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Rights-of-Way on Indian Land; Final Rule

**DEPARTMENT OF THE INTERIOR****Bureau of Indian Affairs****25 CFR Part 169**[156A2100DD/AAKC001030/  
AOA501010.999900 253G]

RIN 1076–AF20

**Rights-of-Way on Indian Land****AGENCY:** Bureau of Indian Affairs, Interior.**ACTION:** Final rule.

**SUMMARY:** This final rule comprehensively updates and streamlines the process for obtaining Bureau of Indian Affairs (BIA) grants of rights-of-way on Indian land, while supporting tribal self-determination and self-governance. This final rule further implements 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. The rule also applies to BIA land.

**DATES:** This rule is effective on December 21, 2015.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Appel, Director, Office of Regulatory Affairs & Collaborative Action, (202) 273–4680; [elizabeth.appel@bia.gov](mailto:elizabeth.appel@bia.gov).

**SUPPLEMENTARY INFORMATION:****I. Executive Summary of Rule**

The Department of the Interior (Department) published a proposed rule in the **Federal Register** to comprehensively update and streamline the process for obtaining BIA grants of rights-of-way on Indian land (individually owned Indian land and/or tribal land) and BIA land (tracts owned and administered by BIA) on June 17, 2014 (79 FR 34455) with a comment deadline of August 18, 2014. The Department then extended the comment deadline to October 2, 2014, then to November 3, 2014, and finally to November 28, 2014. See 79 FR 47402, 60794, and 65360.

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 part 169 (Rights-of-Way) to mirror those revisions to the extent applicable in the rights-of-way context and otherwise modernize requirements for obtaining a right-of-

way over or across Indian land and BIA land. The final rule reflects additional changes made in response to comments received during the public comment period. Highlights of this final rule include:

- Simplifying requirements by relying on general statutory authority to grant rights-of-way and eliminating outdated requirements that apply to specific types of rights-of-way;
- Clarifying processes for BIA review of right-of-way documents;
- Streamlining the process for obtaining a right-of-way on Indian land by:
  - Eliminating the need to obtain BIA consent for surveying in preparation for applying for a right-of-way;
  - Establishing timelines for BIA review of rights-of-way requests;
  - Adding certainty to applicants by allowing BIA disapproval only where there is a stated compelling reason;
  - Providing Indian landowners with notice of actions affecting their land;
  - Deferring to individual Indian landowner decisions subject to an analysis of whether the decision is in their best interest;
  - Promoting tribal self-determination and self-governance by providing greater deference to Tribes on decisions affecting tribal land;
  - Clarifying tribal jurisdiction over lands subject to a right-of-way; and
  - Incorporating tribal land policies in processing a request for a right-of-way.

The general approach to the final rule is to provide a uniform system for granting rights-of-way over Indian land by relying primarily on a single statutory authority, 25 U.S.C. 323–328, and to allow Indian landowners as much flexibility and control as possible over rights-of-way on their land. The rule requires that owners of a majority of the interests in a tract must consent to the right-of-way, in accordance with the statutory requirement in 25 U.S.C. 324, and specifies that tribes and individual Indian landowners may negotiate the terms of their consent, which ultimately become the terms of the grant. The rule clarifies that landowners may negotiate the terms to ensure the right-of-way is best suited to their needs. Landowners currently have this option, but are often presented with a “take-it-or-leave-it” offer by the potential grantee, and fail to negotiate. To provide efficiencies in standardization, the Department will develop a template grant form with placeholders for conditions and restrictions agreed to by landowners. The rule also affords landowners as much notice as possible regarding rights-of-way on their land, giving tribes

and individual Indian landowners actual notice (as opposed to constructive notice) of every right-of-way affecting their land, including any land in which the tribe owns a fractional interest.

The rule addresses tribally owned land differently than individually owned land because, although the U.S. has a trust responsibility to all beneficial owners, it has a government-to-government relationship with tribes and seeks to promote tribal self-governance. The final rule also provides tribes with as much deference as possible, within the bounds of the Department’s trust responsibilities, to determine which rights-of-way to grant, for how much compensation, and with identified enforcement provisions. The rule also provides that the BIA will defer to individual Indian landowners in their determinations, to the extent it is possible to coordinate with multiple individual Indian landowners.

Consistent with 25 U.S.C. 325, the general trust relationship between the United States and the Indian tribes and individual Indians, and deference to tribal sovereignty, the final rule requires that the compensation granted to Indian landowners is just. The final rule does not establish any ceiling on compensation; to do so would unduly restrict landowners’ ability to get the maximum compensation for their land interest. The Department’s role is to ensure that the compensation is “just” for the Indian landowners.

Together, these revisions 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. Response to Comments**

The Department published a proposed rule with the above revisions on June 17, 2014. See 79 FR 34455. The Department extended the initial public comment deadline of August 18, 2014 to October 2, 2014, then November 3, 2014, and finally to November 28, 2014. See 79 FR 47402 (August 13, 2014), 79 FR 60794 (October 8, 2014); and 79 FR 65360 (November 4, 2014). We received 176 written comment submissions prior to the final deadline of November 28, 2014. Of these, 70 were from Indian tribes, 19 were from tribal associations and tribal members, 7 were from State government entities, and 5 were from county or city government entities. These submissions also included significant input from the energy sector, including 15 from electric cooperatives, and 25 from gas and oil companies and

associations, pipeline companies, and power and water utilities combined. We also received 3 written submissions from telecommunications companies and 2 from railroad companies. In addition, we reviewed comments at tribal consultation sessions held in Bismarck, North Dakota; Phoenix, Arizona; Atlanta, Georgia; and by teleconference. The following is a summary of the substantive comments we received and our responses. The designation “PR” refers to the section from the proposed rule; the designation “FR” refers to the designation in the final rule.

## Table of Contents for Response to Comments

- A. General
- B. Subpart A—General Provisions
  - 1. Purpose of Regulations (PR 169.001)
  - 2. Definitions (PR 169.002) & Applicability (PR 169.003(a))
  - 3. Life Estates (PR 169.003(b)/FR 169.109, FR 169.112, FR 169.121, FR 169.122, FR 169.415)
    - a. Life Estates—Protection of Land
    - b. Life Estates—Consent
    - c. Termination of Life Estates
    - d. Life Estates—Other Comments
  - 4. When a Right-of-Way Is Needed (PR 169.004)
  - 5. Types of Uses for Rights-of-Way (PR 169.005)
  - 6. Applicability to Existing Rights-of-Way and Applications (PR 169.006/FR 169.7)
  - 7. Administration of Regulations by Tribes on BIA’s Behalf (PR 169.007/FR 169.8)
  - 8. Laws Applicable to Rights-of-Way Approved Under These Regulations (PR 169.008/FR 169.9)
    - a. State Jurisdiction/State Law
    - b. Tribal Law
    - c. Tribal Jurisdiction
  - 9. Taxes Applicable to Rights-of-Way Approved Under These Regulations (PR 169.009/FR 169.11)
  - 10. Notice of Rights-of-Way (PR 169.010/FR 169.12)
  - 11. Appeals of Right-of-Way Decisions (PR 169.011/FR 169.13)
- C. Subpart B—Obtaining Right of Way
  - 1. Consent
    - a. Consent To Survey
    - b. “So Numerous”
    - c. Non-Consenting Tribe (PR 169.107(d))
    - d. Who Is Authorized To Consent (PR 169.108/FR 169.108)
  - 2. Compensation
    - a. Compensation—Electric Cooperatives and Utilities
    - b. Compensation/Fair Market Value for Rights-of-Way (PR 169.109/FR 169.110, PR 169.111/FR 169.112)
    - c. Different Compensation Approaches for Tribal Land Than for Individually Owned Indian Land
    - d. Valuation (PR 169.111/FR 169.114)
    - e. Who Conducts Valuation
    - f. Method of Valuation
    - g. Alternative Compensation
    - h. Compensation for Renewals
  - 3. Payment (PR 169.112/FR 169.115)

- 4. Direct Pay (PR 169.113/FR 169.116)
- 5. Method of Payment (PR 169.114/FR 169.117)
- 6. Non-Monetary and Varying Types of Compensation (PR 169.115/FR 169.118)
- 7. Issuance of Invoices (PR 169.116/FR 169.119)
- 8. Compensation Reviews or Adjustments (PR 169.117/FR 169.111 and FR 169.113)
- 9. Other Payments Required (PR 169.118/FR 169.120)
- 10. Condemnation
- 11. Process for Grant of Right-of-Way
  - a. Deadlines for BIA Decisions
  - b. Process for Granting Right-of-Way (PR 169.119/FR 169.123)
  - c. BIA Decision To Grant a Right-of-Way (PR 169.120/FR 169.124)
  - d. Contents of the Grant (PR 169.121/FR 169.125)
  - e. Preference for Employment of Tribal Members
- 12. Process for Rights of Way Applications Within or Overlapping Existing Rights of Way, or “Piggybacking” (PR 169.123/FR 169.127, 169.128)
- 13. Location in Application and Grant Differ From Construction Location (PR 169.124/FR 169.129)
- 14. Bonding (PR 169.103/FR 169.103)
- Subpart C—Terms, Renewals, Amendments, Assignments, Mortgages
  - 1. Term (Duration)
  - 2. Holdovers
  - 3. Renewals (PR 169.201–169.202/FR 169.202)
  - 4. Multiple Renewals (PR 169.203/FR 169.203)
  - 5. Amendments
  - 6. Assignments
  - 7. Mortgages
- Subpart D—Effectiveness
  - 1. Appeal Rights
  - 2. Compelling BIA Action (PR 169.304/FR 169.304)
  - 3. Appeal Bond
- Subpart E—Compliance and Enforcement
  - 1. Abandonment
  - 2. Negotiated Remedies (PR 169.403/FR 169.403)
  - 3. BIA Enforcement (PR 169.404–169.405/FR 169.404–169.405)
  - 4. Late Payment Charges (PR 169.407/FR 169.407)
  - 5. Cancellation for Non-Use or Abandonment (PR 169.408/FR 169.408)
  - 6. BIA Enforcement Against Holdovers (PR 169.410/FR 169.410)
  - 7. Trespass (PR 169.412/FR 169.413)
- Subpart F—Service Line Agreements ((PR Subpart F (169.501–169.504)/Final Subpart B (169.51–169.57))

### A. General

*Comment:* Several commenters, such as the Northern Natural Gas Company, stated that the rule would have the opposite effect of streamlining the right-of-way process, creating a slower, less efficient, and “in many ways unfair” right-of-way process because they provide parties with the opportunity to negotiate with each other, which will slow the issuance of rights-of-way, particularly on individual Indian tracts.

One energy company commenter stated that the right-of-way process is burdensome and often takes years to complete before it can provide service to the customer, but that the proposed rule offers a middle ground that accommodates tribal consent and allows utilities to provide service to customers in a timely manner. At least one commenter stated that the rule bolsters tribal self-governance by allowing tribes to dictate the extent of rights-of-way.

*Response:* Although negotiations between the parties may slow down the process of obtaining landowner consent by giving the parties time to negotiate, this clarification is necessary to promote Indian landowner control over their trust or restricted land, and allows ordinary market forces to work. To provide efficiencies in standardization, BIA will develop a template grant form that provides flexibility by incorporating conditions and restrictions agreed to by landowners.

*Comment:* Several commented on the proposed rule’s statement that BIA will rely on the broad authority under the 1948 Act, rather than the limited authorities under specific statutes. Some commenters pointed out that Congress did not repeal, override, supersede, or alter the other statutes and that the specific statutory authorities and requirements are still applicable to the Department. One commenter stated that the 1948 Act was intended as “cleanup legislation” to address Indian land not already covered by the “hodge podge of statutes” and that the 1948 Act affirmed the earlier statutes by filling gaps in coverage by the other statutes.

Several tribal commenters strongly supported consolidating approval of all rights-of-way in a single location under 25 U.S.C. 323–328, noting that the process of approving different types of rights-of-way under different authorities and standards was antiquated and increased the burden on tribes to manage rights-of-way.

*Response:* The final rule consolidates approval of all types of rights-of-way across Indian land under one set of regulations, implementing the general statutory authority at 25 U.S.C. 323–328, just as was proposed. The Department is not attempting to repeal any limited authorities under specific statutes; rather, it is making the policy decision to review and approve rights-of-way under the 1948 Act (25 U.S.C. 323–328). The 1948 Act offers maximum flexibility in rights-of-way, whereas the limited authorities under specific statutes impose various non-uniform restrictions. Legislative history indicates that Congress intended a transition from grants under the specific statutory

provisions to a uniform system based on 25 U.S.C. 323–328. See Senate Report No. 823 (80th Congress, 2d session) (Jan. 14, 1948), p. 4. The intent of Congress in enacting the broader 1948 statute, while leaving the others in place, was to afford tribes and the Department a choice and the Department does not exceed its authority by enacting regulations choosing one statutory scheme over the other. *Blackfeet Indian Tribe v. Montana Power Co.*, 838 F.2d 1055, 1059 (9th Cir. Mont. 1988).

The rule also lists the Indian Land Consolidation Act (ILCA), as amended by the American Indian Probate Reform Act, 25 U.S.C. 2201 *et seq.*, as statutory authority because the rule relies on this statute as supplemental authority. Given the intent of Congress in the 1948 Act to facilitate right-of-way transactions, and the intent behind ILCA not to disturb specific standards for the percentage of ownership interest that must approve an agreement, we continue to apply the percentage requirements of the 1948 Act (*i.e.*, consent of a majority of interests) rather than the “sliding scale” consent requirements of 25 U.S.C. 2218 (which may require consent of owners of more than a majority interest, for example where there are five or fewer owners of the tract). See Senate Report No. 823 (80th Congress, 2d session) (Jan. 14, 1948), p. 4; 25 U.S.C. 2218(f).

*Comment:* A commenter suggested including in the final rule the industry-specific standards and guidelines for oil and gas pipelines that have been in place for decades, at current section 169.25(f).

*Response:* The final rule provides landowners and grantees the freedom to negotiate for whatever standards and guidelines are appropriate for incorporating into the right-of-way grant. The final rule does not prevent a grantee from following the industry-specific guidelines and standards for oil and gas pipelines.

*Comment:* Several commenters pointed to the U.S. Supreme Court decision in *Strate* as establishing that a grant of right-of-way essentially transforms Indian land into fee land. See *Strate v. A-1 Contractors*, 520 U.S. 438, 451–52 (1997). Specifically, these commenters stated that when a landowner grants a right-of-way, they reserve no right to the exclusive dominion or control over the right-of-way, and the land underlying the right-of-way is removed from tribal jurisdiction. These commenters asserted that the *Strate* holding means there can be no “seamless consistency” between the right-of-way regulations and leasing regulations, because this precedent

treats land subject to a right-of-way differently from leased land.

*Response:* The circumstances in *Strate* are limited to the facts presented in that case. In *Strate*, neither the Federal Government nor the tribe expressly reserved jurisdiction over the land in the grant of the right-of-way. 520 U.S. at 455. This lack of reservation of a “gatekeeping right” led the Supreme Court to consider the right-of-way as aligned, for purposes of jurisdiction, with land alienated to non-Indians. *Id.* In these regulations, as grantor, the United States is preserving the tribes’ jurisdictions in all right-of-way grants issued under these regulations and is requiring that such grants expressly reserve tribal jurisdiction. Therefore, grants of rights-of-way under these regulations, consistent with the Court’s reasoning in *Strate*, would not be equivalent to fee land, but would retain the jurisdictional status of the underlying land.

*Comment:* A few commenters stated that the regulation is a violation of the trust responsibility, claiming it subjects individual Indian landowners to an additional layer of bureaucracy without protections for Indian land rights.

*Response:* The regulations retain protections for Indian land rights and promote landowners’ control over and notification of rights-of-way over and across their land. Landowners are free to negotiate for terms acceptable to them in negotiating with right-of-way applicants, subject to BIA review and approval, as required by statute.

*Comment:* Several commenters, including both tribal and industry representatives, submitted petitions and comments calling on BIA to cancel the rulemaking and start over. Some suggested gathering a workgroup of tribes and allottees to rewrite the regulations. Several tribal commenters requested additional consultation and others requested additional opportunity for public input. A few tribal commenters supported the regulatory efforts to add transparency and certainty to the right-of-way process.

*Response:* The Department complied with the applicable Administrative Procedure Act requirements for public notice and comment and consulted with tribes in updating these regulations, consistent with the Executive Orders and Departmental policy on consultation with tribes. Both public and tribal input on the proposed rule was robust, touching upon nearly every section of the proposed rule. The Department considered each comment in drafting the final rule and has incorporated suggested changes, balancing the Department’s trust

responsibility to landowners, support for tribal self-determination and self-governance, and promotion of productive use of Indian land.

*Comment:* A tribe requested that the rule better reflect that the tribe has ongoing sovereign interests in right-of-way lands, through consenting to renewals, consenting to changes to the right-of-way document after it is granted, and investigating activities and conditions on the land and its improvements to determine compliance with tribal laws or with the terms and conditions of the right-of-way document.

*Response:* The final rule includes a new section FR 169.010 to clarify that the grant of a right-of-way has no effect on tribal jurisdiction. In response to this comment, the final rule also includes a provision (FR 169.402(b)) recognizing the right of the tribe to investigate compliance with the grant, and imposes other tribal approval and notification requirements throughout the right-of-way process.

## B. Subpart A—General Provisions

### 1. Purpose of Regulations (PR 169.001)

*Comment:* We received suggestions for several line edits to PR 169.001. One commenter requested we clarify that the rules govern how BIA will consider a request for a right-of-way, and another suggested we add a statement regarding the applicability of tribal law. Another commenter requested that PR 169.001(d) be clarified to state that the special acts of Congress authorizing rights-of-way without BIA’s approval are only those specifically authorizing rights-of-way across tribal land, to preclude the assertion of a right under general Federal statutes to obtain or condemn a right-of-way without BIA approval.

*Response:* We incorporated these suggestions.

