



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

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National Policy Memorandum

Office of Trust Services
Division of Real Estate Services

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Title: Streamlining the Rights-of-Way (ROW) and Business Lease Application Process for Bipartisan Infrastructure Law, Telecommunication, and Renewable Energy Projects

1. Purpose

This memorandum establishes Bureau of Indian Affairs (BIA) policy for the efficient and effective processing of Rights-of-Way (ROWs) and Business Leases for projects funded by the American Rescue Plan Act and Infrastructure Investment and Jobs Act (IIJA) also known as Bipartisan Infrastructure Law (BIL), as well as Telecommunications and Renewable Energy Projects.

It is the policy of the BIA, consistent with applicable laws, to support Tribal Nations in exercising their sovereignty to govern their lands and pursue economic self-sufficiency, conservation practices, and climate resiliency. On January 26, 2021, President Biden issued a Memorandum to the Heads of Executive Agencies reaffirming Executive Order 13175, which, among other things, directs federal agencies to utilize waiver authorities for the benefit of Indian Tribes. This memorandum reaffirms the policy that projects on Indian lands are most successful when supported and directed by Tribes.

Bipartisan Infrastructure Law

On November 6, 2021, Congress passed the BIL to provide substantial once-in-a-generation investment in the Nation's infrastructure. The signing of the BIL in mid-November by President Biden marked a new era of building a better America together. The BIL is historic in its size – the largest ever investments in broadband, rail and transit, clean energy, and water, just to name a few – as well as the breadth of programs and sectors included in the law. The infrastructure law allocated funding to over 350 distinct programs across more than a dozen federal departments and agencies.

Broadband

On July 11, 2019, the Federal Communications Commission (FCC) released a Report and Order *In the Matter of Transforming the 2.5 GHz Band* (WT Docket No. 18-120), in which the FCC adopted a priority window for Tribal Nations to obtain access to the 2.5 GHz band on rural Tribal lands. The application for the 2.5 GHz Rural Tribal Priority Window (Priority Window) opened February 3, 2020, and closed September 2, 2020. The FCC began to grant license applications in late 2020 and continues to grant new licenses as pending applications are reviewed. Though the program application window closed, projects are still being approved for funding. Tribes that are granted licenses under the Priority Window are subject to strict deadlines for building out broadband network infrastructure to serve 50 percent of the population in the license area within two years of receiving the license, and 80 percent of the population within five years. For many Tribes, their ability to successfully meet these deadlines and to retain these licenses is contingent on their ability to obtain ROW for their telecommunications projects in a timely fashion.

On December 21, 2020, Congress passed the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 which provided \$1 billion for a new Tribal Broadband Connectivity Grant Program at the U.S. Department of Commerce. Eligible uses for the grant funds include “broadband infrastructure deployment” on Tribal lands, meaning any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more Tribes in trust or restricted fee status. The term also includes the surface estate of lands held in trust for a Tribe but reserved for BIA administrative purposes and includes the surface estate of lands held in trust for an Indian corporation chartered under section 17 of the Indian Reorganization Act of 1934 (25 U.S.C. 477). Grant recipients are required to expend awarded funds within one year of receiving them. Unexpended funds may be rescinded. The Secretary of Commerce has the authority to extend this deadline for infrastructure projects, under certain conditions; however, this is not mandatory. Recently, the BIL was passed, and it added 2 billion more dollars for broadband projects.

Renewable Energy

The 2013 Leasing regulations at 25 CFR 162 introduced subpart E-Wind and Solar Resource Leases. The BIL includes resources to support renewable energy infrastructure. Furthermore, it is in the national interest to support Tribes seeking to stand up renewable energy projects within their lands.

Rights-of-Way Regulations

The 2016 ROW regulations at 25 CFR 169 incorporated many streamlining initiatives, including: established timeframes for the processing and decision-making of a ROW application, and providing to the maximum extent possible, deference to the Tribes’ determination of documents needed. On Tribal lands it is necessary not only to maximize the use of federal funds, but also to provide Tribes with the maximum flexibility and economic development opportunities to leverage these programs for the benefit to their Tribal communities.

