

[4310-6W-P]

**DEPARTMENT OF THE INTERIOR**

**Bureau of Indian Affairs**

**25 CFR Part 169**

**[Docket ID: BIA-2014-0001; DR.5B711.IA000814]**

**RIN 1076-AF20**

**Rights-of-Way on Indian Land**

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Proposed Rule.

**SUMMARY:** This proposed rule would comprehensively update and streamline the process for obtaining BIA grants of rights-of-way on Indian land, while supporting tribal self-determination and self-governance. This proposed rule would also further implement the policy decisions and approaches established in the leasing regulations, which BIA finalized in December 2012, by applying them to the rights-of-way context where applicable. This publication also announces the dates and locations for tribal consultation sessions to discuss this proposed rights-of-way rule.

**DATES:** Comments on this rule must be received by [INSERT DATE 60 DAYS AFTER PUBLICATION IN FEDERAL REGISTER]. *Comments on the information collections contained in this proposed regulation are separate from those on the substance of the rule.*

Comments on the information collection burden should be received by [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] to ensure consideration, but must be received no later than [INSERT DATE 60 DAYS FROM PUBLICATION IN THE

FEDERAL REGISTER]. Please see the SUPPLEMENTARY INFORMATION section of this notice for dates of tribal consultation sessions.

**ADDRESSES:** You may submit comments by any of the following methods:

- Federal rulemaking portal: <http://www.regulations.gov>. The rule is listed under the agency name “Bureau of Indian Affairs.” The rule has been assigned Docket ID: BIA-2014-0001.

- E-mail: [consultation@bia.gov](mailto:consultation@bia.gov). Include the number 1076-AF20 in the subject line.

- Mail or hand delivery: Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action, U.S. Department of the Interior, 1849 C Street, NW, MS 4141, Washington, DC 20240. Include the number 1076-AF20 on the envelope.

Please note that we will not consider or include in the docket for this rulemaking comments received after the close of the comment period (see DATES) or comments sent to an address other than those listed above.

Comments on the information collections contained in this proposed regulation are separate from those on the substance of the rule. Send comments on the information collection burden to OMB by facsimile to (202) 395-5806 or e-mail to the OMB Desk Officer for the Department of the Interior at [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov). Please send a copy of your comments to the person listed in the FOR FURTHER INFORMATION CONTACT section of this notice.

Please see the SUPPLEMENTARY INFORMATION section of this notice for addresses of tribal consultation sessions.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Appel, Director, Office of Regulatory Affairs & Collaborative Action, (202) 273-4680; elizabeth.appel@bia.gov. You may review the information collection request online at <http://www.reginfo.gov>. Follow the instructions to review Department of the Interior collections under review by OMB.

## **SUPPLEMENTARY INFORMATION:**

### **I. Executive Summary of Rule**

This is a proposed rule to comprehensively update and streamline the process for obtaining BIA grants of rights-of-way on Indian land. The current regulations were promulgated in 1968, and last updated in 1980. In December 2012, the Department issued final regulations comprehensively reforming residential, business, and wind and solar leasing on Indian land and streamlining the leasing process. Given the supportive response to the leasing regulatory revisions, we are updating 25 CFR 169 (Rights-of-Way) to mirror those revisions to the extent applicable in the rights-of-way context.

Highlights of the proposed rights-of-way revisions include:

- Eliminating the need to obtain BIA consent for surveying in preparation for a right-of-way;
- Establishing timelines for BIA review of rights-of-way requests;
- Clarifying processes for BIA review of right-of-way documents;
- Allowing BIA disapproval only where there is a stated compelling reason;
- Providing greater deference to Tribes on compensation for rights-of-way;
- Clarifying the authority by which BIA approves rights-of-way; and
- Eliminating outdated requirements specific to different types of rights-of-way.

Together, these revisions will modernize the rights-of-way approval process while better supporting Tribal self-determination. This rule also updates the regulations to be in a question-and-answer format, in compliance with “plain language” requirements.

## II. Summary of All Revisions to 25 CFR 169

The following table summarizes revisions to part 169, by showing where the substance of each section of the current rule is in the proposed rule and describing the changes.

Current 25 CFR §	Current Provision	Proposed 25 CFR §	Description of Change
169.1	Definitions of “Secretary,” “individually owned land,” “tribe,” “tribal land,” and “Government owned land.”	169.002	Revises the definition of “tribe” to be “Indian tribe” and to refer to the Federal List Act. Simplifies the remaining definitions. Adds definitions for “abandonment,” “assignment,” “avigation hazard easement,” “BIA,” “compensation,” “constructive notice,” “easement,” “fractional interest,” “grant,” “grantee,” “immediate family,” “Indian,” “Indian land,” “in-kind compensation,” “legal description,” “LTRO,” “map of definite location,” “market value,” “right-of-way,” “right-of-way document,” “Section 17 corporation,” “service line,” “trespass,” “tribal authorization,” “trust account,” “trust account encumbrance,” “trust and restricted status,” “Uniform Standards for Professional Appraisal Practice (USPAP),” and “us/we/ our.”
169.2(a), (c)	Purpose and scope of regulations.	169.001	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	169.003-169.010	New sections. Specify what land part 169 applies to, when a right-of-way is needed, what types of rights-of-way are covered by part 169, 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, what taxes apply to rights-of-way, and how BIA provides notice of its actions related to rights-of-way.
169.2(b)	Appeals	169.011	Adds exceptions to part 2 appeals and clarifies “interested party” to make consistent with availability of appeals in the leasing context.
169.3(a)	Tribal consent required.	169.106	No substantive change.
169.3(b)-(c)	Individual Indian landowner consent required.	169.107, 169.108	Adds a requirement for BIA to provide 30-day notice to landowners on whose behalf it will consent. 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.

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	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, and information necessary to comply with environmental laws.
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. Adds requirement that map be signed by a professional surveyor or engineer.
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 unsurveyed land, be connected with corner of public survey < 6 miles away.	169.002	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.	169.002	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)	Maintains the requirement for an engineer to sign the map, but adds that a surveyor may sign the map instead. 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.	169.109-169.111	Provides that the Secretary will defer to the tribe's negotiated 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	169.112-169.117	New sections. 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) and put limits on availability of direct pay, allow for non-monetary (e.g., discount internet service) and varying types of compensation, clarify whether BIA will notify when a payment is due, and clarify when right-of-way grant must provide for compensation reviews or adjustments.
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.	169.118	Adds 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	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.	169.119-169.120	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	161.122	New section. Clarifies that a right-of-way grant may include a preference for employment of tribal members.
N/A	N/A	161.123	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.	169.124	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.
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.
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 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. Specify the process by which BIA will cancel a right-of-way and when cancellation is effective.
N/A	N/A	169.410-169.412	New sections. Specify 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, 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	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.	169.002, 169.501-169.505	Clarifies in definition that a service line is only a utility line running from a main line to provide landowners/occupants with utility service and deletes provisions restricting service lines to a specific voltage.
169.23	Railroads. Lists specific statutory authorities for railroads and other rights-of-way, and includes specific requirements for railroad right-of-ways.	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	Railroads in Oklahoma. Lists specific statutory authorities for railroad rights-of-way in Oklahoma.	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	Oil and gas pipelines. Lists specific statutory authorities and requirements for oil and gas pipeline 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. Specific requirements for oil and gas pipelines are unnecessary because they are already addressed in applicable State and Federal laws.
169.26	Telephone and telegraph lines; radio, television, and other communications facilities. Lists specific statutory authorities and requirements for telephone and telegraph lines, etc.	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.

The core processes for obtaining landowner consent and BIA approval are the same as for obtaining a lease. The timelines this proposed rule would establish for rights-of-way approvals mirror those for business leases at 25 CFR subpart D, allowing for a 60-day review of right-of-way applications, and 30-day review of amendments, assignments, and mortgages. If BIA does not act within those established deadlines, the parties could elevate the application to the Regional Director or Director of BIA, as appropriate, for action.

We are interested in all comments regarding this rule, but also would specifically like comment on the bonding provisions and whether the proposed durations for different types of rights-of-way set out in section 169.201 are appropriate.

### III. Tribal Consultation Sessions

We will be hosting several tribal consultation sessions throughout the country to discuss this proposed rule. The dates and locations for the consultation sessions are as follows:

<b>Date</b>	<b>Time</b>	<b>Location</b>	<b>Venue</b>
Tuesday, August 5, 2014	8 a.m. – 12 p.m. (Local time)	Bismarck, North Dakota	Bismarck Civic Center, Prairie Rose Room 101 315 S. 5 <sup>th</sup> Street Bismarck, ND 58504
Wednesday, August 6, 2014	1 p.m. – 5 p.m. (Local time)	Scottsdale, Arizona	Talking Stick Resort 9800 E. Indian Bend Rd. Scottsdale, AZ 85256
Thursday, August 7, 2014	1 p.m. – 4 p.m. Eastern Time	Teleconference	Call-in number: (888) 989-7589 Passcode: 208-1244

### IV. Procedural Requirements

#### A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs

agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This rule is also part of the Department's commitment under the Executive Order to reduce the number and burden of regulations and provide greater notice and clarity to the public.

### **B. Regulatory Flexibility Act**

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

### **C. Small Business Regulatory Enforcement Fairness Act**

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. It will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. The rule's requirements will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises because the rule is limited to rights-of-way on Indian land.