*Comment:* One commenter suggested adding a separate subsection on the “interplay and application of tribal law and policy.”

*Response:* A separate subsection on tribal law is unnecessary because other sections of the rule address the applicability of tribal law; however, the final rule adds a sentence to § 169.001(a) to clarify that the regulation is intended to support tribal self-determination and self-governance by acknowledging and incorporating tribal law and policies in processing requests for rights-of-way across tribal lands.

*Comment:* One tribal commenter stated that the proposed rule appeared to grant the Secretary authority to grant rights-of-way under the Federal Power Act without the tribe’s consent. This

commenter stated that the rule should clarify whether it applies to Federal Power Act power lines and apply only to those Federal power projects that produce electricity from hydroelectric generators. Another commenter stated that the regulations should cover rights-of-way for Federal Power Act transmission lines.

*Response:* The proposed and final rules both include the same language as the current rule on the Federal Power Act. This is governed by statute, and the rule does not affect it. The regulations do not cover rights-of-way for Federal Power Act transmission lines, but do cover other transmission lines.

## 2. Definitions (PR 169.002) & Applicability (PR 169.003(a))

*Comment—Several definitions’ reference to “surface estate”:* Several commenters suggested that definitions such as “Government land,” “Indian land,” “individually owned Indian land,” and “tribal land” should include the subsurface estate, as well as the surface estate.

*Response:* The definitions refer to the surface estate only because these regulations address only the surface estate and BIA distinguishes only between the surface estate and the mineral estate. The surface estate includes everything other than mineral estate, such that any buried lines or other infrastructure affect the surface estate and require a right-of-way. As such, the surface estate includes what some of the commenters are calling the “subsurface estate,” which includes the soil and any other non-mineral material below the surface. To address these comments, the final rule includes an introductory sentence in PR 169.002, clarifying that these definitions apply only for the purposes of rights-of-way regulations.

*Comment—“Abandonment”:* A few commenters supported the definition of the term “abandonment” as helpful to distinguish relinquishment of a right-of-way through non-use versus affirmative relinquishment. One commenter asked whether the grantee must file a document to affirmatively relinquish the right-of-way. Another commenter suggested criteria for “abandonment in fact” to establish when the grantee relinquished the right-of-way without a formal declaration of relinquishment. A few commenters suggested that the definition be expanded to include not just affirmative relinquishment by the grantee, but to also include an act that shows the grantee gave up its rights and does not intend to return to exercise the rights.

*Response:* The proposed rule and final rule, at § 169.408, provide that enforcement may occur for “non-use,” which is what the commenter calls “abandonment in fact,” and establish the criteria for the non-use. The final rule expands the definition of “abandonment” as requested to include acts by the grantee to allow BIA to imply abandonment based on an analysis of the circumstances. See FR 169.2. To affirmatively relinquish a right-of-way, the grantee need not necessarily file a document. Because the definition cannot enumerate all of the ways in which a grantee could communicate relinquishment, BIA will determine on a case-by-case basis whether affirmative relinquishment has occurred.

*Comment—“BIA”:* One commenter suggested defining “BIA” to include the United States generally, to address an issue with an interagency agreement being recorded. Some commenters expressed confusion about defining “BIA” to include tribes that contract or compact to carry out BIA services, saying that it would appear to be an unlawful delegation of authority.

*Response:* The final rule retains the proposed definition of “BIA.” The definition of “trust or restricted status” already establishes that the United States rather than BIA specifically holds title in trust or imposes restricted status. Tribes are statutorily authorized to carry out BIA realty services that are not inherently Federal functions, as long as certain procedures are followed.

*Comment—“Cancellation”:* A few tribal commenters requested definitions for “cancellation” and “termination.”

*Response:* The final rule adds these definitions.

*Comment—“Compensation” and “Market Value”:* A few commenters suggested revising definitions for “compensation” and “market value” to impose a requirement that the Secretary determine the amount is “just” under 25 U.S.C. 325, regardless of whether the amount meets fair market value.

*Response:* The final rule does not incorporate these suggested changes because detailed provisions for determining compensation are addressed elsewhere in the regulations.

*Comment—“Consent”:* Several commenters requested a definition for “consent.”

*Response:* The final rule adds a definition for this term that is consistent with the definition in the leasing regulations (25 CFR part 162).

*Comment—“Constructive Notice” and “Notice”:* A few commenters requested a definition of “notice, notify and notification” to mean informing the

parties by certified or registered mail or commercial mail service that tracks delivery or email. Other commenters suggested adding more specifications for constructive notice on how long and where the notice will be posted.

*Response:* With regard to notice generally, and the allowable forms of notice, PR 169.010 and FR 169.12 address these issues. See the discussion of comments on that section, below, for information about the forms of notice. Constructive notice is required only for notification to landowners of certain enforcement actions BIA takes against the grantee, so no definition has been added.

*Comment—“Easement”:* One commenter stated that the definition of “easement” should reflect that title remains vested in the owner.

*Response:* The final rule clarifies that an easement is simply a right to use, but that title remains vested with the owner.

*Comment—“Eminent domain”:* One commenter requested a definition for “eminent domain.”

*Response:* The final rule does not include the term “eminent domain” or address eminent domain, so this definition was not added. Statutory authority exists in 25 U.S.C. 357 for condemnation under certain circumstances, but these regulations do not address or implement that authority.

*Comment—“Fractional interest”:* One commenter suggested a revision to exclude application to tribal land.

*Response:* No change to the rule is necessary. Tribal land includes land in which the tribe and others own fractional interests.

*Comment—“Government land”:* Some commenters suggested narrowing the definition to refer to land administered by the BIA, rather than all Federal Government lands because other Federal agencies are responsible for granting rights-of-way on lands under their statutory and regulatory jurisdictions.

*Response:* The final rule changes the term from “Government land” to “BIA land” and specifies that the BIA owns and administers the land.

*Comment—“Grantee”:* One commenter suggested including assignees in the definition of “grantee.”

*Response:* The final rule clarifies that once an assignment becomes effective, the assignee becomes the grantee.

*Comment—“Immediate family”:* A commenter stated that the definition of “immediate family” should track the definition in 25 CFR part 152.

*Response:* The final rule’s definition of “immediate family” tracks the definition in the leasing regulations, and consistent with our support for tribal

self-determination and self-governance, defers to the definition of “immediate family” under applicable tribal law.

*Comment—“Indian land”:* A few commenters stated that the definition should better track the definition of “tribal land” to address that Indian land may be owned by more than one tribe, more than one individual Indian, or a combination of both. One commenter requested clarification that “Indian land” does not include anything beyond individually owned Indian land and tribal land. Several commenters stated that “trust and restricted land” should be used instead, to eliminate the need to cross-reference multiple other defined terms (*i.e.*, “tribal land,” “individually owned Indian land,” “trust or restricted status”). One commenter stated that the definition appeared to also apply to land owned in fee.

*Response:* The final rule incorporates the clarification that the land may be owned by multiple landowners and that “Indian land” includes only individually owned Indian land and tribal land. The final rule does not make any revision in response to the comment that the definition appears to apply to fee land, because the definition already states that it includes only land held in trust or restricted status.

*Comment—“Indian landowner”:* A commenter stated that the definition should clarify that “an interest in Indian land” means a trust or restricted interest. One commenter suggested excluding from the definition anyone who has only a right from the tribe to use land and the tribe has reserved the right to consent to easements or rights-of-way.

*Response:* The final rule does not revise the definition to refer to trust or restricted interests because it refers to “Indian land” which is defined to mean trust or restricted interests. The final rule does not exclude tribal land assignments from the definition of “Indian landowner,” but in a case in which a person has only a tribal land assignment, the tribe would still be considered the “Indian landowner” under this definition.

*Comment—“Indian tribe”:* One commenter suggested that the definition of “Indian tribe” should include only tribes organized under the Indian Reorganization Act (IRA), in accordance with a strict reading of the statutory authority for rights-of-way on Indian land. This change would require the consent only of IRA tribes for any rights-of-way and not for non-IRA tribes.

*Response:* The final rule does not narrow the definition of “Indian tribe” as suggested because BIA has

consistently required consent from all tribes, in furtherance of tribal self-determination.

*Comment—“Indian”:* Several commenters commented on this definition. Some questioned including individuals who are “eligible to become a member of any Indian tribe.” At least one commented that the statutory definition discriminates against co-owners of allotments outside of California.

*Response:* As a result of the American Indian Probate Reform Act amendments to the Indian Land Consolidation Act, the definition of “Indian” includes those who are “eligible to become a member of any Indian tribe.”

*Comment—“Individually owned Indian land”:* A commenter suggested this definition should exclude tribal land assignments. Another commenter suggested revising the definition to clarify that the tract may be owned by multiple individuals. One commenter asked whether a tract in which both a tribe and an individual own interests would be considered “individually owned Indian land” or “tribal land.”

*Response:* The definition of individually owned Indian land does not include tribal land assignments; no change is necessary. The final rule clarifies that individually owned Indian land may be owned by multiple individuals, as suggested. A tract in which both a tribe and an individual own interests would be considered “tribal land” for the purposes of requirements applicable to tribal land and would be considered “individually owned Indian land” for the purposes of the interests owned by individuals.

*Comment—“Legal Description”:* One commenter stated that the definition should not refer to a portion of the document.

*Response:* BIA has deleted this definition in response to the comment because “legal description” is a generally understood term.

*Comment—“Life estate”:* One commenter suggested adding a definition for “life estate.”

*Response:* The final rule defines “life estate” consistent with the leasing regulations.

*Comment—“Map of definite location”:* One commenter suggested adding that the boundaries of each right-of-way should be specified as precisely as possible. Others suggested additional requirements for the distance between the surveyed land and right-of-way and allowances for GPS and satellite technologies.

*Response:* The proposed and final regulations at § 169.102(b)(1) refer to the statutory provisions governing maps of definite location, which are

implemented by the Department’s Manual of Surveying Instructions and other Departmental requirements. These require an accurate description of boundaries and impose distance requirements for references to public surveys, and allow for GPS and satellite technologies.

*Comment—“Market value”:* A few commenters suggested using the term “fair market value” rather than “market value” to maintain consistency in terminology with the current regulations and because the term is more widely used in industry parlance. One commenter suggested adding that it should state that it is the most probable price the property would bring in a competitive and open market “under all conditions requisite to a fair sale.” Another suggested clarifying that the market value should be based on the use of the limited portion for the right-of-way, rather than sale of the land.

*Response:* The final rule uses the term “fair market value” in lieu of the proposed “market value” in response to these comments. The final rule does not add “under all conditions requisite to a fair sale” because this concept is already captured in “competitive and open market.” The final rule does not add that the market value is based on the limited portion for the right-of-way because this is understood.

*Comment—“Nonprofit rural utility”:* One commenter suggested adding a definition for this term to mean “a member-owned cooperative nonprofit corporation organized under State law for the primary purpose of supplying electric power and energy and promoting and extending the use of electricity in rural areas and Indian lands.”

*Response:* The final rule adds a definition for “utility cooperatives” to include member-owned utility cooperatives. Later provisions of the rule provide for waivers of compensation requirements and bonding requirements for utility cooperatives and tribal utilities under certain conditions.

*Comment—“Parties”:* A few commenters suggested a definition of “parties.”

*Response:* The final rule does not include a definition for “parties” because it is clear from context where this term is used who it includes.

*Comment—“Right-of-Way”:* A few commenters suggested edits to this definition to clarify that easements are a type of right-of-way. Other commenters suggested adding “in, over, under, through, on, or to” to capture all possible types of rights-of-way. Some commenters stated that a right-of-way

should reflect that they are transfers of real property interests to grantees; others stated that the right-of-way should reflect they are not transfers, and that title remains vested in the landowner. Some commenters suggested clarifying in the definition that rights-of-way do not include service lines.

*Response:* The final rule clarifies that rights-of-way include easements and uses the statutory language “over and across” rather than “cross.” The final rule also establishes that right-of-way grants are not transfers of real property interests (see discussion below), but rather that the landowner retains title to the property. The final rule clarifies that rights-of-way do not include service lines.

*Comment—“Service Lines”:* See the discussion of service lines, below.

*Comment—“Secretary”:* A commenter suggested clarifying who is an “authorized representative” of the Secretary.

*Response:* Authorized representatives are those acting within their scope of duties through delegated authority by the Secretary.

*Comment—“Section 17 corporation”:* A commenter noted that this term is defined but not used in the regulation.

*Response:* The final rule deletes this definition.

*Comment—“Trespass”:* One commenter requested narrowing the definition of “trespass” to exclude unintentional instances of trespass and encompass only those instances of willful, purposeful, reckless, or negligent trespass. Another commenter suggested expanding the definition to include listed examples of trespass. The commenter also stated that trespass to airspace and subsoil should be included.

*Response:* The final rule does not add any requirement for intent to trespass because the unauthorized occupancy is a trespass under Federal law regardless of intent (see discussion of trespass, below). The final rule does not list examples of trespass; examples listed by the commenter would meet the definition of “trespass” including, but not limited to, holdover occupancy without consent, affixing unauthorized improvements, adding uses or areas, entry without authorization. The definition does not specify trespasses to airspace and subsoil because these regulations address only the surface estate.

*Comment—“Tribal authorization”:* One commenter requested further specification of when a tribal authorization is “duly adopted.” Another commenter suggested adding a

tribal government division to the definition.

*Response:* The regulations do not add further specification of what constitutes a duly adopted tribal authorization because the procedures vary with each individual tribe. The definition of “tribal authorization” includes a document duly adopted by a tribal government division which reflect that the document is an “appropriate tribal document authorizing the specified action.”

*Comment—“Tribal Land”:* A tribal commenter asked whether a tract is considered tribal land, even if fractional interests are owned by both the tribe and individual Indians. Another commenter suggested defining “tribal land” to include only land that is not individually owned. A commenter suggested limiting tribal land to those tracts in which the tribe holds a majority interest.

*Response:* Under the proposed definition and final definition, a tract is considered “tribal land” if any interest, fractional or whole, is owned by the tribe. A tract in which both a tribe and individual Indians own fractional interest is considered tribal land for the purposes of regulations applicable to tribal land. If the tribe owns any interest in a tract, it is considered “tribal land” and the tribe’s consent for rights-of-way on the tract is required under 25 U.S.C. 323 and 324.

*Comment—“Trust or restricted status”:* One commenter suggested revising the definition to reflect that individual tracts may be owned by a combination of both tribal and individual owners.

*Response:* The final rule clarifies that land may be owned by a combination of both tribal and individual owners by changing “or” to “and/or.”

*Comment: New definition of “utility”:* One commenter suggested adding definitions distinguishing between “commercial” and “public” utilities, such that later provisions can provide more lenient requirements to public utilities.

*Response:* The final rule defines “utility cooperatives” and “tribal utilities” because the regulations provide more lenient requirements for these categories of utilities. “Utility cooperatives” are defined to be those cooperatives that are member-owned, while “tribal utility” is defined to be those utilities that are tribally owned and controlled (*i.e.*, in which tribes own at least 51 percent, receive a majority of the earnings, and control the management and daily operations). The more lenient requirements (nominal compensation, no bonding

requirements) are appropriate for utility cooperatives because cooperatives are established for the purpose of providing service to their members and benefiting their members rather than making a profit. The more lenient requirements are appropriate for tribal utilities, whether for profit or not for profit, because such utilities have a governmental interest in providing service to those within their jurisdictions. The final rule holds other not-for-profit and for-profit utilities to the standard requirements for compensation and bonding because an independent analysis of whether the right-of-way is in the best interest of the landowners is appropriate in those circumstances.

*Comment—Other definitions:* A few commenters suggested defining terms such as “allotted land.”

*Response:* The term “allotted land” is not defined because it is not used in the regulation.

*Comment:* A few commenters had questions about or expressed confusion about PR 169.003(a), specifying that BIA will not condition its grant of a right-of-way on the applicant having obtained a right-of-way from the owners of any fee interests, and that BIA will not take any action on a right-of-way across fee, State or Federal land not under BIA’s jurisdiction.

*Response:* BIA grants rights-of-way only with respect to trust or restricted interests and examines only the trust or restricted interests when determining whether the owners of the majority of the interests consent. It is the applicant’s responsibility to obtain the permission of the owners of the fee interests; BIA is not involved in that process. BIA will not condition its grant of a right-of-way on the applicant having obtained a right-of-way from the owners of any fee interests. The rule requires notice to and consent from owners of trust or restricted interests, as opposed to fee interests. The final definition of “BIA land” clarifies that land not under BIA’s jurisdiction is not included.

*3. Life Estates (PR 169.003(b)/FR 169.109, FR 169.112, FR 169.121, FR 169.122, FR 169.415)*

*Comment:* A commenter stated that the provisions on life estates are “extremely confusing” and should be rewritten. Another commenter stated that the provisions on life estates should be in their own section, rather than as a part of § 169.3.

*Response:* The final rule addresses these comments by redrafting life estate provisions and placing them in new,

separate sections addressing only life estates.

*Comment:* One commenter asserted that the entire section should be deleted because it violates the rules of co-tenancy. This commenter also stated that title vests in the remaindermen under a will as of the date of the death, title passes from the decedent to the remaindermen at that time, and the remaindermen take ownership subject to the life estate. This commenter stated that the estates are concurrent, and that the perspective that there is first a life estate and then a remainder is legally incorrect and would create a hole in the chain of title, rendering it unmarketable. The commenter further stated that the proposed provision stating that BIA will not join in a right-of-way granted by life tenants is an announcement that the Department intends to violate 25 U.S.C. 348, which requires Secretarial approval of all contracts affecting allotted land.

*Response:* This comment is based on a provision in the proposed rule that would have allowed a life tenant to grant a right-of-way without consent of the remaindermen or approval of the BIA. That provision has been deleted in the final rule.

