In The Matter Of:

Right-of-Way on Indian Land

October 27, 2014

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BUREAU OF INDIAN AFFAIRS

PROPOSED RULE

RIGHTS-OF-WAY ON INDIAN LAND

RIGHTS-OF-WAY CONSULTATION

OCTOBER 27, 2014
HYATT REGENCY,
THE LEARNING CENTER CONFERENCE ROOM
6:00pm - 8:00pm

P A N E L I S T S & P R E S E N T E R S

Kevin Washburn,
Assistant Secretary - Indian Affairs

Stephen Simpson,
Senior Attorney, Office of the Solicitor

Mike Black,
Director, Bureau of Indian Affairs

Larry Roberts,
Principal Deputy Assistant Secretary - Indian Affairs

Elizabeth Appel,
Director - Regulatory Affairs & Collaborative Action

Legend of the transcript:

[sic]	**Exactly as said**
[phonetic]	**Exact spelling unknown**
--	**Break in speech continuity**
...	**Trailing speech or omission when reading written material**
[inaudible]	**Mechanical or speaker failure**

P R O C E E D I N G S

6:14 PM

KEVIN WASHBURN: This is the real hardcore crowd willing to spend their dinner hour talking bout Right-of-Way regs. We're really grateful to all of you for being here. We have a lot of staff here. And let me sort of with quickly recognizing them. Mike Black who is abandoning us all of a sudden. Steve Simpson here from his sister job. He's worked really hard on these regulations. Liz Appel from our RACA, our Regulatory Affairs and Collaborative Action office; she's in charge of all of our rule-making efforts and does a great job. Andrea Bledsoe-Downs, our Deputy Assistant Secretary for Policy and Product Development. Sara Harris, our Chief of Staff. Principal Deputy Assistant Secretary, Larry Roberts. Sara Walters in the back. Darin Meeks who runs our Congressional Affairs Office. Did I miss anybody? We've got you surrounded. We may have you almost outnumbered, basically.

This regulation, for most people it's not exactly a riveting subject matter, but those of you who are here, I think, know that it's exceedingly important because tribes get a lot of revenues from their Right-of-Ways. It's a major source of economic development, especially for Western tribes. We have enacted our current Right-of-Way

regulations more than 40 years ago, in 1968. We haven't updated them in over 30 years -- so since 1980 -- and it is time.

The updates that the proposed rule would provide for Right-of-way processed tribal land, BIA will defer to the tribe on it's land management decisions, including decisions about how much compensation they should receive, whether that compensation should be a periodic payment over time or a one time upfront type payment, and what's the form of compensation. Should it be monetary compensation or payments in kind? These revisions are really important for codifying tribal sovereignty and the Rights-of-Way area. We've made a lot of progress. We've had great success with our leasing regulations, our 162 regulations. Building on that success we are making some significant improvements there. We would like to make similar improvements to our Right-of-Way regulations.

This is a priority because economic development is such a priority. We all know the tribes Indian in country will do a lot better if we can increase economic development on tribal lands. Economic development is not just a lease, but it may require easements for infrastructures such as roads and utility lines. Some of our tribes are located in key locations where that infrastructure is important to off the reservation as

well. So that can be a purposed source of revenue.

We published the rule, the proposed rule in July, and so far we have received input from tribes, allottees, and industry. Today we got Pueblo Governor Chevarria's comments. We've hosted three tribal consultation sessions, already, prior to this one. We are really needing to hear from you. This proposed rule is a work in progress. We are here to provide a brief overview of the proposed rule and most of all we are here to listen to you and get your comments, your oral comments, on the rule.

So we want your land to be as productive as you want it to be and we need your input to help us make that happen with our Right-of-Way Regulations. Would anyone else like to say anything before I turn it over to Liz Appel to run through a quick PowerPoint to show you what we have in mind? Take it away, Liz.

LIZ APPEL: Thank you, Kevin. The slides -- there are copies in the back if you didn't pick one up, they're back there. There are also copies of the Rules back there and a sheet that is kind of a summary of what the proposed rule would do. Since we have limited time today, I'm going to run through these slides pretty quickly. I'm going to try to, anyway, to make sure that you have as much time as possible to provide your input.

As Kevin mentioned these are just proposed, they are

not final by any means. So we really need your input if there are pieces that you like or don't like about the proposed rule.

Kevin provided some background about how these came about. Initially, we revised the leasing regulations and as you'll see these Rights-Of-Way regulations take a lot of the similar approaches that the revisions to the residential business and wind and solar leasing regulations do. The current Rights-of-Way regulations were proposed back in the 60s and there were pieces of them were updated over the years, but they haven't been comprehensively updated and they haven't been updated at all since 1980. So it's time that we took a look and proposed this rule.

The current regulations also rely on statutory authorities that are specific to different types of Rights-of-Way. In the proposed rule, we're taking the approach of relying on the general Rights-of-Way statutory authority at 25 USC 323, 326, or 7, 8. Through this approach we're trying to simplify the requirements rather than having different requirements for different types of Rights-of-Way. As I mentioned, the proposed rule incorporates a lot of the approaches that the leasing regulations take.

So I'm going to briefly run through each of the

subparts. Starting with the purpose and definitions. The proposed definition adds several definitions in effort to make the rule more clear and set out the processes and terms more clearly. There are provisions on what land the Rights-of-Way rule applies to, what happens if there is a life estates on the land. Then there are amendments that the general provisions that are in the new leasing regulations are also in these Rights-of-Way regulations. For example, what laws and what taxes apply when there's a Right-of-Way across Indian land. Whether tribes may contract or compact for Right-of-Way and what decisions may be appealed and who's an interested party in those appeals.

So Subpart B sets up the process for obtaining a Right-of-Way. One of the biggest changes is that under the proposed rule, there would be no BIA approval required to survey the land. So currently, it's sort of a two-step BIA approval process. The Right-of-Way applicant would have to first get approval from the survey and then submit the application for the actual Right-of-Way. This instead would cutout that first BIA approval step, but the applicant would still have to get the consent of the landowners to get access to the property and survey.

The proposed rule also sets out what an application must include and it sets out the consent requirements

basically for tribal land; tribal consent is always required. For individually owned land, a consent of the owners majority interest in the land is required. That statutory provision that the majority interest ownership is required. There are certain circumstances where BIA can grant the Right-of-Way without the landowners consent; this also is statutory. The owners are so numerous that it would be impractical, there would be no substantial injury to the land or the landowner. Landowners are compensated, BIA provides a 30-day notice to all of the owners. What's not statutory and what we're specifically seeking comment on is our definition of what "So numerous" means and the proposed rule defines "So numerous" to be 50 or more, but less than 100 owners, where no one owner holds an interest greater than 10 percent, or 100 or more co-owners. If that seems familiar, that's because it's from the definition of highly fractionated in APRA. We are specifically seeking comment on whether "So numerous" should use that definition.

The proposed rule would instead of deposit require a bond or alternative security that could be in the form of a CD or a letter of credit, etc. That security would have to cover the highest annual rent, unless it's a one-time payment for the Right-of-Way. Estimated damages from construction, operation maintenance, and restoration and

reclamation, and under certain circumstances, BIA can waive that requirement for the security. The tribe determines the waivers in it's best interest, BIA will defer to the tribes determination. You'll see that throughout the proposed rule that BIA is deferring to the tribe, the tribes determination and the interest in self-governing.

