

vs.

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

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

Talking Stick Resort
Scottsdale, Arizona
August 6, 2014

1:07 p.m.

MODERATOR:
ELIZABETH APPEL

Prepared by:
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(Original)

1 P R O C E E D I N G S

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

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

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

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

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

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

18 During those consultations and public
19 meetings, we heard pretty often from people that
20 rights-of-way should be the next, next focus for improving
21 the land management regulations. So once we finalized the
22 leasing regulations, we turned our attention to
23 rights-of-way. And we had a work group of subject-matter
24 experts to look at the rights-of-way regulations and draft
25 some updates.

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1 And we had had mostly realty officers from
2 Bureau of Indian Affairs; Stephen Simpson, from the Office
3 of the Solicitor; another, Jennifer Turner, from the Office
4 of the Solicitor. And once that work group developed the
5 draft, we distributed that draft throughout the Bureau of
6 Indian Affairs, to all the realty officers. So this
7 proposed rule really reflects the input of all of the bureau
8 subject-matter experts.

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

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

21 So the proposed regulations try to simplify
22 the approach by relying on the general statutory authority
23 for granting rights-of-way, at 25 USC 323, which I think is
24 the 1948 Act. So as far as our legal team has determined,
25 there's no benefit lost by removing the specific statutory

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1 authorities.

2 But this is a proposed rule, and if anyone
3 else identifies some specific benefit that will be lost by
4 removing those specific statutory authorities, please
5 comment on that.

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

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

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

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

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

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

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

16 So obtaining the right-of-way, the first
17 pretty significant change the proposed rule makes to the
18 process is removing the requirement for BIA to approve
19 surveys on Indian land. So when a right-of-way applicant is
20 preparing their application for the right-of-way, they need
21 to survey, they no longer need to go to the two tiers of BIA
22 review. They'll still need to get approval from the land
23 owners to access the land and survey the land, but there
24 will be no BIA approval required. So the only BIA approval
25 will be part for the actual right-of-way.

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1 So the right-of-way application contents are
2 set out in the proposed rule. And one of the new things is
3 a bond or alternative security, rather than just a deposit,
4 so we will talk about that.

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

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

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

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

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

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

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

23 Compensation, if it's a one-time payment, is
24 due within ten days of the grant or whenever the grant
25 specifies that it's due. Direct pay is available under the

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1 proposed rule only under limited circumstances where there
2 are ten or fewer landowners and they all agree and their
3 trust accounts are unencumbered, and that's real for
4 administrative efficiency.

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

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

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

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

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

23 If it's incomplete, BIA will notify the
24 applicant that it's incomplete. If it's complete, BIA will
25 send a letter acknowledging the date of the receipt. And

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1 within 60 days, BIA must review and issue a decision on that
2 right-of-way application.

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

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

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

25 The right-of-way grant will incorporate any
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1 restrictions or conditions that are in the consent, and
2 there are certain conditions that the regulations set out
3 that will also be included in the grant. And the grant will
4 also incorporate maps of definite location.

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

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

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

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

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

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

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

17 The proposed rule sets out the processes for
18 amending or assigning or mortgaging a right-of-way and
19 basically sets another timeline for BIA approval. The
20 timeline in each of these instances is 30 days, rather than
21 60 days for the original right-of-way. Again, the clock
22 starts when BIA receives the complete package for review.

23 BIA approval of an amendment is required for
24 any change to a right-of-way to accommodate a change in the
25 location of a permanent improvement, if the change in

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1 location to previously unimproved land is within the
2 right-of-way corridor. But if you're amending a
3 right-of-way grant just to correct a legal description or
4 make another technical correction, then a full amendment
5 isn't required, an approval.

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

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

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

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

24 If there is no BIA approval required, the
25 grantee still has to provide BIA with a copy for recording.

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1 And the tribe has to record any grant for tribal utility
2 that's not a separate legal entity, for example, or a grant
3 on tribal land under a special act of congress that
4 authorizes grants without BIA approval.

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

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

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

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

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

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

24 Finally, the proposed rule clarifies that BIA
25 approval is not required for service line agreements.

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1 Service lines are defined as utility lines running from a
2 main line that's used only to supply the owners or occupants
3 of the land with telephone, water, electricity, or other
4 home-utility service.

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

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

22 So once the comment period closes and we've
23 collected all the comments we'll have, we'll reconvene a
24 working group internally to go through all the comments.
25 And all the comments that you make today will be transcribed

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1 by our court reporter here, and they will be included with
2 the written comments that will be reviewed.

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

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

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

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

21 MS. APPEL: Okay. So what we'll do now is
22 open up to you all for your comments and questions. And
23 since we are having this transcribed today, I would ask that
24 you come forward to the microphone and introduce yourself
25 and your affiliation so that our court reporter can capture

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1 that, for the record.

