and have, held disputes will be resolved, whether in tribal court or in other forum. And BIA will generally defer to those.

So the proposed rule sets out the process if
there's a violation, basically sending -- BIA will send a notice of the violation and require the grantee to address it within ten business days. The same type of process occurs if there's a failure to pay rent or compensation. And if the grantee doesn't cure the violation or provide the payment by the deadline, then BIA is going to consult with the landowner.

So if it's tribal land, BIA will consult with the tribe. If it's individually owned land, as much as feasible BIA will consult with the individual landowners. And in their consultation, they'll determine whether they should cancel the grant or use other remedies or give the grantee additional time to address the violation.

So the proposed rule sets out the process for canceling the right-of-way and what the cancelation letter must say, when the cancelation is effective, and it also distinguishes abandonment from nonuse. So in the case of a grantee not using the right-of-way for a consecutive two-year period, for the use for which the right-of-way was granted, BIA may cancel the right-of-way within 30 days after mailing notice. And the same is true if the grantee abandons it, which is defined in the proposed rule as the grantee affirmatively relinquishing the right-of-way.

Finally, the proposed rule clarifies that BIA approval is not required for service line agreements.
Service lines are defined as utility lines running from a main line that's used only to supply the owners or occupants of the land with telephone, water, electricity, or other home-utility service.

And the current regulation includes a capacity limitation, but the proposed regulation does not. And while BIA approval is not required for service line agreements, the proposed rule does require that they, the agreement address mitigation of any damages that may occur during construction and restoration of the premises, and that the parties file the agreement in a plat with BIA within 30 days after signing so that BIA can put it in the LTRO and know that it's there.

Comments on the proposed rule are due August 18th. We've received several requests for an extension of that comment deadline, and those are under consideration. We hope to have a decision on that in the next couple days, by early next week at the latest. Email is the preferred way to submit comments, but there are other, you can also submit them by mail or through the federal regulations.gov website.

So once the comment period closes and we've collected all the comments we'll have, we'll reconvene a working group internally to go through all the comments. And all the comments that you make today will be transcribed.
by our court reporter here, and they will be included with the written comments that will be reviewed.

The work group will make any changes that are appropriate to the proposed rule and then publish a final rule in the Federal Register. And that final rule will then become effective 30 days, or no sooner than 30 days after publication.

So that is the quick-and-dirty overview of the proposed rule. Maybe not so quick. So what we're going to do now -- and Stan Webb has joined us. I don't know...

MR. WEBB: I don't have any comments. Liz had asked me to be available. And if there are any questions, maybe discuss what and how, what existing regional policy is or maybe help frame some of the questions, if necessary.

So I'm the regional realty office for BIA, the western regional office in downtown Phoenix. We've got jurisdiction over Arizona, Nevada, Utah, and a little bit of Southern California. I'm glad to be here, and I apologize for being late.

MS. APPEL: Okay. So what we'll do now is open up to you all for your comments and questions. And since we are having this transcribed today, I would ask that you come forward to the microphone and introduce yourself and your affiliation so that our court reporter can capture
MR. HARVIER: Good afternoon. Thank you. By way of introduction, my name is Martin Harvier. I'm the current vice president for the Salt River -- guess I'll turn this on here. Light's on, nobody's home.

MS. APPEL: There you go.

MR. HARVIER: Again, by way of introduction, my name is Martin Harvier. I'm the current vice president for the Salt River Pima-Maricopa Indian community. With that I'd like to welcome everyone here to our community and welcome you to our resort here and appreciate you selecting our resort to hold this very important government-to-governmental consultation that you're holding today.

This is the home of the Akimel O'Odham and the Xalychidom Piipaash, the Salt River Pima and the Maricopa tribe that reside here in our community. So again, we welcome you here. And, again, what I'm about to present today will also be submitted in writing, like you said, prior to the closing date on August the 18th.

I'd like to welcome any other tribal leaders that are here and others that are here this afternoon. The community believes that is long overdue, the revisions of the right-of-way regulations and appreciates the bureau's attempt to create consistency between the BIA leasing and
the right-of-way process.

This assists our community members in understanding federal regulations. And while the community generally supports the draft regulations, the community has five key areas of concerns that we would like to raise here today.

With that, I would like to recognize staff because if there are any questions, I may have to turn to staff to answer some of these questions. But I'd just like to recognize our staff attorney, Nicole King, who is here; our design division manager, Mr. Harold Jones; and our right-of-way specialist, Leticia Dalton; and one of our assistant community managers, Mr. Kent Andrews, is also here with us today. I'd like to thank them for being here this afternoon.

Again, we do have some comments. Our first comment that we have is the increased administrative burden means additional cost and budget funding. The overall draft regulations increases the administrative responsibilities and burdens of the Bureau of Indian Affairs and self-government tribes who manage their own allotted and tribal trust lands by introducing new and time-consuming requirements, such as additional consent and recordation of simple agreements throughout the right-of-way process.

Additional process is particularly burdensome
with respect to allotted lands in the community. Is the
Bureau of Indian Affairs ready to assume these additional
burdens? Will there be additional administrative funding
for tribes, such as our community, that is a self-governance
tribe who manages their own trust lands?

The notice and consent requirements in the
draft regulations are not feasible for right-of-way
projects. I'd like to touch on the entry -- essentially the
landowner notice and/or consent process mimic the federal
leasing process with respect to entry onto allotted lands
for primary purpose; example, survey, NEPA clearance,
appraisals, consent to the application of right-of-ways, for
right-of-ways, the renewal process, amendments, assignments,
mortgages, and terminations, and good faith negotiations
following terminations and cancellations.

