

NWX DOI BUR OF IND AFFAIRS (US)

**Moderator: Elizabeth Appel
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Coordinator: Welcome and thank you for standing by. At this time all participants are in a listen-only mode until the question and answer session of today's conference. At that time you may press Star 1 on your touchtone phone to ask a question. I would like to inform all parties that today's conference is being recorded. If you have any objections you may disconnect at this time. I would now like to turn the conference call over to Mr. Larry Roberts at the Department of Interior. Thank you. You may begin.

Larry Roberts: Okay, good afternoon everyone. This is Larry Roberts, Deputy Assistant Secretary for Indian Affairs at the Department of Interior. I want to thank everyone for participating in this call - this meeting to discuss the proposal rule on Rights-of-Ways across Indian lands. And we have quite a few folks - team here -- folks that have been working on the rule.

I'm going to ask them to introduce themselves and then I'm going to turn it over to Liz Appel to go through a PowerPoint that you can find on our website -- www.bia.gov under our rule-making page. And we'll go through that. That should take roughly 20 minutes and then we're going to open it up for comments from all of the participants.

And I guess is what I would say is this is our opportunity to hear from you in terms of suggested changes or what you like about the rule. We will try to provide clarity to some extent if we can. But the idea is if there is something in the proposed rule is unclear or you think needs to be clarified, we need to get those thoughts directly from you and so that we're able to consider that as part of the rule-making process. And so with that I'm going to just have folks around the table here introduce themselves.

Jennifer Turner: Good afternoon. This is Jennifer Turner from the Office of the Solicitor.

Mike Black: This is Mike Black, Records Bureau of Indian Affairs. Good afternoon everybody.

Robyn White: Hello. I'm Robyn White. I'm acting (unintelligible) for Real Estate Services at DIA.

Steven Simpson: Hi, this is Steven Simpson. I'm with the Office of the Solicitor.

Elizabeth Appel: This is Liz Appel, the Director of Office of Regulatory Affairs and Collaborative Action.

Larry Roberts: Okay. So with that we're going to get started. Liz is going to go through a PowerPoint here - walk you through a PowerPoint and then we will open it up for questions.

Elizabeth Appel: Okay. As Larry said the PowerPoint is available on our website at bia.gov. And if - the easiest way to get there, if you enter into the search box -- right of way -- right - of - way -- it will pull up the page and there are several links on

there including a link to the rule, some explanatory material, and then the presentation is the fourth bullet listed there.

So just as background -- this rule making came about - it's been in the works actually since the early 2000s when the department undertook a comprehensive effort to look at it - how it's meeting its Indian management trust responsibilities. And as part of that effort there were several outdated regulations that were identified that were - where updates were identified as being needed to better support the department's ability to fulfill its trust responsibilities.

And so the first land management rule that we tackled was leasing. In 2011 and 2012 we distributed drafts and proposed versions of leasing regulations, the updated residential and business leasing procedures, and also included a new subpar addressing wind and solar leasing. And we had trouble consultations and took public comment on those persons, and issued final regulations in December of 2012 which became effective in January of 2013.

So with those updated leasing regulations during the consultations we heard a lot of comments that the next piece that needed to be updated as a companion to the leasing regulations with Rights-of-Way. So we next turned our attention to the Rights-of-Way regulation. And in 2013 and 2014, we had a work group of departmental subject matter experts that got together and drafted the revisions to the Rights-of-Way Regulations. And those revisions were then circulated to all the BIA realty officers across the country for comment. And we published the proposed rule on July 17 of this year.

So the current Rights-of-Way regulation is that 25 CFR 169. It was published back in 1968 and it's been updated a few times since then, but there's been no updates since 1980. So it is right for revision and, additionally, they - current

regulation relies on some statutes that are specific to certain types of Rights-of-Ways. So there are statues specific to railroads and have specific term limits, and requirements, and specifically telegraphs, et cetera. And the regulations implement those very detailed statutes.

The proposed rule that was published in June and which we're discussing today, that at first I want to start off and say this is a proposed rule and it will change as a result of comments. But I'm going to go through what the proposed rule says and give you some background as to why some of the changes are included in the proposed rule. And we're very open to comments either good or bad on those proposed revisions.

But the proposed regulations are intended to streamline the current rule in some ways by relying on the current statutory authority that grants Rights-of-Way for all purposes rather than those specific statutes that I mentioned. And our legal team has determined that there's no benefit loss by removing those specific statutory authorities and instead relying on the general statute which is 25 USC 323.

Another major policy approach that we took in the Rights-of-Way proposed rule is that we're incorporating a lot of the approaches that have been taken in the updated leasing regulations to streamline the process for obtaining BIA review and approval, (unintelligible) way request.

We are also clarifying how to go about getting BIA review of Right-of-Way documents and we're incorporating many of the same approaches with regard to supporting title self-determination by deferring to tries on compensation for title land, for example, and trying to provide some more certainty by providing that BIA will disapprove Right-of-Way document only if there is a compelling reason.

And these streamlines are - these approaches for streamlining are basically - as much as we determined are possible given the legal constraints that these are Rights-of-Way on Indian land or meaning land that the US sold in trust or restricted status for Indian tribes or individuals. And so as a virtue of being, Indian land BIA approval is required. And the statute at 25 USC 323 requires the majority land owner consent, and BIA must ensure that the land owners are compensated justly.

So the proposed rule has six subparts which I'll briefly run through. The first subpart is just a general subpart that adds some definitions for clarity. And probably the most important definition is that of Right-of-Way being legal rights across Indian land for a specific purpose. But we've also added some more definitions for transparency.

And then we have a section that clarifies what land the regulation applies to, what happens if there's a (unintelligible) on that land? And then we've used many of the same provisions that the recently updated leasing regulation views regarding when a Right-of-Way is needed, whether tribes can contact for Right-of-Way functions, what laws and taxes apply to Rights-of-Way, how BIA provides notice of Rights-of-Way to land owners, and what decisions can be appealed with regard to Rights-of-Way.

