



FINAL RULE: RIGHTS-OF-WAY ON INDIAN LAND

Available at: <http://www.bia.gov/WhoWeAre/AS-IA/ORM/RightsOfWay/index.htm>

Why does the Bureau of Indian Affairs (BIA) regulate rights-of-way across Indian land?

The Department of the Interior holds approximately 56 million acres of land in trust for Indian Tribes and individual Indians. Congress has enacted laws requiring Departmental approval of rights-of-way across Indian lands.

Why is this rule needed?

Regulations to promote economic development in Indian country must reflect twenty-first century needs of tribal communities and foster tribal self-determination. This rule replaces regulations that were promulgated over 40 years ago and last updated over 30 years ago. The new rule reflects modern requirements for rights-of-way and the need for faster timelines and a more transparent process for BIA approval. This modernization will provide more certainty to Tribes and the public, thereby promoting economic development and Tribal self-determination.

What does this rule do?

This rule updates 25 CFR 169, Rights-of-Way on Indian Land, to:

- Streamline and clarify the process for BIA approval of right-of-way grants on Indian land;
- Support Tribal and allottee decisions regarding use of their land;
- Increase flexibility in compensation and valuations;
- Protect trust property.

How does this rule streamline the BIA approval process?

The rule streamlines the BIA approval process for rights-of-way by:

- Establishing deadlines for BIA action on submitted rights-of-way documents;
- Promoting certainty for right-of-way approvals unless BIA finds a compelling reason not to, based on certain specified findings;
- Eliminating the requirement for applicants to obtain BIA approval to access Indian land to survey it in preparation for a right-of-way application; and
- Promoting certainty by clarifying that BIA approvals of rights-of-way documents are effective on the date of approval, even if an administrative appeal is filed.

How does this rule clarify the process for obtaining rights-of-way on Indian land?

The rule clarifies the process for obtaining rights-of-way on Indian land by:

- Explaining when a use is a “service line” rather than a right-of-way;
- Delineating when a BIA-approved right-of-way is required;
- Clarifying when new, additional uses, known as “piggybacking,” requires a new or amended rights-of-way;
- Defining what a renewal is and the process for obtaining one; and
- Specifying when BIA approval and landowner consent of amendments, assignments, and mortgages of rights-of-way is necessary and the process for obtaining approval.

What time limits does the rule establish for BIA action?

The rule requires that BIA issue a decision on a right-of-way grant within 60 days of receiving an application and a decision on an amendment, assignment, or mortgage of a right-of-way within 30 days of receiving an application. The rule provides that if action is not taken by these timelines, the applicant can elevate the matter to the BIA Regional Director, then the BIA Director.

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How does this rule support landowner decisions regarding use of their Indian land?

The final rule requires Tribes and allottees be kept informed of potential right-of-way actions on their land; explicitly allows for landowners to negotiate with applicants for rights-of-way; and provides that BIA will defer, to the maximum extent possible, to Tribal and allottee decisions.

How does the rule increase flexibility in compensations and valuations?

- *For rights-of-way on Tribal land:* The rule promotes Tribal self-determination by ensuring that Tribes receive just compensation for rights-of-way on Tribal land, as determined by the Tribes themselves. Compensation may be in any amount the Tribe negotiates, or may be an alternative form of rental, such as in-kind consideration. The BIA will not require a valuation, if the Tribe provides documentation that the Tribe has determined the compensation is in its best interest.
- *For rights-of-way on individually-owned Indian land:* Compensation must be at least fair market rental, as determined by a valuation, unless:
 - Grantee is a Tribal utility;
 - Grantee is a utility cooperative and is providing a direct benefit to the Indian land; or
 - Landowners waive or the grantee will construct infrastructure improvements on, or serving, the premises and BIA determines it is in the best interest of all landowners.

In addition, if BIA determines it is in the Indian landowners' best interest, then the grant may provide for alternative forms of rental or varying types of compensation.

How does this rule help protect trust property?

The rule includes several provisions to better protect Tribes' and allottees' trust property, such as:

- Establishing guidelines for "reasonable" durations of rights-of-way on allottee land;
- Adding that a bond, insurance, or other security is required to be provided with the application, rather than a deposit; and
- Setting out compliance and enforcement procedures for trespass, abandonment and non-use, and failure to make payments.

How does this rule clarify taxes, laws, and jurisdiction over land subject to rights-of-way?

The rule clarifies that the grant of a right-of-way has no effect on Tribal jurisdiction, and requires right-of-way grant documents to reserve Tribal jurisdiction. The rule also clarifies that rights-of-way are generally subject to Federal and Tribal law, but not State law, and generally prohibits State and local taxation of improvements and activities on land subject to a right-of-way. These provisions of the rule are intended to support Tribal self-determination and self-governance.

What are some other significant improvements this rule makes to rights-of-way?

The rule also:

- Eliminates outdated requirements specific to different types of rights-of-way;
- Clarifies that a right-of-way grant may include provisions requiring the grantee to give a preference to qualified Tribal members, based on their political affiliation with the Tribe; and
- Allows for direct pay of rights-of-way where there are 10 or fewer landowners, and all landowners consent to direct pay.

Is the final rule retroactive?

- Non-procedural (i.e., substantive) provisions of the final rule do not apply retroactively.
- Procedural provisions of the final rule do apply retroactively, except where there is a conflict with the grant or authorizing statute.
- Current assignees must provide BIA with documentation of past assignments by [INSERT 120 DAYS AFTER EFFECTIVE DATE OF RULE].