*Comment:* Several commenters, including tribal commenters, stated that the life estate provisions should distinguish between Indian and non-Indian life tenants to provide protection to Indian life tenants. The commenters stated that the rule does not explain how BIA will balance the interests of an Indian life tenant and Indian remaindermen. One commenter stated that BIA owes a trust responsibility to everyone with an interest in trust property, including a life tenant. These commenters assert that the rule establishes that BIA will actively breach its trust responsibility to Indian life tenants. For example, the provision saying that BIA will not enforce or consent to a right-of-way where the life tenant holds all the trust or restricted interests in the tract, assumes the life tenant is non-Indian when, in fact, most are Indians to which BIA owes a trust responsibility.

*Response:* The final rule does not distinguish between Indian and non-Indian life tenants because BIA's trust responsibility is not based on whether someone is Indian, but rather stems from the interest in trust or restricted (Indian) land. BIA is responsible for enforcing the terms of the right-of-way only on behalf of the remaindermen because BIA's trust responsibility is to the remaindermen because they are the beneficial owners of the Indian land, rather than the life tenants.

#### a. Life Estates—Protection of Land

*Comment:* A tribal commenter stated that the rule should clarify whether BIA owes a trust responsibility to the co-owners of the holder of the life estate, because it states that it does not owe rights to other parties but leaves this category of parties vague.

*Response:* Where the life estate covers only a fractional interest in the property, the other co-owners are owners of the trust or restricted property to which BIA owes any trust responsibility.

*Comment:* A tribal commenter stated that BIA approval should be required regardless of whether the life estate is over the entire parcel of Indian land or not, because BIA's approval is required to protect the remainder interests and ensure no permanent injury to the Indian land, in either case.

*Response:* The final rule requires BIA approval regardless of whether the life estate covers the entire parcel of Indian land or not.

*Comment:* A tribal commenter stated that provisions saying that the BIA “may monitor the use of the land” should instead provide that the BIA “shall monitor the use of the land.”

*Response:* The final rule continues to provide that BIA “may” monitor use of the land to account for any situations in which BIA determines monitoring is not necessary.

*Comment:* A tribal commenter stated that the rule does not provide for a process for the landowner to appeal to BIA for intervention as trustee to prevent “permanent injury” to the land that may occur through the life tenant granting the right-of-way. Another commenter stated that the term “permanent injury” should be explained, to avoid cases where a pipeline abandoned in place is considered a “permanent injury.”

*Response:* Owners may contact BIA to express concerns regarding the potential for permanent injury either formally or informally. In order to maintain flexibility, the final rule does not establish a specific process for this communication. The determination of whether a “permanent injury” has occurred is made on a case-by-case basis.

#### b. Life Estates—Consent

*Comment:* A commenter requested clarification that the life tenant “consent” to, rather than “grant,” the right-of-way.

*Response:* The final rule clarifies that the life tenant “consents” to the right-of-way.

*Comment:* A few commenters requested clarification that consent is

required from the owners of a majority interest, rather than from a majority of the owners.

*Response:* The final rule clarifies that consent is required from the owners of a majority interest.

*Comment:* One commenter stated that the provisions are consistent with the Interior Board of Indian Appeals (IBIA) decision in *Adakai v. Acting Navajo Regional Director, BIA*, 56 IBIA 104 (2013), requiring a consent of the majority of the remaindermen, but recommended the intent be clarified by adding after the first sentence of paragraph (b): “Except as provided in clauses 1(v) and (3), we will not grant or approve a right-of-way for land subject to a life estate. A life tenant, however, may grant a right-of-way as provided in this paragraph (b).”

*Response:* The final rule requires the consent of both the life tenants and remaindermen, in order to ensure protection of the Indian land for the remaindermen.

*Comment:* A few commenters suggested, as a simpler approach, allowing the life tenant to consent for the full term of the right-of-way, regardless of the duration of the life estate or number of future, unknown remaindermen, and requiring the grantee to pay full compensation for the right-of-way to the life tenant. These commenters asserted that no consent of the remaindermen is required and that the life tenants should have the ability to consent and bind the remaindermen, although one commenter stated that this approach presents “enormous administrative hurdles” when a tract of land held by a life tenant is part of a right-of-way project encompassing other tracts where consent, monitoring, and enforcement are required. In contrast, a tribal commenter stated that the Indian landowner should be required to consent, regardless of whether there is a life estate on the land. One commenter stated that the IBIA's previous determination that rights-of-way must be consented to by both life tenants and remaindermen was based on the silence in the current regulations, and asserted that the new regulations should allow life tenants to consent to issuance of a right-of-way that may exceed the duration of the life estate.

*Response:* BIA may not, by regulation, allow a life tenant to grant an interest that is greater than what the life tenant holds (*i.e.*, an interest for longer than the duration of the life tenant's life); therefore, the life tenant may not consent to the full term of the right-of-way, and may consent only to the term of his or her life. The final rule simplifies the approach by requiring the



consent of the remaindermen as well, for the full term of the right-of-way.

*Comment:* One commenter stated that the rule allows life tenants to encumber land with a right-of-way that may be permanent and impossible to undo.

*Response:* The final rule requires the consent of remaindermen identifiable at the time of the application; with this consent, the right-of-way grant continues even when the life estate ends (assuming the overall term of the life estate has not expired).

*Comment:* A tribal commenter requested clarification in paragraph (b)(2) as to whether the applicant must obtain the consent of a majority of the co-owners including or excluding the life tenant's consent in the calculation. The commenter suggested that the life tenant's consent should be included in the calculation.

*Response:* The life tenant's consent is required in addition to the consent of the owners of a majority of the remainder interests.

*Comment:* A commenter stated that if the life tenant's consent was not needed to meet the majority consent, then the right-of-way should not terminate upon the end of the life estate.

*Response:* Because the final rule requires consent of both the life tenant and remaindermen, this comment is no longer applicable.

#### c. Termination of Life Estates

*Comment:* Several commenters noted the administrative difficulties, uncertainties, and increased costs caused by a right-of-way ending when the life estate ends. Several commenters suggested providing that upon the end of the life estate, the right-of-way continues and the remaindermen receive compensation established for allottees in the original grant, but prorated for the remainder of the right-of-way term.

*Response:* The final rule requires the consent of remaindermen identifiable at the time of the application; with this consent, the right-of-way grant continues even when the life estate ends (assuming the overall term of the life estate has not expired). The final rule addresses the allocation of compensation between the life tenant and remaindermen in § 169.121. Generally this section provides that if a will established the life estate, the terms of the will establishing the allocation will govern. If there is no will provision that controls the allocation, the life tenant and remaindermen may enter into an agreement regarding the allocation. Otherwise, the terms of 25 CFR part 179 apply.

*Comment:* A commenter noted that there may be instances in which the life tenant has rights to encumber the property beyond his or her life, such as when a landowner conveys the property to a third party but retains a life estate and the ability to encumber the property beyond his or her life. In that case, the granting instrument's terms would control and the life tenant may consent to a term beyond his or her life.

*Response:* The final rule covers the overwhelming majority of life estates. If such a situation arises, the BIA will address it on a case-by-case basis, using, if necessary the flexibility in 25 CFR 1.2 to waive the regulations in this Chapter.

#### d. Life Estates—Other Comments

*Comment:* A commenter expressed confusion that the rule requires direct payments to life tenants, but otherwise limits direct payments to landowners, and requested clarification on whether this is intended to apply where the life tenant is non-Indian. Other commenters stated that life tenants should have the option of having the funds deposited in their IIM accounts, if they have one, because otherwise the funds could be subject to levies or garnishment.

*Response:* The final rule requires direct payment to life tenants regardless of whether they are Indian.

*Comment:* A few commenters suggested stating “will or other conveyance document” or “legal instrument” creating the life estate because sometimes a deed creates a life estate.

*Response:* No change is made to the final rule because a deed is considered a conveyance document.

#### 4. When a Right-of-Way Is Needed (PR 169.004)

*Comment:* A few tribal commenters requested clarification that a tribe owning all the interests in a tract need not obtain a right-of-way for that tract.

*Response:* The proposed and final § 169.4(b)(1) state that an Indian landowner that owns 100 percent of the interests in a tract need not obtain a right-of-way grant. No clarification to the rule is necessary, as the definition of “Indian landowner” encompasses tribes.

*Comment:* A tribal commenter requested clarification that an Indian tribe or tribally owned entity that does not own a majority of interests in the tract must obtain a right-of-way with consent of the owners of a majority interest for the tract.

*Response:* The final rule incorporates this clarification. If the tribe already owns the majority of the interests, it need not obtain the consent of the other

fractional owners, but it must notify them of the right-of-way.

*Comment:* A few tribal commenters stated that if a tribe owns a separate legal entity, then the entity should not have to obtain a right-of-way across tribal land under the regulations. These commenters suggested adding an exemption for such legal entities or recognizing the authority of the tribe's governing body to adopt a resolution or other appropriate enactment to allow the tribe and tribally owned and controlled entities to use tribal land without a BIA-approved right-of-way.

*Response:* The final rule allows an entity that is wholly owned and operated by the tribe to use the tribe's tribal land without BIA approval where the tribe submits a resolution authorizing the right-of-way and describing the land across which the right-of-way will cross. This submission is necessary for the Bureau to keep track of authorized users of the Indian land. The Bureau will maintain a copy of the resolution and description in our records.

*Comment:* A tribal commenter requested more specificity as to what “an independent legal entity owned and operated by a tribe” is, noting that it has several enterprises and entities organized through different legal instruments and asking whether these entities must comply with part 169.

*Response:* Whether an enterprise or entity qualifies as “an independent legal entity owned and operated by a tribe” will be evaluated on a case-by-case basis.

*Comment:* One commenter requested adding tribally approved land use agreements, such as tribal land assignments, to the list of those exempted from the regulations. Another commenter requested clarification on what the term “land use agreements” includes.

*Response:* The final rule clarifies at FR 169.4(b) that land use agreements that are exempted from these regulations include tribal land assignments. Such land use agreements may also include permits granted by the Indian landowner for a revocable, non-possessory right of access for a very short term, for limited use of the land.

*Comment:* A tribal commenter stated that, to encourage development, the rule should allow permitting for utility service to homesites without BIA approval.

*Response:* Generally, a right-of-way or filing of a service line agreement would be required to provide utility service to homesites. Nevertheless, Indian landowners may grant permits to allow a revocable, non-possessory right of

access for a very short term, for limited use, where there will be no ground disturbance or risk of environmental damage. Examples include allowing a right of access for a cultural ceremony. BIA approval is not necessary for such permits and BIA will not administer or enforce permits on Indian land; the rule does not address permits because permits are appropriate only in very limited circumstances for a very limited term. Any use that requires more certainty in term (*i.e.*, not unilaterally revocable by the landowner) or requires a longer term, as utility infrastructure would, requires a right-of-way or service line agreement or other authorization under § 169.4. BIA may grant permits for use of BIA land, and part 169 will apply to those permits as appropriate. See Section C for more on terms.

*Comment:* Some tribal commenters expressed support for the proposed rule's provision that the right-of-way regulations do not apply to other authorizations to cross Indian land, such as a federally approved lease. The commenter stated that this provision protects a tribe's choice to use the leasing statutes for energy, telecommunication and transportation corridors.

*Response:* The final rule retains these provisions.

*Comment:* One commenter stated that the regulation should exempt anyone travelling on an established State or county road across Indian land from obtaining a right-of-way.

*Response:* A person travelling across Indian land on a road is not obtaining a legal interest in the property, and therefore does not need a right-of-way grant. To the extent the commenter means to ask whether a State or county needs a right-of-way to place a road across Indian land, the road would require the transfer of a legal interest, thus requiring a right-of-way grant.

*Comment:* Several tribal commenters noted that the provision regarding compliance with statute, judicial order, or common law, where access is allowed by such statute, judicial order, or common law, could be misinterpreted to allow for prescriptive easements. Another tribal commenter requested clarification that prescriptive easements or adverse possession through common law, or otherwise, are not permitted on trust land.

*Response:* The final rule replaces "statute, judicial order, or common law" with "law" to address the commenter's concern. No interest in trust land may be acquired by adverse possession. See *Cohen's Handbook on Federal Indian Law* section 15.09[4], at 1604 (2012 ed.). Except as required for access to a

mineral estate or specific authorization from Congress, prescriptive easements are not available on trust land, because trust land generally cannot be divested. See *e.g.*, *Del Rio Drilling Programs v. United States*, 35 Fed. Cl. 186 (1996) (mineral estate remains dominant, and a subsurface owner has a right of reasonable access to the minerals below). This is not specified in the final rule because it does not directly relate to rights-of-way.

*Comment:* One commenter asked whether a right-of-way grant is required for general ingress and egress by a lessee.

*Response:* A right-of-way grant is generally needed if an interest in the Indian land is being transferred. The leasing regulations provide that a lease may address access to the leased premises by roads or other infrastructure, and such roads and infrastructure must comply with 25 CFR part 169, unless otherwise stated in the lease. Roads and other infrastructure within the leased premises are covered by the lease. See 25 CFR 162.019.

*Comment:* A commenter requested clarification on whether "as-built" rights-of-way to correct unauthorized uses of Indian lands could be issued without a land use agreement authorizing use of the Indian land.

*Response:* The intent of the exemption for land use agreements is not to allow what would otherwise require BIA approval to bypass 25 CFR part 169 requirements by calling it a "land use agreement." The intent is to allow for land use agreements such as those authorized by 25 CFR part 84. "As built" rights-of-way would be authorized under 25 CFR part 169.

*Comment:* A tribal commenter suggested the regulations include a provision under which a tribe could elect to dedicate a portion of tribal land for the construction, operation, and maintenance of tribally owned public transportation facilities, such as roads, bridges, and highways, and record that dedication in the appropriate land title and records office. A few tribal commenters suggested adding a new section recognizing that tribes may dedicate their own trust or restricted lands for public transportation, without having to obtain rights-of-way.

*Response:* These regulations do not affect a tribe's ability to dedicate tribal land for certain uses but granting interests in Indian land to third parties would require a right-of-way.

*Comment:* One commenter expressed concern that, by deleting the various types of rights-of-way listed in current § 169.23 (railroad station buildings, depots, machine shops, side tracks,

etc.), one could argue that such uses are no longer covered by the regulation.

*Response:* The final rule covers all uses that fall within final § 169.5, whether listed or not.

*Comment:* A commenter requested excluding "customary and traditional dirt roads" used to access homesites from the need to obtain a right-of-way grant.

*Response:* Customary and traditional dirt roads to access homesites may be addressed in the homesite lease, rather than requiring a separate right-of-way grant.

#### 5. Types of Uses for Rights-of-Way (PR 169.005)

*Comment:* A commenter requested clarification of whether the provision in PR 169.005(a)(4) for "service roads and trails essential to any other right-of-way purpose" is intended to address access across only the same allotment or access across adjacent or nearby Indian land. Another commenter requested that "appurtenant to" replace "essential to" to avoid disputes over what types of service roads and trails are "essential."

*Response:* The question of whether a right-of-way is required for service roads and trails is required is determined on a case-by-case basis. The final rule replaces "essential to" with "appurtenant to" as requested by the commenter.

*Comment:* Commenters requested additions to the list of rights-of-way types part 169 is intended to cover, including: oil and gas facilities such as well pads and associated service roads; pump stations, meter stations and other appurtenant facilities to oil and gas pipelines; and power projects (power plants, substations and receiving stations). A commenter also requested specifying that "oil and gas" includes hydrocarbons, refined products, natural gas liquids and other oil and gas products. One commenter stated that radio, television, and other communication facilities should be added to the list of examples.

*Response:* The final rule adds pump stations, meter stations and other appurtenant facilities to the oil and gas pipeline item. Appurtenant facilities may also include well pads. Whether such facilities will be addressed in the grant depends upon the specific circumstances. The facilities may be included in the overall mineral lease, and therefore addressed in separate mineral leasing regulations. If the facilities are associated with a mineral lease on a split estate (in which the mineral estate and the surface estate are not owned by the same person or entity), then it may be appropriate for

the grant of right-of-way to address the facilities.

The final rule does not add examples of oil and gas products because the term "oil and gas" is broad enough to encompass each of the examples. The final rule does not add power plants, substations and receiving stations to the list of examples because these items may be more appropriately governed by the leasing regulations at 25 CFR part 162 than these rights-of-way regulations. The list of examples includes "telecommunications" lines, which is intended to cover computer, television, radio, and other types of lines for technology used for communication over distances.

*Comment:* One commenter requested an exception from part 169 for temporary access for mineral exploration.

*Response:* The mineral regulations, rather than part 169, address temporary access for mineral exploration and geological and geophysical permits. See 25 CFR parts 211 and 212.

*Comment:* One commenter requested a catch-all provision for the list of examples of rights-of-way such as "any other right-of-way that comes to be recognized as such" to capture any new types of rights-of-way that will arise in the future.

*Response:* The final rule adds a catch-all provision as requested at FR 169.5(a)(13).

*Comment:* One commenter requested that the final rule delete the examples of right-of-way uses and instead stated that the part covers rights-of-way for all linear and non-linear surface uses.

*Response:* The final rule retains the list of examples for guidance.

*Comment:* One power administration commenter requested clarification that a right-of-way includes the right to manage vegetation and conduct emergency and routine maintenance as necessary to maintain safe and reliable electric transmission service. The commenter also requested an appendix to the rule setting out specifically which equipment is included in a transmission system right-of-way and allow for inspection, maintenance, repair, operations, upgrade and replacement of the equipment. The commenter also asked that the description be more specific with regard to electric transmission systems.

*Response:* The final rule adds a new paragraph (b) to § 169.5 to clarify that a right-of-way includes access necessary to manage vegetation and maintain and repair equipment. The final rule does not include an appendix, because the text of the rule specifies that poles, towers, and appurtenant facilities are

included in a transmission right-of-way use, and the new paragraph (b) specifies that inspection, maintenance, and repair are included in the use. With regard to operations, upgrade, and replacement of the equipment, generally these activities would be allowed, but if they expand or change the use of the right-of-way then an amendment to the existing grant or a new right-of-way grant would be required. The final rule adds more specificity to § 169.5(a)'s description of electric transmission, as requested by the commenter.