### **D. Unfunded Mandates Reform Act**

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

**E. Takings (E.O. 12630)**

Under the criteria in Executive Order 12630, this rule does not affect individual property rights protected by the Fifth Amendment nor does it involve a compensable “taking.” A takings implication assessment is therefore not required.

**F. Federalism (E.O. 13132)**

Under the criteria in Executive Order 13132, this rule has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule only concerns BIA’s grant of rights-of-way on Indian land.

**G. Civil Justice Reform (E.O. 12988)**

This rule complies with the requirements of Executive Order 12988. Specifically, this rule has been reviewed to eliminate errors and ambiguity and written to minimize litigation; and is written in clear language and contains clear legal standards.

**H. Consultation with Indian Tribes (E.O. 13175)**

In accordance with the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments,” Executive Order 13175 (59 FR 22951, November 6, 2000), and 512 DM 2, we have evaluated the potential effects on

federally recognized Indian tribes and Indian trust assets. We will be consulting with Indian tribes during the public comment period on this rule.

## **I. Paperwork Reduction Act**

This rule contains information collections requiring approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq. The Department is seeking approval for a new OMB Control Number.

*OMB Control Number:* 1076–NEW.

*Title:* Rights-of-Way on Indian Land.

*Brief Description of Collection:* This information collection requires applicants for, and recipients of, right-of-way grants to cross Indian land to submit information to the Bureau of Indian Affairs.

*Type of Review:* Existing collection in use without OMB control number.

*Respondents:* Individuals and entities.

*Number of Respondents:* 550 on average (each year).

*Number of Responses:* 3,300 on average (each year).

*Frequency of Response:* On occasion.

*Estimated Time per Response:* 1 hour (for applications); 0.5 hours (for responses to notices of violation); 0.5 hours (for responses to trespass notices of violations); and 0.25 hours (for filing service line agreements).

*Estimated Total Annual Hour Burden:* 2,500 hours.

*Estimated Total Non-Hour Cost:* \$2,200,000.

## **J. National Environmental Policy Act**

This rule does not constitute a major Federal action significantly affecting the quality of

the human environment because these are “regulations . . . whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” 43 CFR 46.210(j). No extraordinary circumstances exist that would require greater NEPA review.

#### **K. Effects on the Energy Supply (E.O. 13211)**

This rule is not a significant energy action under the definition in Executive Order 13211.

A Statement of Energy Effects is not required.

#### **L. Clarity of this Regulation**

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the “COMMENTS” section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

#### **M. Public Availability of Comments**

Before including your address, phone number, e-mail address, or other personal

identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

## **List of Subjects in 25 CFR Part 169**

Indians-lands, Rights-of-way.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, proposes to amend part 169 in Title 25 of the Code of Federal Regulations to read as follows:

### **PART 169-RIGHTS-OF-WAY OVER INDIAN LAND**

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- 169.503 Is a valuation required for service line agreements?  
169.504 Must I file service line agreements with the BIA?

AUTHORITY: 5 U.S.C. 301; 62 Stat. 17 (25 U.S.C. 323 - 328), 25 U.S.C. 2218, and other acts cited in the text.

### **Subpart A - Purpose, Definitions, General Provisions**

#### **§ 169.001 What is the purpose of this part?**

(a) This part is intended to streamline the procedures and conditions under which we will approve (i.e., grant) rights-of-way over and across tribal lands, individually owned Indian lands, and Government-owned lands, by providing for the use of the broad authority under 25 U.S.C. 323-328, rather than the limited authorities under other statutes.

(b) This part specifies:

(1) Conditions and authorities under which we will approve rights-of-way on or across Indian land;

(2) How to obtain a right-of-way;

(3) Terms and conditions required in rights-of-way;

(4) How we administer and enforce rights-of-ways;

(5) How to renew, amend, assign, and mortgage rights-of-way; and

(6) Whether rights-of-way are required for service line agreements.

(c) This part does not cover rights-of-way on or across tribal lands within a reservation for the purpose of Federal Power Act projects, such as constructing, operating, or maintaining dams, water conduits, reservoirs, powerhouses, transmission lines or other works which must constitute a part of any project for which a license is required by the Federal Power Act.

(1) The Federal Power Act provides that any license that must be issued to use tribal lands within a reservation must be subject to and contain such conditions as the Secretary deems necessary for the adequate protection and utilization of such lands (16 U.S.C. 797(e)).

(2) In the case of tribal lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), the Federal Power Act requires that annual charges for the use of such tribal lands under any license issued by the Federal Energy Regulatory Commission must be subject to the approval of the tribe (16 U.S.C. 803(e)).

(d) This part does not apply to grants of rights-of-way on tribal land under a special act of Congress authorizing grants without our approval under certain conditions.

#### **§ 169.002 What terms do I need to know?**

Abandonment means the grantee has affirmatively relinquished a right-of-way (as opposed to relinquishing through non-use).

Assignment means an agreement between a grantee and an assignee, whereby the assignee acquires all or part of the grantee's rights, and assumes all of the grantee's obligations under a grant.

Avigation hazard easement means the right, acquired by government through purchase or condemnation from the owner of land adjacent to an airport, to the use of the air space above a specific height for the flight of aircraft.

BIA means the Secretary of the Interior or the Bureau of Indian Affairs within the Department of the Interior and any tribe acting on behalf of the Secretary or BIA under § 169.007 of this part.

Compensation means something bargained for that is fair and reasonable under the circumstances of the agreement.

Constructive notice means notice:

(1) Posted at the tribal government office, tribal community building, and/or the United States Post Office; and

(2) Published in the local newspaper(s) nearest to the affected land and/or announced on a local radio station(s).

Easement means an interest in land owned by another person, consisting of the right to use or control, for a specific limited purpose, the land, or an area above or below it.

Encumbered account means a trust fund account where some portion of the proceeds are obligated to another party.

Fractional interest means an undivided interest in Indian land owned as tenancy in common by individual Indian or tribal landowners and/or fee owners.

Government land means any tract, or interest therein, in which the surface estate is owned and administered by the United States, not including Indian land.

Grant means the formal transfer of a right-of-way interest by the Secretary's approval.

Grantee means a person or entity to whom the Secretary grants a right-of-way.

Immediate family means, in the absence of a definition under applicable tribal law, a spouse, brother, sister, aunt, uncle, niece, nephew, first cousin, lineal ancestor, lineal descendant, or member of the household.

Indian means:

(1) Any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner as of October 27, 2004, of a trust or restricted interest in land;

(2) Any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) and the regulations promulgated thereunder; and

(3) With respect to the inheritance and ownership of trust or restricted land in the State of California under 25 U.S.C. 2206, any person described in paragraph (1) or (2) of this definition or any person who owns a trust or restricted interest in a parcel of such land in that State.

Indian land means any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status and includes both individually owned Indian land and tribal land.

Indian landowner means a tribe or individual Indian who owns an interest in Indian land.

Indian tribe or tribe means an Indian tribe under section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a).

Individually owned Indian land means any tract, or interest therein, in which the surface estate is owned by an individual Indian in trust or restricted status.

In-kind compensation means payment is in goods or services rather than money.

Legal description means that part of the conveyance document of land or interest in land, which identifies the land or interest to be affected.

LTRO means the Land Titles and Records Office of BIA.

Map of definite location means a survey plat showing the location, size, and extent of the right-of-way and other related parcels, with respect to each affected parcel of individually owned land, tribal land, or Government land and with respect to the public surveys under 25 U.S.C. 176, 43 U.S.C. 2, and 1764.

Market value means the amount of compensation that a right-of-way would most probably command in an open and competitive market.

Right-of-way means a legal right to cross tribal land, individually owned Indian land, or Government land for a specific purpose, including but not limited to building and operating a line or road. This term may also refer to the land subject to the grant of right-of-way.

Right-of-way document means a right-of-way grant, renewal, amendment, assignment, or mortgage of a right-of-way.

Secretary means the Secretary of the Interior or an authorized representative.

Section 17 corporation means an Indian corporation federally chartered under section 17 of the Act of June 18, 1934, 25 U.S.C. 476.

Service line means a utility line running from a main line that is used only for supplying owners or authorized occupants or users of land with telephone, water, electricity, gas, internet service, or other home utility service.

Trespass means any unauthorized occupancy, use of, or action on tribal or individually owned Indian land.

Tribal authorization means a duly adopted tribal resolution, tribal ordinance, or other appropriate tribal document authorizing the specified action.

Tribal land means any tract, or interest therein, in which the surface estate is owned by one or more tribes in trust or restricted status, and includes such lands reserved for BIA administrative purposes. The term also includes the surface estate of lands held in trust for an Indian corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477).

Trust account means a tribal account or Individual Indian Money (IIM) account for trust funds maintained by the Secretary.

Trust or restricted status means:

(1) That the United States holds title to the tract or interest in trust for the benefit of one or more tribes or individual Indians; or

(2) That one or more tribes or individual Indians holds title to the tract or interest, but can alienate or encumber it only with the approval of the United States because of limitations in the conveyance instrument under Federal law or limitations in Federal law.