Third point we would like to bring out is how
does the Bureau of Indian Affairs envision this provision be
carried out and exercised? How is mortgaging of
right-of-ways an Indian landowner's best interest. Is there
even a need for this type of mortgaging authority? This
will only cause future issues. What mortgage documents and
encumbrances will be required to be reviewed and approved by
the Bureau of Indian Affairs, the Indian landowners, and
affected tribal communities?

How would the Bureau of Indian Affairs
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address right-of-way defaults, foreclosures, mortgage sales, and encumbrance violations, et cetera? Has the Bureau of Indian Affairs analyzed the impact of the Straight versus Al contractors in this issue?

The community strongly urges the Bureau of Indian Affairs to remove these mortgage provisions from the draft right-of-way regulations.

Number four, not all right-of-ways are commercial in nature. In fact, most right-of-ways in the community are governmental in nature to provide basic service, including utilities, to community members. In these draft regulations, there is a presumption that all right-of-ways are for profit transactions, however, many of the right-of-way applications in our community are actually tribal government projects to provide needed public infrastructure and to improve and to sustain the living conditions of our members.

Next point, the current process for the service line agreement works and should not be changed. As proposed in the draft regulations, the BIA is increasing costs, time, and delay in the service line process for electricity and other needed utilities. The community is concerned the proposed recordation requires the service line agreements provision will cause delay and frustrate providing basic service to Indian home owners.
Service line agreements are meant to be simple agreements between the utility or governmental provider and the homeowner, who already has the approved homesite lease and to allow the service provider to cross the leased land to provide the basic utilities, as electricity, water, telecommunications.

In conclusion here, the right-of-ways are very important legal documents that provide both commercial opportunity and necessary governmental services to Indian landowners. Not all right-of-ways should be treated as commercial for-profit ventures. Governmental right-of-ways are necessary for tribal governments to provide basic service and utilities to their people.

With respect to two right-of-ways, a government's goal isn't to make money but instead to improve the lives of their elders, their families, and future generations. We ask that the Bureau of Indian Affairs look at the key issues that the community has raised today and revise these draft regulations to remove unnecessary administrative burdens and to also treat governmental right-of-way projects as what they are, the delivery of long-needed roads, sanitation, and utility services. And all of this is really to improve the life of our community members. Thank you.

MS. APPEL: Thank you.
MR. SIMPSON: I want to just say a couple of things there, one is that on the mortgages, just to be clear, they are actually, there apparently is a need. We have actually gotten requests for mortgages of rights-of-way, mostly up in the north, in the plains with oil and gas pipelines. So just to let you know that's why that provision is there.

And this goes to both you and community and any other tribal government that if you have ways to or suggestions for how we could clarify or make the requirements for tribal utilities, for provision of tribal utilities better for tribal governments, please give us specific comments on that and how to do that. We would appreciate finding that out from you.

MR. LEWIS: Good afternoon. My name is Stephen Lewis, and I'm the lieutenant governor from the Gila River Indian community. Again, I'd like to thank Vice President Harvier and the Salt River Pima-Maricopa County community for hosting this and also for the DOI's efforts in revisiting these long overdue right-of-way regulations. I will be just articulating some general comments, but the community will be submitting more detailed written comments by the deadline.

So like many tribes, the community has historically had problems arising from the rights-of-way
that cross the Gila River Indian Community, our reservation boundaries. In fact, as you know, in 2006 we filed a complaint in the D.C. federal district court against the United States for an accounting of all of our trust assets, trust funds, including the rights-of-way across the reservation.

The litigation is currently stayed pending settlement negotiations with the United States. And although we're not going to get into those here, we'll continue to hope to address our historic claims in federal litigation.

We're very interested, as well, in the department's efforts to improve rights-of-way process in the future. And we strongly support a more streamlined approach that takes into account how the federal rights-of-way approval process can affect economic development efforts on the reservation, and I echo the statements made by Vice President Javier.

At Gila River we have experienced firsthand how the rights-of-way process can be exceedingly lengthy. For instance, while we manage most of our rights-of-way, at the community ourselves and, you know, that includes the necessary environmental assessments, still we typically run into significant delays, once we submit the environmental assessments, the EAs, to the department for your approval.

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And so such delays complicate, needlessly, the community's effort to construct much needed infrastructure on the reservation, for the benefit of our over 20,000 community members. So we support an amended process that clarifies the process for BIA reviews of rights-of-way documents, provides greater deference to tribes on compensation for rights-of-way -- and I saw that, that that's one of the proposed improvements as well -- and eliminates outdated requirements.

We believe that a friendly and energetic administration and streamlined approach will help modernize the rights-of-way approval process in such a way that supports tribal self-determination and, importantly, improves the approval process to encourage economic development across our reservation.

Again, we would like to thank you for the opportunity on behalf of the community, for myself, to provide comments. And, of course, we look forward to working with the Department of Interior in the future. Thank you.

MS. APPEL: Thank you very much.

Do we have any other tribal leaders who are present who would like to make a comment? Or other tribal representatives?

MR. ALLAN: Good afternoon. My name is CANYON STATE REPORTING
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Robert Allan. I'm the principal attorney of the Division of Natural Resources of the Navajo Nation, and we'd like to make some comments about your proposed amendments to the current right-of-way regulations, codified in 25 CFR Part 160. We are also reserving our right to submit written comments as well.

I guess as a general matter, to begin with, these are, these proposed regulations are a significant improvement over what is currently promulgated in regulations we work with.

Beginning with proposed section 169.002, there are some definitions there, especially dealing with abandonment. We notice that the terms "abandonment," "termination," and -- "abandonment," "termination," and there was another term. Well, anyway -- "relinquishment," That's what it was.

The definition of "abandonment" uses the word "relinquishment," but to us there are three different transactions involving these terms. So we're recommending that you add -- you provide definitions for all three, "abandonment," "relinquishment," and "termination."