So subpart B jumps into the meat of the rule and the process. And the first major change for the process for obtaining BIA approval of the Right-of-Way is that the proposed rule removes the requirement for obtaining BIA approval to survey land when someone is surveying land in preparation for their Right-of-Way application.

Currently they must obtain BIA approval but this would remove that requirement. And the applicant would still need to obtain the approval of the

land owners but they could go straight to -- once they survey -- go straight to the application. So the subpart that's outlet must be included in the application.

The consent requirements for tribal lands -- that consent of the tribe is required. If it's individually-owned land then under the statute of consent of the owners of majority interest in that land must consent. And BIA can, in certain circumstances, grant the Right-of-Way even without the land owners' consent under the statute. If the owners are so numerous that it would be impracticable to obtain the majority consent and certain other conditions are met, then BIA can grant the Right-of-Way.

And as I said that's statutory. But what the regulation does that's new is defines how many owners are so numerous. And the proposed definition would define it as 50 or more, but less than 100 land owners where no one owner holds an interest greater than 10%, or where there are a 100 or more co-owners. And that definition is based on AIPRA -- the American Indian Probate Reform Act.

The proposed would also, in lieu of a deposit, require a bond or alternative security that could be a CD, a letter of credit, et cetera. And that would need to cover the highest annual rent unless it's a - the rent is a one-time payment. Estimated damages from the construction of permanent improvement, operation and maintenance charges if the land's in an irrigation project, restoration and reclamation of premise.

And BIA can waive that requirement for a bond or alternative security for tribal lands, basically if the tribe thinks that it should be waived, and for individually-owned land if owners of a majority interest request and BIA determined that the waivers and owners interest.

For compensation, as with the leasing regulations for tribal land, the proposed rule would provide that the BIA defers to the tribe. And the tribe may waive evaluation for individually-owned land, market value is required unless the owners waive and BIA determines the waiver to be in the land owners' best interest.

And evaluation is required for individually-owned land unless land owners waive or, as with the leasing regulations, if the grantee will construct infrastructure improvements that benefit the land owners and BIA determines it's in the land owners' best interest then BIA may waive the evaluation even if not all land owners agree to it.

The rules that (unintelligible) when compensation is due basically is its one-time payment for the Right-of-Way. It will be due within 10 days of the grant. Otherwise the grants must specify when the payments are due. And direct pay is made available only in certain circumstances where there are 10 or fewer land owners.

Reviews and adjustments of the compensation aren't required for tribal land unless the tribe got to acquire them. And for individually-owned land, they're not required to payments. A one-time lump sum if the Right-of-Way duration is five years or less. If the grant provides for automatic adjustment or BIA determines that it's in the land owners' best interest not to acquire the review and adjustment. And compensation may also be provided as in-kind payments or payments based on through-put or percentages income.

So as far as the process for obtaining a Right-of-Way grant, once BIA receives the application package it will review the package to make sure it's complete and includes all the necessary supporting documents including any that needs

review. If it's incomplete, BIA will send a letter to the applicant identifying what information is missing. If it's complete they'll send an acknowledgement letter and review an issue on the decision application within 60 days.

So there's a 60-day clock for BIA to review - to ensure that the Right-of-Way application is acted upon in a timely manner. And that 60-day clock starts when the package is complete. So if BIA misses that 60-day deadline then the parties can file a notice to compel action.

And as I mentioned with the leasing regulations, are limited grounds for disapproval and, likewise, in the Rights-of-Way proposed rule, BIA can disapprove Right-of-Way application only for certain specified needs. And so the maximum extent possible, BIA will defer to the land owners' determination that the Right-of-Way is in their best interest.

And BIA has the option - if there are multiple tracks covered by the Right-of-Way application and BIA has a discussion to either grant one Right-of-Way for all of those tracks or issue separate grants or for different tracks. The rule sets out what the Right-of-Way grants will include incorporating any restrictions that were in the consent, and we'll attach the reference map of that location.

A question that has come up multiple times is piggy-backing. So if there is an existing Right-of-Way and the grantee wants to use that Right-of-Way for a new use the grantee has to obtain a new Right-of-Way if that use is not specified in the original grant or if the use is not within the same scope of the use that's specified in the original grant. And that is a little bit of a legal determination in there as to whether the use would be in the same scope.

And then BIA would grant a new Right-of-Way if it was not in the same scope, if the new Right-of-Way didn't interfere with the use for the purpose of the existing Right-of-Way and the existing Right-of-Way consensus.

So subpart C sets out the term of the Right-of-Way and establishes that it has to be stated in the grant. It's not necessarily in perpetuity. Tribal lands -- BIA will defer to the tribes' determination as to whether a term is reasonable. And the proposed rule sets out guidelines for individually-owned land as to what terms would be appropriate to the different uses. And we're very interested in comments whether it be guidelines appropriate for the various pieces.

BIA will renew a Right-of-Way only if the original Right-of-Way allows for renewal and specifies what the compensation will be. And if there's no change in the size type or location of the use and land owners consent. So the original Right-of-Way could provide if a renewal is appropriate without land owners consent as long as the land owners' consented to that term.

If there will be a change in the size, type, location, or duration of the Right-of-Way then the grantee has to apply for a new Right-of-Way. The proposed rule sets out the processes for obtaining BIA approval of amendments, assignments, and mortgages. And it sets out timelines for BIA review of each of these. BIA has to approve within 30 days.

Again, that's (unintelligible) for BIA review starts only once the package is complete including any need for evaluation. And BIA will send a letter acknowledging the date of receipt so that everybody knows what the 30-day start date is.

For amendment BIA approval is required for a change in location of permanent improvement to any previously unimproved land within the Right-

of-Way quarter. It's - an amendment is not required if the Right-of-Way revision is just a correct legal description or technical correction that can be done without the BIA approval. Land owner consent is required for amendments, and BIA may disapprove only if certain circumstances are met.