Likewise, for compensation, BIA is going to defer to whatever the tribe determines to be the appropriate compensation. For individually-owned land, generally, market value is required, except in certain exceptions. The proposed rules sets out specifics about when compensation would be required, but it always defers to the grant. So the parties can negotiate if they want certain compensation requirements that can always be included in the negotiated grant. The proposal will also incorporate the same approach that the leasing regulations take to direct pay limiting to when direct pay is available to only those situations where there are 10 or fewer landowners and they all agree to direct pay.

Reviews and adjustments generally, will not be required for tribal land unless the tribe would like to require them. For individually owned land, they are required, unless the payments of one-time lump sum or one of these other conditions.

The process for the Right-of-Way application. Once an applicant submits a complete application package to BIA, BIA will notify them that it is complete, if it's not complete BIA will notify them and identify what the missing information is. If it's complete, BIA will review it and issue a decision within 60 days. So it's providing some certainty with the Right-of-Way to help with economic development processes. Just a note: As with the leasing regulations, the 60-day clock for reviews starts only when the package is complete, meaning all the consents have been obtained, the NEPA, if any is required, has been done and all of the evaluations have been done.

The proposed rule sets out limited grounds for BIA to disapprove a Right-of-Way only if the consents haven't been obtained or there's a compelling reason or other requirements of the regulations haven't been met. That also is to provide some sort of certainty that through the application process, that a Right-of-Way will be granted unless there are valid reasons for not approving that Right-of-Way. And again, BIA is going to defer to maximum extent possible to the Indian landowner's determination that a Right-of-Way is in its best interest and BIA not unreasonably withhold approval. BIA has the discretion to grant one Right-of-Way for all tracts traversed by a Right-of-Way. To use one grant for several tracts or to

issue separate grants for a Right-of-Way traversing several tracts and that is made explicit in the proposal.

The grant is going to incorporate any restrictions or conditions set out in the consents and that's with the idea that it's more of a negotiation and will also list the restrictions that are set out in the regulations. The proposed rule provides -- it specifically addresses piggybacking. It addresses when you can add a new use to an existing Right-of-Way versus when you have to get a new Right-of-Way grant for a new use. Basically, if the use is specified in the original Right-of-Way grant, then you don't need a new Right-of-Way or if the use is within the same scope of the use that's in the original Right-of-Way grant, then you will have to obtain a new Right-of-Way; you could piggyback. The determination of whether the use is in the same scope, is actually a legal determination. But we welcome any comments, if you have any, on that issue among everything else.

BIA will grant the new Right-of-Way for if the use is not within the scope. If the new Right-of-Way does not interfere with the use or purpose of the existing Right-of-Way and the existing Right-of-Way grantee consents.

Subparts C addresses the Right-of-Way term/duration. What I really want to highlight here, BIA is going to

defer to the tribes determination what the appropriate term would be. But for individually owned land, the proposed rule has a table where it sets out various types of Rights-of-Way and has suggested terms for those Rights-of-Way. We particularly would like comment on whether those terms are appropriate for the different types of Rights-of-Way. So please pay special attention to that.

Renewal. BIA will renew the original Right-of-Way files. If there is a change in size, type, or location, than a greater chance to get a new Right-of-Way; they can't renew. The proposal sets out the process for amendments, assignments, and mortgages, generally there time limits for approving each of these. Again, the clock starts only when the package is complete. The proposed rules sets out the requirements for when approval is appropriate or when those limited conditions when BIA can disapprove one of those.

Effectiveness. The proposed rule sets out that the Right-of-Way would be effective upon BIA approval. Even if an appeal is filed, the Right-of-Way would be immediately effective under the proposed rule. BIA will refer Right-of-Way documents in the LTRO.

The compliance and enforcement provisions really mirror those of the new leasing regulation. The BIA

basically, establishes when BIA will investigate for compliance with a Right-of-Way and establish that BIA is going to consult with the tribe on tribal land before taking any enforcement action. It sets out if the violation is one of other than nonpayment what the steps are that BIA will take to enforce against that grantee and if the failure is a failure to pay compensation and the median time required by the grant what the steps are that BIA will take. Then it sets of the process for canceling.

Something that's new is the proposed rule addresses abandonment and non-use. Basically, it defines non-use as if the grantee does not use the Right-of-Way for a two-year period for the purpose for which a Right-of-Way was granted. And an abandonment would be if the grantee affirmatively relinquishes the Right-of-Way. In either case, the BIA can cancel Right-of-Way within 30 days after mailing notice to the grantee.

And then finally, the proposed rule addresses service lines as a piece separate from the whole Right-of-Way granting process. Service lines are defined as a utility line that's supplying the occupants of the property with utility service, basically. Unlike the current regulation, the definition of service line in the proposed rule does not have any capacity limitation for what qualifies as a service line.

As I said, there's no Right-of-Way grant required for service lines, but there are service line agreements required that must be filed with the BIA. There's no BIA approval, but parties have to file it with the BIA. The BIA will record it in the LTRO so that there is a record that that service line is in place.

So comments on the proposed rule are not due November 3rd. You can feel free to provide hard copy or e-mail. This is the e-mail address: Consultation@bia.gov. You can also comment through regulations.gov. Our next staff search will be to review the comments, make changes that's appropriate, and ultimately publish a final rule in the Federal Register. Once the final rule is published, there will be at least a 30-day period before that rule becomes effective and that's to allow people time the to familiarize themselves with the rule and comply with it.

That is the presentation. We can open it up now to all of your comments and input. We have our esteemed panel here to answer any questions you may have. So we have a microphone that I will make sure is turned on. If you want to come up to the microphone or if you want to raise your hand, I'll bring to you.

KEVIN WASHBURN: We also have a court reporter, so when you come up to the mic to make your comment, please identify yourself so the court reporter can get your name

for the record. It's important to know who is here and what they said. You deserve credit for the ideas you help us with.

GARY HAYES: My name is Gary Hayes, Councilman from the Ute Mountain Ute Tribe, we appreciate this opportunity. As you go down this road, I think there are other tribes in this situation. Back in the early 1900s the WAPA lines -- we have WAPA lines crossing our reservation today. As the responsibility, trustee responsibility to the tribe, they agreed to have each line perpetual agreements. Today we know that's wrong. As a trustee back in those days, I think, they failed to protect the tribe into these agreements. I guess my question is -- you guys are attorneys -- to think what can we do to undo the injustice that is it created today, because it is wrong. Maybe our leaders didn't understand -- I'm not trying to demean them or anything, but it's the responsibility of the BIA to protect our interest and not to agree to disagreement for perpetual. I'm just throwing that out. Is there a way, a strategy, that we can go forward with? I don't know if any other tribes in Indian country face that same situation.

KEVIN WASHBURN: Thank you, Chairman Hayes, for that comment. We certainly are open to all views. We want to focus on the Rights-of-Way we have before you. We know

there's been a lot of injustices in the past. I have to say that everything day at work seems like correcting mistakes that our government's made in the past. We can't correct all of the them in the past, but we can certainly try to make things better going forward. So that's the purpose of the consultation now to get these Rights-of-Way regs to a place where tribes have much more control over the Rights-of-Way on your reservation. We reserve that discussion for another time about the Western Area Power Authority Rights-of-Way. Thank you.

GARY HAYES: But with the proposal --

STEPHEN SIMPSON: I'm Steve Simpson the from the Solicitor's office. As Kevin noted the proposal is to deal with Rights-of-Way in the future. We do have a proposed regulation we do note that certain Rights-of-Way, if the tribe negotiations them that way could be in perpetuity. And we would appreciate comments from those of you, including you who have Rights-of-Way or are subject to Rights-of-Way that are in perpetuity and my not have worked out so well. Let us know what we might be able to do with these rules to try and not make the same mistake twice.