In your violation section of the right-of-way, when you police it up, you talk about all three forms of action that may be taken, but there's no definition for "termination" and "relinquishment."
What we've done in the past and in our tribal litigation, our federal litigation or federal administrative practice is we viewed abandonment as nonuse and intent not to develop or failure to develop within the two-year period. Relinquishment is a voluntary act which has to be recorded and then the termination occurs then.

Termination, seems like that would be an adjudication where the investigation is done for violation of the terms of right-of-way. And if there's a violation and it's not, there's no progress made towards reinstating the grant right-of-way, then seems like termination would be appropriate. So I think that would help, that provides clarity.

This federal power act project, we were wondering if that was meant to include the scope of commercial transmission power lines, or are we just going to confine that to federal power projects?

MR. SIMPSON: Excuse me for interrupting but I just wanted to clarify that one.

That is the existing regulations as well. And while I'm not a FIRC attorney by any means, my understanding, from our water people, is that that's what it is for, it is for hydro power projects.

MR. ALLAN: Hydro power.

MR. SIMPSON: And that's what it's used for.
Federal Inter Regulatory Commission does not regulate transmission lines, I don't think. But that's what it's intended for, is generally used for hydro power projects, is my understanding.

MR. ALLAN: Thank you.

 Compensation, that term, the way it's defined, means "something bargained for." So we were thinking, well, perhaps that word "something" might, might be better clarified by the statement "goods, services, money, or a combination of all of these forms of compensation."

And trespass, the Navajo Nation, we have a trespass statute. And although this is a reasonable definition and it's workable, we were wondering if, perhaps, you might want to amend it to include causing things to happen in your right-of-way, for example, pollution, or there's a mining operation adjacent to the right-of-way and, like uranium, or spills over onto the right-of-way, who's going to clean that up? Are we going to hold the right-of-way grantee responsible or mining company, mining lessee.

Moving on, Section 169.004, I like, I generally like that, but some questions have come up. What does it really mean when you say a person or legal entity, including an independent legal entity owned and operated by CANYON STATE REPORTING
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a tribe or federal state or local government, who is not an owner of the Indian land?

As you probably know, the Navajo Nation, we have several enterprises, and we have a utility company, utility authority. We also have energy development enterprises. We have an oil and gas enterprise. And was this meant to require them to now get grants of right-of-way, or would this be a unilateral grant by the Nation?

What you have is provisions for consent by an Indian tribe, but there doesn't need to be consent or a transaction for a grant of right-of-way under these regulations. It appears if you fall within that definition, who is not an Indian owner, a person or legal entity is not an Indian owner, does that mean -- we're kind of confused when it comes on our enterprises and business entity. Do they need to get rights-of-way through the federal system, or do we just grant them from the Nation to the tribal government?

The other is the exception "unless you are authorized by a" -- I guess that's "land use agreement, not subject to this part or lease." I think I -- we've had this problem in the past, and this is related to telecommunications and power transmission lines that were constructed without a grant of an easement. They were...
existing, I think, around the time of the statute, the
general 25 USC statutes were approved for the granting
rights-of-way on Indian lands.

So how do we make those legal? Are they
legal now, or are they trespass? We can bring them within
the scope of an agreement to make, to legalize the past use.
And then "or lease." Does that mean they'll automatically
get a grant of an easement for egress -- ingress/egress with
a lease, or is that separate? We have transactions where we
do both. So we're wondering, we think there needs to be a
little bit of clarification on that point.

And then as-built rights-of-way, especially
for Public Law 93.121 water projects, public water projects.
We have an agreement for those, plus we have a special
statute. And we were wondering if they would be impacted.
And then we also use as-built rights-of-way to correct title
problems, perhaps trespasses, unauthorized uses that have a
long history. And I'll make this, I'll just touch the
larger points of this.

Looking at 161.008, there are discussions
that involve text, allows for the incorporation of state
law. We feel that this is a waiver of sovereign immunity,
both for the Indian tribe and the federal government. We
think that this needs to be eliminated or very much limited.

That same issue comes up in highway
rights-of-way when you start talking about applying state law on the highway right-of-way, Al versus Straight. We have problems with the state of New Mexico and their discussion on rights-of-way perpetuity. There needs to be a residuary clause reform so that we don't run into the problem when there's an equivalent of a deed-out of the title to the property. Then the State will say well, we can't build any highways unless we have this right-of-way perpetuity and we want everyone to abide by the state law and that's the only way we can build this. If you don't agree to it, we'll move the money to build the highway to elsewhere in the state.

We've gone back and forth with the State on that issue. And those are points I think that need to be addressed. They are real. Right now we've had, we had some cases, but we didn't get any adverse results where we lost land or sovereignty on car accidents.

At 169.123, grant of right-of-way required for new use within our overlapping and existing right-of-way. We've had some problems recently with this. I know that some of the regional offices in the Bureau of Indian Affairs, they take the view that there can be a grant of right-of-way over existing right-of-way.

We're wondering if that's what you intend to do with this proposed rule in the text here. And what
happens in the event there's an adverse grant of right-of-way approved by the Nation but the grantees have not consented to its use to, to its possession of the right-of-way and now there's going to be a new use that may interfere with their grant of right-of-way? Example is running fiberoptic telephone lines inside highway right-of-way.

We have part of the Bureau of Indian Affairs saying that different federal statute, the Highway Safety Act, may, the way they were reading it, their engineers read it as it limits tribal sovereign immunity. Congress didn't intend that. And they are saying well, we can grant a unilateral right-of-way outside of the provisions of what we have so far, if we want to. But we have been able to come to agreement on those issues and avoid all kinds of litigation plus confusion over who has the right to use property and who owns the improvement inside the property.

Taxes. We think that all the taxes, possessory interest, business activity, et cetera, those proceeds should go to the tribe exclusively. Of course there's all kinds of case law. But the way you have drafted your regulations, the text supports tribes and tribal sovereignty, which we agree with and support.