*Comment:* One commenter stated that any questions as to a right-of-way's validity should be decided in tribal court.

*Response:* Because the rights-of-way are issued by the Federal Government, the proper forum for disputes related to their validity is the Federal administrative agency (Bureau of Indian Affairs, with the possibility for appeal to the Interior Board of Indian Appeals). Appeals from federal administrative decisions are heard in the United States District Courts.

*Comment:* A few commenters read proposed 169.005(b) (now FR 169.6) as allowing prior unperfected and unapproved rights-of-way to be recognized as valid and legal rights-of-way.

*Response:* This provision does not validate or approve existing, unapproved rights-of-way. Any unauthorized use remains unauthorized.

*Comment:* A commenter asked that proposed 169.005(b) (now FR 169.6) state that BIA will act on requests, rather than "grant," to clarify that the grant of a right-of-way is not automatic.

*Response:* The final rule clarifies at final § 169.6 that BIA will act on requests.

#### 6. Applicability to Existing Rights-of-Way and Applications (PR 169.006/FR 169.7)

*Comment:* A commenter requested that the new regulations not apply to any applications that are pending BIA approval, because applying the new regulations would create legal uncertainty as to the enforceability and effectiveness of those applications. This commenter was particularly concerned that the applicant would be penalized for BIA's delay in approval by being forced to obtain new consents from landowners and resubmit information.

*Response:* Applicants who have already submitted a right-of-way application under the pre-existing regulations, prior to the effective date of the new regulation, would not have to obtain any new consents or resubmit materials for the application as a result

of the new regulations. BIA will review the application under the regulations existing at the time of submission, unless the applicant chooses to have the new regulations apply by withdrawing and resubmitting the application.

*Comment:* Several commenters requested that the rule expressly state that it does not and will not impose any new burdens, limitations, restrictions, or responsibilities on preexisting right-of-way grants issued through other statutory authorities. A commenter requested clarification that the regulations do not apply to railroad rights-of-way granted in perpetuity under specific statutes enacted by Congress in the late 19th century.

*Response:* Rights-of-way under statutes other than 25 U.S.C. 323 exist. Only new grants of rights-of-way must comply with part 169's new provisions for obtaining a right-of-way. Existing approved rights-of-way remain valid under the new regulations. The new provisions of part 169 do not affect the authority of those specific railroad statutes; however, the procedural requirements of the new part 169 will apply to the extent that they do not conflict with the authorizing statute or explicit provisions in the grant. For rights-of-way granted under specific statutory provisions, rather than the general authority in 25 U.S.C. 323, BIA will read the existing statutory requirements and grant provisions in a manner that promotes consistency with the new regulations.

*Comment:* Many commenters opposed the proposed provision stating that the new regulations apply retroactively to existing right-of-way grants except where they "conflict" with the express terms of those grants, and stated that rights-of-way approved prior to the new rule's effective date should not be subject to the new rule. These commenters pointed out that most pre-existing grants are silent on the requirements imposed by the new regulations. For example, a right-of-way grant without a specific provision waiving BIA approval or consent, as was the common practice (because express language was never before required), would now require BIA approval and landowner consent for certain actions (assignments, e.g.). A few commenters asserted that existing rights-of-way grants are property rights. Commenters also stated that BIA cannot legally modify or insert new material terms into existing grants, but must honor the terms as written and the parties' expectations as of the time the grant was issued. These commenters stated that exempting the existing rights-of-way would preserve the integrity of existing

contracts and avoid legal issues for breach of contract, breach of implied duty of good faith and fair dealings, or takings.

With regard to assignments, specifically, several tribal commenters requested that consent and approval always be required because there have been numerous instances in which a right-of-way was assigned with no notification to, or consent of, the tribe, meaning that neither the landowner nor BIA may have record of the authorized user of the Indian land.

*Response:* The new regulations are not intended to replace the original grant or statutory provisions, but the procedural requirements of these new regulations apply to the extent they do not conflict with the original grant or statutory provisions.

In addition, in response to tribal commenters' concerns that, in the past, rights-of-way were assigned without any notification to BIA or the tribe, the final rule establishes a new requirement for the assignee to notify BIA of past assignments to ensure BIA is aware of the identity of the legal occupant of the Indian land in furtherance of meeting its trust responsibilities to protect the Indian land from, for example, trespass. From the perspective of the assignee, this recordation requirement is simply a good business practice to ensure the Department has documentation of the assignee's right to occupy Indian land. The final rule establishes a target deadline of 120 days after the effective date of the regulations for assignees to either provide BIA with documentation of their assignment, or to request an extension of time to provide BIA with such documentation. This requirement is not included in the previous version of the regulations but is imperative to BIA's ability to fulfill its trust responsibilities.

For any right-of-way grant application submitted but not yet approved by the effective date of the regulations, the grantee may withdraw the application and resubmit under the new rule. Otherwise, BIA will review the application under the regulations in existence at the time of submission, but once the right-of-way is granted, procedural provisions of the new rule apply. For example, if the grantee or assignee wants to assign, amend, or mortgage the right-of-way after the effective date of these regulations, the grantee or assignee will have to follow the procedures in this regulation, to the extent that such new processes and requirements do not change the terms of the pre-existing grant or statutory authority. In other words, if the preexisting grant or statutory authority

is silent on a particular procedural requirement, such as an assignment or amendment, the new regulatory provisions concerning that procedure would apply.

Examples of procedural provisions that apply include procedures for obtaining amendments, assignments, mortgages, renewals, and complying with and enforcing rights-of-way grants. However, many current grants include language granting to the grantee and the grantee's assignees; in that case, the grant would contain explicit language allowing the grant to be freely assigned without landowner consent or BIA approval, and that explicit grant language would govern. An example of a non-procedural provision is a regulatory statement of what jurisdiction applies.

The question of whether tribal law or taxes apply to preexisting right-of-way grants after the effective date of the new regulations is not before the Department at this point, but to the extent any preexisting right-of-way is assigned or amended, the provisions of the new regulations govern.

*Comment:* A few commenters stated that the rule should allow for renewals of rights-of-way grants existing prior to these regulations without the need to obtain consent because those older grants may not have addressed the possibility of renewal. Commenters further stated that this new requirement should not be applied retroactively, and that otherwise, this rule will effectively prevent renewal of existing rights-of-way, even when there is no change in use, requiring a survey and full application process.

*Response:* If the original right-of-way was granted prior to the effective date of these regulations and is silent on whether renewals are permitted and under what conditions, then these regulations apply, and the grantee must follow the procedural requirements of these new regulations to obtain a renewal. See Section C for more on renewals.

*Comment:* A few commenters stated that the review and adjustment requirements should not be applied retroactively. The commenters note that the current regulations provide no requirement for review or adjustment.

*Response:* The review and adjustment requirements do not apply retroactively to grants that pre-date these regulations because they are non-procedural (*i.e.*, substantive) provisions that would affect compensation, a core term of the grant; those grants were issued based on the compensation established when they were negotiated and approved.

#### 7. Administration of Regulations by Tribes on BIA's Behalf (PR 169.007/FR 169.8)

*Comment:* One tribal commenter requested that, throughout the regulations, "BIA," "BIA office," and "we" should be revised to clarify that it refers to the tribe in those cases in which the tribe administers real estate services under a Public Law 93-638 contract.

*Response:* The term "BIA" is defined to include tribes acting on behalf of the Secretary or BIA under Indian Self-Determination and Education Assistance Act contracts or compacts.

*Comment:* One commenter stated that tribes do not gain any substantive authority to administer rights-of-way under the new rules because the new rules do not allow tribes to grant, approve, or disapprove a right-of-way document or waiver, cancellation or appeal.

*Response:* The new rules make no change to the scope of functions a tribe may compact or contract for, but does specify which functions may not be contracted or compacted because they are "inherently Federal."

*Comment:* One commenter asked that this section specify that a tribe may require that the applicant negotiate with it as a condition of obtaining tribal consent for the right-of-way.

*Response:* When tribal consent for a right-of-way provision is required, the tribe may require that the applicant negotiate the terms of consent.

*Comment:* One commenter stated that the rule should be clearer on whether BIA or the tribe administers the functions.

*Response:* The final rule clarifies that applicants may check with either the BIA office or the tribal office to determine whether the tribe has compacted or contracted to administer realty functions.

*Comment:* One commenter asserted that tribes are not authorized to compact or contract to administer BIA functions with regard to pipeline rights-of-way because the Indian Self-Determination and Education Assistance Act (ISDEAA) does not specify that program.

*Response:* Realty functions, including administration of rights-of-way, may be compacted or contracted under the ISDEAA. See 25 U.S.C. 450f(a)(1)(A)-(E).

*Comment:* A commenter stated that the term "tribal organization" in this section is unclear as to whether it includes entities such as the telephone authority. Another commenter requested clarification on which officer or entity in the tribe is authorized to

make decisions in administering the compacted or contracted functions.

*Response:* The ISDEAA governs the meaning of “tribal organization” in this section. Tribal law governs which officer or entity is authorized to make decisions on behalf of a tribe.

**8. Laws Applicable to Rights-of-Way Approved Under These Regulations (PR 169.008/FR 169.9)**

*Comment:* A commenter stated that the rule should specify that a right-of-way “use” is interpreted consistently with general common law principles of easements and rights-of-way, and that Federal common law applies except that State law may apply where it is not hostile or aberrant to Federal policy or otherwise frustrates Federal policy.

*Response:* Final § 169.9 clarifies that rights-of-way are generally subject to Federal and tribal law, but not State law.

*Comment:* A commenter noted that the structure of the proposed section is disjointed and causes confusion. Other commenters stated that the section should be deleted because of the risk that the regulations could cause confusion regarding what the law is and is unnecessary.

*Response:* The final rule redrafts this section to address concerns as to its disjointed and confusing nature and also divides the section into two separate sections, one addressing law (FR 169.9), and one addressing jurisdiction (FR 169.10).

**a. State Jurisdiction/State Law**

*Comment:* Several commenters opposed the proposed provision allowing parties to consent to the applicability of State law, stating that it is a waiver of sovereign immunity and that landowners may inadvertently choose State law by signing a document without full knowledge of the consequences.

*Response:* Proposed paragraph (c) was a choice of law provision that was intended to clarify that where a vacuum of applicable Federal and tribal law exists, the landowners may choose to apply State law. The final rule deletes this provision due to commenters’ opposition.

*Comment:* Several commenters opposed the proposed provision indicating that State law applies if the tribe, Congress, or a Federal court has made it expressly applicable. Several commenters stated that this provision invites a broad reading, allowing State law to apply in nearly every circumstance. One commenter stated that the *Kennerly* case forecloses the application of State jurisdiction over

Indian land subject to a right-of-way, whether by a tribal member or a tribe absent a statute conferring jurisdiction. One commenter suggested the provision instead state that rights-of-way are not subject to State law “except to the extent allowable under Federal law and consistent with Indian treaty rights and tribal sovereignty.”

*Response:* To address the comments, the final rule deletes the specifics on when State or local law may apply and instead provides that “generally” State and local law do not apply. The provision allowing landowners to agree to the application of State law was intended for situations in which neither the tribe nor Federal law address a specific topic, and the tribe chooses State law to fill the vacancy (*e.g.*, if a tribe chooses to apply State law regarding cable access). The proposed provision regarding Congress was included because there are Federal statutes conferring jurisdiction over Indian land subject to a right-of-way (*e.g.*, Maine Indian Claims Settlement Agreement of 1980 or Pub. L. 83–280). If State law is made applicable by Federal or tribal law, these instances are covered by the other provisions establishing the applicability of Federal and tribal law.

*Comment:* Some commenters stated that the new regulation conflicts with established law (in *Strate*) because tribal law and jurisdiction does not presently apply to lands subject to a right-of-way.

*Response:* The new regulation provides that future rights-of-way will explicitly state that the grant does not diminish the tribe’s jurisdiction.

*Commenter:* Some commenters stated that this section truncates State jurisdiction over Indian lands, violating the Federalism executive order.

*Response:* The Federalism executive order addresses the balance of authority between the Federal government and States; it is inapplicable here because this rule addresses the balance of authority between tribal and State law.

**b. Tribal Law**

*Comment:* A few commenters stated that proposed paragraph (a) is erroneous in stating that rights-of-way are subject to tribal law because Congress preempted any application of tribal law to transportation by rail and State laws apply to utility service on tribal lands. A commenter also noted that some tribes have relinquished jurisdiction by treaty.

*Response:* Paragraph (a), as well as other paragraphs in this section, do not expand the applicability of tribal law; rather it clarifies that the grant of a

right-of-way will not limit any existing applicability in any way.

*Comment:* Several tribal commenters stated that the proposed paragraph (a)(2) should simply say that rights-of-way are subject to tribal law “except to the extent that tribal law is inconsistent with applicable Federal laws” and delete the provisions in proposed paragraph (b) allowing for tribal law to modify the regulations under certain circumstances. Tribal commenters stated that the provisions are too restrictive and disrespect tribal sovereignty. Additionally, non-tribal commenters expressed concerns that tribal regulations may change without any notice or consent of the right-of-way grantee. Another stated that if the provision is not removed, it should at least clarify that the tribal law will not be effective if it conflicts with other binding Federal laws. One tribal commenter stated that allowing the tribal law to supersede unless the tribe’s law would “conflict with our general trust responsibility” provides no guidance. Some tribal commenters stated that the regulation should provide that tribal law “presumptively applies.” A few commenters stated that tribal laws should apply to all land within the reservation (both tribal and allotted); otherwise, an individual could consent to a right-of-way that is in violation of tribal law.

Some commenters opposed the applicability of tribal law under any circumstance because a grantee that needs to obtain rights-of-way across several tribes’ lands could be subjected to multiple, and possibly conflicting requirements, undermining the purpose of the rule to streamline the process. A tribal commenter also suggested deleting the requirement that the tribe provide BIA with notice that the law supersedes because this could become a technical glitch that would hinder application of tribal laws that would otherwise be applicable.

*Response:* In response to these comments regarding the uncertainty of whether tribal law would supersede or modify Federal law, the final rule simplifies this provision to state that rights-of-way are subject to tribal law except to the extent that the tribal law is inconsistent with applicable Federal law. Tribes are sovereigns with the inherent power to make laws. It is the responsibility of anyone doing business within a particular jurisdiction to know the law of that jurisdiction.

*Comment:* One commenter stated that the phrase “except to the extent that those tribal laws are inconsistent with these regulations or other applicable Federal law” should be deleted because

it is too confusing, and is unnecessary given that it has already been established that Federal law applies.

*Response:* The final rule retains this necessary provision because there may be circumstances in which tribal law would apply but for the fact that the tribal law is inconsistent with Federal law.

### c. Tribal Jurisdiction

*Comment:* A few tribal commenters suggested line edits to this section to clarify that the tribe has jurisdiction over persons, as well as activities, and to change “not inconsistent with” to “within” the right-of-way. Commenters also stated that people and activities should be included in the scope of things over which the tribe’s jurisdiction remains unaffected.

A few other commenters requested the rule instead expressly describe circumstances in which the tribe’s jurisdiction does not extend to lands subject to a right-of-way, such as taxation of non-tribal members on fee land within a reservation. Another commenter stated that the rule should reflect that tribes have “virtually no authority over non-member conduct.”

*Response:* The final rule does not grant or add any jurisdiction to tribes, but establishes that the grant of right-of-way does not diminish the tribe’s jurisdiction. The final rule also clarifies that the grant of right-of-way does not affect the tribe’s jurisdiction over people and activities, in addition to land. A grant of right-of-way is merely a grant of a specific use of the land for a specified period of time within the confines of the grant document. The grant does not in any way diminish tribal sovereignty over those lands.

*Comment:* A commenter suggested deleting the introduction to proposed paragraph (e) because it suggested a tribe might cede tribal jurisdiction in its consent to a right-of-way, while *Kennerly* established that this can be done only through an Act of Congress.

*Response:* The final rule deletes the identified provision because, as the commenter points out, the U.S. Supreme Court has determined that a tribe may not cede jurisdiction without an Act of Congress. See *Kennerly v. District Court*, 400 U.S. 423 (1971).

*Comment:* One tribal commenter stated that the regulations should remind the public of the basic principle of Indian law that tribes may negotiate a right-of-way without including State regulatory bodies.

*Response:* While the commenter is correct, it is not necessary to state so in the regulation.

*Comment:* A commenter stated that proposed paragraph (e)’s language that the tribe has jurisdiction over those “who enter into consensual relationships” does not apply in the context of right-of-way grants because case law has established that grantees are not in a “consensual relationship” with the tribe by virtue of the right-of-way grant. Other commenters suggested that the provision stating that the regulation does not limit the tribe’s inherent sovereign power to exercise civil jurisdiction over non-members “who enter into consensual relationships” with the tribes improperly limits the tribes’ sovereign power by implying that the *Montana* analysis extends beyond fee land.

*Response:* The proposed language regarding a consensual relationship was derived from the decision in *Montana v. United States*, 450 U.S. 544, 565 (1981). As commenters pointed out, *Montana*’s general rule limiting tribal authority over nonmembers’ activities and its two exceptions, including the consensual relationship exception, is limited to non-Indian fee land. 450 U.S. at 557. See also *Strate v. A-1 Contractors*, 520 U.S. at 453 (describing *Montana*’s “main-rule and exceptions” as “[r]egarding activity on non-Indian fee land”); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 (2001) (referring to “*Montana*’s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land”); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 813 (9th Cir. 2011) (noting that “*Montana* ordinarily applies only to non-Indian Land”). The *Montana* court recognized that a tribe may regulate nonmembers’ activities “on land belonging to the [tribe] or held by the United States in trust for the [tribe].” 450 U.S. at 557. For this reason, the final rule eliminates the “consensual relationship” language and instead states simply that the regulations do not limit the tribe’s inherent sovereign power to exercise civil jurisdiction over non-members on Indian land. *Plains Commerce Bank v. Loving Family Land & Cattle Co.*, 554 U.S. 316, 327–28 (2008). This statement confirms that the grant of right-of-way preserves any pre-existing tribal authority.