As far as the existing ones, there's very little that could be done except for perhaps renegotiation. We know that is happening in some places, including Salt River,

where there has been so renegotiation of those Rights-of-Way and Western Area Power, in particular, has changed some things.

MR. CHEVARRIA: Good evening Assistant Secretary. My name is Michael Chevarria, I'm the Governor for Santa Clara Pueblo. For public lands there only assigned properties, the Pueblo takes ownership of those lands. Also, my question -- you kind of answered that -- between the individual and tribal lands, before it was up to the tribes to then negotiate these Rights-of-Way. We do have some perpetual Rights-of-Way regarding our state called Therlean [phonetic] in the State of New Mexico. It is very important that we address it because it is an impact of transportation for all of our community there in Santa Clara Pueblo. Is the BIA still going to have a hearing of the function regarding the biological cultural assessment, which is part of the requirements or is the tribe going to have to use its tribal funds, now, as it did before those functions on behalf of BIA?

Also, what is going to be the function of BIA for appeals? One of the things that we're dealing with in New Mexico is that some of the state legislators thinks its an issue dealing with utilities crossing through tribal land. Again, how do we deal with the issue involved with electric also with PNM with the gas lines. Those utility

lines are very important and we still need the support of Interior BIA on this initiative, because it is federal law. It is not a state law. So that's what we're trying to formulate as a position paper on the laws.

In August of 1924 Pueblo Land Act comes into play. That's very important that these legislators don't know the history of Indian law and how the rights are disposition to negotiate these rights or the easements through tribal lands. So again that's very important and still have the support from BIA regarding those appeals regarding some of these Rights-of-Way. And again, once the process is going forward, will the regional director be that person to then approve that Right-of-Way or would it have to come to the secretary level for that approval? So it is very important as we move forward, giving the tribe the opportunity of performing functions on behalf of BIA.

So again, once we go through this process, will BIA come and perform audits on the tribe? Because now we're receiving that money, it's just like they received money for Forest Management Deduction, and also for realities now they're getting audited from BIA to come and look at those funds.

So it is very important as we move forward on this process, I guess, submit a 5-page written comment relating

to some of the steps I gave to the Assistant Secretary.

Again, it's very important because it's not a one-size-fits-all, but it gives the tribes an opportunity of then how to then form these functions on behalf of the Pueblo. I should mention, Assistant Secretary, the economic ventures for the Pueblo, especially there in Santa Clara.

So this will be very important as tribal leaders that we understand and learn more so that we present this to our tribal councils and into our communities. And so that we're not -- we're fillig in those gaps; we have no loop holes in there. So again, as we move forward, as you mentioned since '68 to now, looking at those opportunities will be very important. So I'm going to get some of my comments that I have added to these comments that I submitted to you. I think I have until November 3rd, which is next week, to provide additional comments. But again, Assistant Secretary, I appreciate the opportunity for you holding this session this evening. Again this is something else that's going to be very -- an opportunity for tribes to then consider and move upon. So those are just my comments. Thank you.

STEPHEN SIMPSON: Thank you very much, Mr. Chevarria, on behalf of the assistant secretary. Assignments, I'm looking to see if we have the provision in here, we may

not. I know that there is a provision in the leasing regulations that talks about if tribal land is subject to a tribal land assignment, would that -- we would not grant -- we would not approve a lease without consent of the tribe. We want not just the assignee, but also the tribe. Because it's still tribal land. We want to make sure that if that is not in the Right-of-Way regs, it should be. So please check and make sure and we'll check and make sure that it is.

On the environmental issues. The responsibility for compliance with the Endangered Species Act is still with the Bureau know matter what. The processing may happen as part of your tribal contracts. The way we're talking about with tribes taking over this process is through the normal 638 contacts. So if you've already contracted reality, that's what we're talking about here. That scope would remain the same under these regulations.

Yes, you're right, the approval of Rights-of-Way is delegated down -- it could always come back to the assistant secretary, in a particular case, but it is delegated down to the superintendent or the regional director. And that doesn't change under these regulations, either.

MR. CHEVARRIA: And the appeals process?

STEPHEN SIMPSON: The appeals process will remain the

same as it is now. There is a slight change in that we've adopted a provision that we put in the leasing regulations for if a superintendent or regional director is not making a decision within proper a timeframe, you can ask the next higher-up person in the bureau, up to the director, to instruct that official to make that decision or make the decision themselves. Instead of filing an appeal under Section 25 CFR 2.82 to the Interior Board of Indiana Appeals. Because they aren't in that supervisory chain and doesn't really make sense for them to be telling the regional director to make a decision. It makes much more sense for that regional director's boss, the director of the bureau, to be telling the RD to make that decision. So with that one difference, which again was adapted from the recent regulations, the appeals process would stay the same.

DEANNA SCABBY: Good evening. My name is Deanna Scabby from Salt River Pima Maricopa Indian Community. I don't know if the gentleman's question was adequately answered concerning the WAPA, but Salt River did file suit against WAPA and they too felt it was in perpetuity. And what we did was -- I spoke to Christians -- I was the Tribal Council Representative. We had 25 percent ownership of that Right-of-Way, from 2007 and finally this past June paid out to all the landowners. We initially

had 700 allottees names. By the time it was all over, those who passed on and all the other relations, we had well over a thousand maybe 1400 of those who were paid out. So we did renegotiate, and was responsible to notify the community prior to expiration of that Right-of-away.

JOE GARCIA: Good evening everyone. My name is Joe Garcia, I'm from Ohkay Owingeh. I'm the head councilman. I just wanted to also speak a little bit about what Governor Chevarria spoke about, but generally, the tribal council would support the changes on the proposal to make compensations and evaluations. I think in the past we were sort of -- the tribe was sort of at a disadvantage in determining what amounts to charge for any Rights-of-Way. Well, this go around the Pueblo of Ohkay Owingeh did negotiate an amount with Amos Co-op, who is a cooperative, nonprofit electric company in northern New Mexico.

There's questions about what negotiation vales were set. It was a negotiated settlement for amount, so the fact that there's no evaluations and the tribe can charge as much as they want. So as long as it's negotiated that's no reason -- the bottom line, I believe. The fact of matter is that we are now being challenged by the state government on that amount. So the question would be: This comment is good to have in the proposed rule, but what protection does then the tribe have for whatever is

negotiated on the amount?

There's been some proposed legislation by some legislative people in New Mexico to stop the tribe from negotiating whatever they think is an appropriate amount. So basically, I'm not sure what it would do to our settlement, but I'm not sure what it would do to other opportunities that the tribes may have. They were taking advantage of the tribe too long and now that we're sort of stepping up and we know little bit more; the other side doesn't like it. So I think it is important to keep an eye on what's transpiring in New Mexico; it maybe happening in the other parts of the country as well. But we genuinely support the proposed changes. Thank you.

IRENE COOCH: Good evening, Kevin Washburn, Assistant Secretary, I'm here with the Ute tribe, we have a delegation here.

KEVIN WASHBURN: Chairman, would you identify yourself by name?

IRENE COOCH: Okay. Irene Cooch, former chair of the Ute tribe, Fort Duchesne, Utah. I have a delegation here, current tribal council members that are here: Phillip Chimbarras, Tony Small, and we also have Jeremy Henderson, attorney from Oregon. Just wanted to state that we are talking with our tribal delegation, the attorney, the Ute tribe did submit comments on the proposed rules, dated

October 22, 2014. I think it is pretty self explanatory. The Ute tribe does also have a resolution, which is pending before the National Congress of American Indians. The government resolution number is 14, Atlanta 14, and it's the Ute tribes generally supports BIA proposed Right-of-Ways. It is also pretty self-explanatory, it does explain the reasons why they support it and also the reasons where they have stated that -- I can read it, here it is.