Valuation of compensation and the value of the easement. We are very happy that you've allowed for
tribes to determine what they think is appropriate compensation, which helps the Navajo Nation. I mean, we like that. But the problem comes in when we begin to rely on our market analysis, we try to tie that with appraisals or other appropriate valuation method with USPAP.

An example is well, when there's a real estate appraisal, they decide when the value is, and there's generally these three different factors. And we look at the economic value to the Nation to determine what we think is fair compensation, and it's much different than what an appraiser would say the fair market rental would be or the fair market value of the premises.

And, for example, a commercial right-of-way, a rock could be valued at several hundreds of dollars or thousands of dollars, but if you bring in a real estate appraisal, they'll say oh, that's just $40. And that generally doesn't help the Nation or the Indians or tribal sovereignty or governance by the United States of these lands.

I think that pretty much is our major concerns. We will submit written comments. Thank you.

MS. APPEL: Great. Thank you. We appreciate the specificity, too. It's very helpful.

All right. Do we have any other tribal representatives?
MS. ABEITA: Good afternoon. I'm Carolyn Abeita, and I'm general counsel for the Pueblo de San Ildefonso, New Mexico, and I want to thank everyone for the opportunity to present some comments. The Pueblo will also be submitting written comments, as well, but the Pueblo feels that it's important to participate in this consultation, and so we appreciate the opportunity.

Generally, the Pueblo agrees that the right-of-way regulations need to be streamlined and support tribal self-determination, self-governance. And it's important that the BIA support and expand its deference to the tribes' decisions regarding rights-of-way over their land, and the proposed revisions are a step in that direction, so we appreciate that.

We do have a little bit of a concern about the consultation process and that we understand that the Bureau had a working group and you involved BIA realty offices in the development of this. It would have been good to also include the tribes earlier on, rather than just after getting consultation during the public comment period. Although, you know, we do appreciate the opportunity to provide this input.

Specifically, we, the Pueblo agrees that the regulations have to provide clear and greater deference to tribal decisions on how the tribe choses to value its land.
and what type of compensation it negotiates for its right-of-way.

Section 169.109 is important to San Ildefonso. We support the language where BIA will defer to the tribe and not require market valuation if the tribe submits a tribal authorization to waive valuation. This allows the tribe to negotiate any payment amount, including other types of compensation that it feels is in the best interest of the tribe.

We've been involved in situations where third parties feel that the BIA must require tribes to comply with a standard type of appraisal and evaluations, meaning tribes should just get fair market value based on an appraisal and that is it.

We have been involved in a utility right-of-way case in New Mexico where the tribe and utility company negotiated for rights-of-way over its lands, and then the utility company went to the state regulatory commission to, for a rate increase, to recoup the cost of having to pay out for the right-of-way over tribal lands.

As a result, the tribe, the cost of right-of-way is being passed on to utility customers. So when we say "third parties," those customers are the ones saying well, our utilities rates are going up because the tribes are charging so much for their rights-of-way.

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Now, never mind that when, 50 years ago, the tribe had a right-of-way that was $10,000 for 50 years and these costs were passed on, nobody had a problem. But now this is becoming a very big concern and is now being elevated by these third parties, who are not a party to the underlying right-of-way agreement between the utility and the tribe. And it is clearly within the tribes' sovereign authority to be able to negotiate and value what it feels is proper for the access to over its lands.

Now, when you have the third parties, they are saying no, that is, that's not right and they are pushing that really tribes are limited to either fair market value or the appraised market price for that. So the Pueblo is very supportive of the language is Section 109.

We also support the language that allows the tribes to request BIA assistance to determine the value but then defer again to the tribes' decision as to whether they will use that valuation in their negotiation.

San Ildefonso also supports the language of Section 169.11A, and this allows -- where the BIA will use different valuation methods when requested by a tribe. Again, this is where we've had situations where third parties complain that BIA needs to require the Pueblo, in this instance, to accept a BIA appraisal and nothing more.

In fact, there are people at the state
regulatory level that feel that if San Ildefonso did not request an appraisal or did not use an appraisal that somehow that made that right-of-way defective because they don't understand the process and the deference that needs to be given to a tribe as to how it deems to value its land. So there's a lot of misconceptions out there, and so this language helps tribes and it supports that tribal self-governance over their land.

We also support the language in Section 169.115 that allows for non-monetary or other types of compensation. We like the opportunity to negotiate for items, such as technical assistance on projects, construction of other infrastructure, increased access to utilities for tribal members, and so forth, depending on what the parties seeking the right-of-way may have to offer as in-kind compensation. And so this is an opportunity for the tribes to develop a deal that is more beneficial, based on their needs.

We're also happy to see that BIA would consider the valuation alternative based on through-put or percentage of income. This gives tribes more tools to negotiate what is best for their situation.

So, generally, we're supportive of this language regarding compensation and the ability for the tribes to do what they, or negotiate what they feel is best.
for them.

The Pueblo has some specific concerns regarding some of the items in the proposed regulation. And first is the definition of service line. And you have that so that it's a utility line running from a main line that is used only for supplying owners or authorized occupants or users of land with telephone, water, electricity, gas, or internet service or other home utility service. We would suggest that you clarify that you add that this is tribal land. That makes it consistent with the last section, which does talk about tribal land.

Again, referring back to the situation with the utility, a lot of these third party, there's a large population of non-Indian fee landowners within the exterior boundaries, and so they were pushing to say that well, the service line agreements should apply to them as well. And so it needs to be very clear that this is over tribal land and typically for tribal users.

We also have a concern about the definition that says running from a main line. Again, we have a situation in New Mexico where a utility company has said that the distribution line that runs off a transmission line and runs onto the reservation and then branches off into specific lines to houses and tribal offices, those smaller branching lines are typically what would be subject to a
service line agreement. But the utility company is making
the decision to say that that distribution line is also part
of the service line agreement and they should not be
required to pay for right-of-way.

