

Department of the Interior  
Office of the Assistant Secretary – Indian Affairs



**Rights-of-Way on Indian Land**  
Proposed Rule - 25 CFR 169

# Background

- Efforts to Improve Trust Land Management
  - 2011-2012 (Leasing)
    - Work on residential, business, wind and solar leasing regulations
    - Tribal consultations on draft and proposed
    - Final regulations (77 FR 72440) published December 2012
  - 2013-2014 (Rights-of-Way)
    - Workgroup of BIA and SOL drafted ROW revisions
    - Circulated for comment by all BIA Realty Officers
    - Proposed rule published June 17, 2014 (79 FR 34455)

# Need for Revisions

- Current Rights-of-Way (ROW) regulations at 25 CFR 169
  - Published in 1968
    - Few sections updated in 1972, 1973, others in 1980
    - No updates since 1980
  - Rely on statutory authorities specific to type of ROW
    - Railroads
    - Telegraph and telephone lines
    - Impose specific requirements (e.g., no parallel ROW within 10 miles)

## Proposed Rule

- Proposed regulations
  - Rely on general statutory authority for granting ROWs for all purposes
    - Simplifies – one set of requirements applies to all
    - No benefit lost by removing any specific statutory authority
  - Incorporate approaches taken in leasing regulations to streamline
    - Establish timelines for BIA review of ROW requests
    - Clarify processes for BIA review of ROW documents
    - Allow BIA disapproval only if BIA states a compelling reason
    - Defer to tribes on compensation amount for tribal land

## Proposed Rule - Overview

- Subpart A – Purpose, Definitions, General Provisions
- Subpart B – Obtaining a Right-of-Way
- Subpart C – Term, Renewals, Amendments, Assignments, Mortgages
- Subpart D – Effectiveness
- Subpart E – Compliance and Enforcement
- Subpart F – Service Line Agreements

## Proposed Rule - Overview

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# Proposed Rule

## Subpart A: Purpose, Definitions, General Provisions

- Adds definitions for several terms, including:
  - Abandonment
  - Assignment
  - Constructive Notice
  - Easement
  - Fractional Interest
  - Grant, Grantee
  - Immediate Family
  - Indian, Indian land
  - Map of definite location
  - Market value
  - Service line

## Proposed Rule

### Subpart A: Purpose, Definitions, General Provisions (cont'd)

- What land 169 applies to
  - Indian land
  - What happens if life estate on land
- Same general provisions as leasing regulations
  - When a ROW is needed
  - Whether tribes may contract or compact for ROW functions
  - What laws apply to ROWs
  - What taxes apply to ROWs
  - How BIA provides notice of ROWs
  - What decisions may be appealed; who is an “interested party”



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## Proposed Rule

### Subpart B: Obtaining a ROW

- No BIA approval required to survey land
- Application
  - Identify applicant, tract, ROW location, duration, and purpose, and who is responsible for permanent improvements to be constructed
  - Must include:
    - Legal description of ROW and parcels
    - Map of definite location signed by surveyor or engineer
    - Bond or alternative security
    - Record of consent
    - Valuation, if applicable
    - Corporate documentation, if applicable
    - Environmental and archeological reports

## Proposed Rule

### Subpart B: Obtaining a ROW

- Consent Requirements
  - Tribal land – Tribal consent required
  - Individually owned land – consent of owners of a majority interest
- BIA may grant ROW without consent if:
  - Owners are **so numerous**, it would be impracticable;
  - No substantial injury to land or any landowner;
  - Landowners are compensated; and
  - BIA provides 30-day notice of intent to all owners
- So numerous means:
  - 50 or more but less than 100 owners, where no one holds an interest greater than 10%
  - 100 or more co-owners