Assignments require BIA approval unless the original Right-of-Way allows for assignments without approval and parties provide BIA with a copy of the assignment so BIA knows who the grantee is at any point and time. Land owner consent is also required for assignment. And, again, BIA may only disapprove if certain conditions are met. BIA approval is required for mortgages and land owner consent is required. And certain conditions must be met for BIA to disapprove.

So part C assesses the effectiveness of Right-of-Way documents and establishes that they're effective upon BIA approval even if an administrative appeal is filed. BIA will report Right-of-Way documents in the land, title, and records office immediately following approval. If no BIA approval is required then the grantee has to provide BIA with a copy for reporting so that BIA's land records are up-to-date.

And the tribe must record grants on tribal lands or tribal utilities that aren't a separate legal entity. They wouldn't need BIA approval and grants of tribal land under special acts of congress that don't need BIA approval.

So part E addresses the compliance and enforcement of the Right-of-Way's fees provisions against parallel closely the leasing provisions to ensure consistency. And they provide that BIA can investigate compliance with the Right-of-Way and enter the premise to ensure compliance. And if the land owner notifies BIA of the specific violations then BIA will promptly investigate that.

The parties may decide to establish negotiated remedies for Right-of-Way violation and if they do they must be included in the land owners consent to the Right-of-Way grant. And if the negotiated remedies allow a power to terminate the Right-of-Way that's effective without BIA approval if it's tribal land and BIA approval is required of the termination of the individually-owned land.

And the Right-of-Way can also specify that the tribal-addressed violations and will specify how - may specify how (unintelligible) be resolved. The rule sets out the process. If there is a violation for other than nonpayment and if there's a violation for failure to pay rent. And then if the grantee doesn't answer the violations or provide adequate proof of payment then the BIA will consult with the tribe or, where feasible, with the Indian land owners for individually-owned land about what action to take next. And that is to ensure communication stays open between BIA and the land owner beneficiary.

So following consultation, BIA can take any appropriate enforcement action and the rule provides what steps have to be taken if it is to cancel the Right-of-Way grant. BIA may also cancel for abandonment. If the grantee affirmatively relinquishes the Right-of-Way or if they grantee has not used the Right-of-Way for a consecutive two-year period for the purpose for which the Right-of-Way was granted.

And then finally the last subpart addresses the service line agreement as a separate category because the rule specifies that Rights-of-Way grants are not required for service line agreement. And service lines are defined as utility lines running from a main line that's used only for supplying the owners or occupants of land with utility service. And unlike the current Right-of-Way

regulation the proposed rule does not have a capacity limitation on service line, but instead just relies on that definition.

So while no Right-of-Way grant is required the parties are required to enter into service line agreements that address the mitigation of damages and (unintelligible) of the premises once the service line is terminated. And the agreement must be signed by the land owners.

And while no evaluation is required the parties have to file a copy of the agreement and a platter diagram of the service line with BIA within 30 days after signing. And BIA will then record that in its land, title, and records office so that it is aware of the service line.

So the final - some comments on the proposed rule originally were due on August 18 and that deadline has been extended to October 2. And this call is one of our - in addition to reviewing the written comments we will be reviewing transcripts of tribal consultations and the public hearing today. And those comments will be weight equally so we're interested in your comments today and also in writing.

If you would like to submit comments in writing we ask that you email them to consultation.bia.gov. So with that I will turn it back over to Larry.

Larry Roberts: All right, thank you Liz. And I think with that, operator, we will open up the lines to comments on the proposed rule.

Coordinator: Thank you. We will now begin the question-and-comment session. To ask a question or make a comment, please press Star 1 and record your name at the prompt. If you need to withdraw your question or comment press Star 2. Again, to ask a question or make a comment, please press Star 1. It will take a

few moments for the questions and comments to come through. Please standby.

The first question comes from Peter Breen of the New Mexico Taxation and Revenue Department. Your line is open.

Peter Breen: Mr. Roberts thank you for allowing us this opportunity to make these oral comments with regard to the rules. My name is Peter Breen from New Mexico Taxation and Revenue Department. On behalf of New Mexico TRD I would like to thank the girl for this opportunity to offer oral, later written comments to proposed rules.

The rules are unlawful. BIA does not have the power to create or diminish the territorial jurisdiction of the tribes. That is creation of progress and, ultimately, the federal courts, their jurisdictional determinations. More practically the rules will create unnecessary jurisdictional conflict with fates. The beneficiaries will be non-Indians who would like to escape both Indian and state jurisdiction both regulatory and taxation jurisdiction.

The Supreme Court has repeatedly stated that the tribes' regulatory jurisdiction is (unintelligible) us with its taxation jurisdiction. An underground pipeline, a railroad, or an electric train (unintelligible) line may be out of site but they should not be out of mind. They require regulatory oversight where the results may be catastrophic.

The rule excluding the state from taxation jurisdiction would eventually be filed by taxation of state regulatory jurisdiction over the same activity. Until that legal eventuality occurs states would be deprived of the revenues that they require to (unintelligible) these services of regulation and response.

Remember, these facilities tend to be located in rural areas. Before-gone property tax revenues from an interstate pipeline are very significant to smaller towns. This rule would help neither the Indians be disproportionately live around these facilities nor the state which provides these services. Right or wrong, the Supreme Court has severely cut back on the ability of the Indians to both tax and regulate non-Indians operating in their midst.

If the states don't do this and charge for it through their taxes it won't get done. We will be filing written comments later. But thank you for your time. I have nothing further.

Larry Roberts: Okay. Thank you for participating in the call today and we look forward to your written comments.

Coordinator: The next question or comment is from Carmen Campbell. Your line is open.

Carmen Campbell: Good afternoon everyone. I work for Rural Electric Cooperative in Northwestern New Mexico. And we cost our - we serve 10 different tribal entities within our sense of service territory. And one of the hardest things in complying with the BIA regulations as they stand today is that we're limited on our - we're required to obtain Right-of-Way on individually-owned lands to people that live on those lands. And so they're very mixed in. So obtaining that Right-of-Way, and so by extending this service line agreements a little bit that would help us a lot.