So we would like to have something in the
regulation that would address situations where a utility
company would try to classify everything as a service line.

MR. SIMPSON: We've heard some of that from
transmission companies as well, that what they call a
service line -- or what we call a line is what they call a
service drop. And so we've asked for them, then, to try and
help us clarify because what we're thinking is a service
lines is exactly what you're thinking is a service line.

MS. ABEITA: Right, and --

MR. SIMPSON: So, yeah, if you can help us
clarify that, make that distinction absolutely clear because
we agree that that's, that those lines coming in from the
main line should have that.

MS. ABEITA: Right. And then the other issue
with that is that if there is a distribution line and then
it branches off into service line agreements to, say, the
tribal facilities or to tribal residences and then a
non-Indian then hooks onto that service line to service
their fee property, what is that. And so that there's a
discussion about well, that should be a service line because
it's coming off of a service line, even though it's over tribal land.

So you can see where, who is defining what is a service line is important. And if it's the utility company that's defining that, then that is really going to be to the detriment of the tribes. So we would like that to be considered.

We agree that BIA must have time lines for decisions on our right-of-way submission, and we agree, generally, with the time lines set out in Section 304. But the Pueblo has had right-of-way agreements lingering in BIA for years, in some instances. And these are, the delay is primarily at the front end, while we're waiting to find out if a packet is complete.

And so, you know, are these surveys, are these initial surveys sufficient on those types of things? And so for that reason, we ask that there be more definite time frames for the BIA to notify the tribe as to when the application, as to whether their application is complete and, because it's not until you get that receipt letter that the 60 days run. But, again, conceivably, you could still have something, a packet sitting in BIA at the agency office or even at the regional level for months, for a year, until somebody gets to that packet.

And I agree that these are, you know, there
are some needed resources. And a lot of this delay is because of the lack of resources in the realty divisions and departments at BIA. You know, we've got one guy who's looking at all the surveys for the regional office in Albuquerque. So, and then, so we agree with the comments that some of these administrative burdens will increase that. And then you add the time line, so you're really increasing the burden on the BIA to meet these. And so we have a real concern about the lack of resources.

Similarly, for those tribes that are compacted or even 638-ing some of these activities. So that's a real concern. And because of that lack of a timeline at the beginning, some of the other time lines become almost meaningless because if you can get past that first one, then you're almost golden. So that's an issue there.

We'd also like to point out that as far as time lines and the appeal process, under Section 304, at the end, the burden is really upon the parties to hold the Bureau's feet to the fire so that if the Bureau is not meeting these time lines, the party, a party may file a written notice to compel.

So, again, you have your 15 days, but if the tribe doesn't get to this for 30, 45 days, that's still, you know, you've still put the burden on the tribes to really
monitor and push, so that's going to still be a problem.

The other thing we would like to point out is in, at the last step of the process. If the regional, or the BIA director does not issue a decision within 15 days, the parties may file an appeal from their inaction. So you're again, you're requiring the tribe to file an appeal, and what are they appealing? The fact that the director didn't make a decision?

So that seems like there should be, possibly, consideration that if at that level the director has not made a decision, that it is deemed approved. That may be a consideration at that level. After you go through all of that process, if the director does not make a decision within, whatever, 15 days, that it be deemed approved, much like some of these other submissions, say, for a compact or something like that.

Again, if it does have to be appealed to IBIA, will the IBIA be making a decision as to whether to grant or deny the right-of-way, or would they just be issuing a decision to compel the director to make a decision that he hasn't made already? So that's an issue there.

We also, in following along the line of an appeal, looking at section one -- 169.011, the only parties that can appeal a denial are the Indian landowner. And then there is another provision in here that talks about an
interested party.

And so while the first two sections seem to limit who has the right to appeal, the last provision under B talks about an interested party who is defined as any person whose own direct economic interest is adversely affected by an action or decision. And so I don't know who that would be, if the landowner is the only entity that can appeal a decision. So I don't know why that is in there.

And that would also give rise to someone saying, for example, those affected utility customers, they would say well, I have a direct economic interest and it's adversely affected.

So I understand that, you know, that that's not what the intent is, but what we've gone through, what we've been dealing with in New Mexico, we've got folks that are lay folks, we've got people that are looking at all of these regs, and they will be submitting comments. They have been encouraged to submit comments on this. So we just want to point that out.

And then, lastly, the Pueblo de San Ildefonso supports the language of 169.009 that affirmatively states that improvements, activities, possessory interest within the tribal right-of-way may be taxed by the tribe but may not be taxed or assessed by the State, as a result of the federal laws.
We think it's important that the regulation reaffirm that the tribes still have this authority over the right-of-way, over their land, and that the grant of the right-of-way does not diminish that sovereign authority, and that is a vast improvement.

The Pueblo also supports the language in 169.008 that a grant of right-of-way by the BIA does not diminish tribes' jurisdiction, taxation enforcement, civil authority. So we appreciate the fact that there is vast improvements, and we appreciate the fact that the intent is really to defer and give greater deference to the tribes' rights and sovereign authority over their lands. And we look forward to improving on some of these. And we hope to submit some additional, more detailed comments. So thank you for the opportunity.

MS. APPEL: Thank you.

MR. SIMPSON: Yeah, only one follow-up thing on that, and it's -- I'm not asking a question, so you don't need to come back up but... We've had, now, a couple of comments on the legal jurisdiction provision, at least that's what I refer to it as, the one that talks about retention of sovereign rights and sovereignty over land such as rights-of-way. And I want to ask for specific comments on that portion.

The intent of that provision is to assert, as
a grant from the secretary, the secretary asserting the rights of the sovereign tribes over their land to the greatest extent possible, while remaining inside the Supreme Court's decisions in Montana and Straight, because of course we can't overrule the Supreme Court.