Even if *Montana*’s rule and exceptions do apply, we disagree with the commenters that a tribe is not in a consensual relationship with a right-of-way grantee on tribal trust or restricted land. Under *Montana*, an Indian tribe “may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its

members, through commercial dealing, contracts, leases, or other arrangements.” 450 U.S. at 565. As explained above, and required by the 1948 Act, tribal consent is required for the right-of-way. Therefore, the consensual relationship exception applies.

*Comment:* Several commenters asserted that the tribe has no jurisdiction over right-of-way land or over non-Indians, pointing to the decision in *Strate* for the premise that land subject to a right-of-way is the equivalent of fee land.

*Response:* As described above, the fact pattern, and, therefore, the cited holding, in *Strate* does not apply to rights-of-way granted under these regulations because the regulations and grants establish continued tribal jurisdiction over the granted land. *Strate* does confirm, however that “where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.” 520 U.S., at 453 (brackets and internal quotation marks omitted).

*Commenter:* One commenter suggested that proposed paragraph (e)(5), regarding the character of the land as Indian country under 18 U.S.C. 1151, should add “as interpreted and supplemented by Federal case law.”

*Response:* The final rule does not add this modifier because it is unnecessary. Whether land is “Indian country” is a legal question.

*Comment:* One commenter stated their opposition to the tribe regulating allotted lands, and asserted that, under *Strate*, allotted or other land subject to a right-of-way grant is not subject to the tribe’s jurisdiction.

*Response:* The right-of-way grant does not affect the tribe’s jurisdiction over the land. If the land is within the boundaries of the tribe’s reservation, then the tribe has jurisdiction, regardless of whether a right-of-way has been granted. See *Cohen’s Handbook on Federal Indian Law* section 4.01[2][c], at 216–218 (2012 ed.).

*Comment:* A few commenters noted that proposed paragraph (e)(2) seems to assert that the tribe has the power to tax trust land, and instead should be limited to allowing the tribe to tax improvements and activities.

*Response:* This section is simply clarifying that the regulations do not affect any pre-existing jurisdiction that the tribe may have. See *Merrion v. Jicarilla*, 455 U.S. 130 (1982); *Cohen’s Handbook on Federal Indian Law* section 8.01[1], at 676 (2012 ed.) (“Indian tribes have the power to law and collect taxes, subject to certain

exceptions with respect to non-Indians”).

*9. Taxes Applicable to Rights-of-Way Approved Under These Regulations (PR 169.9/FR 169.11)*

*Comment:* Several commenters supported the proposed rule’s affirmation of tribes’ exclusive and continuing sovereign authority to tax improvements and activities on lands subject to rights-of-way. These commenters suggested the final rule require that the right-of-way applications and documents include references to this section and describe the basis for this section to reinforce the Department’s position. One commenter recommended that the regulations prohibit State taxation of any compensation the tribe receives for its right-of-way and any pass-through to the tribe or tribal members. This commenter noted that if a State requires a tribe to pay back any of the compensation it receives for a right-of-way, the State is effectively circumventing the compensation requirement, benefitting, for example, a rural electric cooperative at the expense of the tribal beneficiaries. One commenter stated that the U.S. Supreme Court has ruled that certain State taxes may apply to utilities that operate within Indian rights-of-way, pointing to *Wagon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95 (2005).

*Response:* The final rule at § 169.125(c) adds requirements for the right-of-way documents to include references to the regulatory section on taxation. Tribes have inherent plenary and exclusive power over their citizens and territory, which has been subject to limitations imposed by Federal law, including but not limited to Supreme Court decisions, but otherwise may not be transferred except by the tribe affirmatively granting such power. See *Cohen’s Handbook of Federal Indian Law*, 2012 Edition, section 4.01[1][b]. The U.S. Constitution, as well as treaties between the United States and Indian tribes, executive orders, statutes, and other Federal laws recognize tribes’ inherent authority and power of self-government. See *Worcester v. Georgia*, 31 U.S. 515 (1832); *U.S. v. Winans*, 198 U.S. 371, 381 (1905) (“[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”); *Cohen’s Handbook of Federal Indian Law*, 2012 Edition, section 4.01[1][c] (“Illustrative statutes . . . include [but are not limited to] the Indian Civil Rights Act of 1968, the Indian Financing Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975 . . . [and] the

Tribe Self-Governance Act . . . In addition, congressional recognition of tribal authority is [also] reflected in statutes requiring that various administrative acts of . . . the Department of the Interior be carried out only with the consent of the Indian tribe, its head of government, or its council.”); *Id.* (“Every recent president has affirmed the governmental status of Indian nations and their special relationship to the United States”).

Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, preempts State and local taxation of permanent improvements on trust land. See *Confederated Tribes of the Chehalis Reservation v. Thurston County*, 724 F.3d 1153, 1157 (9th Cir. 2013) (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973) (“use of permanent improvements upon the land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens [25 U.S.C. 465] must be construed to encompass an exemption for the former”). Similarly, section 465 preempts state taxation of rent payments by a lessee for leased trust lands, because “tax on the payment of rent is indistinguishable from an impermissible tax on the land.” See *Seminole Tribe of Florida v. Stranburg*, No. 14–14524, \*13–\*17, n.8 (11th Cir. 2015).

In addition, with a backdrop of “traditional notions of Indian self-government,” Federal courts have applied a balancing test to determine whether State taxation of non-Indians engaging in activity or owning property on the reservation is preempted. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The *Bracker* balancing test requires a particularized examination of the relevant State, Federal, and tribal interests. In the case of rights-of-way on Indian lands, the Federal and tribal interests are very strong. *Confederated Tribes of the Chehalis Reservation v. Thurston County*, 724 F.3d at 1157; see also *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (determining that “[a] key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on Federal funding”).

The Federal statutes and regulations governing rights-of-way on Indian lands occupy and preempt the field of Indian rights-of-way. The Federal statutory scheme for rights-of-way on Indian land is comprehensive, and accordingly precludes State taxation. State taxation would undermine careful work of

Federal actors analyzing the best interests of tribal beneficiaries under the trust responsibility.

The Federal regulatory scheme is pervasive and leaves no room for State law. Federal regulations cover all aspects of rights-of-way: Whether a party needs a right-of-way grant to authorize possession of Indian land; how to obtain a right-of-way grant; how a prospective grantee identifies and contacts Indian landowners to survey and negotiate for a right-of-way grant; consent requirements for a right-of-way and who is authorized to consent; what laws apply to rights-of-way; employment preference for tribal members; combining tracts with different Indian landowners in a single right-of-way grant; trespass; emergency action by us if Indian land is threatened; appeals; documentation required in approving, administering, and enforcing rights-of-way; right-of-way grant duration; mandatory grant provisions; construction, ownership, and removal of permanent improvements, and plans of development; legal descriptions of the land subject to a right-of-way; amount, time, form, and recipient of compensation (including non-monetary rent) for rights-of-way; valuations; bond and insurance requirements; Secretarial approval process, including timelines, and criteria for granting rights-of-way; recordation; consent requirements, Secretarial approval process, criteria for approval, and effective date for grant amendments, assignments, subleases, and mortgages; investigation of compliance with the terms of a right-of-way grant; negotiated remedies; late payment charges or special fees for delinquent payments; allocation of insurance and other payment rights; Secretarial cancellation of a grant for violations; and abandonment of the premises subject to a right-of-way grant.

Right-of-way grants allow Indian landowners to use their land profitably for economic development, ultimately contributing to tribal well-being and self-government. Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments. State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy. It is unequivocally the policy of the United States to attract economic development to Indian lands. State taxation can undermine the economic attractiveness of a right-of-way across Indian land. It can also effectively undermine the ability of a tribe, as a practical matter, to impose its own taxation. Consenting

to rights-of-way on trust or restricted land is one of several tools, including entering into leases, that animate “the traditional notions of sovereignty and [ ] the federal policy of encouraging tribal independence.” *Bracker*, 448 U.S. at 145 (citing *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 174–75 (1973)). The granting of rights-of-way on trust or restricted lands facilitates the implementation of the policy objectives of tribal governments through vital residential, economic, and governmental services. Tribal sovereignty and self-government are substantially promoted by rights-of-way under these regulations, which require significant deference, to the maximum extent possible, to tribal determinations that a grant provision or requirement is in its best interest. See Joseph P. Kalt and Joseph William Singer, *The Native Nations Institute for Leadership, Management, and Policy & The Harvard Project on American Indian Economic Development, Joint Occasional Papers on Native Affairs, Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, No. 2004–03 (2004) (“economically and culturally, sovereignty is a key lever that provides American Indian communities with institutions and practices that can protect and promote their citizens interests and well-being [and] [w]ithout that lever, the social, cultural, and economic viability of American Indian communities and, perhaps, even identities is untenable over the long run”).

Another important aspect of tribal sovereignty and self-governance is taxation. Permanent improvements and activities on the premises subject to a right-of-way and the interest itself may be subject to taxation by the Indian tribe with jurisdiction over the leased property. The Supreme Court has recognized that “[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). State and local taxation of grantee-owned improvements, activities conducted by the grantee, and the right-of-way interest also has the potential to increase project costs for the grantee and decrease the funds available to the grantee to compensate the Indian landowner. Increased project costs can impede a tribe’s ability to attract non-Indian investment to Indian lands where such investment and participation are critical to the vitality of tribal economies. An increase in project costs is especially damaging to

economic development on Indian lands given the difficulty Indian tribes and individuals face in securing access to capital. A 2001 study by the U.S. Department of the Treasury found that Indians’ lack of access to capital and financial services is a key barrier to economic advancement. U.S. Dept. of the Treasury, *Community Development and Financial Institutions Fund, The Report of the Native American Lending Study at 2* (Nov. 2001). According to the report, 66 percent of survey respondents stated that private equity is difficult or impossible to obtain for Indian business owners. *Id.*

Tribes may contractually agree to reimburse the non-Indian grantee for the expense of the tax, resulting in the economic burden of the tax ultimately being borne directly by the tribe. Accordingly, the very possibility of an additional State or local tax has a chilling effect on potential grantees as well as the tribe that, as a result, might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs. Such dual taxation can make some projects less economically attractive, further discouraging development in Indian country. Economic development on Indian lands is critical to improving the dire economic conditions faced by American Indians and Alaska Natives. The U.S. Census Report entitled *We the People: American Indians and Alaska Natives in the United States*, issued February 2006, documented that a higher ratio of American Indians and Alaska Natives live in poverty compared to the total population, that participation in the labor force by American Indians and Alaska Natives was lower than the total population, and that those who worked full-time earned less than the general population. See also U.S. Census American Community Survey Brief: *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007–2011* (Issued February 2013).

In addition, Congress specifically allowed for State taxation of rights-of-way on Indian land in other instances, such as at 25 U.S.C. 319. The fact that Congress did not specifically authorize State taxation at 25 U.S.C. 323 evidences that it did not intend for rights-of-way granted under that authority to be taxable by the State. Indeed, to the extent that the lack of a specific authorization for State taxation creates an ambiguity, the Department expressly determines, for all the reasons stated above, that State taxation is not authorized under 25 U.S.C. 323 and would substantially undermine the statutory scheme.

*Comment:* One State commenter stated that it addresses the dual taxation issue by entering into intergovernmental agreements with the tribes, whereby the State collects the tax and shares the revenue with the tribes. The State expressed its concern that if the rule removes State jurisdiction to tax projects in rights-of-way, then tribes will have to undertake the expensive auditing and tax collection functions, and the uniformity of intergovernmental agreements would be lost.

*Response:* Nothing in these regulations precludes tribes, States, and local governments from entering into cooperative agreements to address taxation and regulatory issues. The Department encourages such cooperative agreements.

*Comment:* One commenter requested clarification that State or local governments may not assess a tax, fee, assessment, etc., on materials used or services performed in constructing improvements in rights-of-way.

*Response:* The final rule’s term “activities” is intended to include, among other things, materials used or services performed in constructing improvements in the right-of-way.

*Comment:* A few commenters stated that certain individuals or entities should not be subject to taxation, such as when a State, county, city, other tax-exempt entity, or allottee is making the improvements, participating in the activities, or holding the possessory interest.

*Response:* The final rule does not change the scope of individuals and entities that a tribe may tax, but merely recognizes explicitly this authority where it exists.

*Comment:* One commenter noted that “possessory interest” should instead be “right-of-way interest.”

*Response:* The final rule replaces “possessory interest” with “right-of-way interest” in response to this comment.

*Comment:* One commenter stated that by prohibiting State taxation on rights-of-way on Indian land, the rule does not guarantee that tribes commensurately gain taxing authority, but rather opens a jurisdictional vacuum. The commenter stated that a vacuum would be detrimental to the public as a whole and tribal members who live near rights-of-way.

*Response:* The rule does not create a jurisdictional vacuum, as tribes may tax within their jurisdiction; it is up to the tribe whether to exercise that taxing jurisdiction.

*Comment:* A few commenters stated that the proposed provisions regarding improvements being subject to taxation by tribes are unnecessary and should be



deleted, because they could be read to expand tribes' taxing authority rather than just preserve taxing authority where it already exists.

*Response:* The final rule combines the proposed provisions into one comprehensive provision at paragraph (b) addressing tribal taxation of improvements. The final rule does not change the substance of the proposed rule. The commenters are correct that this provision is intended to preserve tribal taxation authority. The Department has determined that no change is necessary to the proposed language, that improvements "may be subject to taxation by the Indian tribe," because this language states that such authority may exist without providing independent authority for taxation.

*Comment:* A few commenters stated that proposed § 169.009's use of the phrase "subject only to Federal law" is ambiguous. One said it could be read to exclude tribal law. Another commenter asked specifically whether any "fee, tax, assessment" under this section would include State and local income taxes, gross receipt taxes, payroll taxes, and personal property taxes. A few commenters stated that there are Federal court decisions upholding State taxes on interests or activities in a right-of-way, including *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184 (9th Cir. 1971) and *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976). One commenter stated that the rule should clarify that Federal court decisions' precedential weight should be limited to rights-of-way granted before the effective date of the revised regulations.

*Response:* To clarify, the phrase "subject to" in final rule § 169.11 (and PR 169.009) means that State or political subdivisions of States may not propose fees, taxes, assessments, etc., unless Federal law provides otherwise. Federal law includes, but is not limited to, Federal statutes, Federal regulations, treaty provisions, Executive orders, or Federal case law. Each fee, tax, and assessment is subject to an analysis under Federal law, including any applicable Federal case law precedent. The Department agrees that Federal case law issued prior to these regulations may have limited precedential weight because they did not have the benefit of the Department's analysis under *Bracker*.

*Comment:* One commenter stated that there is already extensive Federal regulation over the national power grid, and to the extent the rule's provisions could authorize new taxes on electric transmission services, it could interfere with national energy policy by adding

costs to ratepayers. Another commenter stated that the rule extends beyond the Department' authority by unnecessarily complicating jurisdictional issues on Indian land. These and other commenters stated that the rule is contrary to current practices in which utilities pay county property taxes for facilities located on Indian lands. One commenter asked whether the county would be subject to enforcement under this rule for imposing taxes.

*Response:* The final rule does not authorize taxation by tribes, States or political subdivisions of States, but preserves the tribe's ability to tax and states the Federal position in the *Bracker* balancing test on State taxation. While electric transmission may be subject to taxation by the tribe, a utility need not pay county property taxes for facilities that are outside the county's jurisdiction (*i.e.*, on Indian land). A county that imposes taxes on a utility within a right-of-way on Indian land is not subject to enforcement under this rule because it is not a party to the right-of-way.

*Comment:* A few commenters stated that a tribe's imposition of taxes upon non-members' interests or activities in a right-of-way is presumptively invalid, citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001).

*Response:* The case cited by the commenter for this proposition related to fee land. As described above, trust or restricted land that is subject to a right-of-way remains trust or restricted land and it does not become fee land if the tribe reserves its jurisdiction over the land.

*Comment:* One commenter suggested revising this section to state simply that taxes may be assessed if permitted by applicable law on land, improvements, and activities.

*Response:* The final rule retains the substance of the proposed provisions on taxation, rather than taking the commenter's suggestion, in order to explain the strong Federal and tribal interests against State and local taxation.

*Comment:* One commenter stated that, if the rule intends to alter the balance under the *Bracker* test, then it will impact the abilities of State and tribal governments to impose taxes, which is contrary to the statement in the Federalism section stating that the rule has no substantial direct effect on the States, the relationship between the national government and the States, or distribution of power. Another commenter stated that the Department should notify and consult with affected States before issuing a final regulation if it preempts State taxing authority.

*Response:* The Federalism analysis addresses the balance of power between the Federal government and States. The balance of power between tribal governments and States is outside the scope of Federalism. As noted above, States commented on the proposed rule, including on this provision.

*Comment:* One commenter questioned how any structure within a right-of-way for a term less than an indefinite term could be considered a "permanent improvement."

*Response:* The final rule adds a definition for permanent improvement to clarify its meaning; it is not necessary that the improvement be actually permanent, but that it be attached to (or in) the land.

*Comment:* One commenter stated that the tribe cannot tax the land because trust and restricted lands are not subject to taxation.

*Response:* The regulation addresses taxation of activities and interests, rather than taxation of the land itself.

#### 10. Notice of Rights-of-Way (PR 169.010/FR 169.12)

*Comment:* One commenter stated that the term "affecting" for Indian land is ambiguous and could be interpreted in an overly broad manner in this section to require notice of actions on non-Indian lands.

*Response:* The final rule changes "affecting" to "over or across" to clarify that the notice to Indian landowners is triggered for rights-of-way actions on or across their Indian land. The final rule also replaces the term "affecting" and "on or across" in other sections throughout the rule in response to this comment.