2. Scope

This policy applies to all BIA programs, offices, regions, and agencies involved in the ROW and Business Lease.

3. Policy and Procedures

It is the BIA's policy to comply with all federal laws and regulations as well as Department of the Interior (DOI) policies regarding the processing and approval of ROW and lease applications for Tribal infrastructure projects.

BIA has determined that ROW and lease applications for the purpose of utilizing funding available to Tribes for infrastructure projects that provides a direct benefit to the Indian land and Tribal communities. If an application package is received by the BIA, a review of the package must be made within five business days as to whether the package is complete or not. BIA will implement the following additional steps to simplify and streamline the processing of ROW and lease applications that are part of, or related to, infrastructure:

A. ROW and Business Lease Applications on Tribal Lands Where Tribe Owns 100% of the Tract:

- 1) If the Tribe, or a Tribal utility, is the applicant, the Tribe does not need BIA approval of a ROW on Tribal land. 25 CFR § 169.4(b)(1) and 169.4(b)(3)(iii).
 - a) For leases, an independent legal entity owned and operated by a Tribe may have to obtain a lease from owners of the land before taking possession of the land (25 CFR § 162.005(a)(1)).
 - b) The Tribe, as an Indian landowner who owns 100 percent of the trust or restricted interests in a tract, does not need a lease to possess Tribal land (25 CFR § 162.005(b)(1)). As a result of the Land Buy Back program, there may be allotted tracts of land where the Tribe owns 100 percent of the trust interests in the tract.
 - c) The ROW application, grant, lease document, map of definite location and any other Tribal broadband use agreements for project development with states and other federal agency(ies) must be filed with the BIA for recording in the system of record, the Trust Asset and Accounting Management System (TAAMS) within 30 days of approval.
 - d) If the ROW or lease is part of one of the BIL projects included in the Tribal Broadband Connectivity Program and BIL grant, a copy of the grant(s) may be the authorizing document rather than a Tribal resolution.
 - e) A lease is not needed to possess Indian land if the applicant is a 25 U.S.C. 477 corporate entity that manages or has the power to manage the Tribal land directly under a federal charter or under a Tribal authorization (not under a lease from the Indian Tribe).

- f) A ROW or lease is not needed if the applicant has entered into a contract or agreement that encumbers Tribal land under 25 U.S.C. 81.
- 2) If the applicant is a third party:
- a) The Tribe may exercise all the regulatory permissions, including negotiating for any payment amount, and asking the Secretary to waive the valuation and bond and insurance requirements.
 - b) The ROW grant could be utilized as one grant for all the tracts traversed by the ROW (25 CFR § 169.124(d)).
 - c) Approval of the application must occur 60 days after making the determination that the application is complete.
 - d) The ROW or lease application, grant or lease document, map of definite location and any Tribal use agreement(s) connected to Tribal infrastructure and broadband project development agreements with states and other federal agency(ies) must be filed with the BIA for recording in the official system of record, the Trust Asset and Accounting Management System (TAAMS) within 30 days of approval.

B. ROW and Business Lease Applications for Allotted Lands

- 1) If the Tribe, or Tribal utility, or a third party is the applicant:
- a) The individual Indian owners may negotiate for any payment amount and may waive the valuation requirement.
 - b) The ROW may be approved for the negotiated amount per 25 CFR part 169.112 and Business Leases per 25 CFR part 162.421.
 - c) BIA will determine the number of owners of, and undivided interests in, a fractionated tract of Indian land, for the purposes of calculating the requisite consent based on BIA records on the date the application is submitted to the BIA (25 CFR 169.107(c) and 25 CFR 162.012(a)(5)).
 - d) If the Tribe already owns the majority of the interests, consent of the other fractional owners is not required, but the Tribe must notify the co-owners.
 - e) Review of the application must occur immediately upon making the determination that the application is complete.