And also we have other situations where we are required to pay really high Right-of-Way costs because they're - because our lines are running across these tribal lands. But we're actually also serving those people on those tribal lands. And so we're having to pass that cost back onto them. And so by (unintelligible) Right-of-Way for the distribution lines that also cross - that

also serve people within those tribal boundaries, it's actually costing them more too because we're a nonprofit, you know, electric cooperative.

So we've submitted comments that reflect what changes we would recommend. And so we would appreciate your consideration of those and in improving the lives of people living on Native American lands and also people surrounding them and nonprofit cooperatives like ourselves. And in reviewing the comments that have all ready been posted, I believe there's another nonprofit cooperative that provides utilities on Indian land that are feeling the same - having the same issue with it.

So I appreciate your time. And thank you for having this call today. That's all I have.

Larry Roberts: Okay, thank you. And we will take a close look at those issues. As we're going forward I just want to assure you that we will consider all the comments submitted, and written comments are extraordinarily helpful for us as we're working through these issues. So I appreciate your time and effort in making this a better rule.

Coordinator: The next question or comment comes from Lynn Slade. Your line is open.

Lynn Slade: Good afternoon Mr. Roberts and others. Thanks for hearing comments. I'm a lawyer out in Albuquerque and our clients are in utilities and entities that have Rights-of-Way and require Rights-of-Way for their business across tribal and allotted lands here in New Mexico and in other parts of the country.

Our first comment and question relate to section 169.110 which pertains to compensation. If it reasonably provides that tribes may negotiate for any form of compensation they desire then with respect to allotted lands, posits that

compensation can be in a number of forms. It first deviates from the longstanding standard in the rules which called for evaluation at an amount that is pegged to fair market value plus any severance damage.

And our first comment is that - that is a standard that had good, well-defined meaning in the standards that really determine the acquisition of lands for utility and other purposes. And our first question would be -- what was the reason for deviating from that standard?

Larry Roberts: So I'm going to ask our Solicitor's Office to take a crack at that. I don't know that we have a precise answer to your question right now but it is something that we will take a look at as we're looking to finalize the final rule.

Steven Simpson: This is Steven Simpson with the Solicitor's Office and we - the reasoning behind this is to - is more to give core flexibility for negotiating different sorts of compensation. The standard, as you've noted, has been not only for fair market value but one payment upfront. And if you're doing a Right-of-Way for a long period of time that one period upfront may not be so good for the land owners.

So we are allowing for -- not requiring but allowing for other forms of compensation to allow for flexibility and to allow for payments throughout the term of the Right-of-Way rather than just upfront. And we would appreciate comments on how that works or would not work.

Lynn Slade: Thank you Steven. An additional comment I think we'll be forwarding to you is for the allotted land proposed rule again in 169 110 suggests such things as percentage of profits who put these severance damages that are provided here, franchise fees and others. Is there a concern that injecting these (unintelligible) into allotted lands negotiations are going to lead to

expectations or forms of compensation that will not be achievable particularly in light of the availability of condemnation for allotted lands under 25 USC Section 357?

Steven Simpson: That could be there but we're hoping that allowing flexibility will at least, in time, in most cases prompt some kind of negotiated resolution rather than having to resort to condemnation.

Lynn Slade: You'll see in our comments that we wonder about the extent to which negotiations with the very numerous allottees over such matters would - could be productive.

I'm going to move to one other comment, and it's one that a number of our - we have a number of concerns about and that pertains to Section 169.207 pertaining to assignments, and 169.210 through 212 pertaining to mortgages. And it relates to a larger concern which arises from the fact that 169.006 says, "These regulations are going to pertain to Rights-of-Way granted at an earlier date."

And while this proposed regulation says that the parties can agree in the grant or in the agreement or grant to waive BIA approval they don't provide for a waiver of land owner consent to an assignment or a mortgage. But perhaps equally problematically, although they recognize that these matters can be addressed in the agreement, under the prior regulations that took place today, there's no requirement for the agreement to address consent to those matters.

And, therefore, under existing Rights-of-Way a Right-of-Way is freely assignable or can be subjected to mortgages without any written approval in the grant of Right-of-Way. Now those existing grants under this regulation and 169.006 are now locked into a situation where they can - those grantees

cannot secure an assignment or a mortgage without getting the consent of the tribe if it's a tribal grantor or all of the - or a majority, at least, I suppose, of all of the allottees.

And since many of these Rights-of-Way are for very long periods of time this is going to become tremendously problematic and certainly will compromise the extent to which folks are interested in Rights-of-Way across tribal lands.

Larry Roberts: So what is your suggested solution to that?

Lynn Slade: Two suggestions. The first would be -- there needs to be some kind of a grandfathering provision where the new Right-of-Way - excuse me - the new regulations would not adversely affect parties who have relied upon what they can do freely under the prior regulations with the kinds of grants that were issued at that time. The regulations now say the new regulations won't be applied if they conflict with a prior grant.

But if the prior regulations and the grant were both silent then that may not lead to conflict and it may at the very least be ambiguity about whether assignments and mortgages on presently existing Rights-of-Way can be done without going out and getting (unintelligible) allottees and a crime.

As to the future, frankly, our preference would be to see the existing regulation stay in place. And given the very long periods of time and the nature of Rights-of-Way simply not require tribal or allottee consent and leave that if it's going to be negotiated.

If that's something that a tribe or an allottee wants it can be negotiated as it often is now with tribes. But, otherwise, not to address it or, at the very least,

if a consent requirement stays in, it should be waive-able as to both the BIA approval and land owner consent.

Sorry for that lengthy answer but I hope that answers your question.

Larry Roberts: Okay. Thank you - thank you very much, and thank you for participating today. Operator, are we ready for the next caller?

Coordinator: The next question or comment comes from Mary Wynne. Your line is open.

Mary Wynne: Thank you and good morning. My name is Mary Wynne. I am a lawyer. I represent the Rosebuds and Tribal Utilities Commission which is a very active regulatory authority. Can you hear me?