2 MR. HARVIER: Good afternoon. Thank you. By
3 way of introduction, my name is Martin Harvier. I'm the
4 current vice president for the Salt River -- guess I'll turn
5 this on here. Light's on, nobody's home.

6 MS. APPEL: There you go.

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

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

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

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1 the right-of-way process.

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

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

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

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

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

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

25 How would the Bureau of Indian Affairs
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1 address right-of-way defaults, foreclosures, mortgage sales,
2 and encumbrance violations, et cetera? Has the Bureau of
3 Indian Affairs analyzed the impact of the Straight versus A1
4 contractors in this issue?

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

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

18 Next point, the current process for the
19 service line agreement works and should not be changed. As
20 proposed in the draft regulations, the BIA is increasing
21 costs, time, and delay in the service line process for
22 electricity and other needed utilities. The community is
23 concerned the proposed recordation requires the service line
24 agreements provision will cause delay and frustrate
25 providing basic service to Indian home owners.

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1 Service line agreements are meant to be
2 simple agreements between the utility or governmental
3 provider and the homeowner, who already has the approved
4 homesite lease and to allow the service provider to cross
5 the leased land to provide the basic utilities, as
6 electricity, water, telecommunications.

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

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

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

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

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

24 So like many tribes, the community has
25 historically had problems arising from the rights-of-way

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1 that cross the Gila River Indian Community, our reservation
2 boundaries. In fact, as you know, in 2006 we filed a
3 complaint in the D.C. federal district court against the
4 United States for an accounting of all of our trust assets,
5 trust funds, including the rights-of-way across the
6 reservation.

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

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

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

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

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

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

21 MS. APPEL: Thank you very much.

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

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

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

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

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

22 In your violation section of the
23 right-of-way, when you police it up, you talk about all
24 three forms of action that may be taken, but there's no
25 definition for "termination" and "relinquishment."

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1 What we've done in the past and in our tribal
2 litigation, our federal litigation or federal administrative
3 practice is we viewed abandonment as nonuse and intent not
4 to develop or failure to develop within the two-year period.
5 Relinquishment is a voluntary act which has to be recorded
6 and then the termination occurs then.

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

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

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

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

24 MR. ALLAN: Hydro power.

25 MR. SIMPSON: And that's what it's used for.

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1 Federal Inter Regulatory Commission does not regulate
2 transmission lines, I don't think. But that's what it's
3 intended for, is generally used for hydro power projects, is
4 my understanding.

5 MR. ALLAN: Thank you.

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

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

22 Moving on, Section 169.004, I like, I
23 generally like that, but some questions have come up. What
24 does it really mean when you say a person or legal entity,
25 including an independent legal entity owned and operated by

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1 a tribe or federal state or local government, who is not an
2 owner of the Indian land?

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

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

20 The other is the exception "unless you are
21 authorized by a" -- I guess that's "land use agreement, not
22 subject to this part or lease." I think I -- we've had this
23 problem in the past, and this is related to
24 telecommunications and power transmission lines that were
25 constructed without a grant of an easement. They were

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1 existing, I think, around the time of the statute, the
2 general 25 USC statutes were approved for the granting
3 rights-of-way on Indian lands.

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

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

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

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

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

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

24 We're wondering if that's what you intend to
25 do with this proposed rule in the text here. And what

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1 happens in the event there's an adverse grant of
2 right-of-way approved by the Nation but the grantees have
3 not consented to its use to, to its possession of the
4 right-of-way and now there's going to be a new use that may
5 interfere with their grant of right-of-way? Example is
6 running fiberoptic telephone lines inside highway
7 right-of-way.

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

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

24 Valuation of compensation and the value of
25 the easement. We are very happy that you've allowed for

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1 tribes to determine what they think is appropriate
2 compensation, which helps the Navajo Nation. I mean, we
3 like that. But the problem comes in when we begin to rely
4 on our market analysis, we try to tie that with appraisals
5 or other appropriate valuation method with USPAP.

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

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

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

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

24 All right. Do we have any other tribal
25 representatives?

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1 MS. ABEITA: Good afternoon. I'm Carolyn
2 Abeita, and I'm general counsel for the Pueblo de San
3 Ildefonso, New Mexico, and I want to thank everyone for the
4 opportunity to present some comments. The Pueblo will also
5 be submitting written comments, as well, but the Pueblo
6 feels that it's important to participate in this
7 consultation, and so we appreciate the opportunity.

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

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

23 Specifically, we, the Pueblo agrees that the
24 regulations have to provide clear and greater deference to
25 tribal decisions on how the tribe choses to value its land

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1 and what type of compensation it negotiates for its
2 right-of-way.