Therefore, be it resolved NCAI supports NUI's proposed regulation to Right-of-Way of Indian land provided that the issues set forth in this resolution are addressed in the final regulations. Be it further resolved, the NCAI request the regulations are modified to remove any provisions of references to the application state law to Rights-of-Way in Indian country in their entirety.

The resolution is pretty self-explanatory. We would like to ask that NCAI support this resolution. Ute tribe has been a member of the National Congress American Indian since its inception in 1944. We always have come to the -- we've always attended the annual meetings. We believe NCAI was sent to support sovereignty, also protect the land and resources and also protect the rights of our people. We're asking for NCAI to support this resolution,

our resolution. Also, I'm going to turn this over to Tony Small or Phillip to make comments.

TONY SMALL: Good evening, my name is Tony Small, Ute tribal council member. I just wanted to make a comment, Mr. Washburn. It is important for BIA to make it clear that the tribes retain sovereign authority and jurisdiction over any Right-of-Way that they have granted for any purpose and to clarify that state law does not apply.

Also, applying state law to a Right-of-Way crossing the reservation will compromise tribal jurisdiction. So we have proposed modifications to prevent the application of state law to land within our exterior boundaries of any Indian reservation. Those are just a couple of the comments I wanted to make. I'm going to give this to my colleague, Phillip.

PHILLIP CHIMBARRIS: Thank you, Tony. This is Phillip Chimbarris, council member of the Ute Indian tribe. I have a couple of comments. The federal government should respect fractionated ownership interest in land by providing notice and notice to 100 percent of Indian land owners and to acquire their concerns before granting a Right-of-Way.

Another issue is there is know need for perpetual Right-of-Way. BIA should replace Rights-of-Way that are

in perpetuity for Indian lands held in trust by the United States with a term of 50 years.

JEREMY HENDERSON: Mr. Secretary, this is Jeremy Henderson, serving as general counsel for the Ute tribe. Just to echo the comments made by the Ute tribal business committee members and Ms. Cooch. I think the regulations by and large do go a long ways to improve the Right-of-Way process and update the system that is very antiquated and has been antiquated for decades. So in that respect, I think, by and large the changes that are being proposed with the regulations are positive. However, there's the issues that the Ute tribe views as problematic that was identified earlier on. The application of state law to individual Indian Right-of-Ways and to allow individual allottees to act where the state law can or cannot apply as proposed to tribal and federal law to the governments and administration Right-of-Way raises a whole host of issues and it serves largely to undermine tribal sovereign authority and jurisdiction. That's currently the issue, I think you're aware that the Ute tribe is facing litigation with the State of Utah where they're in a fight for the lives of over jurisdiction as it relates to these Right-of-Ways. I know this is a problem that other tribes have experienced and to allow individual allottees to let state law apply to that Right-of-Way just adds fuel to the

fire on that issue.

Separate from that, it's also problematic. I think to have been language in the regs that allows for extension of similar uses within the same scope for a grant of a Right-of-Way. This has been a problem that a number of tribes face throughout the United States, where Right-of-Way might grant access for a pipeline, 3-inch pipeline, as part of the Right-of-Way with specific parameters of that Right-of-Way are identified and granted. A company will come along and expand that pipeline to 6 inches or they might add four more pipelines. The language that seems to allow for similar usage, I think, could be exploited by these companies where they come in, if it's for a power line, they might not have additional latitude or they might expand it out to 12 lines, which would raise a number of issues.

We also have problems with companies that try to piggyback on Right-of-Ways. So if a utility has a Right-of-Way for a pipeline to deliver water, another utility will try to piggyback on that Right-of-Way to add another pipeline to deliver gas. So that language that allows for expanded or similar uses within the same scope, I think, would cause a host of problems and not add clarity to the process.

Similarly, there's also, I think, the problem in

allowing for the Rights-of-Way to regulations to be applied retroactively. We've heard from a number of the Ute tribe's industry partners that this will create further level of uncertainty in terms of Rights-of-Way that have been negotiated. As we read the regs, the regulations, with their specifics would trump any contrary terms in existing Rights-of-Ways that have been set forth.

But a number of these past Rights-of-Way don't contain specific provisions that deal with mortgages and other items. So this would lend further uncertainty to the Right-of-Way process which would very likely resolve the litigation, which would inevitably resolve in further delays for the implementation of positive changes that, I think, can come about through these regulations.

So looking at the retroactive application of these Right-of-Ways, I think, it is really critical as this process moves forward. Thank you.

STEPHEN SIMPSON: Thank you very much. We look forward to the detailed comments that you've submitted. We are concerned about jurisdiction. I understand that one particular provision in is may be problematic. If you've got suggestions for how to change that, we would appreciate it.

I would also appreciate you looking at Subsection E of that same section, which is the one that talks about

retaining tribal jurisdiction and retaining tribal law of the Right-of-Way to try and make a point that -- to say where the Supreme Court said it straight to BIA, when contracting, the tribe could not retain jurisdiction in that particular Right-of-Way. We're trying to retain that jurisdiction. We're trying to make sure that the tribe can keep that jurisdiction. So if you could take a look at that provision, we'd appreciate that and any strengthening we could do there.

On the piggybacking, this is a new provision in these regulations. We have not had a provision about similar scopes in previous Right-of-Way regulations. If we need to tighten that, please let us know. In any case, please give us some specifics on how to do that and we would very much appreciate it.

KEVIN WASHBURN: One moment, Reid. Let me ask a question of you folks. You don't need to address it right now. You don't need to answer that question. Mr. Morris's [sic] -- Council member Morris's request raises a question for me. Which, I think what he said is that the federal government should never grant a Right-of-Way in perpetuity. What our proposed regulation says is that we will defer to the tribe on term length. So the way I read that is it's saying that even if the tribe wants a Right-of-Way in perpetuity, we should not grant that.

That gives me some pause, because I strongly believe in the tribal self-determination and the tribes ability to make those determinations. I can imagine the situation where there's someone maybe that wants to build a road, instead we don't give them perpetuity we're not going to build a road. We're not going to bring our capital to the reservation and build on the reservation.

So I guess I want to make sure I understand. Do people not want the tribal government to have the right to obtain a Right-of-Way in perpetuity? That's what we say we're going to defer to the tribal government. Do you think we shouldn't give the tribal government that option, is basically the question? If other people have views on that, we'd be delighted to hear that. Thank you.
Mr. Chambers?

REID CHAMBERS: Thank you. I'll try to talk to that and a couple of these other points. Kevin, first, let me commend you and your staff --

MIKE BLACK: Tell our reporter who you are.

REID CHAMBERS: I'm sorry. I apologize. I'm Reid Chambers from the Sonosky firm. I'm accompanied here by my colleague Tanner Amdur-Clark, from our firm. I do want to commend everyone who has worked on these regulations. This is a major improvement and modernization. It does, as you said, follow the leasing regulations, these are

very good regulations that can be made somewhat better. So we will submit comments on November 3rd. And Kevin let me also thank you for extending the comment period this last time past October 2nd. It did permit this listening meeting here tonight and it did permit tribal leaders to hear this and to make additional comments. So thank you so very much for doing that.

On the state jurisdiction point, I think there's a simple solution: Take it out. It shouldn't be in the 169-008 proposal and it shouldn't be there for an additional reason, in addition to whatever everybody has said about it. In our view, the Kennerly case forecloses the application of state jurisdiction over an Indian granted Right-of-Way whether by a tribal member or by a tribe absent a statue of congress conferring that jurisdiction over the state.