And so I would especially appreciate tribal lawyers', industry lawyers' thoughts on whether we've managed to pull that off and any sort of, exactly how that should work, how it should be clarified, if it needs to be and that sort of thing because it's sort of our first attempt at it, and we'd like your thoughts on that.

MS. APPEL: Do we have any other tribal representatives who would like to speak?

Come on up.

MS. LUCEI: I'm not a tribal representative, I'm staff, so is that all right?

MS. APPEL: Yeah.

MS. LUCEI: Okay. My name is Karen Lucei. I work for Yakama Nation Trust Real Estate Services. And we have staff that wish they could have been here, but because of the distance, our land enterprise, our wildlife people, they couldn't attend this session. And I think it's important to attend such a consultation hearing. The notice wasn't in advance enough to where our elected officials could be present. We have a lot of issues going on in CANYON STATE REPORTING (602)277-8882
Yakama that they just couldn't be here at this time, and I wish they could have been here.

So the short time that I and the right-of-way attorney were able to discuss, which was maybe five minutes, we put together a short list that is only for discussion, it's not our comments. Our formal comments will be submitted but... I won't go over all of them. I have a list of six, I'll go through maybe three of them.

Under proposed 169.111, there is a reference to using a market analysis appraisal or other appropriate valuation method of determining the market value of permanent homelands that will be converted to a right-of-way use. It is time to recognize the premium value that should be applied to permanent homelands.

Permanent homelands are unlike any other lands and should be valued as such. We have quite a few rights-of-way that were granted by the Bureau of Indian Affairs under perpetual that probably should have never been granted because those areas are within the closed areas of our reservation that are supposedly for the exclusive use and benefit of the Yakima Nation. So it's kind of late to do anything about that.

The specific use language of current 169.05 has been omitted from the proposed regulations. That language was added to the regulations in 1980 to prevent
piggybacking of utilities and should be continued.

Now, I wasn't on the staff in '72, '73, or 1980, so I don't know what was said at those sessions or those hearings or during the regulation revisions, but I think it's good to remember what was said.

The partial disallowance of piggy-backing without BIA approval under proposed 169.123 would be a good first step, but the practice of piggy-backing should be disallowed completely, regardless whether it is allowed by state law.

The proposed 169.07 changes the consent requirements of 25 USC 324 by authorizing a form of administrative condemnation contrary to prior federal circuit court decisions that prohibited the re-delegation of interior authority, example SP Transportation Company versus Y (phonetic), 700 FTD 550 Ninth Circuit 1983, and the administrative condemnation of tribal lands, USB 10.69 acres of land, more or less, in Yakima County.

And we rely on a tribal coalition for generating support for issues that affect our tribes. And the timing of the comments due will not allow for us to meet. Our tribal officials come together, Atee (phonetic) and I, I believe, will be meeting in September, which after the comment deadline is. So that's kind of detrimental to tribes, the timing of the deadline of comments.

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Thank you.

MS. APPEL: Thank you. And as I mentioned before, we have other requests to extend the deadline, so hopefully we'll hear on that soon.

MS. LUCEI: Right. And I agree with the comment that was made that I wish tribal officials and staff had been included during the writing of this regulation to show a cooperation, because my realty officer and I, as a right-of-way staff, were never contacted about these regulations and we're a contracted program.

MS. APPEL: Thank you.

Do we have any other tribal...

MS. LAWSON: Is it all right if I take the microphone off, so I can lean?

MS. APPEL: Yes.

MS. LAWSON: So my name is Sarah Lawson. I'm with Muckleshoot Indian Tribe in Auburn, Washington. I'm the trust real estate director for the tribe. The comments that I'm giving today are not necessarily the tribe's comments, but the tribe will publically submit comments later.

My first question is under the new or under the proposed regs, there will be no mortgages without consent and no assignments or piggy-backing without consent. We've actually had Puget Sound Energy mortgage all of the
rights-of-ways that they have on Muckleshoot Indian reservation without consent. They let that slip to me one day, and I was like really guys? You don't have permission to do that.

So my question is, what are my remedies? I don't see any remedies in the rights-of-way regs, if those things are done without consent, if there's piggy-backing without consent or if there's mortgages without consent.

Section 169.009, taxation. It says, let's see, subject only to applicable federal law. Have we thought at all about what those other applicable federal laws might be? We have Comcast operating on the reservation, and they have telecom laws. We have Puget Sound Energy and Bonneville Power Association -- or I'm sorry, Administration.

MR. SIMPSON: Let me respond to that one because this language is taken directly verbatim from the leasing regulations, and we went through that with those and, in fact, I've been quoted in some litigation on that point, during consultation on those regs.

The subject to applicable federal law here is a reference to the White Mountain v. Bracker balancing test. If I remember right, Bracker is spelled B-r-a-c-k-e-r.

The Supreme Court set up a balancing test for whether state taxes could be applied to Indian land, and it
balances the federal interests, the state interests, and the tribe's interest in those taxes. And what I've said in the leasing regs and it's been quoted and I might as well say it again is that this provision is putting the federal thumb down on that balance.

Typically those, that litigation only involves tribes and, or lessees and the state, and the federal government isn't often in those cases. And so the, so what we're doing here is we're expressing the strong federal interest in opposition to state taxes.

Because the Supreme Court set up a balancing test, we cannot actually prohibit them by regulation. But that's what that subject to federal law means, is it means that those taxes are subject to that balancing test, and we are generally very against such taxation.

MS. LAWSON: Okay. Thank you for the clarification.

MR. SIMPSON: You're welcome.

MS. LAWSON: You said you want more -- what's the word I'm looking for -- similarity with the BIA leasing rights, but there's a couple of things that are different in the rights-of-way regs. And I'm all for having them be very similar because I think it's helpful for BIA staff.