*Comment:* Several commenters opposed notifying individual Indian landowners by constructive notice. These commenters stated that every landowner is entitled to actual notice of actions involving their land, no matter how numerous the landowners are. A few commenters stated that the Department should provide direct notification by certified letter to individual Indian landowners of any determination. Other commenters stated that providing notice to every individual owner is too expensive and supported constructive notice and one suggested providing no notice to landowners.

*Response:* The final rule deletes the allowance for "constructive notice" for grants of rights-of-way and instead requires the Department to provide actual notice to the individual Indian landowners by mail or, upon the landowner's request, by email. This approach ensures that each beneficial

owner receives written notice of a right-of-way on his or her land. The final rule does not require certified letters because of the additional expense associated with such letters. The rule provides for constructive notice of certain enforcement actions.

*Comment:* A commenter suggested that applicants should also be permitted to provide constructive notice to individual Indian landowners.

*Response:* Applicants must directly contact individual Indian landowners, and may not use constructive notice, both to ensure that the landowners are aware of the potential application for a right-of-way and to obtain the consent of the individual owners of the requisite majority interests.

*Comment:* A few commenters suggested allowing the Department to notify the applicant and tribe by email.

*Response:* The final rule allows the Department to notify the applicant and tribe by email of any status updates or determinations where the applicant or tribe requests. The final rule also allows individual Indian landowners to request to receive their notices by email.

*Comment:* Several tribes requested that they be notified of rights-of-way on land within their jurisdiction, even if the tribe is not an owner of the land. The commenters note that such notice would allow the tribe to better plan for development within the tribe's jurisdiction.

*Response:* The final rule incorporates a provision to notify the tribe of rights-of-way in its jurisdiction.

*Comment:* A few commenters stated that the rules increase the Department's ability to make decisions on behalf of tribes and individual on actions impacting their lands.

*Response:* The rule does not increase the Department's ability to make decisions on behalf of Indian landowners without notice. In fact, the rule provides that the Department will defer to the tribe's decision for tribal land. The rule increases the notice that is provided to the tribe to include notice of right-of-way decisions on any land within its jurisdiction, and formalizes notice requirements for individual Indian landowners.

#### 11. Appeals of Right-of-Way Decisions (PR 169.011/FR 169.13)

*Comment:* A few commenters suggested that the proposed rule could be construed broadly to allow any Indian landowner to appeal a right-of-way denial, regardless of whether the landowner owns land over which the right-of-way would cross.

*Response:* The final rule clarifies that an Indian landowner may appeal a

denial of a right-of-way under 25 CFR part 2 only if the right-of-way would have been over or across land owned by that Indian landowner.

*Comment:* Several commenters objected to limiting the right of appeal to Indian landowners if BIA disapproves a right-of-way application. These commenters reasoned that anyone with a "legitimate interest" should have the right to administrative appeal and the applicant is uniquely situated because it invested time and money applying for the right-of-way. These commenters also stated that denying the applicant the opportunity to appeal administratively would limit the applicant to challenging the denial in Federal district court, rather than a more cost-effective administrative appeal and eliminate the Department's ability to defend on a failure to exhaust administrative remedies. One commenter pointed out that allowing only the Indian landowner to appeal a denial of a right-of-way application puts the burden on the landowner to expend the resources to appeal. A few commenters suggested deleting this section and instead referring to 25 CFR part 2 (Appeals from Administrative Actions).

*Response:* The final rule allows both applicants and Indian landowners to appeal the Department's decision to deny an initial right-of-way application or any other right-of-way grant document. This approach is more closely aligned to that taken in the generally applicable administrative appeals provisions at 25 CFR part 2, which allows an appeal by any person (including corporations, tribes, or organizations) whose interests could be adversely affected by a decision. While this is different from the approach taken in the leasing regulations, it is appropriate with regard to rights-of-way because the applicants have a greater interest in a particular location for rights-of-way, given that rights-of-way often cross several tracts.

*Comment:* A few commenters disagreed with the proposal to limit who qualifies as an interested party to only those "whose own direct economic interest is adversely affected by an action or decision." These commenters note that this definition is narrower than the current, generally applicable definition at 25 CFR part 2, which allows anyone whose interests may be adversely affected to appeal. One commenter stated that if a right-of-way for a power line is subject to renewal, anyone who would have been served by the power line should be entitled to appeal the Department's denial of the renewal. One commenter suggested further limiting who qualifies by adding

that the person must also be located adjacent to or in close proximity to the right-of-way.

*Response:* The final rule retains the proposed limitations on who is considered an "interested party" for the purposes of rights-of-way because those without a direct economic interest are only tangentially affected and should not have the right to appeal. In response to the comment about further limiting who qualifies as an "interested party," the final rule adds that an interested party is any person whose land is subject to the right-of-way or located adjacent to or in close proximity to the right-of-way whose own direct economic interest is adversely affected by an action or decision. This addition reinforces that the economic interest must be "direct" both in cause and effect and in proximity.

### C. Subpart B—Obtaining a Right-of-Way

#### 1. Consent

*Comment:* One commenter stated that BIA should provide notice to 100 percent of the Indian landowners and obtain 100 percent consent before granting a right-of-way.

*Response:* The final rule clarifies that all landowners must be notified. Under the proposed and final rule, BIA generally requires the applicant to obtain the consent of the Indian landowners to obtain access to the land to survey (at PR and FR 169.101(b)) and BIA requires record of the requisite landowner consent for a right-of-way (at PR and FR 169.107). The applicant must also obtain the consent of the owners of a majority of the interests in the tract to obtain the right-of-way. Consent of the owners of 100 percent of the interests in a tract is not required because the governing statute requires only a majority (25 U.S.C. 324).

*Comment:* One commenter questioned why the applicant must provide notice to 100 percent of the landowners, when consent is required of only the owners of a majority interest. A commenter also stated that the notice and consent provisions were not feasible.

*Response:* Each landowner has the right to know of important actions potentially occurring on land in which he or she owns an interest. The final rule requires notification consistent with the Department's trust responsibility to individual Indian landowners.

*Comment:* A tribal commenter stated that while the revisions modernize the regulations in support of economic development, there are challenges in servicing thousands of landowners for

basic infrastructure needs and the rigors of providing notice and obtaining consent can cause considerable delay.

*Response:* The Department recognizes that, while providing notice and obtaining consent is time- and resource-intensive, as trustee of landowners, it must demand that such notice is provided and the required level of consent is obtained (as required by statute), regardless of whether the right-of-way is for economic development or basic infrastructure. The final rule does provide relief for utility cooperatives and tribal utilities with regard to compensation and bonding, as described below, to encourage rights-of-way to provide infrastructure.

*Comment:* A few commenters stated that tribal consent should be required for a right-of-way over any tribal land; one noted that it has been longstanding practice to require tribal consent over any tract in which a tribe owns a fractional interest. Others stated that the rule should not require tribal consent where the tribe owns only a fractional interest because a tribe could unilaterally stop other individual Indian landowners who have a majority interest from granting the right-of-way. These commenters pointed to statutory authority at 25 U.S.C. 2218 for granting rights-of-way without tribal consent in tracts where the tribe owns less than a majority interest. A few commenters stated that there are specific statutes that allow granting and renewal of rights-of-way without tribal consent that the Department should rely upon to grant rights-of-way without tribal consent.

*Response:* The proposed and final rules require tribal consent. See PR 169.102(b)(4), FR 169.107(a). Tribal consent for a right-of-way is required by statute at 25 U.S.C. 324. Because the regulations rely primarily on 25 U.S.C. 323–328, and not 25 U.S.C. 2218 or other statutes authorizing the granting of rights-of-way, tribal consent is required for any tract in which the tribe owns an interest, regardless of whether the tribal interest is less than a majority. Requiring tribal consent restores a measure of tribal sovereignty over Indian lands and is consistent with principles of tribal self-governance that animate modern Federal Indian policy.

*Comment:* One commenter suggested clarifying that a tribe may require a more formal agreement with the right-of-way applicant than just providing consent.

*Response:* The final rule clarifies in § 169.107 that the tribe may require a more formal agreement with the grantee than just providing consent.

*Comment:* A commenter stated that rights-of-way even on individually owned Indian land should require tribal consultation because the right-of-way use may interfere with, or otherwise impact, the tribe's zoning and land use laws.

*Response:* Tribes, as sovereigns, have inherent authority to regulate zoning and land use on Indian trust and restricted land within their jurisdiction, and the regulations require compliance with tribal laws relating to land use. See § 169.9. In addition, the final rule clarifies at § 169.102(b)(9) that the applicant must certify compliance with the tribe's land use laws.

*Comment:* One commenter stated that § 169.107 should state that remaindermen are bound by the consent of life tenants as successors in interest.

*Response:* The provision at FR 169.107(b)(3) does not apply to life tenants and remaindermen because remaindermen are not successors in interest to life tenants.

*Comment:* One commenter stated that applicants should not be required to obtain consent from landowners who have not lived on their lands in two or more years.

*Response:* Landowners have the right to notice and consent regardless of whether they live on the land.

*Comment:* A commenter asked that the rule clarify what qualifies as proof of consent.

*Response:* The final rule clarifies that landowners' consent must be written.

*Comment:* One commenter stated that the rule fails to define how a tribe provides consent.

*Response:* Tribes provide consent through a tribal authorization in accordance with tribal law.

*Comment:* A tribal commenter asserted that there may be a joint BIA-applicant effort to establish a right-of-way, and stated that this joint effort is facilitated by provisions allowing BIA to grant the right-of-way without individual Indian landowner consent (where the owners are "so numerous that it would be impracticable to obtain consent"), and to rely on an appraisal paid for by the applicant.

*Response:* The final rule reflects that BIA is the trustee of the individual Indian landowners by establishing several factors that BIA must consider prior to granting a right-of-way without landowner consent and by establishing that third-party appraisals must meet certain requirements. See FR 169.107(b) and FR 169.114(c). In all circumstances, BIA will examine whether the grant of the right-of-way is in the best interest of the Indian landowners, and while BIA will defer, to the maximum extent

possible, to the Indian landowners' determination that the right-of-way is in their best interest, BIA may withhold the grant for a compelling reason, in order to protect the best interests of the Indian landowners. See FR 169.124.

#### a. Consent To Survey

*Comment:* One tribal commenter stated that the omission of a requirement to obtain tribal consent to survey tribal land is significant. One commenter noted the difficulty in obtaining consent on highly fractionated lands and stated that eliminating the requirement to obtain prior BIA approval for survey work will expedite planning for projects on these lands.

*Response:* The proposed and final rules require landowner consent for surveys, including tribal consent for surveys of tribal land at § 169.101(b). In certain situations BIA may grant access to the land. See § 169.101(c). However, no BIA approval is necessary for access to survey.

*Comment:* A commenter stated that the rule should allow applicants to survey without landowners' permission if landowners are too numerous and BIA provides notice.

*Response:* The final rule generally states that applicants must obtain consent from Indian landowners for access to survey; the statutory provisions regarding consent for rights-of-way do not apply because the applicant is seeking access that does not rise to the level of a legal interest in Indian land. Applicants should work directly with Indian landowners for permission to access their land to survey.

#### b. "So Numerous"

*Comment:* Several commenters opposed the provision allowing BIA to issue a right-of-way without the consent of the individual Indian owners if the owners would be so numerous that it would be impracticable to obtain consent. One commenter stated that the provision amounts to "administrative condemnation."

Regarding the thresholds the proposed rule provides on how many landowners add up to "so numerous" (i.e., 50 to 100 landowners where no one landowner owns greater than 10 percent, or 100 landowners), one commenter stated that there is no reason to define a threshold. One commenter suggested instead of identifying the number of landowners, that the rule should provide that it is impracticable to obtain consent when the tribe determines the project is vital to the tribe's interests. Other commenters stated that the proposed rule sets the

baseline too low and said it would allow “steamrolling” by companies over individual trust allotments. A few commenters supported the proposed threshold for “so numerous.” One noted that the provision could be helpful in overcoming the challenges of significant land fractionation in the right-of-way context. Another stated that the threshold strikes an appropriate balance between the rights of the landowner and rights of the applicant. A few commenters stated that the proposed thresholds were too high. A few recommended lowering the threshold to 20 or 25 to 50 landowners, where none owns an interest over 10 percent, or 50 landowners and above otherwise. Another stated that the high threshold creates undue hardship and challenges to individual Indian landowners and tribes in granting rights-of-way on highly fractionated tracts.

*Response:* The provision allowing BIA to issue a right-of-way where the landowners are “so numerous that it would be impracticable to obtain consent” is established by statute at 25 U.S.C. 324 and is permitted under the current regulations at § 169.3(c)(5). The proposed and final rules provide guidance by defining the baseline for what is “so numerous.” The Department believes that defining the baseline promotes transparency, clarity and certainty, and more closely meets Congress’s intent than a determination that obtaining consent is impracticable where the tribe determines it should be. The final rule establishes the baseline at 50 owners, as a simplified approach to what Congress defined as highly fractionated land in 25 U.S.C. 2218. The final rule attempts to balance the burdensome, yet vitally important, process of obtaining landowner consent with the Department’s duty to landowners as established by Congress. As noted above, the final rule clarifies that all landowners will receive notice of the proposed right-of-way. This notice will also include a request for consent. If landowners object to the right-of-way, in response to the notice, the Bureau will consider those objections in its review of “substantial injury.” See the next response.

*Comment:* A few commenters suggested clarifying what constitutes “substantial injury” in PR 169.107(b) and in PR 169.108(c). One commenter suggested replacing this phrase with a determination of what constitutes the Indian landowner’s best interest.

*Response:* The rule clarifies in both sections that the Department will look at the term, amount of acreage, disturbance to the land, type of activity, potential for environmental or safety impacts, and

objections by the landowners in determining whether the grant will cause “substantial injury” to the land or any landowner. The rule does not replace “no substantial injury” with a best interest determination because “no substantial injury” is statutorily required. See FR 169.107(b) and in FR 169.108(c).

*Comment:* A commenter stated that the section should require BIA to make an effort to obtain owner consent and wait a specified period of time for owner response, and only then make the factual finding that it is impracticable to obtain consent. One stated that allottees should be entitled to 60 days or longer after receipt of a notice to object, another stated that 30 days is appropriate. A few commenters noted that the provision allowing BIA to issue a right-of-way without the consent of the individual Indian owners where the owners would be so numerous that it would be impracticable to obtain consent requires BIA to provide notice of the intent to grant the right-of-way to all owners at least 30 days prior to the date of the grant, using the procedures in PR 169.010 (FR 169.12).

*Response:* The final rule now requires that the notice of intent be sent 60 days in advance and allow landowners 30 days to object to the grant. The notice must be sent by mail. Constructive notice is not adequate, even though constructive notice is less expensive, because each landowner is entitled to the opportunity to object to the future grant. See FR 169.107(b)(1)(ii).

*Comment:* Another owner suggested the rule clarify that applicants may include in the initial notification that BIA intends to issue a grant within 30 days if consent is not obtained.

*Response:* An applicant may, in its initial notice and request for consent, state that BIA may grant the right-of-way under FR 169.107(b) if consent is not obtained; however, BIA must send its own, separate notice if it determines that a grant without consent is appropriate under FR 169.107(b). In that case, BIA will send a notice of intent to grant the right of way 30 days prior to the grant.

*Comment:* One commenter stated that requiring BIA to provide a 30-day notice to all landowners will delay grant of the right-of-way beyond the specified 60-day period.

*Response:* The final rule clarifies that if the applicant is relying on § 169.107(b) in lieu of providing a record of consent, it must include in its application a request for a grant without consent. See FR 169.102(b)(5). This allows BIA 30 days to review before providing the 30-day notice.

*Comment:* One commenter stated that the rule should require the applicant to provide the right-of-way application and conditions and terms to the landowners, allow for the landowners’ review for several days, and then provide proof that it was given to the landowners.

*Response:* The process suggested by the commenter is essentially what is required to obtain landowner consent. The rule requires proof of consent, but it is each individual’s responsibility to ask for time to review, if needed, and review the document to determine whether to provide consent.

*Comment:* A few commenters stated that the rule should require the Department to grant a right-of-way if the necessary consents are obtained or if the conditions for a grant without consent (where landowners are “so numerous”) are met.

*Response:* The rule keeps intact the Secretary’s discretion to grant a right-of-way, rather than making it mandatory where consent is obtained because there are other factors (compensation, *e.g.*) that affect the Secretary’s decision to grant or not.

#### c. Non-Consenting Tribe (PR 169.107(d))

*Comment:* Several commenters opposed the language in PR 169.107(d) stating that a right-of-way will not bind a non-consenting tribe. These commenters stated that the provision is contrary to other provisions of the rule and undermines tribal self-governments.

*Response:* The final rule removes paragraph (d) because tribal consent for a right-of-way is always required under 25 U.S.C. 324.

*Comment:* A telephone authority commenter stated that further clarification is required as to whether BIA gives permission for access or whether the allottee himself can give permission for a right-of-way.

*Response:* In all cases, the Indian landowner may consent to access or grant a right-of-way across their land; however, notice to landowners is always required and landowners may seek the assistance of BIA. In certain limited circumstances, BIA may consent on behalf of a landowner, or grant a right-of-way without landowner consent

#### d. Who Is Authorized To Consent (PR 169.108/FR 169.108)

*Comment:* A commenter suggested restricting PR 169.108 to allow BIA consent only on behalf of the owners of minority interests.

*Response:* The final rule does not restrict BIA consent to minority interests because this authority, exercised on a landowner-by-landowner basis, is separate and distinct from the

authority of BIA in FR 169.107(b) to grant a right-of-way where the landowners are so numerous.

*Comment:* A commenter suggested adding a provision allowing BIA to consent on behalf of individual owners following a 90-day notice, as provided for in the leasing regulations.

*Response:* The final rule does not add the requested provision because the provision in the leasing regulations is based in statutory authority applicable to leasing, rather than rights-of-way.

*Comment:* One commenter requested an addition to allow tribes to consent on behalf of Indian landowners.