## Proposed Rule

### Subpart B: Obtaining a ROW

- Bond or alternative security (CD, irrevocable letter of credit, Treasury securities, surety bonds, assigned savings account) to cover:
  - Highest annual rent (unless one-time payment)
  - Estimated damages from construction of permanent improvements
  - O&M charges (if land located in irrigation project)
  - Restoration and reclamation of premises
- BIA may waive
  - For tribal land, BIA will defer to tribe's determination that waiver is in its best interest
  - For individually owned land, BIA may waive if owners of >50% of interests request and BIA determines in owners' best interest

# Proposed Rule

## Subpart B: Obtaining a ROW

- Compensation
  - Tribal land – BIA defers to tribe, if tribe submits authorization stating that it has determined compensation to be in its best interest; tribe may waive valuation
  - Individually owned Indian land
    - Market value required unless landowners waive and BIA determines waiver is in landowners' best interest
    - Valuation required unless:
      - Landowners waive or
      - Grantee will construct infrastructure improvements benefitting landowners and BIA determines it is in landowners' best interest

## Proposed Rule

### Subpart B: Obtaining a ROW

- Compensation (continued)
  - If one-time payment, due within 10 days of grant
  - Otherwise, grant must specify when due
  - Direct pay available if:
    - 10 or fewer landowners
    - All agree to direct pay
    - Their trust accounts are unencumbered

## Proposed Rule

### Subpart B: Obtaining a ROW

- Compensation (continued)
  - Reviews and Adjustments
    - Tribal land – not required
    - Individually owned land – not required if:
      - Payment is one-time lump sum;
      - ROW duration is 5 years or less;
      - Grant provides for automatic adjustments; or
      - BIA determines it's in landowners' best interest

## Proposed Rule

### Subpart B: Obtaining a ROW

- Right-of-Way Grant Process
  - Upon receipt of application package, BIA ensures package is complete (see supporting documents required)
    - If incomplete, send letter identifying missing information
    - If complete:
      - Send letter acknowledging date of receipt of complete package; and
      - Review and issue decision within 60 days
- 60-day clock for BIA review only starts when package is **complete** (including any NEPA & valuation)
  - 60 days to issue a decision
  - If miss deadline, parties may file a notice to compel action



## Proposed Rule

### Subpart B: Obtaining a ROW

- BIA Approval
  - Limited grounds for disapproval
    - Required consents have not been obtained from parties
    - Requirements of regulations have not been met
    - Compelling reason to withhold approval to protect best interests of Indian landowners
  - Defer, to maximum extent possible, to Indian landowners' determination that a ROW is in their best interest
  - May not unreasonably withhold approval
- BIA may:
  - Grant one ROW for all of the tracts traversed by the ROW, or
  - Issue separate grants for one or more tracts traversed by the ROW

## Proposed Rule

### Subpart B: Obtaining a ROW

- The grant will:
  - Incorporate any restrictions/conditions set out in consents;
  - List restrictions/conditions set out in regulations, such as:
    - Grantee has no right to any products or resources to the land, unless otherwise provided by grant;
    - Grantee must construct and maintain the ROW in a professional manner consistent with industry standards;
    - Grantee must comply with all applicable laws and obtain all required permits;
    - Grantee must comply with due diligence requirements
  - Attach or incorporate by reference maps of definite location

## Proposed Rule

### Subpart B: Obtaining a ROW

- New use within or overlapping existing ROW
  - Must obtain a new ROW if:
    - Use is not specified in the original grant; or
    - Use is not within the same scope of the use specified in the original grant
- BIA will grant the new ROW if:
  - New ROW does not interfere with the use or purpose of the existing ROW; and
  - The existing ROW grantee consents.

