

Rights-of-Way on Indian Land (25 CFR 169)
Comparison of Current Rule & New Rule¹

March 2016

Current 25 CFR §	Current Provision	New 25 CFR §	Description of Change
169.1	Definitions of “Secretary,” “individually owned land,” “tribe,” “tribal land,” and “Government owned land.”	169.2	<ul style="list-style-type: none"> • Adds definitions for “abandonment,” “assignment,” “avigation hazard easement,” “BIA,” “BIA land,” “compensation,” “consent,” “easement,” “fair market value,” “fractional interest,” “grant,” “grantee,” “immediate family,” “Indian,” “Indian land,” “in-kind compensation,” “life estate,” “LTRO,” “map of definite location,” “permanent improvements,” “right-of-way,” “right-of-way document,” “termination,” “trespass,” “tribal authorization,” “tribal utility,” “trust account,” “trust and restricted status,” “Uniform Standards for Professional Appraisal Practice (USPAP),” “us/we/ our,” and “utility cooperative.” • Revises the definition of “tribe” to be “Indian tribe” and to refer to the Federal List Act. • Simplifies the remaining definitions.
169.2(a), (c)	Purpose and scope of regulations.	169.1	Updates the purpose of the regulations to provide that BIA will use its general statutory authority for granting rights-of-way.
N/A	N/A	169.3- 169.12	New sections to specify: <ul style="list-style-type: none"> • What land part 169 applies to; • When a right-of-way is needed; • What types of rights-of-way are covered by part 169; • What statutory authority BIA will use to act on requests for rights-of-way; • Whether part 169 applies to rights-of-way applications submitted before this version of the rule; • That tribes may compact or contract for certain BIA realty functions related to rights-of-way; • What laws apply to rights-of-way; • The effect of a right-of-way on a Tribe’s jurisdiction over the underlying parcel; • What taxes apply to rights-of-way; and • How BIA provides notice of its actions related to rights-of-way.
169.2(b)	Appeals	169.13	Adds exceptions to part 2 appeals, limits who may appeal a disapproval of a right-of-way, and clarifies “interested party” to make consistent with availability of appeals in the leasing context.

¹ 80 FR 72492 (November 19, 2015), effective April 21, 2016.

N/A	N/A	169.14	Addresses how the Paperwork Reduction Act affects the regulation.
169.3(a)	Tribal consent required.	169.107(a)	No substantive change.
169.3(b)-(c)	Individual Indian landowner consent required.	169.107(b), 169.108	<ul style="list-style-type: none"> • Adds factors for determining whether a grant will cause “no substantial injury” to the land or any landowner. • Adds a requirement, where owners of the interests in the land are so numerous, for BIA to provide 60-day notice to the landowners of the intent to issue a ROW and allow them 30 days to object. • Establishes that the statutory phrase “so numerous” means there are 50 or more co-owners of undivided trust or restricted interests. • Reorganizes to establish whom BIA can consent on behalf of. Updates to comply with statutory authorities that have been updated since the last regulatory revision.
N/A	N/A	169.109	Establishes whose consent is needed if there is a life estate on the tract that would be subject to the right-of-way.
169.4	Permission to survey.	169.101(b)	Removes the requirement for BIA approval to survey, but retains the requirement for obtaining landowner consent to survey.
169.5	Application for right-of-way.	169.101- 169.102, 169.121	<ul style="list-style-type: none"> • Removes requirement for duplicate filing and statutory citation. • Consolidates provisions and provides that they will be issued in the grant, rather than requiring grantee to submit them in a stipulation with the application. • Clarifies that application must identify the affected tract, right-of-way location, purpose, and duration, and ownership of any permanent improvements. • Adds that the following must accompany the application: legal description, bond or other security, record that notice was provided to all landowners, information necessary to comply with environmental laws and, if required by the Tribe, a statement from the appropriate Tribal authority that the proposed use is in conformance with applicable Tribal law.
N/A	N/A	169.105	Establishes requirement for due diligence in construction of permanent improvements.