But surveys. So in the leasing regs, you don't have to get permission to survey. But in the
rights-of-way regs, you do have to get permission to survey. Personally, I am not in favor of having to get permission to survey because I don't believe we need to get permission in this day and age of GIS and GPS and everything can be done, basically, using satellites. But you might want to fix that difference between the two.

And then the rights-of-way regs say that once an application is received, BIA staff shall, quote-unquote, promptly notify the applicant. But in the leasing regs there's a ten-day deadline for them to notify that the application has been received, and it would be nice to have the same deadline apply for rights-of-way regs, or for the rights-of-way regs.

169.121, which sort of deals with the -- if I can find it -- what provisions the grant of right-of-way must contain, part three of that includes some provisions that are either exactly identical or substantially similar to the current rights-of-way regs.

We have a lot of trouble getting utility companies to agree to those provisions. And the way we've gotten around that at Muckleshoot is that the right-of-way is first given to the tribe and then the tribe, when they assign a portion or assign a certain use to the utility, holds back those provisions. So if we are assigning it to City of Enumclaw for gas services, City of Enumclaw is not
required to restore the right-of-way in a workmanlike manner or keep clear. Those obligations are still on the tribe.

And we also want to clarify whether tribes can hold third parties back from those provisions or if they have to be given over because you're not going to get utility companies -- I mean, we've had the Puget Sound Energy, City of Enumclaw for gas service, and I think one other, I can't remember off the top of my head, all expressly object to those provisions.

169.107, the consent requirements, my personal opinion on this is that this is going to allow steamrolling by utility companies over allotments, individual trust land allotments that have 50 to 100 co-owners.

At Muckleshoot we have an expired Bonneville Power easement that goes through a trust allotment. We have been in negotiations with Bonneville Power since 2007 in order to get a new unexpired easement in place. This provision would allow Bonneville Power to essentially steamroll all the negotiations that we've conducted over the last seven years between the landowners and Bonneville Power and have the easement granted at a fair market value over the landowners' objections.

I also think your statement earlier in saying that it was language that was derived directly from AIPRA,
it may not be a good idea to use the language from AIPRA because if it's from AIPRA, it was probably designed to reduce fractionation. And I don't know if we can -- I mean, we're not going to be reducing fractionation, so maybe we need to find some sort of other thing.

One item or one additional I thought of that we could possibly use there would be to say if owners are too numerous or use some sort of whereabouts unknown status because we have, the property that has Bonneville Power on it has 97 co-owners, but they are all there. We can find them. Lots of them are on council.

So if it was maybe an owners too numerous situation I could understand -- I mean, I'm sorry, not owners too numerous. If it was a whereabouts unknown situation, I could understand approving without consent. But when the owners are there and have been actively involved in the negotiation, you shouldn't be able to go over their head like that.

MR. SIMPSON: We would appreciate you thinking some about that. This provision is statutory. The power bureau to grant consent on a right-of-way where the owners are too numerous to contact is actually out of 25 USC 324.

So what we're doing here is we're defining what too numerous means in that statute. So that -- we
would appreciate some ideas on that.

    MS. LAWSON: Okay. Great. Thank you.

    MR. SIMPSON: Uh-huh.

    MS. LAWSON: Then getting back to the, I believe you called it the jurisdictional clause 169.008, my first thought was yes, this looks like it's supposed to get to Straight, but it is confusing and jerrymandered. And I relish the opportunity to help make it better because I was really excited when I saw that it was hitting it straight, and then I was like except there's too many exceptions to the exception. So thank you for, I guess, affirming my guess on that one.

    Okay. Those are the only comments I have. Thank you.

    MS. APPEL: Thank you.

    Do we have any other tribal representatives present that would like to comment?

    Then we'll open it up to see if anyone else has a comment. If anyone has a comment, feel free to come up to the microphone. And just remember to state your name and affiliation.

    Anybody?

    Shall we take a quick break and let people digest what they've heard so far? How about if we come back in ten minutes. It's 2:40 now, so let's reconvene at 2:50.

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Thank you, everyone.

(Recess was taken at 2:40 p.m.; resumed at 3:00 p.m.)

MS. APPEL: Does anyone who hasn't commented yet want to comment today?

Just to reiterate, this is your chance, if you want to make a comment. If no one would like to comment, then I think we'll probably wrap up early, so come on up.

MR. SIMPSON: Yes. If you've spoken before and want to talk again, you're welcome to do that too.

MS. ABEITA: We're not trying -- this is our one chance here to really kind of focus some of this.

This is under Section 169.202, and then we're talking about the renewal of a right-of-way and the issue of the change in size, type, location, or duration of the right-of-way. And we've had that issue with fiber optics where the line has been laid and then the grantee has said look, we need to come in and we need to fix or improve the line; however, the line that they are now laying is a much bigger capacity type fiberoptic line.

And so the tribe has said that we think that this is a change in the size or the scope granted, there's no change in the actual size of the right-of-way, but there is a change in the use or the purpose of it. It's allowing...
for, I guess, a greater capacity.

And so that the tribe has felt that in some instances there needs to be a new right-of-way. But the Solicitor's office has rendered an opinion under -- I forget, the -- there's a policy about, it talks about improvements in communications or something to that effect, and that that is covered under, so that any kind of improvements is covered under that and that the BIA would not consider that a change in the scope or the type of right-of-way. And so I'm wondering what the opinion is on that.

MR. SIMPSON: It's a, it's a, what is called in the Solicitor's office an M opinion. What that means is it's mandatory on all of the parts of the department.

The opinion was issued -- and I could give you -- I can't give you the cite to it off the top of my head. I've got it, I've read it, but what it says is that it's -- actually, it's in the context, originally, of a federal right-of-way, if I remember right.