Certainly, whatever authority the tribe has to barrow state law. We think that is also barred in the Kennerly case; the Supreme Court decision in 1971, absent of that of Congress. Certainly, an individual doesn't have authority to extend state law over the Right-of-Way on an allotment on an Indian reservation. Tribal law applies to an allottee, federal law applies to him or her, and an individual has no authority to infer to that kind of jurisdiction of the state by agreement or the practices.

Kevin, let me speak for a second on this perpetual Right-of-Way issue. I think it's the wrong question -- the wrong way to frame the question, as a matter of tribal self-determination. I mean I understand that formulation. The better way to look at the question is why and at what circumstances would there ever be a need for perpetual Right-of-Way? Now, if you paused the situation with a road and there may be situations where the road really does need to be in perpetuity.

The current regulations are confusing and somewhat internally self-contradictory, but they appear to set a 20-year timeline for gas pipelines in part 25. And a 50 year timeline on electric power lines in 27, 27(d) in the existing regulation. Those are excellent limitations for those kinds of uses. It's hard to conceive -- if you have an oil and gas pipelines that benefits the tribe, there may be a reason to make it longer. But as you know throughout the West, there are oil and gas pipelines and electric lines going from some point off the reservation to some distance city off the reservation that provide no service and no benefit to the reservation. It's just hard to imagine that there's any legitimate basis for perpetual Right-of-Way for that kind of use. Plus you write these regulations in the context of a very good study that the department did, the Department of Energy, I think in 2006,

around then. It was mandated by the Energy Policy Act about the history of Rights-of-Way and compensation for tribes on Rights-of-Way. And what, for example, Chairman Hayes was talking about with the perpetual Right-of-Way. That study showed the terrible history of overreaching not just by WAPA, not just by a federal agency where there's a conflict of interest, but also by private industry. It grossly under compensated tribes for Rights-of-Way. That's something that has changed and it wasn't something that happened on your watch. Maybe, honestly, that was a little more on my watch.

Assistant Secretary, that was the defect at that time. The remedy for that has been when these Rights-of-Way expires at that time tribes can come and see jus compensation for the use of their unique reservations. Indian reservations are not just like other land out in the West. They're unique, historic homelands, as you well know, of Indian tribes. Tribes have been very successful in recent years. And I think the renewal time should be relatively short. Almost all of these true-put lines have been fully depreciated, they've been there for many years and it's time for tribes to be fairly compensated.

So we would strongly question whether you should have a provision in there allowing for perpetual Rights-of-Way, at least for most uses. I think that really needs to be

addressed in the context of the terrible history of not fairly compensating tribes for uses of all kinds of Rights-of-Way on their land.

I should add on the piggybacking provision. We will make specific comments on how we think Steve can strengthen it. I think you all are to be commended among the many things, you know, this is an A minus job. We just need to make it an A plus job. We don't want to go back for another 20 years.

STEPHEN SIMPSON: I appreciate that good of a grade.

REID CHAMBERS: I think it's very, very wise that you've raised this piggybacking problem. It has been a problem for many reservations and it should be foreclosed and we would have specific comments on that.

The last thing I want to say is on tribal ownership of fractional interest in an allotment. We don't know of any authority that allows the secretary to grant a Right-of-Way over any tribal land, including a tribal interest and a fractional allotment, even if it's a 1 percent interest or something like that without the tribes consent. Certainly, for a tribe organized under the Indian Reorganization Act. The Federal statute that you're relying on, the 1948 Statute, specifically bars that. But your regulations certainly, since the 60s and I think going back before that, provides it for all tribes.

There shall not be any grant of Right-of-Way over tribal lands without tribal consent. That's been the longstanding practice, you should not change that -- the tribal ownership of the fractional ownership in an allotment is another abuse of tribal land.

Thanks you for a good job. I look forward to you giving some improvements.

MAJEL RUSSELL: Thank you. Majel Russell, I'm with the Elk River Law Office in Billings. My comment is pretty much consistent with Mr. Chambers' comment. We also -- Clark Madison is here with me. We also were concerned about how you're going to force a Right-of-Way on fractional interest in a tract that is owned by the tribe. We are trying to make sense actually what specifically Section 169.107(d) says. We were looking and trying to understand exactly what that means. It seems to be that you're saying you can grant the Right-of-Way across a tract of land with an undivided interest held by the tribe, but the tribe would be a non-consenting party to the Right-of-Way. We're not real clear on what that would mean. So I'll let you address that.

But also in addition to that, I think that we're all thinking a lot, in Indian country, about the back end of buyback. The back end of the buyback program where we're envisioning that the tribe is going to own a lot of

undivided interests with allottees. And we see here that there are different standards in terms of how you're going to compensate a tribe or how you're going to arrive at what compensation for a tribe would be and how compensation for an individual owner would be. We're wondering how these different standards are going to work when you have tracts of land where you have individuals and the tribe owning undivided interests.

I think that will be a very pertinent issue as we move through the buyback program and the tribe requires fractionated interests, sometimes not real small fractionated interest, but clearly undivided interest in a tract. Thank you.

STEPHEN SIMPSON: Thank you very much, both Majel and Reid for bringing this up. What the provision that you point out in 107(d) is, again, from leasing regs but more importantly it comes out of the Indian Land Consolidation Act Amendments of 2000. The applicable percentages there that -- it just occurred to me -- apply to leasing and not Rights-of-Way. So but that's where that comes from and that's where that concept of a grant of a over the non-consist of a tribe comes from. So if you can think about that tension and give us comments on your views on how that should work and why Rights-of-Way in this context are different than leases, we would appreciate that.

But that's where that provision comes from and if you ask me what 107(d) means, I'm not sure I could tell you either. It's up straight out of the statute and I'm not even sure that the current general counsel of NCAI can tell you that, because I asked him. But that's the statutory language and that's where it came from. And so that's the tension we're looking at, between the 1948 Act and the ILCA Amendments of 2000. So if you can let us know what you think about that, we'd appreciate it.

REID CHAMBERS: Well, Steve, I'm not suggesting that a Consolidation Act implicitly repeal the '48 provision and the 24 -- I mean that's --

STEPHEN SIMPSON: I am not. I am not. In fact, I'm telling you that that's where it came from and it may be a slip on our part.

REID CHAMBERS: Okay.

STEPHEN SIMPSON: So if that gets me from the A minus up to an A, I'll be in good shape. No and, in fact, it just occurred to me as you and Majel were talking about it that, that's where that came from. And I had a little thought up here that, oh, wait a minute, the '48 Act may not be consistent there. So let me know what you're thinking.

JOHN LEWIS: John Lewis from Gila River Indian Community. I'm the chairman of the Gila River Indian

Community Utility Authority, GRICUA. First, I think want to kind of chime in on the comments from Ute Mountain, the chairman, regarding WAPA. I think our experience with WAPA has been equally underwhelming and not spectacular. I think that there's a reason why there's a lot of not uncertainty, but, I think, just regarding the WAPA process. And I think the whole experience has left a very bad taste and that's been resonating for a very long time in Indian country. The experience of some of these situations, you know, as a whole, I think, us talking about it is beneficial.

The point I do want to bring up as a comment is with regards to subpart F, the service line agreements. So I think on a whole, I think, the proposed rule, in general, I think it's a very good start. It's a good fresh look. So from my perspective, as part of the GRICULA, the wholly owned enterprise utility authority of the Gila River Community, I think it's a good look, but I'm a little concerned about the service line agreements. Where my concern lies is that there is no Right-of-Way grant required for service lines. So the expansion of services, the existing service lines, or new service lines that a non-community, non-tribally-owned utility could expand, I think would concern me. They could extend lines. There's also no restriction, no definitive capacity limitation.