Larry Roberts: Yep, we can hear you.

Mary Wynne: Okay - is a very active regulatory authority which is now in the process of working on Rights-of-Way with (WAPPA), and so these proposed regulations were combed over in our - a very much a concern to the regulatory agency of the Rosebud Sioux Tribe. So I want to go through the concerns that my client has.

The first one concerns Section 169.005 12D. In that phrasing, the concern of my client is that the phrasing is ambiguous and poorly drafted, such that it invites an interpretation that prior unperfected and unapproved Rights-of-way are now to be recognized as valid and legal Rights-of-Way.

Mike Black: So Ms. Wynne?

Larry Roberts: I'd like to...

Larry Roberts: I guess we're not...

Mary Wynne: Yes?

Larry Roberts: On that comment I think if the tribe is able to or the tribal utility is able to, on those sort of things where you think language is unclear it would be helpful to get proposed language from the tribal utilities' suggestions on how to clarify it to address your concerns so that it's really helpful to know that you all feel that it is unclear or ambiguous.

But at the end of this comment period when we're going through all the different comments, you know, we're going to be left, sort of, trying to figure out how to clarify it when I think we would be in a better position of being able to evaluate some language that you have that you think would clarify it.

Mary Wynne: Thank you. That's very helpful and we will surely take a stab at that.

Larry Roberts: Great. Thank you.

Mary Wynne: The second part of the comment on that particular section is that it would seem to me to be helpful if the language were included to say that if there confusion over whether or not a Right-of-Way is valid that the form of choice would be the tribal court to decide whether or not the Right-of-Way is valid.

The second comment concerns 169.005. What types of Rights-of-Way does this cover? Again there would be a suggestion to add some more general language such as - and any other Rights-of-Way that come to be recognized as such. Just because the landscape of Indian land is changing and the landscape

of land law is changing much more than I would ever have expected and there may be new types of Right-of-Ways that will come up in the future.

On Section 169.003 for NB, for M2, for M and for Roman Numeral III, the Right-of-Way must provide that the grantee pays the live tenant directly unless the live tenants' whereabouts are unknown. The - my client felt that the live tenants should have the option of depositing funds derived from (unintelligible) into his or her IAM account if they have one.

And in order to meet the trust responsibility the Federal Government should advise the Native American live tenant of the impact of freeing those monies from the protective status of the trust account. That is to say -- what would happen if a levy occurred on that money by a judgment creditor if the money were in the hands of the live tenant as opposed to in a trust account? That's all on that one.

With regard to 169 003 B14 and 169 003 B25 my client asked me to mention that this language be changed to require the BIA to monitor the use of land by changing the word may to shall. This - my client believes this is one of the most important responsibilities of the tribe that the tribe has when it looks to its trustee, the United States Government, which is to watch over the land for the best (unintelligible) of the native owners. So they were asking that that language change be completed.

That gets us to 169.008 831 and 2. This language is talking about the jurisdiction when there are disputes about Rights-of-Way. The concern of my client here was loud and clear. It's their belief that the trustee for Indian country should never be advocating the application of state law within the boundaries of Indian country. And they very much are against that language being continuing to be within these regulations.

Larry Roberts: Okay. What about the - so I see where you pointed that situation there. It says, "State law may apply in specific areas or circumstances in Indian country." But the qualifier there is where the Indian tribe with jurisdiction has made it expressly applicable. It's almost following tribal law there. You have a concern with that?

Mary Wynne: I do because it changes the landscape of tribal - tribe's laws, generally, throughout the nation. I've sat on or practiced in probably 70 to 74 tribal courts. And what usually appears in the codes are two things. One is an ability to recognize state court decisions based on some kind of defined comity.

And the second is a choice of law section which tells the Tribal judge what that particular tribe - what the people of that tribe want the judge to follow in terms of law if the code doesn't fi- if the tribal code doesn't instruct the judge. And so because of that this greatly narrows this and says, "Well if there's no law there you must follow state law."

Whereas some tribes will follow a sister tribe that's very closely affiliated or sometimes tribes will follow custom and tradition. I think you're taking away the options from the tribe to be able to choose its own choice of law.

Larry Roberts: Okay.

Steven Simpson: Okay. Great, we appreciate that. This is Steven Simpson with the solicitor's office. We appreciate that and we are actually trying to preserve the option...

((Crosstalk))

Steven Simpson: ...for the tribe to make its own choice of law and its provisions. And to choose state law if they decide it wants to - to filling gas or something like that. So we would appreciate - and we had the same language in the leasing regulations. So we would appreciate any changes you might suggest to make that clearer.

Mary Wynne: Yes and I understand now.

Steven Simpson: By no means are we trying to impose state law where it does not all ready apply -- where congress hasn't all ready applied it.

Mary Wynne: Well I'll go back to my client and ask them for substitute language. But I think...

Steven Simpson: Yes.

Mary Wynne: ...that's a very fair comment.

Steven Simpson: (Unintelligible).

Mary Wynne: Yeah, if I have suggestions about language changes, to give some options. I think that's fair. May I go on?

Mike Black: Yeah.

Larry Roberts: Absolutely.

Steven Simpson: Please do.

Mary Wynne: On 169.103 on your bonding requirement - and I'm not sure that I just seem paranoid here but, again, I had a concern. And this was my concern. My client

wasn't particularly opposed to this but I'm worried about ground disturbing activities that create an oil leak or something where there's a massive environmental disruption. Is there any way to revise this language so that the bonding reflects that?

And here's what my client's concerned about. On ground disturbing activities that disturb the cultural (unintelligible) -- the place where people have always had a prayer circle -- things of that nature, which frequently don't get reported because of the laws that apply to them that require a stop work for 30 days.

And then frequently get ignored because the ruling here by our district court judge is that once you report it and you wait your 30 days, you can do whatever you want to - to that ground. And so, you know, this - my client wanted to know -- could this be expanded in a way to fill in that gap that there is in the Graves Protection Act? And that was their comment.