*Response:* The final rule does not add the requested provision because the Department has not identified any legal authority for such a provision.

*Comment:* A commenter stated that an attorney should never be authorized to consent on behalf of a landowner unless the attorney is operating under a power of attorney document.

*Response:* The proposed and final rules state that the attorney must have been retained by the landowner “for this purpose,” meaning the landowner retained the attorney to provide consent.

*Comment:* One commenter stated that PR 169.108(b)(5)(iii) could be interpreted to require specific language on providing consent to a right-of-way in the power of attorney document, and suggested the rule clarify that language such as “generally convey or encumber interests in trust land” or similar language would be acceptable.

*Response:* The final rule adds this clarification.

*Comment:* A few commenters suggested clarifying that the provisions in PR 169.108 apply to “individual Indian landowners.”

*Response:* The final rule clarifies these provisions.

*Comment:* One commenter stated that PR 169.107 and PR 169.108 allow BIA broad authority to assume control of an individual Indian landowner’s property interests as they pertain to rights-of-way and forego providing notice to that person.

*Response:* The final rule implements statutory authority to consent on behalf of landowners, while providing limitations on when BIA may exercise that authority. The final rule also establishes that BIA will send notice to all individual Indian landowners of a right-of-way on their land.

*Comment:* One commenter requested detail on what a “reasonable attempt to locate” in PR 169.108(c)(2) means. Another suggested the whereabouts of any landowner that does not respond to constructive notice within 60 days should be considered unknown.

*Response:* BIA will determine whether efforts qualify as a “reasonable attempt to locate” an individual Indian landowner as part of its determination as to whether the landowner’s whereabouts are unknown. These determinations are made on a case-by-case basis.

*Comment:* A commenter stated that BIA should not have the right to consent on behalf of adults under a legal disability because the individual’s guardian should have responsibility for consent.

*Response:* The provision allowing BIA the right to consent on behalf of individuals under a legal disability applies only where the person does not have a legal guardian. See 25 CFR 115.002, definition of “legal disability.”

*Comment:* A commenter stated that, while the rule supports the autonomy of landowners, some landowners such as the elderly, disabled, and emancipated minors, may require additional assistance beyond mere consent.

*Response:* In response to this comment, the final rule adds a new provision, at FR 169.106(c), that specifies that BIA will assist individual Indian landowners, upon their request, in negotiations with the applicant for a right-of-way.

*Comment:* A commenter opposed BIA consenting on behalf of landowners, stating that the landowners should be entitled to make the decision but BIA has an obligation to ensure that the landowner’s decision is informed.

*Response:* Overall, the rule implements statutory authority for BIA to grant a right-of-way with the consent of the landowners of a majority of the interests in a tract (*i.e.*, without the consent of the landowners of a minority of the interests in the tract). See FR 169.107(b). This rule also allows BIA to consent to a right-of-way on behalf of individual Indian landowners only in limited circumstances, such as where an individual Indian landowner is under a legal disability. See FR 169.108(c). BIA may also grant a right-of-way without consent if the landowners are so numerous, and certain procedures are followed. See FR 169.107(b). These requirements all exist in the current rule, and are carried forward in the final rule.

## 2. Compensation

*Comment:* Many commenters asserted that the rule should address the upper bounds of what tribes and individual Indian landowners can demand for compensation for a right-of-way. Several commenters stated their belief that compensation for rights-of-way on Indian land should be limited to fair

market value, and no more. A few commenters requested that the rule require BIA to grant the right-of-way for an applicant that agrees to pay fair market value. Some commenters wanted compensation schedules, similar to those used for Bureau of Land Management (BLM) and U.S. Forest Service lands.

*Response:* The statutory authority merely states that the Secretary must determine the compensation to be just. Indian landowners have the right to demand as much compensation as they deem appropriate, just as other private landowners do. As such, neither the proposed nor final rule limit the Indian landowners to fair market value, through a compensation schedule or otherwise. See the discussion below.

*Comment:* One commenter stated that the rule should require that the right-of-way document state the amount of compensation.

*Response:* The final rule does not add this as a requirement because, while the grant will normally reflect that the landowners received consideration, there may be circumstances in which it is not appropriate for the grant document to state the amount.

### a. Compensation—Electric Cooperatives and Utilities

*Comment:* Several commenters, in New Mexico, especially, stated that the rule changes will have a significant impact by increasing already high easement costs, especially for those who receive their utilities from nonprofit electric cooperatives. Several electric cooperatives and others (Eastern Navajo Land Commission) requested that the requirement for compensation be waived for all rights-of-way for public infrastructure projects that serve the tribe or tribal members, including service lines. One suggested that nominal compensation should be approved because the cooperatives have a “special relationship” under PR 169.110(b)(2)(iii). These commenters reason that:

- Through the act of joining a cooperative, the member typically agrees to provide access for the cooperative to build the necessary infrastructure at no cost; and
- Cooperatives have no ability to absorb costs, but must pass them directly to consumers, such that higher compensation costs will translate to higher electricity costs for members. These commenters further stated that providing an exemption or otherwise limiting the compensation electric cooperatives must pay would ensure that the cooperatives can afford to continue providing service to

cooperative members, including tribal members, and ensure that members are provided with electric power at an affordable price.

One tribal commenter stated that exempting utility companies from compensation would conflict with tribal self-determination and self-governance.

Public service commenters stated that they have an obligation to customers to ensure rates are fair and reasonable to all, that using projected income as the basis for valuation is cumbersome and unreasonable, and that the regulations should instead provide a certain and fair approach for all parties.

One commenter stated that rights-of-way that serve tribal people should be different from those that serve non-tribal people and that right-of-way costs should be minimized to encourage the sustainability and expansion of telecommunications services to tribes.

*Response:* The final rule provides for more flexibility in compensation for rights-of-way over and across individually owned Indian land. Specifically, the rule provides an exemption from the requirement to pay compensation on individually owned land if all the landowners agree, but does not provide the exemption for tribal land. The rule does not provide an exemption for compensation to tribes, but instead defers to the tribe if the tribe is willing to accept nominal compensation, no compensation, or alternative compensation. The rule also adds a specific exemption for utility cooperatives and tribal utilities on individually owned Indian land to encourage the provision of utility services on individually owned Indian land. Tribes may also allow for such an exemption on tribal land, on a case-by-case basis, but are not required to do so. See FR 169.112(b)(3)(iii).

b. Compensation/Fair Market Value for Rights-of-Way (PR 169.109/FR 169.110 and PR 169.111/FR 169.112)

*Comment:* Several commenters stated that the regulations should limit compensation to no more than fair market value, as determined by an appraisal or other valuation, to prevent “unrealistic” charges. One commenter stated that the proposed rule’s approach of allowing the tribe to determine compensation and waive valuation is “huge to industry.” Some of these commenters stated that the rule gives “unfettered, lopsided bargaining power” to tribes. They state that this is contrary to Federal law because the 1948 Act requires the Secretary to determine just compensation and that it could not have been Congress’s intent to allow tribes to demand compensation beyond “just

compensation.” One suggested imposing an upper limit on compensation of no more than 110 percent of the fair market value. Senator Tom Udall from New Mexico provided a petition stating that the absence of an upper limit for tribal governments to charge has resulted in more than \$36M in easement fees for Jemez Mountains Electric Cooperative, Inc. (JMEC) members, and that both tribal and non-tribal JMEC members will experience more than a 40 percent increase in their electric bills.

Several commenters point to potential negative consequences of allowing tribes to negotiate for compensation beyond fair market value such as increased costs for customers and discouragement of future development on tribal lands. According to these commenters, it should be BIA’s role to ensure the certainty and reasonableness of compensation.

Several tribal commenters supported the proposed rule’s provisions that require BIA to defer to tribally negotiated compensation amounts and valuation waivers. These commenters stated that these provisions are important to the sovereignty of tribal nations and their self-determination, streamline unnecessary appraisal processes, and recognize that the tribe consenting to the right-of-way is uniquely situated to assess the value of the compensation it is receiving. Some of these commenters stated that providing for non-monetary or alternative types of compensation, such as in-kind consideration, enables tribes to craft unique compensation agreements, and that allowing the form of compensation to change at different stages of development helps tribes achieve maximum benefits over the life of the grant, allowing tribes to negotiate amounts that serve best interests. As one tribal commenter pointed out, there may be circumstances in which a tribe values some other form of consideration more than fair market value, and that the rule’s provisions respect tribes’ ability to make those decisions.

*Response:* Consistent with 25 U.S.C. 325, the United States’ general trust relationship with Indian tribes and individual Indians, and deference to tribal sovereignty, the final rule requires that the compensation granted to Indian landowners is just. The current regulations, at § 169.12, state that compensation is “not limited to” the fair market value, allowing tribes to negotiate for higher compensation. The final rule provides that BIA will defer to the tribe’s determination that compensation is in its best interest. Tribes have the right, through self-

governance and self-determination, to charge more than fair market value for their land. History has taught us that some tribal values are not readily measured or estimated by market valuations. BIA will defer to the tribe’s negotiated compensation amount, which may be an amount mutually agreed to with the applicant. Not only is it not BIA’s role to ensure that the compensation is predictable and reasonable for the applicant, BIA does not have the legal authority to limit the amount that Indian landowners charge for a right-of-way.

The statute requires that the right-of-way be made with the payment of “such compensation as the Secretary of the Interior shall determine to be just.” 25 U.S.C. 325. This statute was enacted for the benefit of Indians, and as such, Interior is interpreting this language in favor of the Indians, to allow the Secretary to defer to tribes to determine that compensation beyond fair market value is “just.” *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 846 (1982) (“We have consistently admonished that Federal statutes and regulations relating to tribes and tribal activities must be construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the Federal policy of encouraging tribal independence.”)

*Comment:* A tribal commenter stated that the rule should allow tribal governments to enter into operating agreements with utility companies to cover a “market area” of the company for a cooperative work relationship.

*Response:* Tribal governments are free to enter into agreements with utility service providers.

*Comment:* One commenter, the Village of Hobart, Wisconsin, stated that the municipality does not impose many of these requirements on tribal governments for rights-of-way across Village land, and suggested that the rule should add a “fair and equitable process for co-located governments to obtain right-of-way easements” without complications.

*Response:* Municipalities and others who are co-located with tribal governments are free to negotiate with those tribal governments on compensation for rights-of-way on tribally owned land.

*Comment:* A few commenters suggested that the rule either require compensation based on an objective valuation methodology, provide a procedure for the applicant to appeal to BIA for an administrative adjudication of value if the applicant and tribe cannot agree, or obligate the tribe to accept the fair market value determined

by the valuation if the applicant and tribe cannot agree.

*Response:* Tribal law may address situations in which the tribe and applicant cannot agree. BIA may not grant the right-of-way without tribal consent. Where individual Indian landowners and the applicant cannot agree, existing mechanisms can address the situation.

*Comment:* Several commenters opposed the proposed change to the current compensation standard (“fair market value of the rights granted plus severance damages, if any, to the remaining estate”) to a compensation standard that includes market value and may include additional fees, such as throughput fees, franchise fees, avoidance value, bonuses, or other factors. According to the commenters, this may create unwarranted expectations for individual Indian landowners, which could lead to a failure of landowners to agree with applicants on rights-of-way and could then lead to an increase in applicants’ use of eminent domain to acquire the right-of-way. The commenters note that this would be directly contrary to the goal of streamlining the right-of-way process. Others said all of these concepts are already incorporated in “market value” and identifying them individually suggests they should be added above fair market value. Others said that these hypothetical valuation methodologies are unfitting for land valuations.

*Response:* The proposed and final rules clarify that Indian landowners may take into account additional fees when negotiating compensation. This rule does not address or impact the availability (or unavailability) of eminent domain. The Department does not agree that providing individual Indian landowners with a list of additional fees that may be considered in negotiating compensation, beyond fair market value, will lead to “unwarranted expectations” and ultimately increase the use of eminent domain; rather it helps ensure parity in negotiations between landowners and applicants, providing better information to improve the functioning of the market.

#### c. Different Compensation Approaches for Tribal Land Than for Individually Owned Indian Land

*Comment:* Several commenters advocated for requiring the same compensation on tribal land as on individually owned Indian land. A few commenters stated that “tribal land” should not include land in which the tribe owns a fractional interest, for the

purposes of PR 169.109, because otherwise, different compensation amounts could be required for different interests in the same tract. One commenter noted that this question is especially pertinent because there will be increased fractional tracts owned by tribes as a result of the Land Buy Back Program for Tribal Nations under the settlement in *Cobell v. Salazar*. A commenter stated that requiring tribes to accept the same terms of service that apply to the non-tribal areas does not deprive them of sovereign rights. Several commenters suggested the rule should allow BIA to defer to individual Indian landowners’ determination completely, just as the rule allows BIA to defer to tribes’ determinations. Another commenter stated that BIA oversight is necessary to prevent an Indian landowner from holding hostage an entity seeking to make improvements by demanding an unreasonable sum.

*Response:* Consistent with 25 U.S.C. 324 and 325 and the United States’ general trust relationship with Indian tribes and individual Indians, the final rule treats tribal and individual Indian landowners differently, providing more deference to tribal landowners in the approval process and in the enforcement process. It is consistent with BIA’s trust responsibility to allow for different compensation amounts, as long as both the tribe and the individual Indian landowner receive compensation that is just. It is possible that different owners in the same tract could negotiate different compensation amounts; this is within the landowners’ rights and is possible even under the current rule. Requiring tribes to accept the same terms that apply to individual Indian landowners would undermine tribal self-determination and self-governance.

*Comment:* A commenter stated that the proposed rule is paternalistic in that it would allow BIA to require fair market value even if all the landowners agree to waive it, if BIA determines it is in their best interest.

*Response:* Even if all Indian landowners agree to waive fair market value, BIA will evaluate rights-of-way applications to determine whether the waiver is in their best interest in accordance with 25 U.S.C. 324. Consistent with the statute and the United States’ general trust relationship with Indian tribes and individual Indians, BIA will defer to the maximum extent possible to the landowners’ determination that the right-of-way, including any waiver, is in their best interest. See FR 169.124(b).

*Comment:* One commenter suggested only the owners of a majority interest should be required to waive both

valuation and just compensation, and questioned why the consent of all landowners is necessary.

*Response:* We have determined that all non-consenting landowners are entitled to fair market value, as our trust responsibility is to all landowners, not just to those who have consented to the right-of-way.

*Comment:* Several tribal commenters stated that PR 169.110 should specify that BIA may approve “alternative compensation” for individually owned land.

*Response:* Alternative compensation is provided for in FR 169.118.

#### d. Valuation (PR 169.111/FR 169.114)

*Comment:* A few tribal commenters stated their support for not requiring a valuation if the tribe submits a tribal authorization, and deferring to the tribe’s decision as to whether to use the valuation or negotiate another amount. One commenter suggested allowing the applicant to request a valuation, even where the tribe does not.

*Response:* The Department’s trust responsibility is to the Indian landowners; for this reason, BIA will obtain a valuation only at the tribe’s request.

*Comment:* One commenter stated that BIA has not traditionally required the applicant to obtain the valuation, but proposed § 169.109 does.

*Response:* Final § 169.114 applies only if the tribe does not submit a tribal authorization waiving the valuation and does not request a valuation in writing. Under these circumstances, a valuation must be completed to establish fair market value. The current regulations require that a valuation be submitted with the right-of-way application. In practice, BIA or the applicant may complete the application. Final § 169.110(c) clarifies that it does not require the applicant to provide the valuation, but simply requires that the applicant pay fair market value based on a valuation.

*Comment:* A few commenters requested that the rule require BIA to prepare the valuations within 30 days of receiving the request.

*Response:* The Office of the Special Trustee for American Indians (OST), rather than BIA, prepares valuations. OST is governed by a separate set of regulations and policies.

*Comment:* A few commenters suggested that the applicant be required to deposit funds to be used for a valuation or otherwise pay for the valuation.

*Response:* It is not feasible at this time for the Department to maintain accounts for applicants’ payment for valuations.

*Comment:* Several tribal commenters pointed out that Indian land is often undervalued or appraised at a low market value due to rural location, undeveloped condition, and the lack of a “real market” for land in Indian country. These commenters suggested accounting in the valuation of the land with the right-of-way, assuming the right-of-way enhances or will enhance the land’s value. One commenter pointed out that even land that has been subject to a right-of-way for a pipeline crossing is appraised as though the use has not been present, imposing an artificial restraint on the compensation owed to landowners.

Other commenters stated that it is a fundamental precept of landowner compensation regimes that fair market value measures the economic impact of the right-of-way on the affected land, rather than compensating for economic benefit enjoyed by the right-of-way grantee. One commenter stated that market value should be based on the value of the land that is the subject of the transaction, and not on speculation regarding the potential future value of the pipeline.

Likewise, tribal commenters supported listing potential adjustments to market value, such as a percentage of gross income, and additional fees, such as throughput fees, severance damages, franchise fees, avoidance value, bonuses, or other factors.

*Response:* The final rule provides flexibility in two ways: (1) By allowing for any type of valuation of fair market value, as long as it meets Uniform Standards of Professional Appraisal Practice (USPAP) standards and Departmental policies; and (2) by listing factors that Indian landowners may wish to consider in negotiating for compensation either by ensuring they are included in the estimate of fair market value or by requesting that they be added. *See* FR 169.114(c). Identifying them individually does not necessarily suggest that they “should” be added above fair market value, but instead provides Indian landowners, our trust beneficiaries, with examples for types of fees might be included in compensation. Providing information to landowners improves the fairness of any negotiations.

*Comment:* Several commenters requested changing “fair market value before any adjustments” to simply “fair market value” in PR 169.110, and deleting the provisions regarding adjustments “based on a fixed amount, a percentage of the projected income, or some other method” based on their concern that there is no legal standard on BIA’s calculation of payments owed.

*Response:* Final § 169.112(a) deletes reference to “adjustments” but includes the list of examples of fees that landowners may wish to seek in compensation negotiations. This provision also clarifies that compensation may be based on a fixed amount or another method. These provisions provide flexibility to negotiate for compensation and a formula for reaching that amount.