So whether that's a distribution level -- a different type of distribution level, distribution line, whether it's heating or electricity, that would concern me. I think that could work in our favor as the tribal-owned electric utility, because we would have service lines that we want to expand and that would work in our favor.

But I think if there was an SRP, Salt River Project, APS, Arizona Public Service, utility, various non-Indian utilities that would want to -- I meant that would not only create -- we would want to limit the level of energy infrastructure that we don't own. It seems that there's no check on that. So that would be my concern. I think it should be limited to -- there should be no Right-of-Way grant required for service lines. That should be limited to tribally-owned enterprises and the utility authorities. That would be my one comment.

STEPHEN SIMPSON: Thank you. You bring up a good point. The point that we've been struggling with. What we're referring to -- the service line piece is in the current regulations. We've had some discussion, especially, with utilities, as to exactly what that means; what we're referring to there. So what I think -- what we think of is it may be that we're talking more about what the utilities would refer to as service drops, rather than service lines, which is -- if you've got a line --

For instance, in my neighborhood in Maryland, I have a line that goes down one main road and then I live on a street coming off of that. There's a line that comes from that main line down my street. Then there's a line that comes into my house from that line down my street. What we're referring to -- what we're attempting to refer to as service lines in this regulation is that line coming into my house, not the one going down my street from the main line.

I understand that from some of the discussions we've had with utilities about their comments, that they be more accurately referred to as the service drop. So if we need to, that's where we're headed here, is the line from some kind of service -- line to an individual dwelling or an individual building. So if there's something we need to do with the definition to make that clear that that's what we're referring to, that would be very helpful to know.

JOHN LEWIS: Sorry. I don't need a microphone.

STEPHEN SIMPSON: That's okay.

JOHN LEWIS: I think that would be easily tightened up.

STEPHEN SIMPSON: Yes.

JOHN LEWIS: As I think that you're going to do -- there's some leeway. I'm not saying this in a very adversarial way, but I think utilities will do it until

they're told not to.

STEPHEN SIMPSON: I understand that and I want to tighten that up for that very reason.

JOHN LEWIS: Right. In our experience, we have electric distribution level lines that have surface drops to a specific household, we also have expansion of service lines that are kind of like sub-distribution levels.

STEPHEN SIMPSON: Right.

JOHN LEWIS: They know what they're doing. We know what they're doing, but it's up to us to call them on it. If we don't have federal rulings to back us up, they're not going to -- I mean it's going to be one of those things.

STEPHEN SIMPSON: Give us a way to fix it and to tighten it up.

MARTIN HARVIER: Good evening. First of all I want to thank you all for meeting with us this evening. My name is Martin Harvier, I'm the current vice president for the Salt River Pima Maricopa Indian Community. I want to thank Mr. Simpson, I know you came to the community and met with the leaders in the metro area. I want to thank you for coming out and meeting with us.

I was looking a the board there and I remember the staff was trying to get all the comments put together by the 18th. I see August 18th is scratched out. I didn't

know there was an October 2nd that was scratched out. But now there is a November 3rd. Have any of the previous comments -- I'm wondering have any of the previous comments that have been submitted and be responded back to yet on our concerns that we have?

STEPHEN SIMPSON: No. We will be responding to all of the comments in the final regulation.

MARTIN HARVIER: In the final regulation?

STEPHEN SIMPSON: Yes, and in the preamble to the final regulation.

MARTIN HARVIER: I believe I've already made our concerns, but I just wanted to make the point here that I did hear fractionalization. I know Mr. Washburn knows about our issues that we faced here at Salt River with fractionation. Not all development is commercial in the community, this could be tribal government projects that we're trying to make sure we try get those services to members of our tribe. We have one situation where we have a line trying to go over three allotments and there's over 600 individuals that are apart of the Right-of-Way to get that service to. So these are the issues that we're facing.

I know one of the questions we did ask, this seems like it's going to put a lot more work on the Bureau, and just our concern, about the turnaround time of getting

things done on their behalf. These are some things that I'm hoping those are the responses that you'll get back on how you're going to get those responses back to us in development.

Right now as far as commercial, I think we have staff that are committed and professional in doing their job, developers from the outside want to come in, they know that the process is going to get done fairly quick so that they can get their project in the ground and they can start making money because that's what it's all about. I'm just hoping that some of the responses of what you're going to put into place so that it's a timely response back to the tribes on whatever development they were doing. Again, it's not all commercial, we're facing community development by the tribes. I just wanted to bring those comments to you. Thank you.

MIKE BLACK: Yes, that's the real focus. This is Mike Black, with BIA. I appreciate the comments. To that is point, my hope is in looking at the regs and stuff, is yes. It looks on the face of it that it could create more work for BIA, but in the end it actually provides more clarity for our staff. It simplifies our processes. It provides more clarity. There's a lot more definitions in relation to all of it.

Right now, we're trying to get a lot of different

things into one Right-of-Way. And now we ask for specific guidelines of those areas and it also imposes those deadlines that 60- and 30-day deadlines for us to review and approve these. Hopefully, you'll find that to be a quicker process than we're currently going through now.

MARTIN HARVIER: Just to comment on that. I know he's got the mic. I think one of our concerns is being a self-governance tribe, I think that's going to put more work and the responsibility back on the tribe to make sure we go through all of the processes. I just wanted to bring that up, also.

RON ROSIER: Good evening. My name is Ron Rosier, I'm the attorney with the Gila River Indian Community and I want to thank the BIA for going through the process of updating these regulations. I can see that that is a positive step forward, it does do a lot of benefit. I think in some areas and in some of our comments we do want to move further and then still help out. We were impacted in the Gila River Community because we're the largest provider of infrastructure within the community and we go through a lot of lands. When it's done on tribal trust land, no issues, no tribal council pushing tribal issues. Going through allotments that can be an issue in a sense. Also we have two very large utility companies that have corridors going through the reservation in which the

Rights-of-Way expired. We entered into negotiation process for ourselves and on behalf of our allottees. We are able to get a significant compensation packages for both the community and for the allottees at the same standard applying to both.

Once we renegotiated these deals, then we had to turn around and go through the consent process. And it can be very difficult because of this extreme fractionation that exists within the reservation. So to point to the issue of life estates of native land under 169.003. We see in there that if we get the consent of the life estate holder, we're good, we don't need the remainder. That's a benefit because as you know under the law right now, all money must be in agreement between the two parties. If it goes to a life estate holder and it's almost impossible to get consent of the remainders. We see that as a positive step.

What we're concerned with though is that under the regs, if the life estate holder -- if the life estate comes to an end, then for those tracts that are wholly owned by a single life estate, the Right-of-Way term expires with the holder of Right-of-Way. And then in situations in which the life estate holder, the remainder of them, that interest is necessary to obtain majority approval for all of the allotment for 51 percent. The way

we read the rules, if that interest passes or if the life estates ends, then the Right-of-Way would also end for that allotment, too. So what we propose is that a solution to that is that the remainder would be entitled to compensation of the then agreed-upon compensation package prorated for the years remaining on the term of the Right-of-Way. So that if the grantee is going to pay that, the Right-of-Way would continue in effect and otherwise you would always have to do a new Right-of-Way. You have to carve out, go around, you would have to pull out lines, and just the cost of that can be extremely expensive. So we offer that as a possible solution.