Uniform Standards of Professional Appraisal Practice (USPAP) means the standards promulgated by the Appraisal Standards Board of the Appraisal Foundation to establish requirements and procedures for professional real property appraisal practice.

Us/we/our means the BIA.

**§ 169.003 To what land does this part apply?**

(a) This part applies to Indian land and Government land.

(1) We will not take any action on a right-of-way across fee land or collect compensation on behalf of fee interest owners. We will not condition our grant of a right-of-way across Indian land or Government land on the applicant having obtained a right-of-way from the owners of any fee interests. The applicant will be responsible for negotiating directly with and making any payments directly to the owners of any fee interests that may exist in the property on which the right-of-way is granted.

(2) We will not include the fee interests in a tract in calculating the applicable percentage of interests required for consent to a right-of-way.

(b) This paragraph (b) applies if there is a life estate on the land proposed to be subject to a right-of-way.

(1) Unless otherwise provided in a will creating the life estate, when all of the trust or restricted interests in a tract are subject to the same life estate (created by operation of law), the

life tenant may grant a right-of-way over the land without the consent of the owners of the remainder interests or our approval, for the duration of the life estate.

(i) The right-of-way will terminate upon the expiration of the life estate.

(ii) The life tenant must record the right-of-way in the LTRO.

(iii) The grantee must pay compensation directly to the life tenant under the terms of the right-of-way unless the whereabouts of the life tenant are unknown, in which case we may collect compensation on behalf of the life tenant.

(iv) We may monitor the use of the land, as appropriate, and will enforce the terms of the right-of-way on behalf of the owners of the remainder interests, but will not be responsible for enforcing the right-of-way on behalf of the life tenant.

(v) We will not grant a right-of-way on behalf of the owners of the remainder interests or join in a right-of-way granted by the life tenant on behalf of the owners of the remainder interests except as needed to preserve the value of the land.

(2) Unless otherwise provided in a will creating the life estate, when less than all of the trust or restricted interests in a tract are subject to a particular life estate (by operation of law), the life tenant may grant a right-of-way for his or her interest without the consent of the owners of the remainder interests, for the duration of the life estate, but the applicant must obtain the consent of the co-owners and our approval.

(i) The right-of-way over the life interest will terminate upon the expiration of the life estate.

(ii) We will not grant a right-of-way on the life tenant's behalf.



(iii) The right-of-way must provide that the grantee pays the life tenant directly, unless the life tenant's whereabouts are unknown in which case we may collect compensation on behalf of the life tenant.

(iv) The right-of-way must be recorded in the LTRO.

(v) We may monitor the use of the land, as appropriate, and will enforce the terms of the right-of-way on behalf of the owners of the remainder interests, but will not be responsible for enforcing the right-of-way on behalf of the life tenant.

(3) We may grant a right-of-way for longer than the duration of a life estate with the consent of a majority of the owners of the remainder interests, and may consent on behalf of undetermined owners of remainder interests.

(4) Unless otherwise provided in a will creating the life estate, where the owners of the remainder interests and the life tenant have not entered into a right-of-way or other written agreement approved by the Secretary providing for the distribution of rent monies under the right-of-way, the life tenant will receive payment in accordance with the distribution and calculation scheme set forth in Part 179 of this chapter.

(5) The life tenant may not cause or allow permanent injury to the land.

(6) The life tenant must provide a copy of their right-of-way consent to us and must record any right-of-way granted under paragraph (b)(1) of this section in the LTRO.

**§ 169.004 When do I need a right-of-way to authorize possession over or across Indian land?**

(a) You need an approved right-of-way under this part before crossing Indian land if you meet one of the criteria in the following table, unless you are authorized by a land use agreement

not subject to this part (e.g., under 25 CFR part 84) or a lease under 25 CFR part 162, 211, 212, 225, or similar, tribe-specific authority.

<b>If you are...</b>	<b>then you must obtain a right-of-way under this part...</b>
(1) A person or legal entity (including an independent legal entity owned and operated by a tribe or Federal, State, or local governmental entity) who is not an owner of the Indian land	from us, with the consent of the owners of the majority interest in the land before crossing the land or any portion thereof.
(2) An Indian landowner of a fractional interest in the land	from us, with the consent of the owners of other trust and restricted interests in the land, totaling at least a majority interest, unless all of the owners have given you permission to cross without a right-of-way.

(b) You do not need a right-of-way to cross Indian land if:

(1) You are an Indian landowner who owns 100 percent of the trust or restricted interests in the land; or

(2) You meet any of the criteria in the following table.

<b>You do not need a right-of-way if you are...</b>	<b>but the following conditions apply...</b>
(i) A parent or guardian of a minor child who owns 100 percent of the trust or restricted interests in the land	We may require you to provide evidence of a direct benefit to the minor child and when the child is no longer a minor, you must obtain a right-of-way to authorize continued possession.
(ii) Authorized by a service line agreement to cross the land	You must file the agreement with us under § 169.504.
(iii) Otherwise authorized by law (e.g., a	You must comply with the requirements

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statute, judicial order, or common law  
authorizes access).

of the applicable statute, judicial order, or  
common law.

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**§ 169.005 What types of rights-of-way does this part cover?**

(a) This part covers rights-of-way over and across Indian or Government land, for uses including but not limited to the following:

- (1) Railroads;
- (2) Public roads and highways;
- (3) Access roads;
- (4) Service roads and trails essential to any other right-of-way purpose;
- (5) Public and community water lines (including pumping stations and appurtenant facilities);
- (6) Public sanitary and storm sewer lines (including sewage disposal and treatment plant lines);
- (7) Water control and use projects (including but not limited to, flowage easements, irrigation ditches and canals, and water treatment plant lines);
- (8) Oil and gas pipelines;
- (9) Electric transmission and distribution lines (including poles, towers, and appurtenant facilities);
- (10) Telecommunications, broadband, fiber optic lines;
- (11) Avigation hazard easements; or
- (12) Conservation easements not covered by 25 CFR 84, Encumbrances of Tribal Land – Contract Approvals, or 25 CFR 162, Leases and Permits.

(b) BIA will grant rights-of-way using the authority in 25 U.S.C. 323-328, and relying on supplementary authority such as 25 U.S.C. 2218, where appropriate, and this part covers all rights-of-way granted under that statutory authority. This part also covers existing rights-of-way that were granted under other statutory authorities prior to the effective date of this rule, except that if the provisions of the preexisting right-of-way document conflict with this part, the provisions of the preexisting right-of-way document govern.

**§ 169.006 Does this part apply to right-of-way grants I submitted for approval before [INSERT EFFECTIVE DATE OF REGULATIONS]?**

This part applies to all right-of-way documents. If you submitted your right-of-way document to us for granting or approval before [INSERT EFFECTIVE DATE OF REGULATIONS], the qualifications in paragraphs (a) and (b) of this section also apply.

(a) If we granted or approved your right-of-way document before [INSERT EFFECTIVE DATE OF REGULATIONS], this part applies to that right-of-way document; however, if the provisions of the right-of-way document conflict with this part, the provisions of the right-of-way document govern.

(b) If you submitted a right-of-way document but we did not approve or grant it before [INSERT EFFECTIVE DATE OF REGULATIONS], then:

(1) We will review the right-of-way document under the regulations in effect at the time of your submission; and

(2) Once we grant or approve the right-of-way document, this part applies to that right-of-way document; however, if the provisions of the right-of-way document conflict with this part, the provisions of the right-of-way document govern.

**§ 169.007 May tribes administer this part on BIA's behalf?**

A tribe or tribal organization may contract or compact under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f *et seq.*) to administer any portion of this part that is not a grant, approval, or disapproval of a right-of-way document, waiver of a requirement for right-of-way grant or approval (including but not limited to waivers of market value and valuation), cancellation of a right-of-way, or an appeal.

**§ 169.008 What laws apply to rights-of-way approved under this part?**

(a) In addition to the regulations in this part, rights-of-way approved under this part:

(1) Are subject to all applicable Federal laws;

(2) Are subject to tribal law, subject to paragraph (b) of this section; and

(3) Are not subject to State law or the law of a political subdivision thereof except that:

(i) State law or the law of a political subdivision thereof may apply in the specific areas and circumstances in Indian country where the Indian tribe with jurisdiction has made it expressly applicable;

(ii) State law may apply in the specific areas and circumstances in Indian country where Congress has made it expressly applicable; and

(iii) State law may apply where a Federal court has expressly applied State law to a specific area or circumstance in Indian country in the absence of Federal or tribal law.

(b) Tribal laws generally apply to land under the jurisdiction of the tribe enacting the laws, except to the extent that those tribal laws are inconsistent with these regulations or other applicable Federal law. However, these regulations may be superseded or modified by tribal laws, as long as:

(1) The tribe has notified us of the superseding or modifying effect of the tribal laws;

(2) The superseding or modifying of the regulation would not violate a Federal statute or judicial decision, or conflict with our general trust responsibility under Federal law; and

(3) The superseding or modifying of the regulation applies only to tribal land.

(c) Unless prohibited by Federal law, the parties to a right-of-way may subject that right-of-way to State or local law in the absence of Federal or tribal law, if the Indian landowners expressly agree, in writing, to the application of State or local law.

(d) An agreement under paragraph (c) of this section does not waive a tribe's sovereign immunity unless the tribe expressly states its intention to waive sovereign immunity in its consent to the right-of-way on tribal land.