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

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

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

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

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

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

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

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

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

9 We also support the language in Section
10 169.115 that allows for non-monetary or other types of
11 compensation. We like the opportunity to negotiate for
12 items, such as technical assistance on projects,
13 construction of other infrastructure, increased access to
14 utilities for tribal members, and so forth, depending on
15 what the parties seeking the right-of-way may have to offer
16 as in-kind compensation. And so this is an opportunity for
17 the tribes to develop a deal that is more beneficial, based
18 on their needs.

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

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

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1 for them.

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

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

19 We also have a concern about the definition
20 that says running from a main line. Again, we have a
21 situation in New Mexico where a utility company has said
22 that the distribution line that runs off a transmission line
23 and runs onto the reservation and then branches off into
24 specific lines to houses and tribal offices, those smaller
25 branching lines are typically what would be subject to a

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1 service line agreement. But the utility company is making
2 the decision to say that that distribution line is also part
3 of the service line agreement and they should not be
4 required to pay for right-of-way.

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

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

14 MS. ABEITA: Right, and --

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

19 MS. ABEITA: Right. And then the other issue
20 with that is that if there is a distribution line and then
21 it branches off into service line agreements to, say, the
22 tribal facilities or to tribal residences and then a
23 non-Indian then hooks onto that service line to service
24 their fee property, what is that. And so that there's a
25 discussion about well, that should be a service line because

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1 it's coming off of a service line, even though it's over
2 tribal land.

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

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

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

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

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

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

23 So, again, you have your 15 days, but if the
24 tribe doesn't get to this for 30, 45 days, that's still, you
25 know, you've still put the burden on the tribes to really

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1 monitor and push, so that's going to still be a problem.

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

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

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

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

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1 interested party.

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

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

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

20 And then, lastly, the Pueblo de San Ildefonso
21 supports the language of 169.009 that affirmatively states
22 that improvements, activities, possessory interest within
23 the tribal right-of-way may be taxed by the tribe but may
24 not be taxed or assessed by the State, as a result of the
25 federal laws.

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1 We think it's important that the regulation
2 reaffirm that the tribes still have this authority over the
3 right-of-way, over their land, and that the grant of the
4 right-of-way does not diminish that sovereign authority, and
5 that is a vast improvement.

6 The Pueblo also supports the language in
7 169.008 that a grant of right-of-way by the BIA does not
8 diminish tribes' jurisdiction, taxation enforcement, civil
9 authority. So we appreciate the fact that there is vast
10 improvements, and we appreciate the fact that the intent is
11 really to defer and give greater deference to the tribes'
12 rights and sovereign authority over their lands. And we
13 look forward to improving on some of these. And we hope to
14 submit some additional, more detailed comments. So thank
15 you for the opportunity.

16 MS. APPEL: Thank you.

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

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

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

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

14 Come on up.

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

17 MS. APPEL: Yeah.

18 MS. LUCEI: Okay. My name is Karen Lucei. I
19 work for Yakama Nation Trust Real Estate Services. And we
20 have staff that wish they could have been here, but because
21 of the distance, our land enterprise, our wildlife people,
22 they couldn't attend this session. And I think it's
23 important to attend such a consultation hearing. The notice
24 wasn't in advance enough to where our elected officials
25 could be present. We have a lot of issues going on in

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1 Yakama that they just couldn't be here at this time, and I
2 wish they could have been here.

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

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

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

23 The specific use language of current 169.05
24 has been omitted from the proposed regulations. That
25 language was added to the regulations in 1980 to prevent

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1 piggybacking of utilities and should be continued.

2 Now, I wasn't on the staff in '72, '73, or
3 1980, so I don't know what was said at those sessions or
4 those hearings or during the regulation revisions, but I
5 think it's good to remember what was said.

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

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

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

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1 Thank you.

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

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

11 MS. APPEL: Thank you.

12 Do we have any other tribal...

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

15 MS. APPEL: Yes.

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

22 My first question is under the new or under
23 the proposed regs, there will be no mortgages without
24 consent and no assignments or piggy-backing without consent.
25 We've actually had Puget Sound Energy mortgage all of the

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1 rights-of-ways that they have on Muckleshoot Indian
2 reservation without consent. They let that slip to me one
3 day, and I was like really guys? You don't have permission
4 to do that.

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

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

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

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

24 The Supreme Court set up a balancing test for
25 whether state taxes could be applied to Indian land, and it

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1 balances the federal interests, the state interests, and the
2 tribe's interest in those taxes. And what I've said in the
3 leasing regs and it's been quoted and I might as well say it
4 again is that this provision is putting the federal thumb
5 down on that balance.