169.6	Maps. Requires maps of definite location on tracing linen or other “permanent and reproducible material.” Requires a separate map for each 20 miles, a specific scale, and the parcels, sections, townships, and ranges affected.	162.102(b)	Removes specific requirements for format of map of definite location (e.g., tracing linen), scale, etc.
169.7	Field notes. Requires field notes either on map or submitted separately.	N/A	Deleted.
169.8	Public survey. Requires terminal of line of route to be fixed to nearest corner of public survey and, if terminal is on un-surveyed land, be connected with corner of public survey < 6 miles away.	169.2	Definition of map of definite location requires it to include reference to a public survey.
169.9	Connection with natural objects. Requires connection with natural object or permanent monument if distance to an established corner of the public survey is > 6 miles.	N/A	Deleted. Legal description and map make this unnecessary.
169.10	Township and section lines. Requires map to show distance to nearest corner if line of survey crosses a township or section line of public survey.	169.2	Definition of map of definite location requires it to include reference to a public survey.

169.11	Affidavit and certificate. Requires map to include an affidavit by engineer and certificate by applicant on accuracy. Requires BIA-built roads transferred to county or State to include affidavit by BIA engineer and State officer on accuracy.	169.102(b)(2)	<ul style="list-style-type: none"> • Deletes the requirement for an engineer to sign the map. • Deletes requirement for applicant to sign a certificate regarding the map's accuracy, because the rule otherwise requires that the map be accurate. • Deletes the section on maps covering BIA roads to be transferred to a county or State.
169.12	Consideration for right-of-way grants. Requires fair market value and requires the Secretary to obtain and advise landowner of appraisal information.	169.110, 169.112	<ul style="list-style-type: none"> • Provides that the Secretary will defer to the Tribe's agreed-upon compensation for Tribal land. • Maintains requirement for fair market value and a valuation for individually owned Indian land, but adds exceptions. • Allows for market value to be determined by several methods (in addition to, or instead of, appraisals).
N/A	N/A	169.111, 169.113, 169.115-169.119	<p>New sections to:</p> <ul style="list-style-type: none"> • Clarify when right-of-way grant must provide for compensation reviews or adjustments; • Clarify when compensation payments may be due for a right-of-way, allowing for agreements to make payment at times other than upon application; • Require the right-of-way grant to specify how payment occurs (direct pay or to BIA); • Limit the availability of direct pay; • Allow for non-monetary (e.g., discount internet service) and varying types of compensation; and • Clarify whether BIA will notify when a payment is due. •
169.13	Other damages. Requires grantee to pay all damages incident to the survey or construction or maintenance of the facility for which the right-of-way is granted.	169.120	Describes other charges that grantee may be subject to.

169.14	Deposit and disbursement of consideration and damages. Requires applicant to deposit total estimated consideration and damages with application. Requires amounts to be held in "special deposit" accounts.	169.103	<ul style="list-style-type: none"> Requires estimated damages payment to be in the form of a bond or alternative security. Deletes reference to "special deposit" accounts, because the specific accounts into which compensation would be deposited is outside the scope of this regulation.
165.15	Action on application. Provides that Secretary may grant right-of-way, with attached maps of definite location. Allows Secretary to issue one document for all tracts traversed by the right-of-way, or separate documents.	169.123-169.124	<ul style="list-style-type: none"> Establishes the process and criteria by which BIA will grant a right-of-way. Establishes deadlines for BIA action. Maintains flexibility for Secretary to issue one document or separate documents for multiple tracts.
169.16	Affidavit of Completion. Requires applicant to file an affidavit of completion once a right-of-way is constructed.	N/A	Deleted.
N/A	N/A	161.126	New section. Clarifies that a right-of-way grant may include a preference for employment of tribal members.
N/A	N/A	161.127	New section. Clarifies when a new right-of-way is required for a new use within or overlapping an existing right-of-way.
169.17	Change of location. Requires a new right-of-way, including consent, amended maps, etc., if a change from the location in the grant is necessary due to engineering difficulties or otherwise.	169.129	Allows flexibility for BIA to determine whether a new right-of-way and/or consent, amended maps, etc., are required based on whether the use is provided for or is within the same scope of use provided for in the original grant.

N/A	N/A	169.130	New section. Requires a ROW grant to specify who owns permanent improvements and what happens to the permanent improvements grantee constructs.
169.18	Tenure of approved right-of-way grants. Provides that rights-of-way under 1948 Act may be without limitation as to term of years, except as stated in the grant, but all others may not exceed 50 years, as determined by BIA.	169.201	Provides guidance to BIA staff for determining appropriate duration of a right-of-way based on purpose of the right-of-way. Eliminates distinction between rights-of-way under the 1948 Act and others
169.19	Renewal of right-of-way grants. Allows applications for renewal where no change in location or status, with consent and consideration. Requires new right-of-way application if there is any change to the size, type, or location.	169.202	Allows a renewal without consent if the original grant provides for it and the grantee notifies the landowners of the renewal.
N/A	N/A	169.203	New section. Clarifies when a right-of-way may be renewed multiple times.
N/A	N/A	169.204-169.206	New sections. Clarify the circumstances in which a right-of-way may be amended, and the process for amending.
N/A	N/A	169.207-169.209	New sections. Clarify the circumstances in which a right-of-way may be assigned, and the process for assigning.
N/A	N/A	169.210-169.212	New sections. Clarify the circumstances in which a right-of-way may be mortgaged, and the process for mortgaging.