((Crosstalk))

Mary Wynne: Now the next one was 169.1111 -- determining fair market value for a Right-of-Way. This, my client was extremely upset about because it provides an option where the - what they said was, "It puts the fox in the henhouse." It provides an option where the purchaser of the Right-of-Way can provide the appraisal if there's not a quick enough response from the Bureau of Indian Affairs.

And that raised a grave concern because, again, my client's in the middle of negotiating the compensation for a large - large Right-of-Way with the federal agency controlling that issue -- the Department of Energy. And the issue there is how to value the Rights-of-Way across Indian country.

And secondly, the other part of it is my client is in the middle of hotly-contested litigation with the local electric cooperative regarding all the Rights-of-Way they have that don't have any approval all over the Rosebud Reservation which is a large land (unintelligible) reservation. I think it's about 2.7 million acres. So my client is very concerned about providing actual fair market value of the Rights-of-Way that are going across Indian land.

The next one was 169.107 -- must I obtain individual Indian land owners consent to a grant of Right-of-Way across individually-owned land. And I heard the comment prior to my comment. And I understand where that attorney is coming from. He certainly is representing his clients well. However, there were several concerns about my client which followed on the opposite side of the set.

First, my client considered the 50 or more owners in a track of being too numerous to notify allowing the agency to simply make that decision. My client felt that every land owner, no matter how numerous, is entitled to notice of what's being done to their land. And that is a denial of due process rights not to provide the notice. If they don't respond after the notice, well then you've done your due diligence. But the least the bureau can do in meeting this trust responsibility is let that land owner know.

Second, the only notice to the owner required by the regulation is by mailing whether the address is current or not. And usually in the BIA their address is not current. Suggestions for alternative notice should be included.

Like, when I used to hear children's cases. I was a chief judge at Callville, I required the prosecutor to notify the mother of the missing parent and they always found them and brought them in by their ear into the courtroom. I

mean, if you know the culture of the people around you, you're going to know how to reach that land owner.

Also if the land owner actually gets the decision on time the owner may appeal. But most owners would have to retain an attorney to do so. Substantially, all trust land owners do not have the funds to retain an attorney. And, again, this (unintelligible) is the result of being the member of a tribe.

And (Todd Conney), whose mother comes from Shannon County, which you may recognize as always one, two, and three in the poorest counties in the United States. Some things should be in there that allows for provision of, you know, an advocate - it doesn't have to be a lawyer - someone who actually knows how to do this paperwork and can provide forms and advice to people who want to do the appeal. Finally...

Jennifer Turner: Okay, can I - this is Jennifer Turner from the solicitor's office and I just want to clarify something that you mentioned. Under the provision you're referring to about the BIA issuing the Right-of-Way where the owners of interest in the land are so numerous that it would be impracticable to obtain consent -- that is actually a statutory provision in 25 USC 324 that authorizes BIA to do that.

But the earlier provisions in 169.107, specifically says that BIA will provide notice of its intent to issue the right of way before it actually does so. And that's 30 days notice. And that goes to everyone, you know, not just a certain number of land owners. But that specifically says that it will notify all the land owners.

Mary Wynne: Very good. I think that addresses my concern, thank you. And I did hear you say it with statutory in the first place. I just didn't realize it was addressed in another place. Let's see I wanted to point out that my client was interested in

having you define what most substantial or no significant harm is to a land owner who might not get a notice that maybe that's taken care of by your prior comment.

So let's move onto 169.113. Unless the Right-of-Way specifies who received monetary compensations payments. Again the - my client raised the same concern about allowing payment to be made directly to the Indian owner for Rights-of-Way should be supported by a provision that requires the bureau to provide both written materials. And because we're from an oral tradition, an oral explanation to the land owner regarding how that decision affects the fund as far as what can be done to the fund by judgment predators, by liens, by garnishments, etcetera. Because most of the people on the Rosebud Reservation and Attobola would not be aware of those differences.

There was one other general comment and that was - oh, there are two things. One is that I think that one of the things that has come up as being very important in the negotiations of the right of way that my client is doing is the number of years that the right of way would last. I think the Bureau should require that there be a re-evaluation of the compensation due on that right of way for every so many years, depending on the type of land the right of way is going over and the type of right of way it is.

And finally I wanted to commend the writers for the mention of the fact that a right of way is not - it's not the intent of the Native American owner to give away title to the land when they give away a right of way. That's a very important thing to include in these regulations, but I do suggest that instead of just including it in the regulations you have a spot to - you require it in the right of way itself. Have a spot for both parties -- the owner and the person getting the right of way -- to initial it as in agreement and understanding. I think it's that important with the U.S. Supreme Court decisions and the

confusion that they're creating between a possessory right to land and a right to simply cross it or use it. I think that's all I have and I thank you very much for listening to all of that.

Man: Okay, thank you very much. Those were excellent comments. We do appreciate you taking time to give those. And if you have anything additional, please don't forget to send them in in writing.

Woman: Thank you.

Man: And operator, I think we're ready for the next caller.

Coordinator: The next question or comment comes from (Sydney Beadle). You line is open.

(Sydney Beadle): Thank you very much for this opportunity to ask a question. I'm with the New Mexico Public Regulation Commission staff and I just want to make sure that you understand that my question did not reflect the questions or ideas of our commissioners. I work for the staff and we're independent, of sorts. So - but we do often work these tribal right of way issues in terms of rates for utilities, primarily rural electric cooperatives that recover the cost. So rate design has become a very complicated and time consuming issue for us with respect to the recovery of tribal right of way costs.

So my question specifically pertains to your definition - definitional changes to service lines. I believe that's 169.22. But let me start. Can a service line - my question is -- and then I'll give you an example -- can a service line include what is known as in the electric utility industry as a distribution line?

So for example, if a distribution line radiates from a transmission line or substation and -- radiates or extends -- and runs along the road and delivers

electricity to more than one home -- maybe five or more -- but exists only for the purpose of delivering electricity to those homes, can that be considered - can that fall within the definition of a service line? Or is a service line intended to include only those lines that extend from a distribution line and provide electricity to only a single home or location? Those are commonly referred to in the industry as service drops.