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# Proposed Rule

## Subpart C: Term, Renewals, Amendments, Etc.

- ROW Term/Duration
  - Must be stated in grant
  - Tribal land – BIA defers to tribe's determination of term
  - Individually owned land – must be reasonable, depending on use based on these guidelines:
    - In perpetuity – railroads, public roads and highways, public and community water lines, public sanitary and storm sewer lines, water control and use projects
    - 50 years – electric power projects, plants, switchyards, lines
    - 30 years – telecommunication, broadband, fiber optic lines
    - 25 years with renewal option – access roads
    - 20 years – oil and gas pipelines, aviation hazard easements
    - Consistent with use – service roads and trails essential to ROW purpose, conservation easements

## Proposed Rule

### Subpart C: Term, Renewals, Amendments, Etc.

- ROW Renewal
  - BIA will renew if:
    - Original ROW allows for renewal and specifies compensation
    - Grantee attests there is no change in size, type, location, etc.
    - Landowners consent unless original ROW allows for renewal without landowner consent
- If there will be a change in the size, type, location, or duration of the ROW, the grantee must apply for a new ROW

## Proposed Rule

### Subpart C: Term, Renewals, Amendments, Etc.

- Amendments, Assignments, Mortgages
  - BIA Approval
    - Must approve within 30 days
    - Clock for BIA review only starts when package is **complete**
    - Send letter acknowledging date of receipt

# Proposed Rule

## Subpart C: Term, Renewals, Amendments, Etc.

- Amendment
  - BIA approval required
    - For a change to any ROW provision or to accommodate a change in location of permanent improvements to previously unimproved land within the ROW corridor
    - Not to correct legal description or other technical correction
- Landowner consent required
- BIA may disapprove only if:
  - Landowners did not consent
  - Grantee's sureties did not consent
  - Grantee is in violation of the ROW
  - Requirements in the regulations not met
  - Compelling reason to withhold approval in best interest of landowners



## Proposed Rule

### Subpart C: Term, Renewals, Amendments, Etc.

- Assignments
  - BIA approval required unless:
    - Original ROW allows assignments without approval; and
    - Parties provide BIA with a copy
  - Landowner consent required
- BIA may disapprove only if:
  - Landowners did not consent
  - Grantee's sureties did not consent
  - Grantee is in violation of the ROW
  - Assignee does not agree to be bound by the terms of the ROW
  - Requirements in the regulations not met
  - Compelling reason to withhold approval in best interest of landowners

## Proposed Rule

### Subpart C: Term, Renewals, Amendments, Etc.

- Mortgages
  - BIA approval required
  - Landowner consent required
- BIA may disapprove only if:
  - Landowners did not consent
  - Grantee's sureties did not consent
  - Grantee is in violation of the ROW
  - Assignee does not agree to be bound by the terms of the ROW
  - Requirements in the regulations not met
  - Compelling reason to withhold approval in best interest of landowners

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## Proposed Rule

### Subpart D: Effectiveness

- ROW documents are effective upon BIA approval
  - Even if an appeal under 25 CFR 2 is filed
- BIA will record ROW documents in LTRO immediately following approval
  - If no BIA approval required, grantee must provide BIA with a copy for recording
  - Tribe must record
    - Grant on tribal land for a tribal utility that is not a separate legal entity
    - Grant on tribal land under a special act of Congress authorizing grants without BIA approval

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## Proposed Rule

### Subpart E: Compliance and Enforcement

- BIA may investigate compliance with a ROW
  - Enter the leased premises to ensure compliance:
    - At any reasonable time, upon reasonable notice; and
    - Consistent with any notice requirements under applicable tribal law and applicable ROW documents
- Promptly initiate investigation if an Indian landowner notifies that a specific violation has occurred

# Proposed Rule

## Subpart E: Compliance and Enforcement

- Negotiated remedies for ROWs
  - Must be included in landowners' consent to ROW grant
  - If the grant provides one or both parties with the power to terminate the ROW
    - Tribal land - BIA approval is not required and termination is effective without BIA cancellation, but landowners must notify BIA so that BIA can record the termination
    - Individually owned land – BIA approval required to ensure consent
- Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to BIA, as specified in the ROW grant