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

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

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

18 MR. SIMPSON: You're welcome.

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

24 But surveys. So in the leasing regs, you
25 don't have to get permission to survey. But in the

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

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

14 169.121, which sort of deals with the -- if I
15 can find it -- what provisions the grant of right-of-way
16 must contain, part three of that includes some provisions
17 that are either exactly identical or substantially similar
18 to the current rights-of-way regs.

19 We have a lot of trouble getting utility
20 companies to agree to those provisions. And the way we've
21 gotten around that at Muckleshoot is that the right-of-way
22 is first given to the tribe and then the tribe, when they
23 assign a portion or assign a certain use to the utility,
24 holds back those provisions. So if we are assigning it to
25 City of Enumclaw for gas services, City of Enumclaw is not

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1 required to restore the right-of-way in a workmanlike manner
2 or keep clear. Those obligations are still on the tribe.

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

10 169.107, the consent requirements, my
11 personal opinion on this is that this is going to allow
12 steamrolling by utility companies over allotments,
13 individual trust land allotments that have 50 to 100
14 co-owners.

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

24 I also think your statement earlier in saying
25 that it was language that was derived directly from AIPRA,

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1 it may not be a good idea to use the language from AIPRA
2 because if it's from AIPRA, it was probably designed to
3 reduce fractionation. And I don't know if we can -- I mean,
4 we're not going to be reducing fractionation, so maybe we
5 need to find some sort of other thing.

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

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

19 MR. SIMPSON: We would appreciate you
20 thinking some about that. This provision is statutory. The
21 power bureau to grant consent on a right-of-way where the
22 owners are too numerous to contact is actually out of 25 USC
23 324.

24 So what we're doing here is we're defining
25 what too numerous means in that statute. So that -- we

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1 would appreciate some ideas on that.

2 MS. LAWSON: Okay. Great. Thank you.

3 MR. SIMPSON: Uh-huh.

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

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

15 MS. APPEL: Thank you.

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

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

22 Anybody?

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

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1 Thank you, everyone.

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

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

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

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

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

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

22 And so the tribe has said that we think that
23 this is a change in the size or the scope granted, there's
24 no change in the actual size of the right-of-way, but there
25 is a change in the use or the purpose of it. It's allowing

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1 for, I guess, a greater capacity.

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

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

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

20 And I want to say it has to do with Mountain
21 States Telephone & Telegraph, but I'm not sure about that.
22 But basically there was a right-of-way at issue there where
23 the original right-of-way, as with so many of the railroad
24 ones from the late 19th century, the original right-of-way
25 allowed for telegraph and telephone lines.

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1 And the opinion says that -- oh, it has to do
2 with MCI. That's what it was. It wasn't Mountain States
3 Telegraph, it was MCI, before they became Verizon or whoever
4 they are now. And the company wanted to put in fiberoptic
5 lines because, of course, we don't generally put in
6 telegraph lines anymore and telephone lines are getting less
7 and less.

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

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

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

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

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

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

5 MR. SIMPSON: Uh-huh.

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

11 MR. SIMPSON: Sure.

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

21 MR. SIMPSON: Yeah. It's a difficult issue.
22 We've also had ones where, for instance, there's a rail
23 line, used to be a commercial freight line, between
24 Albuquerque and Santa Fe, the BNSF. That rail line is now
25 the Rail Runner commuter train and which crosses several

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1 pueblos, too, and we had to figure out how that could work.

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

6 MS. ABEITA: Thank you.

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

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

24 MR. SIMPSON: I think so. I'm looking for
25 our effectiveness provision in here. There it is.

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1 So if we already, if we granted or approved
2 the right-of-way before these regulations are effective,
3 then this regulation applies to that right-of-way document,
4 unless there's a conflict, unless the provisions of the
5 right-of-way conflict with this part.

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

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

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

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

21 MR. SIMPSON: Thank you.

22 MS. LAWSON: When I heard about the mortgages
23 and assignments thing, especially the mortgages part, with
24 Puget Sound Energy, I went and looked at the regs and I
25 didn't see anything that said anything about it. But now

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1 that we have it in the proposed regs, I went and looked at
2 the effectiveness subsection to see if it would apply to all
3 of the mortgages that have been done or all the assignments
4 that have been done without permission of the landowners or
5 permission of the tribe. And I was pretty excited that we
6 can go back and address these piggy-backing and mortgaging
7 issues, so thank you.

8 MR. SIMPSON: You're welcome.

9 MS. APPEL: Do we have any more comments?

10 MR. SIMPSON: Don't make us start calling out
11 people.

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

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

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

23 Thank you.

24 (3:11 p.m.)

25 * * * * *
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1 STATE OF ARIZONA.)
) Ss.
 2 COUNTY OF MARICOPA)

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

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

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

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 SANDRA L. MUNTER, RPR
 Certified Reporter No. 50348

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