And I want to say it has to do with Mountain States Telephone & Telegraph, but I'm not sure about that. But basically there was a right-of-way at issue there where the original right-of-way, as with so many of the railroad ones from the late 19th century, the original right-of-way allowed for telegraph and telephone lines.
And the opinion says that -- oh, it has to do with MCI. That's what it was. It wasn't Mountain States Telegraph, it was MCI, before they became Verizon or whoever they are now. And the company wanted to put in fiberoptic lines because, of course, we don't generally put in telegraph lines anymore and telephone lines are getting less and less.

And the solicitor opined that, essentially, a fiberoptic line now is basically the same thing as a telephone or telegraph line. And so that would be the same use that was already allowed in that right-of-way and so that there would not be a different, a requirement for a new right-of-way.

MS. ABEITA: Okay. So that's still the position, then?

MR. SIMPSON: That's what we've opined. Those opinions, of course, are subject to regulation. So I hesitate to say this because it's an M opinion, but it's the truth that we could, in fact, overrule it through regulations, if we needed to, at least for Indian land.

We'd have to think long and hard about it, but the possibility is there.

MS. ABEITA: Okay. This goes again to those long-term, in perpetuity --

MR. SIMPSON: Right.
MS. ABEITA -- type of right-of-way, but yet there's this improvement the grantee is allowed to change to do this but yet they are still relying on that, on the long-term right-of-way --

MR. SIMPSON: Uh-huh.

MS. ABEITA: -- and at that point, the tribe had said well, we think this should actually be subject to a new right-of-way. So with changing technology, I think that -- again, while not every right-of-way mentioned is for commercial use, some of these are --

MR. SIMPSON: Sure.

MS. ABEITA: -- and so the tribes, particularly that need to maximize their resources when they are trying to, again, get adequate compensation for the use of their resources, this is something that I think needs to really be considered. And, again, once that long-term right-of-way is set, it makes it very difficult for the tribe to come back and adjust. And so, again, you feel like the tribe has given up an opportunity for adequate compensation for the use of that land.

MR. SIMPSON: Yeah. It's a difficult issue.

We've also had ones where, for instance, there's a rail line, used to be a commercial freight line, between Albuquerque and Santa Fe, the BNSF. That rail line is now the Rail Runner commuter train and which crosses several
pueblos, too, and we had to figure out how that could work.

It's a tough analysis, especially as you pointed out, the technology has changed so much over the last, you know, 150 years, since these kinds of rights-of-way were originally granted.

MS. ABEITA: Thank you.

STEVEN: My name is Steven, and I'd like to ask just a question that brings to mind is where, for existing easements, where we now have a regulation that speaks to an issue on which the prior regulations under which the easement was granted was silent, where the prior easement was silent, would it be that the new regulation would apply? And I think one of the ones that's come up the most is reassignability.

The old regulations were silent on that, most of our preexisting easements are silent on that; therefore, they were felt to be assignable without owner consent. I think one of the commenters brought that up. And so now we're going to say that all easements, by regulation, are assignable only with owner consent and BIA approval. So long as your preexisting easement was silent on the issue, now further assignments will require consent approval, is that correct?

MR. SIMPSON: I think so. I'm looking for our effectiveness provision in here. There it is.
So if we already, if we granted or approved the right-of-way before these regulations are effective, then this regulation applies to that right-of-way document, unless there's a conflict, unless the provisions of the right-of-way conflict with this part.

So if the right-of-way is silent on that, then there's no provision to conflict and, therefore, this part would govern. So, yes, they would need to have consent to the assignments.

MS. APPEL: Did that spark any new comments from people?

MR. WEBB: The comment that brought that to mind was the one about mortgaging because that question has come to us. And under the existing regulations, the argument was if you can assign without further consent approval, you can -- I would assume that you can mortgage without consent approval. And that's all going to be changed now under the new regulations.

MS. LAWSON: Yes, I would agree. This is Sarah Lawson from Muckleshoot again.

MR. SIMPSON: Thank you.

MS. LAWSON: When I heard about the mortgages and assignments thing, especially the mortgages part, with Puget Sound Energy, I went and looked at the regs and I didn't see anything that said anything about it. But now
that we have it in the proposed regs, I went and looked at
the effectiveness subsection to see if it would apply to all
of the mortgages that have been done or all the assignments
that have been done without permission of the landowners or
permission of the tribe. And I was pretty excited that we
can go back and address these piggy-backing and mortgaging
issues, so thank you.

MR. SIMPSON: You're welcome.

MS. APPEL: Do we have any more comments?
MR. SIMPSON: Don't make us start calling out
people.

MS. APPEL: All right. Seeing no, no one
else come up to the microphone, I think that we'll close
this session for today.

We do have a teleconference session tomorrow
that is at 1:00 p.m. Eastern time, so 10:00 a.m. Phoenix
time. If you're interested in calling in, the number and
pass code are in the Federal Register notice that was
included in your handouts.

Thank you, again, to Salt River Pima-Maricopa
for hosting us in this beautiful facility, and I hope that
everyone has a wonderful afternoon.

Thank you.

(3:11 p.m.)

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       ) Ss.
COUNTY OF MARICOPA )

BE IT KNOWN that the foregoing proceedings were taken before me, SANDRA L. MUNTER, RPR, a Certified Reporter, Certificate No. 50348, for the State of Arizona; that all proceedings were taken down by me in shorthand and thereafter reduced to print by computer-aided transcription under my direction; that the foregoing pages are a full, true, and accurate transcript of all proceedings, all done to the best of my skill and ability.

I FURTHER CERTIFY that I am in no way related to nor employed by any of the parties hereto, nor am I in any way interested in the outcome hereof.

DATED at Phoenix, Arizona, this 15th day of August 2014.

__________________________________
SANDRA L. MUNTER, RPR
Certified Reporter No. 50348