The other thing is on the "So numerous" exception. And again, a very good idea, we like it. We just think the thresholds are really high. We're going through a couple of large revenue projects renewals right now and we looked at that. We have thresholds between 50 and 100 members. If there was an individual owner who did not -- I mean if the owner did not own 10 percent of more, than in that situation NCAI could get approval. Then over 100 percent -- over 100 you can also get approval as well.

In looking at one of our Right-of-Way projects, we actually did the numbers, between 50 and 100 and still we have a significant amount of landowners who probably own 10 percent and it doesn't benefit us, it doesn't help us.

So what we would recommend is lowering the threshold so that if you had between 25 and 50 landowners and none of them had an interest over 10 percent, that the BIA could grant approval. Then top threshold will be at 50 land owners and above, again BIA can have final interest in that could give consent as well.

In regards to the perpetuity discussion on Rights-of-Way, I agree -- we agree that in the context of a third-party, having a Right-of-Way for perpetuity is just, sometimes it's not -- especially for something given so long ago it seems not right, not equitable. But on the other hand, I think, for right of the products involved, tribal, utilities, that they're going through, we're going to be owing them forever to benefit a tribal interest. In those contexts, the perpetuity, I think, is appropriate. Again, trying to be equitable about everything.

Funding. One last comment is that I think under the rules or that the issue of a tribal corporation separately gets parceled out and so even they got to get federally approved Rights-of-Way. We don't understand the interest that promotes, the federal interests. Like for instance, the community does have wholly owned utility corporations, the community puts an infrastructure within the community. And under those situations, we don't think that they need to get federally approved. We just don't understand what

that does. Now, granted we understand for allotments, either the tribe has to get a Right-of-Way approved by the federal government because it's going allotments. Tribal trust lands, you shouldn't, you know, be on tribal utility corporation, you should get federally approved Right-of-Way. Thanks.

STEPHEN SIMPSON: Let me say one thing about the life estate piece. Because this is a difficult thing and it's based right now -- it came to our attention on an IBIA decision. And again this is something that is not in the current regulations, we're trying to address the needs. The reason the life estate piece is written the way it is, is because we've bantered about life estates owner and without regards to waste and how we're going to tell deal with all of that. And then we realized that a life estate owner can only grant what they've got, under basic property law. So that's the reason it's written the way it is.

We've looked at it, I've seen your comments and that maybe a good solution. But we would appreciate that, that's why we're doing it the way we're doing it. So if there is a better way to get that life estate, that Right-of-Way able to not have a hole in the middle of it for that life estate, we'd appreciate it.

RON ROSIER: Just a comment back. We've run into a

lot of life estates situations --

STEPHEN SIMPSON: Yes.

RON ROSIER: -- so it's not like just seeing it here or there, we get that, especially for the large project we had, a number of life estates.

STEPHEN SIMPSON: That's why I appreciate your comments on that.

JULIANN BALTAR: Hello, I'm Juliann Baltar, I'm with the Bristol Bay Native Association up in Alaska. I have a number of comments. The first I would like to make is that I'm not sure why these kind of regulations aren't done by a tribal negotiated rule-making. It seems that the topic is so complex and the tribes that are running the various programs have so much information that needs to go into the rewriting of these regulations that it would just save an awful lot of time, really if you would just do it as a negotiated ruling.

On the topic of perpetuity, something that we're doing -- some of us are doing it up in Alaska. When we have lines that cross into restricted lands is we write language into it that says -- for instance, a public roadway easement or Right-of-Way it will cease to exist if the Right-of-Way is abandoned for it's original purpose. So we don't mandate that the tribe has to make a decision, just that if it's not used for what it was, the

Right-of-Way was provided, it goes away. It goes back to the original land owners. That actually seems to be pretty comfortable for most of the people that we've worked with.

I'm not sure how well Alaska is covered in the regulation. We've got a really odd situation up there. There were many -- there was a solicitors decision, I believe it was back in the '80s, where he told the BIA essentially that we could not have BIA owned roads. We were not allowed to have BIA owned roads, so even though a lot of easements were taken or Right-of-Ways were taken across restricted lands and in many cases across the Alaska Claim Settlement Act lands, they were given to a city government or somebody else. They weren't even provided to the tribes at that point. I'm not sure how this fits in, but it seems that we've got some unique situations up in Alaska that aren't really covered very well. And, in fact, we've sort of, you know, other than dealing with restricted land, this regulation hasn't only applied to us for the most part, but it could in the future. It certainly could in the future.

There are some other things that are going on in Alaska and I don't know if it's across the country or not but it has to do with regional office telling us that they're willing to go to city codes.

We've got this unusual situation in Alaska. We have Alaska native villages that are layered on top of little small city governments that fall under the state requirements. We don't know if that's really true, but we're being told that if the restricted land wants to do a subdivision, that they have to follow the city's codes for public roads. It has to meet their width requirements, things of that nature. I don't know if that's true, it's not spelled out in the regulations. So it's an area that leaves us with a great amount of uncertainty. Of course we got a lot of combination land. We've got a lot of restrictive land that's allottees and we've got a lot of fee land. A large number of the tribes have been taking fee lands and they're building roads now days. They're taking on fee lands property owned roads.

Is there anything in the future that would say they couldn't ask that these be BIA owned Right-of-Ways? So I don't know if that's covered, but it seems like Alaska's situation is so strange and different that it's not really well covered in the regs, proposed regulations. Thank you for this opportunity to comment.

MR. CHEVARRIA: Assistant Secretary, again, Governor Chevarria from Santa Clara. I want to make sure that we don't lose track of the program services that typically on the behalf of BIA, especially to the office of the special

trustee, the Office of Trust Services, and the Division of Real Estate Services. Those are very important as you mentioned, there is a mechanism for the 638 contracting that would take on that responsibility. Eventually we could add it to our Salt River contracts. I want to make sure that the technical assistance is still provided through those programs and departments. That's way I mentioned what is happening, because now it's important as far as management that the deductions and the appraisals.

So I had Mr. Allan Sherry come down to Santa Clara and then do the audit on our Pueblo, because they took over that function to make sure we are following the CFR. And so that's going to be very important for tribes to understand, once you take that responsible over, now we want to make sure we understand the CFR, which is that part of 169. And so it's going to be very important as we move forward. I don't want the BIA to wash their hands away from this.

I've addressed this to Mr. Black, dealing with our Salt River contracts. What I'm being told is that Santa Clara, took over these services, so BIA is no longer involved. That's not correct. You're still the trustee. You still provide a technical assistance, even though it took our tribal share. So that tribal share is going to be very important as we go forward to contracts somewhere

down the road into the future. So I'm going to make sure that the tribes do understand, once you take these responsibilities there is still some kind of ties to the BIA and that we still have your support.

For example, I have leases and Rights-of-Ways that have not expired between the city of Espanola. The city of Espanola is within the exterior boundaries of Santa Clara Pueblo. So that's why it's kind of important where it's not one-size-fits-all, but it gives us the opportunity of how do you then deal with these situations. So that is just an additional comments. Just listening to how these things are going to work gives an opportunity for the tribe, but, again, BIA has to understand that we still have roles and functions that we have to perform on behalf us as trustee for tribal nations.

KEVIN WASHBURN: Thank you, Governor Chevarria. Let me just note even in Santa Clara Pueblo, the United States Attorney's Office has been pursuing potential litigation against the county or the city?

MR. CHEVARRIA: City.

KEVIN WASHBURN: So that is the United State's Trust responsibility in action. You've contracted for the program and the United States still has a trust responsibility as the trust land. In that situation, they are standing up for that trust responsibility and

potentially going after the trespassers on trust land. So we hear you. We hear you loud and clear. We certainly intended for the trust responsibility to continue.