(e) A right-of-way is an interest in land, but title does not pass to the grantee. Unless otherwise expressly stated in its consent to the right-of-way for tribal land, or in a tribal authorization for a right-of-way for individually-owned Indian land, the Secretary's grant of a right-of-way does not diminish to any extent:

(1) The Indian tribe's jurisdiction over the land subject to the right-of-way;

(2) The power of the Indian tribe to tax the land, any improvements on the land, or any activity related to, and not inconsistent with, the right-of-way;

(3) The Indian tribe's authority to enforce tribal law of general or particular application on the land subject to the right-of-way, as if there were no grant of right-of-way;

(4) The Indian tribe's inherent sovereign power to exercise civil jurisdiction over non-members on tribal land by regulating, through taxation, licensing, or other means, the activities of non-members who enter into consensual relationships with the Indian tribe or its members; or

(5) The character of the land subject to the right-of-way as Indian country under 18 U.S.C. 1151.

**§ 169.009 What taxes apply to rights-of-way approved under this part?**

(a) Subject only to applicable Federal law, permanent improvements in a right-of-way, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

(b) Subject only to applicable Federal law, activities under a right-of-way grant are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.

(c) Subject only to applicable Federal law, the right-of-way or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Possessory interests may be subject to taxation by the Indian tribe with jurisdiction.

**§ 169.010 How does BIA provide notice to the parties to a right-of-way?**

(a) When this part requires us to notify the parties of the status of our review of a right-of-way document (including but not limited to, providing notice to the parties of the date of receipt, informing the parties of the need for additional review time, and informing the parties that an application package is not complete):

(1) For rights-of-way affecting tribal land, we will notify the grantee and the tribe by mail; and

(2) For rights-of-way affecting individually owned Indian land, we will notify the grantee by mail and, where feasible, the individual Indian landowners by constructive notice or mail.

(b) When this part requires us to notify the parties of our determination to approve or disapprove a right-of-way document, and to provide any right of appeal:

(1) For rights-of-way affecting tribal land, we will notify the applicant and the tribe by mail; and

(2) For rights-of-way affecting individually owned Indian land, we will notify the applicant by mail and the individual Indian landowners by constructive notice, mail, or electronic mail.

**§ 169.011 May decisions under this part be appealed?**

(a) Appeals from BIA decisions under this part may be taken under part 2 of this chapter, except:

(1) Our decision to disapprove a right-of-way may be appealed only by an Indian landowner.

(2) Our decision to disapprove any other right-of-way document may be appealed only by the Indian landowners or the applicant.

(b) For purposes of appeals from BIA decisions under this part, “interested party” is defined as any person whose own direct economic interest is adversely affected by an action or decision.

**§ 169.012 How does the Paperwork Reduction Act affect this part?**

The collections of information in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned OMB Control Number 1076-NEW. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.



## **Subpart B – Obtaining a Right-of-Way**

### *Application*

#### **§ 169.101 How do I obtain a right-of-way across tribal or individually owned Indian land?**

(a) To obtain a right-of-way across tribal or individually owned Indian land, you must submit a complete application to the BIA office with jurisdiction over the land covered by the right-of-way.

(b) If you must obtain access to Indian land to prepare information required by the application (e.g., to survey), you must obtain the consent of the Indian landowners in the following manner before accessing the land, but our approval to access is not required.

(1) For tribal land, you must obtain written authorization or a permit from the tribe.

(2) For individually owned Indian land, you must notify all Indian landowners and obtain the consent of the Indian landowners of the majority interest under § 169.107. Upon written request, we will provide you with the names, addresses, and percentage of ownership of individual Indian landowners, to allow you to obtain the landowners' consent to survey.

(3) If the BIA will be granting the right-of-way across Indian land under § 169.107(b), then the BIA may grant permission to access the land.

#### **§ 169.102 What must an application for a right-of-way include?**

(a) An application for a right-of-way must identify:

(1) The applicant;

(2) The tract(s) or parcel(s) affected by the right-of-way;

(3) The general location of the right-of-way;

(4) The purpose of the right-of-way;

(5) The duration of the right-of-way: and

(6) The ownership of permanent improvements associated with the right-of-way and the responsibility for constructing, operating, maintaining, and managing permanent improvements under § 169.105.

(b) The following must be submitted with the application:

(1) An accurate legal description of the right-of-way, its boundaries, and parcels associated with the right-of-way;

(2) A map of definite location of the right-of-way and existing facilities adjacent to the proposed project, signed by a professional surveyor or engineer (this requirement does not apply to easements covering the entire tract of land);

(3) A bond meeting the requirements of § 169.103;

(4) Record of consent for the right-of-way meeting the requirements of § 169.106 for tribal land, and § 169.107 for individually owned Indian land;

(5) If applicable, a valuation meeting the requirements of § 169.111;

(6) If the applicant is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, information such as organizational documents, certificates, filing records, and resolutions, demonstrating that:

(i) The representative has authority to execute the application;

(ii) The right-of-way will be enforceable against the applicant; and

(iii) The legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located;

(7) Environmental and archeological reports, surveys, and site assessments, as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements.

(c) There is no standard application form.

**§ 169.103 What bond must accompany the application?**

(a) You must include payment of a performance bond or alternative form of security with your application for a right-of-way in an amount that covers:

(1) The highest annual rental specified in the grant, unless compensation is a one-time payment;

(2) The estimated damages resulting from the construction of any permanent improvements;

(3) The operation and maintenance charges for any land located within an irrigation project; and

(4) The restoration and reclamation of the premises to their condition at the start of the right-of-way or some other specified condition.

(b) The performance bond or other security must be deposited with us and made payable only to us, and may not be modified without our approval, except for tribal land in which case the bond or security may be deposited with and made payable to the tribe, and may not be modified without the approval of the tribe.

(c) The grant will specify the conditions under which we may adjust the security or performance bond requirements to reflect changing conditions, including consultation with the tribal landowner for tribal land before the adjustment.

(d) We may require that the surety provide any supporting documents needed to show that the performance bond or alternative form of security will be enforceable, and that the surety will be able to perform the guaranteed obligations.

(e) The performance bond or other security instrument must require the surety to provide notice to us at least 60 days before canceling a performance bond or other security. This will allow us to notify the grantee of its obligation to provide a substitute performance bond or other security before the cancellation date. Failure to provide a substitute performance bond or security is a violation of the right-of-way.

(f) We may waive the requirement for a performance bond or alternative form of security if the Indian landowners of the majority of the interests request it and we determine a waiver is in the Indian landowners' best interest. For tribal land, we will defer, to the maximum extent possible, to the tribe's determination that a waiver of a performance bond or alternative form of security is in its best interest.

(g) We will accept a performance bond only in one of the following forms:

(1) Certificates of deposit issued by a federally insured financial institution authorized to do business in the United States;

(2) Irrevocable letters of credit issued by a federally insured financial institution authorized to do business in the United States;

(3) Negotiable Treasury securities; or

(4) Surety bonds issued by a company approved by the U.S. Department of the Treasury.

(h) We may accept an alternative form of security approved by us that provides adequate protection for the Indian landowners and us, including but not limited to an escrow agreement and assigned savings account.

(i) All forms of performance bonds or alternative security must, if applicable:

(1) Indicate on their face that BIA approval is required for redemption;

(2) Be accompanied by a statement granting full authority to BIA to make an immediate claim upon or sell them if the grantee violates the right-of-way;

(3) Be irrevocable during the term of the performance bond or alternative security; and

(4) Be automatically renewable during the term of the right-of-way.

(j) We will not accept cash bonds.

**§ 169.104 What is the release process for a performance bond or alternative form of security?**

Upon expiration, termination, or cancellation of the right-of-way, the grantee may ask BIA in writing to release the performance bond or alternative form of security. Upon receiving the grantee's request, BIA will:

(a) Confirm with the tribe, for tribal land or, where feasible, with the Indian landowners for individually owned Indian land, that the grantee has complied with all grant obligations; and

(b) Release the performance bond or alternative form of security to the grantee, unless we determine that the bond or security must be redeemed to fulfill the contractual obligations.

**§ 169.105 What requirements for due diligence must a right-of-way grant include?**

(a) If permanent improvements are to be constructed, the right-of-way grant must include due diligence requirements that require the grantee to complete construction of any permanent improvements within the schedule specified in the right-of-way grant or general schedule of construction, and a process for changing the schedule by mutual consent of the parties. If construction does not occur, or is not expected to be completed, within the time period specified in the grant, the grantee must provide the Indian landowners and BIA with an explanation of good cause as to the nature of any delay, the anticipated date of construction of facilities, and evidence of progress toward commencement of construction.

(b) Failure of the grantee to comply with the due diligence requirements of the grant is a violation of the grant and may lead to cancellation of the right-of-way under § 169.408.

(c) BIA may waive the requirements in this section if such waiver is in the best interest of the Indian landowners.

### *Consent Requirements*

#### **§ 169.106 Must I obtain tribal consent for a right-of-way across tribal land?**

The applicant must obtain tribal consent, in the form of a tribal authorization, to a grant of right-of-way across tribal land.