Steven Simpson: This is Steven Simpson. We've - with the solicitor's office. We've had this question in a - informally from another group and recognize that we need to clarify our terminology, apparently. What we have traditionally considered in the Bureau as a service line is apparently what you're referring to as a service drop, which is the line going - I mean, let me put it this way. I - and I continually think that we're going to need a diagram in these regulations to explain this.

That I live on a street coming off of another - of a major road. And so the line that goes down that - there's a line that goes down that major road which I think we would all figure as a distribution line, although there are houses on that road, too. But - and then there's a line that comes down my street and then I have a line from my house to that line on my street. What the Euro is considering - or what we're considering in these regulations as a service line is only the one from the line on my street to my house. The line going down the main road and the line going down my street are both considered distribution lines for purposes of these regulations.

At least, that's the way we conceive of them now. And if we need to change the definition - if you've got some ideas as to how we can change the definition and make that clearer or change what we're considering as a service line to better meet the needs of Indian Country, then let us know. And if you've got specific language, that would be even better.

(Sydney Beadle): Okay, thank you.

Coordinator: As a reminder, please press star one on your phone and record your name if you have a question or comment. One moment, please. Our next question or comment comes from Steven Martin. Your line is open.

Steven Martin: Thank you. My name is Steven G. Martin, I'm an attorney with the law firm of Best, Best, and Krieger, LLT; Krieger spelled K-R-I-E-G-E-R. We represent the Desert Water Agency and are commenting on their behalf. Desert Water Agency is a public entity created by the California Legislature. It supplies water supply services in and around Palm Springs area of California, which includes providing such services to the reservation for the Agua Caliente Band of Cahuilla Indians.

We had submitted written comments on the proposed rule and we are here today to express our continued concern about the proposed regulatory language. Desert Water Agency's main concern in these comments is with the proposed language to be added at 25 CFR Section 169.009 subsection C. The language states in relevant part the following: subject only to applicable federal law, the right of way or possessory interest is not subject to any fee, tax, assessment, levy, or any - or other charge imposed by any state or political subdivision of a state.

We urge the BIA to provide additional clarification regarding this language. It appears BIA may be attempting to preempt state authority to impose certain charges on rights of way and possessory interest. Desert Water Agency lawfully imposes certain relevant charges on such interest which include taxes, a ground water replenishment assessment, and water service charges.

Desert Water Agency has challenged this same language and sought declaratory relief regarding the interpretation of this language, which is identical to the Bureau's leasing regulations at 162.017 subsection C. As further stated in our comment letter, non-Indian possessory interests are subject to state taxation laws and such taxation laws are not preempted by federal law.

However -- notwithstanding the law -- several entities have relied on the same language presented in section 162.017C to attack Desert Water Agency's right to collect such charges. Thus -- in addition to Desert Water Agency's challenge to the language, the Desert Water Agency has responded to claims and lawsuits regarding the preemptive affect of the regulatory language on possessory interest taxes that are lawfully imposed on non-Indian lessees' interest.

Accordingly, we request that the Bureau remove the unsupported preemptive language from the regulation and provide clarification that federal law does not preempt state taxation of non-Indian possessory interest. We also ask does BIA intend this regulatory language to so preempt as it is written. Thank you.

Man: Okay, great. Thank you very much for your comments; appreciate that.
Operator, do we have any other callers?

Coordinator: At this time I show no further comments or questions.

Man: Well, why don't we give just a couple minutes, see if anybody comes up with any comments?

Coordinator: Absolutely. Again -- as a reminder -- you may press star one on your phone and record your name if you have a comment. The next comment or question

comes from (Bitta Becker). Your line is open. We're not able to hear you, perhaps you're muted.

(Bitta Becker): Yes, thank you. I was. This is (Bitta Becker) with the Navajo Nation and I'm sitting with a room full of people from the Nation, including with our Division of Natural Resources, the Land and Minerals Department. We are preparing comments and will be submitting them. I just had an administrative question. If we continue to have questions as we work through the proposed regulations, who can we contact for further clarification?

Elizabeth Appel Hi, you can contact me, (Liz) Appel. My number is 202-273-4680. And you can also feel free to e-mail me at elizabeth.appel -- A-P-P-E-L -- @bia.gov or bureauofindianaffairs.gov.

Man: Do you have any other comments?

Man: Is it on?

Man: Yeah.

Man: This is (unintelligible). I am with the Navajo Nation and we are (unintelligible). I have few comments. Can you hear me?

Man: Yes, we can.

Man: Okay. First of all, thanks Steve and everybody because obviously we did request this to be in 1988 - in 1980, actually. So something is happening, which is a positive sign. I have few general questions; we will be submitting more complete answers, comments before the closing of comment period.

One question I have that federal power is accrued - I know they have a separate certificate, but I think that there should be some provision for consent there. I realize that has actually has all to do there, but that is one of our comments that why is it really excluded from these regulations.

Second part is that it is - on the survey side, surveying is (unintelligible). Some of the tribe have their own requirements survey. And I did a good step, it is positive that there was no need to have survey, but there should be some there because if the guys are walking on tribal (unintelligible) land, the people living in the area, they must know that - why they are there. And it could be a problem, but some tribes have that surveying permit which we do on the Navajo Nation.

And appraisal is about the biggest issue. We always supposition that when the Indian tribes have negotiated a large right of way there and why it was taking forever to have appraisal. And that is positive comment - positive approach. I don't think it should be necessary unless - if the tribe requests not to have appraisal, that should be seated that day.

One concern you did address that Bureau has (unintelligible) to come by and (unintelligible) and be right of way, but some private is more complex land, our preference from the Navajo Nation side and the experience we have with rights of way, it will be better to separate tribal and fee. Sometimes the terms are not consistent if the terms are right of way that could be, but we have still problem when you combine one right of way for both tribes. And that - actually there is a big disparity between conservations. I think it will be better it should be separated; otherwise we will start including this in our right of way agreement.