## Proposed Rule

### Subpart E: Compliance and Enforcement

- ROW grant may provide that tribe will address violations and specify how disputes will be resolved
  - BIA is not bound by decisions made in such forums, but defers to ongoing actions or proceedings, as appropriate, in deciding whether to exercise available remedies
  - In the absence of actions or proceedings or if it is not appropriate for BIA to defer to them, follow the procedures on the following slides



## Proposed Rule

### Subpart E: Compliance and Enforcement

- If violation (other than nonpayment):
  - Promptly send grantee a notice of violation
    - Send to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land
  - Notice of violation
    - Require grantee to do one of the following within 10 business days of the receipt:
      - Cure and notify BIA (and tribe for tribal land)
      - Dispute determination that a violation occurred
      - Request additional time to cure

## Proposed Rule

### Subpart E: Compliance and Enforcement

- If failure to pay rent in time and manner required by grant:
  - Send grantee a notice of violation promptly following:
    - Date payment was due, if BIA collects
    - Date BIA received actual notice of nonpayment from landowners
  - Send copy to tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land
  - Notice of violation
    - Require grantee to provide adequate proof of payment

## Proposed Rule

### Subpart E: Compliance and Enforcement

- If grantee does not cure a violation or provide adequate proof of payment by the deadline:
  - Consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:
    - BIA should cancel the ROW grant;
    - Landowners will use any remedies available under the grant;
    - BIA should invoke other remedies available (e.g., collect bond)
    - Grantee should be given additional time to cure

## Proposed Rule

### Subpart E: Compliance and Enforcement

- Following consultation, BIA may take action
  - BIA does not have to cancel the grant or give any further notice to the grantee before taking action to recover unpaid compensation
  - BIA may invoke any remedies available to it under the ROW
  - BIA action will be consistent with 25 U.S.C. 4137, as applicable
- To cancel:
  - Send grantee a cancellation letter within 5 business days of decision
  - Send a copy of the cancellation letter to the tribe for tribal land, and provide actual or constructive notice to individual landowners

# Proposed Rule

## Subpart E: Compliance and Enforcement

- The cancellation letter:
  - Explain the grounds for cancellation
  - State amount of any unpaid rent or late payment charges due
  - Notify the grantee of right to 25 CFR 2 appeal
  - Order the grantee to vacate within 31 days, if no appeal
  - Order the grantee to take any other action deemed necessary to protect the Indian landowners
- Cancellation effective 31 days after the grantee receives a cancellation letter or 41 days from the date BIA mailed the letter, whichever is earlier, unless appeal is filed

# Proposed Rule

## Subpart E: Compliance and Enforcement

- Cancellation for Abandonment or Non-Use
  - May cancel 30 days after mailing notice to grantee for:
    - Nonuse of ROW for consecutive 2-year period for the purpose for which ROW was granted
    - Abandonment of ROW (grantee affirmatively relinquishes ROW)

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# Proposed Rule

## Subpart F: Service Line Agreements

- Service Lines
  - Utility line running from a main line that is used only for supplying owners or authorized occupants, or authorized users of land, with telephone, water, electricity, gas, internet service, or other home utility service
  - No definitive capacity limitation



## Proposed Rule

### Subpart F: Service Line Agreements

- No ROW grant required for service lines BUT:
  - Service line agreement should address:
    - Mitigation of any damages during construction; and
    - Restoration of the premises at the termination of the agreement
  - Agreement must be signed by landowners
  - No valuation is required
  - Parties must file a copy of the agreement and a plat or diagram with BIA within 30 days after signing
    - BIA will record in LTRO

## Comments Due

- Comments on the proposed rule are due: **August 18, 2014**
- Email is preferred method to submit comments:
  - E-mail: [consultation@bia.gov](mailto:consultation@bia.gov)
- Next steps
  - Review comments, make changes as appropriate
  - Publish a final rule in the Federal Register
  - Final rule will not become effective for at least 30 days after publication