#### **§ 169.107 Must I obtain individual Indian landowners' consent to a grant of right-of-way across individually-owned land?**

(a) Except as provided in paragraph (b) of this section, the applicant must notify all individual Indian landowners and must obtain consent from the owners of the majority interest in each tract affected by the grant of right-of-way.

(b) We may issue the grant of right-of-way without the consent of any of the individual Indian owners if:

(1) The owners of interests in the land are so numerous that it would be impracticable to obtain consent;

(2) We determine the grant will cause no substantial injury to the land or any landowner;

(3) We determine that all of the landowners will be adequately compensated for consideration and any damages that may arise from a grant of right-of-way; and

(4) We provide notice of our intent to issue the grant of right-of-way to all of the owners at least 30 days prior to the date of the grant using the procedures in § 169.010.

(c) For the purposes of this section, the owners of interests in the land are so numerous that it would be impracticable to obtain consent, where there are:

(1) 50 or more, but less than 100, co-owners of undivided trust or restricted interests, and no one of such co-owners holds a total undivided trust or restricted interest in the parcel that is greater than 10 percent of the entire undivided ownership of the parcel; or

(2) 100 or more co-owners of undivided trust or restricted interests.

(d) The right-of-way will not bind a non-consenting Indian tribe, except with respect to the tribally owned fractional interest, and the non-consenting Indian tribe will not be treated as a party to the right-of-way. Nothing in this paragraph affects the sovereignty or sovereign immunity of the Indian tribe.

(e) Successors are bound by consent granted by their predecessors-in-interest.

#### **§ 169.108 Who is authorized to consent to a right-of-way?**

(a) Indian tribes, adult Indian landowners, and emancipated minors, may consent to a right-of-way affecting their land, including undivided interests in fractionated tracts.

(b) The following individuals or entities may consent on behalf of an individual Indian landowner:

(1) An adult with legal custody acting on behalf of his or her minor children;

(2) A guardian, conservator, or other fiduciary appointed by a court of competent jurisdiction to act on behalf of an individual Indian landowner;

(3) Any person who is authorized to practice before the Department of the Interior under 43 CFR 1.3(b) and has been retained by the Indian landowner for this purpose;

(4) BIA, under the circumstances in paragraph (c) of this section; or

(5) An adult or legal entity who has been given a written power of attorney that:

(i) Meets all of the formal requirements of any applicable law under § 169.008;

(ii) Identifies the attorney-in-fact; and

(iii) Describes the scope of the powers granted, to include granting rights-of-way on land, and any limits on those powers.

(c) BIA may give written consent to a right-of-way, as long as we determine that the grant will cause no substantial injury to the land or any landowner, and that consent must be counted in the majority interest under § 169.107, on behalf of:

(1) The individual owner, if the owner is deceased, and the heirs to, or devisees of, the interest of the deceased owner have not been determined;

(2) An individual whose whereabouts are unknown to us, after we make a reasonable attempt to locate the individual;

(3) An individual who is found to be non compos mentis or determined to be an adult in need of assistance who does not have a guardian duly appointed by a court of competent jurisdiction, or an individual under legal disability as defined in part 115 of this chapter;

(4) An orphaned minor who does not have a guardian duly appointed by a court of competent jurisdiction; and

(5) An individual who has given us a written power of attorney to consent to a right-of-way of their land.

#### *Compensation Requirements*

**§ 169.109 How much monetary compensation must be paid for a right-of-way affecting tribal land?**



(a) A right-of-way affecting tribal land may allow for any payment amount negotiated by the tribe, and we will defer to the tribe and not require a valuation if the tribe submits a tribal authorization expressly stating that it:

(1) Has negotiated compensation satisfactory to the tribe;

(2) Waives valuation; and

(3) Has determined that accepting such negotiated compensation and waiving valuation is in its best interest.

(b) The tribe may request, in writing, that we determine market value, in which case we will use a valuation in accordance with § 169.111. After providing the tribe with the market value, we will defer to a tribe's decision to allow for any compensation negotiated by the tribe.

(c) If the conditions in paragraph (a) or (b) of this section are not met, we will require that the grantee provide for market value based on a valuation in accordance with § 169.111.

**§ 169.110 How much monetary compensation must be paid for a right-of-way affecting individually owned Indian land?**

(a) A right-of-way affecting individually owned Indian land must require payment of not less than market value before any adjustments, based on a fixed amount, a percentage of the projected income, or some other method, unless paragraphs (b) or (c) of this section permit a lesser amount. The grant must establish how the fixed amount, percentage, or combination will be calculated and the frequency at which the payments will be made. Compensation will include market value and may include additional fees, such as throughput fees, severance damages, franchise fees, avoidance value, bonuses, or other factors.

(b) We may approve a right-of-way affecting individually owned Indian land that provides for the payment of nominal compensation, or less than a market value, if:

(1) The Indian landowners execute a written waiver of the right to receive market value;  
and

(2) We determine it is in the Indian landowners' best interest, based on factors including,  
but not limited to:

(i) The grantee is a member of the immediate family, as defined in § 169.002, of an  
individual Indian landowner;

(ii) The grantee is a co-owner in the affected tract;

(iii) A special relationship or circumstances exist that we believe warrant approval of the  
right-of-way; or

(iv) We have waived the requirement for a valuation under paragraph (d) of this section.

(c) We will require a valuation, unless:

(1) 100 percent of the Indian landowners submit to us a written request to waive the  
valuation requirement; or

(2) We waive the requirement under paragraph (d) of this section.

(d) The grant must provide that the non-consenting Indian landowners, and those on  
whose behalf we have consented under § 169.108(c), or granted the right-of-way without consent  
under § 169.107(b), receive market value, as determined by a valuation, unless we waive the  
requirement because the tribe or grantee will construct infrastructure improvements benefitting  
the Indian landowners, and we determine it is in the best interest of all the landowners.

**§ 169.111 How will BIA determine market value for a right-of-way?**

(a) We will use a market analysis, appraisal, or other appropriate valuation method to  
determine the market value before we grant a right-of-way affecting individually owned Indian  
land or, at the request of the tribe, for tribal land.

(b) We will either:

(1) Prepare, or have prepared, a market analysis, appraisal, or other appropriate valuation method; or

(2) Use an approved market analysis, appraisal, or other appropriate valuation method from the Indian landowners or grantee.

(c) We will use or approve use of a market analysis, appraisal, or other appropriate valuation method only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary under 25 U.S.C. 2214 and complies with Departmental policies regarding appraisals, including third-party appraisals; or

(2) Has been prepared by another Federal agency.

**§ 169.112 When are monetary compensation payments due under a right-of-way?**

(a) If compensation is a one-time, lump sum payment, the grantee must make the payment within 10 days of our grant of the right-of-way.

(b) If compensation is to be paid in increments, the right-of-way grant must specify the dates on which all payments are due. Payments are due at the time specified in the grant, regardless of whether the grantee receives an advance billing or other notice that a payment is due. Increments may not be more frequent than quarterly.

**§ 169.113 Must a right-of-way specify who receives monetary compensation payments?**

(a) A right-of-way grant must specify whether the grantee will make payments directly to the Indian landowners (direct pay) or to us on their behalf.

(b) The grantee may make payments directly to the Indian landowners if:

(1) The Indian landowners' trust accounts are encumbered accounts;

(2) There are 10 or fewer beneficial owners; and

(3) One hundred percent of the beneficial owners (including those on whose behalf we have consented) agree to receive payment directly from the grantee at the start of the right-of-way.

(c) If the right-of-way document provides that the grantee will directly pay the Indian landowners, then:

(1) The right-of-way document must include provisions for proof of payment upon our request.

(2) When we consent on behalf of an Indian landowner, the grantee must make payment to us on behalf of that landowner.

(3) The grantee must send direct payments to the parties and addresses specified in the right-of-way, unless the grantee receives notice of a change of ownership or address.

(4) Unless the right-of-way document provides otherwise, payments may not be made payable directly to anyone other than the Indian landowners.

(5) Direct payments must continue through the duration of the right-of-way, except that:

(i) The grantee must make all Indian landowners' payments to us if 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement; and

(ii) The grantee must make an individual Indian landowner's payment to us if that individual Indian landowner dies, is declared non compos mentis, owes a debt resulting in an encumbered account, or his or her whereabouts become unknown.

**§ 169.114 What form of monetary compensation is acceptable under a right-of-way?**

(a) Our preferred method of payment is electronic funds transfer payments. We will also accept:

(1) Money orders;

(2) Personal checks;

(3) Certified checks; or

(4) Cashier's checks.

(b) We will not accept cash or foreign currency.

(c) We will accept third-party checks only from financial institutions or Federal agencies.

**§ 169.115 May the right-of-way provide for non-monetary or varying types of compensation?**

(a) A right-of-way grant may provide for the following, subject to the conditions in paragraphs (b) and (c) of this section:

(1) Alternative forms of compensation, including but not limited to, in-kind consideration and payments based on throughput or percentage of income; or

(2) Varying types of compensation at specific stages during the life of the right-of-way grant, including but not limited to, fixed annual payments during construction, payments based on income during an operational period, and bonuses.

(b) For tribal land, we will defer to the tribe's determination that the compensation under paragraph (a) of this section is in its best interest, if the tribe submits a signed certification or tribal authorization stating that it has determined the compensation under paragraph (a) of this section to be in its best interest.