MARTIN HARVIER: Can I just ask a question real quick? I think I can talk loud enough. This is Vice President Havier from Salt River. Just kind of going over this, just an for example, we have an existing road with an existing Right-of-Way for that road. Say its 40 feet -- I'm not sure what the Right-of-Way for a road is. If the tribe want to put infrastructure within the Right-of-Way of that road, is the process of gaining new Right-of-Ways for whatever, say a sewer line. Is there a new Right-of-Way that has to -- a new process that has to take place to put a sewer line within an existing road Right-of-Way?

STEPHEN SIMPSON: That's what we've been talking about in terms of piggybacking. If the original -- our theory is, and what we're trying to say in the regulation, is that if the original Right-of-Way is for a road, then yes, to put a sewer line in that road is a different, in that Right-of-Way is a different use, a separate use and therefore you would need a separate Right-of-Way for that. If that's not clear from the regulation, then we need to tighten it up. But that's where we're headed. And if you think that's the wrong way, let me know that too.

MARTIN HARVIER: I guess that's what I'm saying. Some of these are projects for --

STEPHEN SIMPSON: That's what we're saying.

MARTIN HARVIER: -- the benefit of our members to put on a sewer line and to get them off of septic systems, which is contaminating the ground. Just the signature part that we have to go through now because of the fractionation. Thank you.

LIZ APPEL: Other comments?

RON ROSIER: This is Ron Rosier, from Gila River. You're probably going to talk about this. When are you going to roll out the regs? I mean what's the expected date?

KEVIN WASHBURN: All right. You can't keep asking us for extensions and then say, when the heck are you going to get it done?

RON ROSIER: I've got to get a deal done before.

KEVIN WASHBURN: Are there other comments before we -- we can't address some of these issues.

DAUBS THOMPSON: Assistant Secretary Washburn, we appreciate it. I think everybody in the room is in agreement that the proposed regulation are a much better start than what currently exists. Excuse me, my name is Daubs Thompson, I'm an attorney in the law firm of Greenberg, Traurig.

Everybody's excited to see some sort of new change to these regulations. One thing I think would be helpful is there's a certain provision in there right now where BIA will defer, to the maximum extent possible, to a tribes determination that the compensation they are receiving is jus or is adequate. I think that would be a good idea to have a similar provision with regards to allotments. The reason for that is is that the way the regulations are currently drafted, an entity seeking a Right-of-Way can provide any type of form of compensation; whether that's services in lieu of, or whether that's something different. But BIA is still required to prepare a fair market evaluation. I think it can be very difficult, especially within the 60-day timeframe for BIA. For example, compensation is consideration in lieu of to compare that to a fair market appraisal evaluation.

So I think it would be helpful for there to also be a provision in here that permits allottees to determine if the compensation they have negotiated for is reasonable and is jus for BIA two defer to that as well.

KEVIN WASHBURN: Okay. Anybody else have comments? Majel Russell, over here.

MAJEL RUSSELL: I didn't say it earlier -- Majel Russell, Elk River law office. I didn't say earlier and want to say now that I do think that this is very

progressive. I understand the intent and I think it's very positive. I did want to say that. There are lots of things that I think we can add and just maybe try to understand a little better. In terms of what Daubs was just saying, we were also thinking about, for example, at Fort Berthold, where the tribe has established minimums for Rights-of-Ways over allotted lands. They've developed an ordinance for the whole reservation. Now, in order to get a Right-of-Way, they've established by ordinance what the payment will be to the individual landowners.

I'm wandering in those circumstances when a tribe does do that, how would you measure whether or not that's fair market value, or how you will measure that type of standard Right-of-Way ordinance that a tribe may pass? So that's one thing I think we need to think about.

We're also real confused about the life estate provisions. So I think that we probably will try to provide you with some comments. I see we just have a few days here on the life estate provisions. I think there are some valid questions in terms of what the life estate holder can do to find the property beyond the tenancy -- or beyond the life of the life estate holder. So I think we've got some issues with that section, also.

Also, I did want to mention to -- I don't know if she's still there. We actually think that the process

that you're utilizing to draft these regulations is an adequate process. I think that negotiated rule making, in my experience working in Indian country has been very difficult, because we would have to bring a lot of the parties to the table other than tribes. So we would probably have bring cities, and towns, and industry, and states, and other parties to the table that, I believe, would possibly bring an interest that we don't necessarily need to accommodate within the process. I would comment that I think the process that you're utilizing is an effective process for Indian country. Thank you.

CLARK MADISON: My name is Clark Madison from Fort Berthold. I'm working with Majel as a consultant and Elk River law office. I want to tell Steve and the group that put this together, you've done a good jog. I think Reid may have graded you a little bit higher than I would have. Overall, I think it's a good attempt at getting things updated. I think you have some aggressive issues about the BIA like piggybacking. There are still a few things that need to be clarified. Overall, I think you did a good job.

STEPHEN SIMPSON: Clark, I figured you'd probably be tougher than Reid is on that point, but thank you.

I've got a request up here from the court reporter that if any lawyers or anybody else in the room who has

commented has business cards, she would appreciate them. So she can make sure to get the names right.

Anyone else?

KEVIN WASHBURN: Okay. We've got just a little more time if anyone wants to make a comment. Anybody?

We do have a November 3 deadline. After multiple extensions for our comment period, we have gotten a lot of comments and while most of the comments that we received here tonight have been from the tribe side, we have a lot of written comments from industry and utilities and state and local government types. So we're really grateful that you all are weighing in because we do have a trust responsibility to tribes and getting tribes comments is imperative in crafting this rule well.

Your comments that we received tonight are really, really useful. Steve and I and all of us thank you for being very cogent and very surgical and very clear in your comments, because that makes our job a lot easier. You've given us good proposals, good ideas about how we might amend the rule and we're really grateful for that. I'm not sure what else we need to say.

We are moving forward. Mr. Rosier asked how quickly we're going to get this rule done. Honestly, I can't answer that at this point. Ultimately, the comment deadline isn't even closed yet. We won't know until we

seen how many comments we've gotten and how long it takes us to go through those comments in a very thorough way. This man to my left is going to be working very hard once that happens and Liz Appel over there, with our Regulatory Affairs Office. We have a lot of work ahead of us. We've got a very robust proposal, obviously. It has been very carefully written, but we also need to very carefully consider all the comments that we have received. You've given us very interesting food for thought. Some very good suggestions and some very interesting thoughts that we need to carefully think through.

So we've got a little ways to go here, but this is one of our highest priorities. Again, as I said earlier, this isn't sexy, but it's very, very important to tribes. We really appreciate how seriously you've taken this process and how good the comments have been tonight. So thank you for that. Is there anybody else who wishes to say anything, or just extend our thanks. We take this very seriously and we are so grateful that you've taken this very seriously.

I'm impressed, it's nearly 8 o'clock and this is the way you're choosing to spend your evening is with us talking about Right-of-Way regs. So you've done your fair share for Indian country this evening. I want to thank all of you for that. This tribal consultation has come to

an end. Thank you.

(Tribal consultation ended at 7:52PM)

CERTIFICATE OF COURT REPORTER

STATE OF GEORGIA:

COUNTY OF DEKALB:

I hereby certify that the foregoing meeting was reported as stated in the caption and the comments and the responses thereto were reduced to typewriting by me; that the foregoing pages, 3 through 61 represent a true, correct, and complete transcript of the meeting held on October 27, 2014, by the Bureau of Indian Affairs.

This the 6th day of November, 2014.

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Roxanne E. Green
Certified Court Reporter
Georgia Certificate, 2795
Certified Verbatim Reporter, 5680

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