Other question I have that it is my understanding that the actual agreement -- like those releases to -- will supersede these regulations if the tribes and the companies agree to that. So it seemed to me whenever we have problem for other tribes, there should be more specific on the side, products, and limitations to - for their own benefit and it will become a more comprehensive agreement. For we have been doing that for quite number of years.

One thing - look at that. You do not have the definition for relinquishment. Abandonment, reclamationment - its part of (unintelligible) and we always do that. But there should - they need that. I think there are two, three categories - those should be considered.

One other thing is that these comments applied at large, but the type of rights of way -- specifically to re-categorize -- because there are different categories and you make difference only for service line but not overall. But we have seen for long time that nature of the right of way and the categories - every time you have to deal with some different way.

Still have some of the comments we have on permit, fair market value - obviously they have been questioned by New Mexico (unintelligible) and that. We will be addressing that. We do believe that each tribe should have their way to - their water (unintelligible). And (Steve) try to explain it, fair market value is very difficult dealing with that. But everybody that definition has different meaning. So if they can get rid of that, I think it should not be that much issue.

Again, I think that with these regulations it would be best for the tribes -- (unintelligible) I cannot say -- but to cover everything in the agreement or in the grant - agreement within the tribes and the company. Thanks for your time

and we -- as I said -- we will be submitting comments and we will be in touch.
Thank you.

Man: Thank you very much. We're ready for the next commenter.

Coordinator: The next comment comes from (Carmen Campbell). Your line is open.

(Carmen Campbell): I just had a question on the comments that were submitted. If you guys have questions on that, will you be contacting the people who commented, or how will that work?

Elizabeth Appel: Sure. If we need clarification on something that you included in your comment, then we'll reach out to you and ask for that clarification.

(Carmen Campbell): Okay. That's all I had.

Elizabeth Appel: Thanks.

Coordinator: The next question or comment comes from (Lynn Slade). Your line is open.

(Lynn Slade): Thank you. Sorry to jump back in, but a couple more comments since there's additional time. First, the provisions proposed 169.003 on life tenants. Again, we'll submit detailed comments on this because there are a lot of elements to that part of the regulation, but two sides of it. The first is the proposed regulations provide that the BIA is not going to provide trust services to the life tenant. That there won't be BIA involvement in the receipt of funds or the approval of that kind of a transfer.

You know, representing companies who deal with allottees on rights of way, I think the involvement of the BIA as in, you know, providing a regular

procedure in providing sort of verification that things are done in accordance with required procedures is helpful. And, you know, I think conceptually the BIA owes a trust responsibility to everyone with an interest in trust property, and that includes a life tenant, which -- let's face it -- it's pretty hard to say just how long the life tenancy will continue.

The other broad brush comment is simply that acquiring rights of way across allotted lands is already a complicated process, requiring contacting a lot of people and communication with a lot of people. It's important that that be done and that it be done in the right way and the regulations try to do that by requiring the consent of remainder persons. The regulations are injecting another level of difficulty in an already difficult process, which run the risk of either unnecessarily complicating the situation or creating confusion or again expectations for compensation that may be difficult to address.

The other thing that I'd like to address is the -- one more moment, please -- provisions pertaining to what happens at the - if a renewal is proposed for an existing right of way. And the - concerning the application, the proposed section 169.102B appears to require survey in that situation. There is an - there are other places in the regulations where there's a provision that renewal can be had when there is no change in the location or use of the right of way. And in that situation, we believe no survey should be required.

And finally, on - in 169.410 the - there's a provision that if the right of way is expired and there may be a negotiation ongoing that the BIA will treat the negotiation as terminated whenever notified by the tribal allottee that the negotiation is terminated and can then terminate initiation -- or cancellation -- proceedings. Suggest two things be considered there.

Five USC Section 558C in the administrative procedure act provides for the extension of a -- quote -- license, which we believe concludes a right of way when a license renewal is requested. And secondly that the BIA should have discretion to consider the position of a grantee that the negotiations are continuing so that the BIA has discretion to allow - to defer termination cancellation proceedings while negotiations in good faith are ongoing. Thank you.

Coordinator: The next question or comment comes from (Sydney Beadle). Your line is open.

(Sydney Beadle): Thank you for the opportunity to ask another question. Do your proposed rules address the situation when a tribe or pueblo and the entity seeking the right of way when their negotiations have reached an impasse? Are there any procedures or processes available through the BIA to assist and support the parties?

Man: I mean, we don't specifically have an operation or, you know, a division or group that does that. But there are times when we may intervene on behalf of the allottees in a negotiation process. Or at least to try and assist to move things forward. But we don't have a specific activity as you're defining it, I don't believe.

Steven Simpson: And it's not addressed in the regulation - in the proposed regs.

(Sydney Beadle): Okay. So if there's an impasse in negotiations of a renewal, that potentially puts the grantee in jeopardy of trespass under your regulations, right?

Elizabeth Appel: Right.

Man: Right.

Woman: Correct.

Steven Simpson: Right, because - yes.

(Sydney Beadle): Okay. And your trespass remedies or actions that you may take are in addition to or any trespass ordinances that the pueblo or tribe may have enacted in the meantime?

Steven Simpson: That's correct.

(Sydney Beadle): Okay. Thank you.

Coordinator: We show now further comments at this time, but as a reminder, you may press star one on your phone and record your name if you do have a comment. One moment please. We are still showing no further questions or comments at this time.

Man: Okay. Well, if there's no further comments, once again let me thank everybody for taking time to visit with us today and provide your comments. We do look forward to getting additional written comments. Just like to remind everybody the deadline for having comments submitted to the department is October 2nd. So we got about two, three weeks prior before those are due. So if there's no further comments -- once again -- thank you all very much. We will be reviewing all the comments after the close of the comment period and generating responses to those as well. So again, thank you and hope you all have a great day.

Coordinator: That concludes today's conference. Thank you for participating. You may disconnect at this time.

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