(c) For individually owned land, we may grant a right-of-way that provides for compensation under paragraph (a) of this section if we determine that it is in the best interest of the Indian landowners.

**§ 169.116 Will BIA notify a grantee when a payment is due for a right-of-way?**

Upon request of the Indian landowners, we may issue invoices to a grantee in advance of the dates on which payments are due under the right-of-way. The grantee's obligation to make these payments in a timely manner will not be excused if invoices are not issued, delivered, or received.

**§ 169.117 Must a right-of-way grant provide for compensation reviews or adjustments?**

(a) For a right-of-way grant affecting tribal land, no periodic review of the adequacy of compensation or adjustment is required, unless the tribe negotiates for reviews or adjustments.

(b) For a right-of-way grant of individually owned Indian land, no periodic review of the adequacy of compensation or adjustment is required if:

(1) Payment is a one-time lump sum;

(2) The term of the right-of-way grant is 5 years or less;

(3) The grant provides for automatic adjustments; or

(4) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to, the following:

(i) The right-of-way grant provides for payment of less than market value;

(ii) The right-of-way grant provides for most or all of the compensation to be paid during the first 5 years of the grant term or before the date the review would be conducted; or

(iii) The right-of-way grant provides for graduated rent or non-monetary or varying types of compensation.

(c) If the conditions in paragraph (b) of this section are not met, a review of the adequacy of compensation must occur at least every fifth year, in the manner specified in the grant. The grant must specify:

- (1) When adjustments take effect;
- (2) Who can make adjustments;
- (3) What the adjustments are based on; and
- (4) How to resolve disputes arising from the adjustments.

(d) When a review results in the need for adjustment of compensation, the Indian landowners must consent to the adjustment in accordance with § 169.107, unless the grant provides otherwise.

**§ 169.118 What other types of payments are required for a right-of-way?**

(a) The grantee may be required to pay additional fees, taxes, and assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 169.009. The grantee must pay these amounts to the appropriate office.

(b) In addition to the compensation for a right-of-way provided for in paragraph (a) of this section, the applicant for a right-of-way will be required to pay all damages incident to the survey of the right-of-way or incident to the construction or maintenance of the facility for which the right-of-way is granted.

*Grants of Rights-of-Way*

**§ 169.119 What is the process for BIA to grant a right-of-way?**

(a) Before we grant a right-of-way, we must determine that the right-of-way is in the best interest of the Indian landowners. In making that determination, we will:

- (1) Review the right-of-way application and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances; and

(3) Require any modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving a right-of-way application, we will promptly notify the applicant whether the package is complete. A complete package includes all the information and supporting documents required under this subpart, including but not limited to, an accurate legal description for each affected tract, NEPA review documentation and valuation documentation, where applicable.

(1) If the right-of-way application package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of an application package, the parties may take action under § 169.304.

(2) If the right-of-way application package is complete, we will notify the parties of the date of our receipt of the complete package. Within 60 days of that receipt date, we will grant or deny the right-of-way, return the package for revision, or inform the applicant in writing that we need additional review time. If we inform the applicant in writing that we need additional time, then:

(i) Our letter informing the applicant that we need additional review time must identify our initial concerns and invite the applicant to respond within 15 days of the date of the letter; and

(ii) We have 30 days from sending the letter informing the applicant that we need additional time to grant or deny the right-of-way.



(c) If we do not meet the deadlines in this section, then the applicant may take appropriate action under § 169.304.

(d) We will provide any right-of-way grant or denial and the basis for the determination, along with notification of any appeal rights under part 2 of this chapter to the parties to the right-of-way. If the right-of-way is granted, we will provide a copy of the right-of-way to the tribal landowner and, upon written request, make copies available to the individual Indian landowners.

**§ 169.120 How will BIA determine whether to grant a right-of-way?**

(a) We will grant a right-of-way unless:

(1) The required consents have not been obtained from the parties to the right-of-way under § 169.106 and § 169.107;

(2) The requirements of this subpart have not been met; or

(3) We find a compelling reason to withhold the grant in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the right-of-way is in their best interest.

(c) We may not unreasonably withhold our grant of a right-of-way.

(d) We may grant one right-of-way for all of the tracts traversed by the right-of-way, or we may issue separate grants for one or more tracts traversed by the right-of-way.

**§ 169.121 What will the grant of right-of-way contain?**

(a) The grant will incorporate the conditions or restrictions set out in the consents obtained pursuant to §169.106 for tribal land and §169.107 for individually owned Indian land

(b) The grant will state that:

(1) The grantee has no right to any of the products or resources of the land, including but not limited to, timber, forage, mineral, and animal resources, unless otherwise provided for in the grant;

(2) BIA may treat any provision of a grant that violates Federal law as a violation of the grant; and

(3) The grantee must:

(i) Construct and maintain the right-of-way in a professional manner consistent with industry standards;

(ii) Pay promptly all damages and compensation, in addition to the performance bond or alternative form of security made pursuant to §169.103, determined by the BIA to be due the landowners and authorized users and occupants of land as a result of the granting, construction, and maintenance of the right-of-way;

(iii) Restore the land as nearly as may be possible to its original condition, upon the completion of construction, to the extent compatible with the purpose for which the right-of-way was granted, unless otherwise negotiated by the parties;

(iv) Clear and keep clear the land within the right-of-way, to the extent compatible with the purpose of the right-of-way, and dispose of all vegetative and other material cut, uprooted, or otherwise accumulated during the construction and maintenance of the project;

(v) Comply with all applicable laws and obtain all required permits;

(vi) Not commit waste;

(vii) Repair and maintain improvements consistent with the right-of-way grant;

(viii) Build and maintain necessary and suitable crossings for all roads and trails that intersect the improvements constructed, maintained, or operated under the right-of-way;

(ix) Restore land to its original condition, as much as reasonably possible, upon revocation or termination of the right-of-way, unless otherwise negotiated by the parties;

(x) At all times keep the BIA informed of the grantee's address;

(xi) Refrain from interfering with the landowner's use of the land, provided that the landowner's use of the land is not inconsistent with the right-of-way; and

(xii) Comply with due diligence requirements under § 169.105.

(4) Unless the grantee would be prohibited by law from doing so, the grantee must also:

(i) Hold the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the applicant's use or occupation of the premises; and

(ii) Indemnify the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or release or discharge of any hazardous material from the premises that occurs during the term of the grant, regardless of fault, with the exception that the applicant is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.

(c) The grant must attach or incorporate by reference maps of definite location reviewed in accordance with the Standards for Indian Trust Land Boundary Evidence.

**§ 169.122 May a right-of-way contain a preference consistent with tribal law for employment of tribal members?**

A grant of right-of-way over Indian land may include a provision, consistent with tribal law, requiring the grantee to give a preference to qualified tribal members, based on their political affiliation with the tribe.

**§ 169.123 Is a new right-of-way grant required for a new use within or overlapping an existing right-of-way?**

(a) If you propose to use all or a portion of an existing right-of-way for a use not specified in the original grant of the existing right-of-way, or not within the same scope of the use specified in the original grant of the existing right-of-way, you must request a new right-of-way within or overlapping the existing right-of-way for the new use.

(b) We may grant a new right-of-way within or overlapping an existing right-of-way if it meets the following conditions:

(1) The applicant follows the procedures and requirements in this part to obtain a new right-of-way.

(2) The new right-of-way does not interfere with the use or purpose of the existing right-of-way or the applicant has obtained the consent of the existing right-of-way grantee. The existing right-of-way grantee may not unreasonably withhold consent.

(3) If the existing right-of-way was granted under the Act of March 3, 1901, 25 U.S.C. 311, to a State or local authority for public highways, before the effective date of this part, we may grant the new right-of-way only if it is not prohibited by State law.

**§ 169.124 What is required if the location described in the original application and grant of right-of-way differs from the construction location?**

(a) If there were engineering or other complications that prevented construction within the location identified in the original application and grant, we will determine whether the change in location requires one or more of the following:

- (1) An amended map of definite location;
- (2) Landowner consent;

- (3) A valuation;
- (4) Additional compensation; and/or
- (5) A new right-of-way grant.

(b) If we grant a right-of-way for the new route or location, the applicant must execute instruments to extinguish the right-of-way at the original location identified in the application.

(c) We will transmit the instruments to extinguish the right-of-way to the LTRO for recording.

**Subpart C –Term, Renewals, Amendments, Assignments, Mortgages**

**§ 169.201 How long may the term of a right-of-way grant be?**

(a) All rights-of-way granted under this part are limited to the time periods stated in the grant.

(b) For tribal land, we will defer to the tribe’s determination that the right-of-way term, including any renewal, is reasonable.

(c) For individually owned Indian land, we will review the right-of-way term, including any renewal, to ensure that it is reasonable, given the purpose of the right-of-way. We will use the following table as guidelines for what terms are reasonable given the purpose of the right-of-way:

<b>Purpose</b>	<b>Term</b>
Railroads	In Perpetuity
Public roads and highways	In Perpetuity
Access roads	25 years, with renewal option
Service roads and trails essential to any other right-of-way purpose	Consistent with use

Public and community water lines (including pumping stations and appurtenant facilities)	In Perpetuity
Utility Gas Lines	In Perpetuity
Public sanitary and storm sewer lines including sewage disposal and treatment plants	In Perpetuity
Water control and use projects (including but not limited to dams, reservoirs, flowage easements, irrigation/ditches and canals and water treatment plants)	In Perpetuity
Oil and gas pipelines	20 years
Electric power projects, generating plants, switchyards, electric transmission and distribution lines (including poles, towers, and appurtenant facilities)	50 years
Telecommunication lines	30 years
Broadband or fiber optic lines	30 years
Avigation hazard easements	20 years
Conservation easements	Consistent with use

(c) Unless the right-of-way grant provides otherwise, a right-of-way may not be extended by holdover.