N/A	N/A	169.301-169.305	New sections. Clarify when a right-of-way is effective and must be recorded, what happens if BIA denies the right-of-way or does not meet a deadline for issuing a decision on a right-of-way, and whether appeal bonds are required.
N/A	N/A	169.401-169.402	New sections. Clarify when BIA may investigate compliance with a right-of-way.
169.20	Termination of right-of-way grants. Provides that the Secretary may terminate a right-of-way with 30-day notice for certain causes.	169. 403-169.405	Allows landowners to provide for negotiated remedies, including termination without BIA concurrence (where tribe is landowner) or with BIA concurrence (where individual Indians are landowners). Provides that BIA will consult with the landowners before determining whether a violation occurred and whether to cancel the grant.
N/A	N/A	169.406-169.407	New sections. Specify what late payment charges and fees apply to delinquent payments and how payment rights will be allocated.
N/A	N/A	169.408-169.409	New sections. <ul style="list-style-type: none"> Specify the process by which BIA will cancel a right-of-way and when cancellation is effective. Specify that abandonment may result in cancellation.
N/A	N/A	169.410-169.413	New sections to specify: <ul style="list-style-type: none"> What BIA will do if a grantee remains in possession after a right-of-way expires or is terminated or cancelled; What appeal bond regulations apply to cancellation decisions; When BIA will issue a decision on an appeal; and What happens if someone uses Indian land without a right-of-way or other proper authorization.
169.21	Condemnation actions involving individually owned lands. Requires that BIA report condemnation actions to Interior.	N/A	Deleted.

169.22	<p>Service lines. Requires execution of service line agreements. Limits service lines to certain voltage. Requires tribe's governing body to consent to service line agreements for tribal land. Requires only a plat or diagram showing location, size and extent of line. Requires filing of agreement with Secretary within 30 days of execution.</p>	169.51-169.56	Clarifies definition of a service line as a utility line running from a main line to provide a house, business or other structure with service.
169.23	<p>Railroads. Lists specific statutory authorities for railroads and other rights-of-way, and includes specific requirements for railroad right-of-ways.</p>	N/A	Deleted. These provisions are unnecessary because the general right-of-way authority in 25 USC 323-328 is being relied upon, rather than specific authorities.
169.24	<p>Railroads in Oklahoma. Lists specific statutory authorities for railroad rights-of-way in Oklahoma.</p>	N/A	Deleted. These provisions are unnecessary because the general right-of-way authority in 25 USC 323-328 is being relied upon, rather than specific authorities.
169.25	<p>Oil and gas pipelines. Lists specific statutory authorities and requirements for oil and gas pipeline rights-of-way.</p>	N/A	Deleted. These provisions are unnecessary because the general right-of-way authority in 25 USC 323-328 is being relied upon, rather than specific authorities. Specific requirements for oil and gas pipelines are unnecessary because they are already addressed in applicable State and Federal laws.
169.26	<p>Telephone and telegraph lines; radio, television, and other communications facilities. Lists specific statutory authorities and requirements for telephone and telegraph lines, etc.</p>	N/A	Deleted. These provisions are unnecessary because the general right-of-way authority in 25 USC 323-328 is being relied upon, rather than specific authorities.

169.27	Power projects. Lists specific statutory authorities and requirements for power project rights-of-way.	N/A	Deleted. These provisions are unnecessary because the general right-of-way authority in 25 USC 323-328 is being relied upon, rather than specific authorities.
169.28	Public highways. Allows State and local authorities to apply under these regulations for rights-of-way for open public highways on Indian land. Allows authorities in Nebraska or Montana to open highways without right-of-way, under specific statutory authority. Cross-references 25 CFR 256.	N/A	Deleted. These provisions are unnecessary because the general right-of-way authority in 25 USC 323-328 is being relied upon, rather than specific authorities.