C. ROW Applications Crossing Over Multiple Tracts

- 1) Applicants may submit one ROW application with supporting documentation for multiple contiguous tracts if applicable.

- 2) BIA will issue one grant for all of the tracts traversed by the ROW for the infrastructure project if applicable.

D. Wind Energy Evaluation Leases (WEEL) and Wind and Solar Resource (WSR) Leases

1) WEELs

- a) WEEL's are short-term leases that authorize possession of Indian land for the purposes of installing, operating, and maintaining instrumentation and associated infrastructure to evaluate wind resources for electricity generation.
- b) A Tribe that conducts wind and resource activities on its own Tribal land does not need a WEEL.
- c) A valuation is not required for a WEEL (25 CFR 162.524).
- d) A performance bond or alternative form of security is not required (25 CFR 162.525).

2) WSRs

- a) WSRs are leases that authorize a lessee to possess Indian land to conduct activities related to the installation, operation, and maintenance of wind and/or solar energy resource development projects, including the installation of instrumentation facilities and infrastructure associated with the generation, transmission, and storage of electricity and other related activities.
- b) A Tribe that conducts wind and resource activities on its own Tribal land does not need a WSR.
- c) The Tribe may negotiate for any payment amount and may waive the valuation requirement (25 CFR § 162.549).
- d) The lease of individually owned Indian land may be approved for the negotiated amount under 25 CFR §§ 162.550 and 162.551.
- e) An appraisal valuation will be requested from the Appraisal and Valuation Services Office (AVSO), unless waived under 25 CFR part 162.550(e).
- f) Review of the application must occur immediately upon making the determination that the application is complete.

4. Roles and Responsibilities

- A. **Director, BIA (DBIA)** is responsible for ensuring that appropriate organizational arrangements, resources, and personnel are available to implement and maintain the BIA's Realty program. The DBIA serves as the Senior Accountable Official for this program and has primary responsibility for implementing and executing BIA programs in accordance with statute, regulation, and Departmental policy.
- B. **Deputy Bureau Director (DBD), Field Operations, BIA** is responsible for overseeing the Regional Directors (RDs) and disseminating policy relevant to the regions.
- C. **DBD, Office of Trust Services (OTS), BIA** is responsible for ensuring that statutory and regulatory timetables for ROW and lease applications are met, and that guidance is available to regional and BIA agency staff tasked with processing ROW and lease applications; initiating periodic program reviews of regional and agency programs; and assisting in the development and dissemination of trust resource policy to the RDs.
- D. **Chief, Division of Real Estate Services (DRES), OTS** is responsible for overall policy and guidance development within the division, including establishing Realty program policies and standards to comply with statutory and regulatory requirements; day-to-day oversight of the Realty program; ensuring technical assistance and training is provided to BIA regions as needed; conducting program reviews; and managing BIA's federal reporting requirements as they relate to the Realty program.
- E. **RD** serves as the Senior Accountable Official for the Realty program in their respective region and is responsible for reviewing and acting on any ROW and lease applications that are not otherwise delegated to the BIA agency level.
- F. **BIA Agency Superintendent** is responsible for managing their respective organization's Realty program compliance in day-to-day operations and coordinating reviews of ROW and lease applications. Superintendents are responsible for implementing Realty responsibilities at the appropriate level as re-delegated by the DBD Field Operations or RD. Such delegation will only be made when the BIA agency or program office has appropriate expertise on staff or are otherwise readily available.
- G. **Regional Realty Program Manager** is responsible for reviewing ROW and lease applications that are not otherwise tasked to the BIA agency level and providing technical assistance throughout this process to the appropriate Superintendent as needed.

Approval

Darryl LaCounte
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Darryl LaCounte
Director, Bureau of Indian Affairs

4/15/2022

Date