**§ 169.202 Under what circumstances will a grant of right-of-way be renewed?**

(a) The grantee may request a renewal (an extension of term without any other change) of an existing right-of-way grant and we will renew the grant as long as:

- (1) The original right-of-way grant allows for renewal and specifies any compensation;
- (2) The grantee provides us with a signed attestation that there is no change in size, type, location, or duration of the right-of-way; and

(3) The grantee provides us with confirmation that landowner consent has been obtained, unless it is not required under paragraph (b) of this section.

(b) Consent is not required if the original right-of-way grant allows for renewal without the owners' consent.

(c) We will record any renewal of a right-of-way grant in the LTRO.

(d) If the proposed renewal involves a change in size, type, location, or duration of the right-of-way, the grantee must reapply for a new right-of-way, in accordance with § 169.101, and we will handle the application for renewal as an original application for a right-of-way.

### **§ 169.203 May a right-of-way be renewed multiple times?**

There is no prohibition on renewing a right-of-way multiple times.

#### *Amendments*

### **§ 169.204 May a grantee amend a right-of-way?**

(a) A grantee may request that we amend a right-of-way grant if the grantee meets the consent requirements in § 169.106 for tribal land or § 169.107 for individually owned Indian land and obtains our approval, except that a grantee may request that we amend a right-of-way to correct a legal description or make other technical corrections without meeting consent requirements.

(b) An amendment is required to change any provisions of a right-of-way grant or to accommodate a change in the location of permanent improvements to previously unimproved land within the right-of-way corridor.

### **§ 169.205 What is the approval process for an amendment of a right-of-way?**

(a) When we receive an amendment for our approval, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed

amendment, proof of required consents, and required documentation (including but not limited to a corrected legal description, if any, and NEPA compliance) to approve or disapprove the amendment or inform the parties in writing that we need additional review time. Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

(b) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the amendment.

(c) If we do not meet the deadline in paragraph (a) of this section, or paragraph (b) of this section if applicable, the grantee or Indian landowners may take appropriate action under § 169.304.

**§ 169.206 How will BIA decide whether to approve an amendment of a right-of-way?**

(a) We may disapprove a request for an amendment of a right-of-way only if at least one of the following is true:

- (1) The Indian landowners have not consented;
- (2) The grantee's sureties have not consented;
- (3) The grantee is in violation of the right-of-way grant;
- (4) The requirements of this subpart have not been met; or
- (5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the amendment is in their best interest.



(c) We may not unreasonably withhold approval of an amendment.

### *Assignments*

#### **§ 169.207 May a grantee assign a right-of-way?**

(a) A grantee may assign a right-of-way by meeting the consent requirements in §169.106 for tribal land or §169.107 for individually owned Indian land and obtaining our approval, or by meeting the conditions in paragraph (b).

(b) A grantee may assign a right-of-way without BIA approval only if:

(1) The original right-of-way grant allows for assignment without BIA approval; and

(2) The assignee and grantee provide a copy of the assignment and supporting documentation to BIA for recording in the LTRO.

#### **§ 169.208 What is the approval process for an assignment of a right-of-way?**

(a) When we receive an assignment for our approval, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to approve or disapprove the assignment. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the grantee or Indian landowners may take appropriate action under § 169.304.

#### **§ 169.209 How will BIA decide whether to approve an assignment of a right-of-way?**

(a) We may disapprove an assignment of a right-of-way only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The grantee's sureties have not consented;

(3) The grantee is in violation of the right-of-way grant;

(4) The assignee does not agree to be bound by the terms of the right-of-way grant;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the assignment is in their best interest.

(c) We may not unreasonably withhold approval of an assignment.

### *Mortgages*

#### **§ 169.210 May a grantee mortgage a right-of-way?**

A grantee may mortgage a right-of-way by meeting the consent requirements in §169.106 for tribal land or §169.107 for individually owned Indian land and obtaining our approval.

#### **§ 169.211 What is the approval process for a mortgage of a right-of-way?**

(a) When we receive a right-of-way mortgage for our approval, we will notify the parties of the date we receive it. We have 30 days from receipt of the executed mortgage, proof of required consents, and required documentation to approve or disapprove the mortgage. Our determination whether to approve the mortgage will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the grantee or Indian landowners may take appropriate action under § 169.304.

#### **§ 169.212 How will BIA decide whether to approve a mortgage of a right-of-way?**

(a) We may disapprove a right-of-way mortgage only if at least one of the following is true:

- (1) The Indian landowners have not consented;
- (2) The grantee's mortgagees or sureties have not consented;
- (3) The requirements of this subpart have not been met; or
- (4) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(4) of this section, we may consider whether:

(1) The mortgage proceeds would be used for purposes unrelated to the right-of-way purpose; and

(2) The mortgage is limited to the right-of-way.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the mortgage is in their best interest.

(d) We may not unreasonably withhold approval of a right-of-way mortgage.

#### **Subpart D – Effectiveness**

##### **§ 169.301 When will a right-of-way document be effective?**

A right-of-way document will be effective on the date we approve the right-of-way document, even if an appeal is filed under part 2 of this chapter.

##### **§ 169.302 Must a right-of-way be recorded?**

(a) Any right-of-way document must be recorded in our LTRO with jurisdiction over the affected Indian land.

(1) We will record the right-of-way document immediately following our approval or granting.

(2) In the case of assignments that do not require our approval under § 169.207(b), the parties must provide us with a copy of the assignment and we will record the assignment in the LTRO with jurisdiction over the affected Indian land.

(b) The tribe must record right-of-way documents for the following types of rights-of-way in the LTRO with jurisdiction over the affected Indian lands, even though BIA approval is not required:

(1) Grants on tribal land for a tribal utility that is not a separate legal entity under § 169.004;

(2) Grants on tribal land under a special act of Congress authorizing grants without our approval under certain conditions.

### **§ 169.303 What happens if BIA denies a right-of-way document?**

If we deny the right-of-way grant, renewal, amendment, assignment, or mortgage, we will notify the parties immediately and advise the landowners of their right to appeal the decision under part 2 of this chapter.

### **§ 169.304 What happens if BIA does not meet a deadline for issuing a decision on a right-of-way document?**

(a) If a Superintendent does not meet a deadline for granting or denying a right-of-way, renewal, amendment, assignment, or mortgage, the parties may file a written notice to compel action with the appropriate Regional Director.

(b) The Regional Director has 15 days from receiving the notice to:

(1) Grant or deny the right-of-way; or

(2) Order the Superintendent to grant or deny the right-of-way within the time set out in the order.

(c) The parties may file a written notice to compel action with the BIA Director if:

(1) The Regional Director does not meet the deadline in paragraph (b) of this section;

(2) The Superintendent does not grant or deny the right-of-way within the time set by the Regional Director under paragraph (b)(2) of this section; or

(3) The initial decision on the right-of-way, renewal, amendment, assignment, or mortgage is with the Regional Director, and he or she does not meet the deadline for such decision.

(d) The BIA Director has 15 days from receiving the notice to:

(1) Grant or deny the right-of-way; or

(2) Order the Regional Director or Superintendent to grant or deny the right-of-way within the time set out in the order.

(e) If the Regional Director or Superintendent does not grant or deny the right-of-way within the time set out in the order under paragraph (d)(2), then the BIA Director must issue a decision within 15 days from the expiration of the time set out in the order.

(f) The parties may file an appeal from our inaction to the Interior Board of Indian Appeals if the Director does not meet the deadline in paragraph (d) or (e) of this section.

(g) The provisions of 25 CFR § 2.8 do not apply to the inaction of BIA officials with respect to a granting or denying a right-of-way, renewal, amendment, assignment, or mortgage under this subpart.

**§ 169.305 Will BIA require an appeal bond for an appeal of a decision on a right-of-way document?**

(a) If a party appeals our decision on a right-of-way document, then the official to whom the appeal is made may require the appellant to post an appeal bond in accordance with part 2 of

this chapter. We will not require an appeal bond if the tribe is a party to the appeal and requests a waiver of the appeal bond.

(b) The appellant may not appeal the appeal bond decision. The appellant may, however, request that the official to whom the appeal is made reconsider the bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

### **Subpart E – Compliance and Enforcement**

#### **§ 169.401 What is the purpose and scope of this subpart?**

This subpart describes the procedures we use to address compliance and enforcement related to rights-of-way on Indian land. Any abandonment, non-use, or violation of the right-of-way grant, including but not limited to encroachments beyond the defined boundaries, accidental, willful, and/or incidental trespass, unauthorized new construction or changes in use, and late or insufficient payment may result in enforcement actions.

#### **§ 169.402 May BIA investigate compliance with a right-of-way?**

BIA may investigate compliance with a right-of-way.

(a) If an Indian landowner notifies us that a specific abandonment, non-use, or violation has occurred, we will promptly initiate an appropriate investigation.

(b) We may enter the Indian land subject to a right-of-way at any reasonable time, upon reasonable notice, and consistent with any notice requirements under applicable tribal law and applicable grant documents, to protect the interests of the Indian landowners and to determine if the grantee is in compliance with the requirements of the right-of-way.

#### **§ 169.403 May a right-of-way provide for negotiated remedies?**

(a) The tribe and the grantee on tribal land may negotiate remedies for the event of a violation, abandonment, or non-use. The negotiated remedies must be stated in the tribe's

consent to the right-of-way grant. The negotiated remedies may include, but are not limited to, the power to terminate the right-of-way grant. If the negotiated remedies provide one or both parties with the power to terminate the grant:

(1) BIA approval of the termination is not required;

(2) The termination is effective without BIA cancellation; and

(3) The Indian landowners must provide us with written notice of the termination so that we may record it in the LTRO.

(b) The Indian landowners and the grantee to a right-of-way grant on individually owned Indian land may negotiate remedies, so long as the consent also specifies the manner in which those remedies may be exercised by or on behalf of the Indian landowners of the majority interest under § 169.107 of this part. If the negotiated remedies provide one or both parties with the power to terminate the grant:

(1) BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented; and

(2) BIA will record the termination in the LTRO.

(c) The parties must notify any surety or mortgagee of any violation that may result in termination and the termination of a right-of-way.

(d) Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to us, as specified in the right-of-way grant. The landowners may request our assistance in enforcing negotiated remedies.

(e) A right-of-way grant may provide that violations will be addressed by a tribe, and that disputes will be resolved by a tribal court, any other court of competent jurisdiction, or by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution

method. We may not be bound by decisions made in such forums, but we will defer to ongoing actions or proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

**§ 169.404 What will BIA do about a violation of a right-of-way grant?**

(a) In the absence of actions or proceedings described in § 169.403 (negotiated remedies), or if it is not appropriate for us to defer to the actions or proceedings, we will follow the procedures in paragraphs (b) and (c) of this section.

(b) If we determine there has been a violation of the conditions of a grant, other than a violation of payment provisions covered by paragraph (c) of this section, we will promptly send the grantee a written notice of violation.

(1) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(2) The notice of violation will advise the grantee that, within 10 business days of the receipt of a notice of violation, the grantee must:

(i) Cure the violation and notify us, and the tribe for tribal land, in writing that the violation has been cured;

(ii) Dispute our determination that a violation has occurred; or

(iii) Request additional time to cure the violation.

(3) The notice of violation may order the grantee to cease operations under the right-of-way grant.

(c) A grantee's failure to pay compensation in the time and manner required by a right-of-way grant is a violation, and we will issue a notice of violation in accordance with this paragraph.



(1) We will send the grantees a written notice of violation promptly following the date on which the payment was due.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to the Indian landowners for individually owned Indian land.

(3) The notice of violation will require the grantee to provide adequate proof of payment.

(d) The grantee will continue to be responsible for the obligations in the grant until the grant expires, or is terminated or cancelled.

**§ 169.405 What will BIA do if the grantee does not cure a violation of a right-of-way grant on time?**

(a) If the grantee does not cure a violation of a right-of-way grant within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the grant;

(2) The Indian landowners wish to invoke any remedies available to them under the grant;

(3) We should invoke other remedies available under the grant or applicable law, including collection on any available performance bond or, for failure to pay compensation, referral of the debt to the Department of the Treasury for collection; or

(4) The grantee should be granted additional time in which to cure the violation.

(b) Following consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, we may take action to recover unpaid compensation and any associated late payment charges.

(1) We do not have to cancel the grant or give any further notice to the grantee before taking action to recover unpaid compensation.

(2) We may still take action to recover any unpaid compensation if we cancel the grant.

(c) If we decide to cancel the grant, we will send the grantee a cancellation letter by certified mail, return receipt requested, within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) If applicable, notify the grantee of the amount of any unpaid compensation or late payment charges due under the grant;

(3) Notify the grantee of the grantee's right to appeal under part 2 of this chapter, including the possibility that the official to whom the appeal is made may require the grantee to post an appeal bond;

(4) Order the grantee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and

(5) Order the grantee to take any other action BIA deems necessary to protect the Indian landowners.

(d) We may invoke any other remedies available to us under the grant, including collecting on any available performance bond, and the Indian landowners may pursue any available remedies under tribal law.

**§ 169.406 Will late payment charges, penalties, or special fees apply to delinquent payments due under a right-of-way grant?**

(a) Late payment charges and penalties will apply as specified in the grant. The failure to pay these amounts will be treated as a violation.

(b) We may assess the following special fees to cover administrative costs incurred by the United States in the collection of the debt, if compensation is not paid in the time and manner required, in addition to the late payment charges that must be paid to the Indian landowners under the grant:

<b>The grantee will pay...</b>	<b>For...</b>
(1) \$50.00	Any dishonored check.
(2) \$15.00	Processing of each notice or demand letter.
(3) 18 percent of balance due	Treasury processing following referral for collection of delinquent debt.

**§ 169.407 How will payment rights relating to a right-of-way grant be allocated?**

The right-of-way grant may allocate rights to payment for any proceeds, trespass damages, condemnation awards, settlement funds, and other payments between the Indian landowners and the grantee. If not specified in the grant, applicable policy, order, award, judgment, or other document, the Indian landowners or grantees will be entitled to receive these payments.

**§ 169.408 What is the process for cancelling a right-of-way for non-use or abandonment?**

(a) We may cancel, in whole or in part, any rights-of-way granted under this part 30 days after mailing written notice to the grantee at its latest address, for any of the following causes:

(1) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted; or

(2) An abandonment of the right-of-way.

(b) If the grantee fails to correct the basis for cancellation by the 30<sup>th</sup> day after we mailed the notice, we will issue an appropriate instrument cancelling the right-of-way and transmit it to the office of record pursuant to 25 CFR 150 for recording and filing.

**§ 169.409 When will a cancellation of a right-of-way grant be effective?**

(a) A cancellation involving a right-of-way grant will not be effective until 31 days after the grantee receives a cancellation letter from us, or 41 days from the date we mailed the letter, whichever is earlier.

(b) The cancellation decision will not be effective if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is ineffective, the grantee must continue to pay compensation and comply with the other terms of the grant.

**§ 169.410 What will BIA do if a grantee remains in possession after a right-of-way expires or is terminated or cancelled?**

If a grantee remains in possession after the expiration, termination, or cancellation of a right-of-way, we may treat the unauthorized possession as a trespass under applicable law in consultation with the Indian landowners. Unless the Indian landowners of the applicable percentage of interests under § 169.106 or 169.107 have notified us in writing that they are engaged in good faith negotiations with the holdover grantee to renew or obtain a new right-of-way, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.

**§ 169.411 Will BIA appeal bond regulations apply to cancellation decisions involving right-of-way grants?**

(a) Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will apply to appeals from right-of-way cancellation decisions.

(b) The grantee may not appeal the appeal bond decision. The grantee may, however, request that the official to whom the appeal is made reconsider the appeal bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

**§ 169.412 What if an individual or entity takes possession of or uses Indian land without a right-of-way or other proper authorization?**

If an individual or entity takes possession of, or uses, Indian land without a right-of-way and a right-of-way is required, the unauthorized possession or use is a trespass. An unauthorized use within an existing right-of-way is also a trespass. We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. The Indian landowners may pursue any available remedies under applicable law.

**Subpart F – Service Line Agreements**

**§ 169.501 Is a right-of-way required for service lines?**

A right-of-way is not required for service lines. Service line agreements are for the purpose of supplying the owners (or authorized occupants or users, as demonstrated by a lease or tribal authorization) of tribal or individually owned Indian land with utilities for use by such owners (or occupants or users) on the premises. A service line agreement should address the mitigation of any damages incurred during construction and the restoration of the premises at the termination of the agreement.

**§ 169.502 What are the consent requirements for service line agreements?**

(a) Before the applicant may begin any work to construct service lines across tribal land, the applicant and the tribe (or the legally authorized occupants or users of the tribal land and the tribe) must execute a service line agreement.

(b) Before the applicant may begin any work to construct service lines across individually owned land, the applicant and the owners (or the legally authorized occupants or users) must execute a service line agreement.

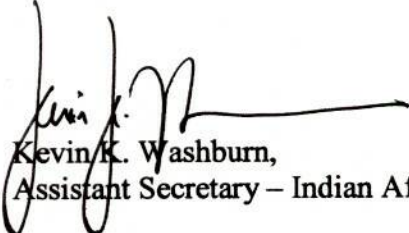
**§ 169.503 Is a valuation required for service line agreements?**

We do not require a valuation for service line agreements.

**§ 169.504 Must I file service line agreements with the BIA?**

The parties must file an executed copy of service line agreements, together with a plat or diagram, with us within 30 days after the date of execution for recording in the LTRO. The plat or diagram must show the boundary of the ownership parcel and point of connection with the distribution line. When the plat or diagram is placed on a separate sheet it must include the signatures of the parties.

Dated: JUN 02 2014

  
Kevin K. Washburn,  
Assistant Secretary – Indian Affairs.