*Comment:* A few commenters suggested the valuation should be based on the amount of land encumbered and the extent of encumbrance or acreage disturbed.

*Response:* The amount of land encumbered, extent of the encumbrance, and acreage disturbed are all factors that the landowners may consider in negotiating compensation.

#### e. Who Conducts Valuation

*Comment:* Several tribal commenters opposed the proposal to allow applicants to hire their own appraisers because of concerns that the appraisers would have a conflict of interest and would undervalue the property. Some suggested requiring a separate, independent appraisal, landowner approval of the appraisal, or landowners’ own appraisal. One commenter expressed concern that the rule could allow an applicant to provide a valuation if BIA fails to provide one, but that doing so could undermine the landowners’ negotiations.

*Response:* The rule requires that the valuation comply with USPAP and Departmental policies to ensure that the valuation meets independent quality standards. For example, the Departmental policies on valuations require that the person conducting the valuation meet certain qualifications and requirements. *See* 602 DM 1.6. Additionally, Departmental policies require anyone who wishes to rely on a third-party appraisal to first consult with the Department (in this case, BIA, who will refer the person to the OST Office of Valuation Services), to select a qualified certified general appraiser, and that OVS make all the appraisal assignment instructions. 602 DM 1.7C. BIA must approve the appraisal.

*Comment:* One tribal commenter stated that if the tribe asks BIA to determine fair market value, the tribe should have the opportunity to choose the appraiser and the valuation method.

*Response:* The tribe is not bound by the valuation conducted by BIA and may choose to obtain its own valuation through a different method.

*Comment:* A few commenters stated that valuations from other Federal agencies should not be accepted because

they could result in an entirely different valuation than would be found by BIA, BIA would not know whether the appraisal is adequate unless it understands the context in which the valuation was conducted, and BIA would possess broad and unchecked discretion in approving or rejecting.

*Response:* BIA will continue to review valuations conducted by other Federal agencies before approving their use to ensure sure the valuations are adequate for the rights-of-way context. If parties disagree with BIA’s reliance on a valuation, they may appeal a decision to grant a right-of-way under 25 CFR part 2.

#### f. Method of Valuation

*Comment:* Several commenters stated that the rule should limit valuation methods to standard practices, such as USPAP, to provide a consistent methodology that would better streamline the rule. A few commenters stated that the proposal to allow BIA to rely on any “other appropriate valuation method” provides BIA too much discretion, and is too ambiguous and broad to provide guidance or the ability to challenge BIA’s determination of “market value.”

*Response:* The rule allows for market analyses and other valuation methods in order to provide flexibility to the parties to obtain a valuation as quickly as possible and to employ the method they deem appropriate for their negotiations. The rule balances this flexibility with requirements that the chosen method must comply with USPAP and Departmental policies to ensure that the valuation meets independent quality standards and that the person conducting the valuation meet certain qualifications and requirements. *See, e.g.,* 602 DM 1.6.

*Comment:* A commenter suggested the rule should require BIA to disclose to the applicant the valuation method that was used to determine fair market value. Another commenter suggested the rule should require BIA to provide the landowners with a copy of the valuation method within 10 days of receipt of a written request.

*Response:* BIA will notify the applicant of the fair market value established by the valuation and will provide the landowner with the valuation for the purpose of assisting in negotiations.

#### g. Alternative Compensation

*Comment:* A few commenters stated that allowing for alternative valuation methodologies inserts uncertainty into the right-of-way process. One noted that this approach could result in each party



completing and submitting valuations that are vastly different, but equally valid under the proposed rule. These commenters advocated for requiring a consistent approach for valuations to determine fair market value to streamline the process, and suggested revisions to state that BIA will only use a valuation in accordance with USPAP standards.

*Response:* The final rule allows for the use of alternative valuation methods as long as they have 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, or has been prepared by another Federal agency. See § 169.114(c). This provision allows Indian landowners more flexibility in negotiating for compensation, while still requiring that the valuation meet USPAP standards and Departmental policies.

*Comment:* One commenter stated that no method of valuation for reservation-wide or systemic use should be used until the Department provides prior actual notice to landowners, publication of notice in the **Federal Register**, and in media outlets.

*Response:* The rule allows for reservation-wide valuations if the valuations meet the requirements of § 169.114(c). If landowners disagree with this type of valuation or any valuation that BIA relies upon, the landowners may appeal BIA's decision on the right-of-way under 25 CFR part 2.

#### h. Compensation for Renewals

*Comment:* Some commenters stated that the rule should impose compensation limits for renewals of rights-of-way. The commenters state that rising renewal charges burden all utility customers, including reservation customers, and bear no relation to property values. One commenter stated that in its experience over the last 10 years, its rights-of-way have been assessed based on the appraised fair market value of the Indian lands over which the rights-of-way are located, rather than the value of the right-of-way itself, and that the assessed renewal fees were 10 times the appraised fair market value. Several electric cooperative commenters expressed concern that they will have to renew rights-of-way and will have to pay amounts in excess of fair market value, creating a conflict for members off the reservation.

*Response:* The terms of the existing right-of-way govern renewals. The new rule encourages parties negotiating for a

right-of-way to also negotiate terms for a renewal.

#### 3. Payment (PR 169.112/FR 169.115)

*Comment:* A few energy company commenters advocated for lengthening the time frame for requiring payment of the right-of-way from 10 days after the right-of-way is granted to 30 days. These commenters stated that more time may be needed to process significant payments. Other commenters suggested using the grantee's receipt of the grant as the starting point for the time period because the grantee may not even know the right-of-way has been granted before the 10 days expires. A few commenters stated that payment should be made at the time the application is filed. Another stated that payments should not be made until the right-of-way is determined to be valid.

*Response:* The final rule adds that the grant may establish a different payment schedule; this allows the parties to negotiate for a payment schedule that works for their circumstances. See § 169.115(a). This approach retains the default, to strike a balance between those wanting payment at the time the application is filed and those wanting a longer period of time, to ensure prompt payment where a different payment schedule is not negotiated. Rights-of-way go into effect, and are valid, with the BIA's grant. The final rule changes the default due date to be the date of the grant because BIA is bound by the 60-day deadline for issuing a decision on the right-of-way. Once the applicant receives confirmation that BIA has received a complete application, the grantee will have up to 60 days to provide payment.

*Comment:* Several commented on payment structures. A tribal commenter recommended allowing each landowner to select how he or she wishes to receive compensation, whether in lump sum or annual payments or another payment structure. The commenter notes that BIA currently requires all landowners to be paid in the same manner, and that some landowners may prefer different structures. Another tribal commenter stated that the rules will add complexity by allowing different payment structures, adjustments, etc.

*Response:* The rule adds flexibility by allowing for different payment structures, to allow the parties to use the structure that best meets their needs; however, the rule does not allow different payment structures for different landowner interests in the same tract because determining and tracking payments would be overly burdensome.

*Comment:* One commenter opposed the provision prohibiting payments more often than quarterly, stating that tribes with direct pay should be able to set any payment schedule without such a restriction. A commenter stated that an applicant should not be allowed to pay quarterly or even yearly, and rights-of-way should not be treated the same as payments for leases.

*Response:* The final rule retains the possibility for quarterly or yearly payments, to allow landowners the flexibility to negotiate for a frequency of payments that meets their needs. The final rule, at § 169.115(b), limits the frequency of payments to no more frequent than quarterly, but only if the payments are made to BIA. This allows payments made by direct pay to be made more frequently, if appropriate.

#### 4. Direct Pay (PR 169.113/FR 169.116)

*Comment:* Several energy companies and electric cooperatives objected to allowing for direct pay, saying that it shifts BIA's responsibility to the grantees, and that it may be difficult in practice, could be burdensome to grantees, would slow the payment process, and would be less secure. Two tribal commenters also expressed concern with allowing direct payments to landowners and stated they should go through BIA for better tracking. A few other commenters also expressed concern that direct pay would expose the landowner's revenue to liens and garnishments. One commenter stated that it would require grantees to issue IRS forms to all landowners. One commenter stated that owners throughout the life of the right-of-way may be different, so direct pay authorization should be renewed every five years.

Some commenters supported direct pay and stated that the grantee should have the option of paying BIA instead of directly paying the landowners. A few stated there should be no limit on the number of owners for direct pay and that it should be an option for each landowner. One commenter suggested direct pay should be available to tribes only.

A few commenters asked why the accounts must be "encumbered."

*Response:* The final rule corrects a typographical error in the proposed rule, to clarify that direct pay is available only if the account is "unencumbered" rather than "encumbered." Otherwise, the final rule retains the provisions for direct pay, making it available to both tribes and individual Indian landowners. The final rule establishes that Indian tribes may choose direct pay, but direct pay is

available to individual Indian landowners only under limited circumstances, such as circumstances in which there are 10 or fewer owners. This approach promotes self-determination and self-governance for tribes and allows some flexibility for individual Indian landowners, while minimizing the burden on grantees.

*Comment:* BIA should be required to assist landowners in the event of non-payment beyond the issuance of a letter, to better fulfill fiduciary duties.

*Response:* If the grantee does not cure the violation in time, following the notice of violation, BIA may take the enforcement actions in FR 169.405.

#### 5. Method of Payment (PR 169.114/FR 169.117)

*Comment:* A few commenters suggested clarifying that this section applies only where payments are made to BIA, but that tribes may negotiate other methods of payment.

*Response:* The final rule clarifies that § 169.117 applies only where payments are made to BIA and adds that, if payments are made by direct pay, the grant will specify the method.

#### 6. Non-Monetary and Varying Types of Compensation (PR 169.115/FR 169.118)

*Comment:* Several electric cooperatives requested that the service they provide be considered the compensation.

*Response:* The final rule adds an exemption from compensation requirements for utility cooperatives, establishing a presumption that the service or infrastructure the cooperatives provide to their members is “just” compensation if it directly benefits the Indian land.

*Comment:* A tribal commenter supported the provisions allowing for non-monetary or other types of compensation, stating that the provisions are important to allow landowners to negotiate. Some commenters opposed allowing alternative forms of compensation because, they claim, it unnecessarily complicates negotiations and payment calculations, and suggests forms that are not appropriate in competitive right-of-way markets. One commenter stated that in-kind compensation should not be allowed for individual landowners because of the potential for abuse.

*Response:* These provisions, as well as other compensation provisions, are intended to increase flexibility for Indian landowners to negotiate for terms that best work for their needs.

*Comment:* A few tribal commenters suggested requiring a tribal authorization, rather than a signed

certification, to establish that it will accept varying types of compensation at PR 169.115.

*Response:* Tribes may choose to provide a tribal authorization (meaning a tribal resolution or other document approved by the tribal governing body), but BIA will require only a certification (meaning a statement signed by the appropriate tribal official or officials). This is intended to reduce any delays that may be associated with passing a tribal authorization.

*Comment:* A few tribal commenters requested clarifying that the types of compensation are examples, rather than a limited list. The commenter also suggested adding “payments adjusted by a fixed amount and payments tied to an index” to the list of varying types of compensation available at specific stages of the right-of-way. Another commenter requested clarifying whether access to broadband services would be considered in-kind compensation.

*Response:* The final rule states that the types of compensation include, but are not limited to, the examples listed. The examples listed are not exhaustive and may include payments adjusted by a fixed amount and payments tied to an index. In-kind compensation may include the provision of broadband services.

*Comment:* A commenter requested simplifying this section to read simply that all forms of compensation and varying types of compensation are allowable.

*Response:* While the regulation would be simpler in stating that all forms of compensation and varying types are allowable, the final rule continues to provide examples to assist Indian landowners in identifying potential options.

#### 7. Issuance of Invoices (PR 169.116/FR 169.119)

*Comment:* One commenter stated that BIA should be required to issue invoices.

*Response:* BIA may issue invoices at the request of Indian landowners, but the payment is due at the times specified in the grant, whether there is an invoice or not.

#### 8. Compensation Reviews or Adjustments (PR 169.117/FR 169.111 and FR 169.113)

*Comment:* One commenter stated that the process for review and adjustment of compensation is unclear. A few tribal commenters supported reviews less frequently than every 5 years, especially if the compensation exceeds the fair market value of the right-of-way. Another tribal commenter stated that 5

years is appropriate so that tribes can adjust rent consistent with economic conditions of the time period.

Some commenters stated that no periodic review or adjustment should be required unless the Indian landowners negotiate for such reviews or adjustments. Commenters also requested exceptions to the review requirements when the grant provides for payment greater than market value or the adjustment results in additional compensation to the landowner.

*Response:* The rule provides that tribes may negotiate for reviews and adjustments at any frequency. See FR 169.111. For individually owned Indian land, the rule establishes a default requiring reviews every 5 years, but provides several exceptions to allow the parties to avoid the reviews if appropriate. For example, if payment for the right-of-way is in a lump sum, then no review is required. See FR 169.113(a). The Department has determined that including a default requirement for compensation reviews and adjustments is necessary, especially in the context of rights-of-way for extended periods, to ensure the trust beneficiaries continue to receive compensation that is just. Even if the Secretary initially determines that the established periodic compensation is just, circumstances and market conditions may change, requiring an adjustment to the compensation.

*Comment:* Several commenters expressed concern that the same project could have different review processes if it crosses both tribal land and individually owned land, frustrating the goal of “streamlining” the regulations. These commenters stated that the rule for periodic review and adjustment should be the same for tribal land as for individually owned land.

*Response:* The approaches to tribal land and individually owned Indian land are necessarily different because of the requirements of the statute and because the Department must provide greater deference to tribes in support of tribal self-determination and self-governance. Tribal governments may have broader interests than ordinary individual landowners.

*Comment:* One commenter asked why the grantee’s consent is not required, but the landowner’s consent is required, for an adjustment. A few commenters stated that requiring landowner consent to an adjustment would be burdensome and unnecessary.

*Response:* The statute, at 25 U.S.C. 324, imposes upon Interior no responsibilities to the right-of-way grantee. For this reason, consistent with the statute and the United States’

general responsibility to Indian tribes and individual Indians, the default rule is that only the landowner's consent is required for adjustments. However, the rule allows the parties to negotiate for the grant to provide an approach different from the default approach for reviews and adjustments, including an approach in which landowner consent would not be required for certain adjustments (e.g., if the adjustment results in increased compensation).

#### 9. Other Payments Required (PR 169.118/FR 169.120)

*Comment:* A commenter suggested qualifying the statement in this section saying the grantee must pay these amounts to the appropriate office by adding "if applicable" to address that the grantee will not be in violation of the grant pending any challenge on whether the grantee owes the additional fees.

*Response:* The final rule adds the suggested phrase "if applicable." BIA will consider the status of the challenge of any such payments in determining how to address a violation of the grant under FR 169.404.

*Comment:* A few tribal commenters suggested adding that the tribe may charge additional fees with the application for use of the land. Another tribal commenter suggested clarifying that such fees may include, but are not limited to, tribal taxes and other fees and payments required under tribal law, and excluding charges imposed by the State or political subdivision of a State.

*Response:* The final rule clarifies that fees may also be associated with the application for use of the land at FR 169.120(a). Taxes and fees required under tribal law, and charges imposed by the State or political subdivision of the State are addressed in FR 169.011.

*Comment:* Several commenters stated that grantees should not be required to pay damages associated with the survey, construction, and maintenance of the facility in addition to compensation because the fair market value would account for any damage, and the right-of-way grant includes provisions for reclamation and restoration as a condition negotiated by the parties. The commenter stated that if the "damages" refers to those beyond customary and reasonable damages for the authorized activity, the rule should so clarify. A few commenters suggested deleting this section. One stated it raises questions as to what happens if the grantee refuses to pay and who will calculate the damages. Another stated that it could significantly increase the cost of acquiring rights-of-way on Indian land

and may, ultimately, impede further development.

*Response:* Final § 169.120 clarifies that, in addition to or as part of the compensation, the grantee will be required to pay for 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. The grantee may choose to negotiate this as part of compensation or bonding or alternative form of security. This section affords the parties the flexibility to account for damages in the manner they choose—as part of the base compensation or additional fees—but reinforce that it is the grantee's responsibility to pay for damages.

#### 10. Condemnation

*Comment:* A few commenters requested provisions regarding when Indian land may be condemned for a right-of-way and noted that the current § 169.21, regarding condemnation, was not included in the proposed rule.

*Response:* These regulations implement the Department's statutory authority for granting rights-of-way across Indian land. The current rule's condemnation section required reporting of facts relating to condemnation to BIA, to safeguard the interests of the Indians. The proposed rule deleted this section because it is not directly related to the rights-of-way approval process. The current rule does not provide guidance for condemnation of Indian land. The statutory provisions at 25 U.S.C. 357 govern this process.

#### 11. Process for Grant of Right-of-Way

##### a. Deadlines for BIA Decisions

*Comment:* A few tribal commenters supported the new deadlines for BIA to issue decisions on rights-of-way, stating that they are important to eliminate delays and promote economic development, will help speed the processing of applications, and provide applicants with more predictable timeframes.

A few tribal commenters stated that the option for BIA to extend the timeframe for an additional 30 days should be deleted, because it may become the norm, making the timeframe a 90-day, rather than 60-day, period. Other tribal commenters requested reducing the timeframe to 30 or 20 days, stating that 60 days appears excessive for rights-of-way. A tribal utility authority requested a special expedited path in which the applicant or tribe pays a reasonable fee that would reduce the decision timeframe to 30 days. One commenter requested increasing the

deadline to 120 days following receipt of the complete package, but specifying that only one 30-day extension is permitted. Others stated that the extension period should be shortened.

*Response:* The final rule continues to require a BIA decision on the right-of-way within 60 days, with the option for a 30-day extension. We did not make any changes to the timeline in response to comments because these timelines are intended to be the outer bounds of the time it will take for BIA review of rights-of-way and are intended to cover all rights-of-way, from the simplest to the most complex.

*Comment:* Several tribal commenters requested that rights-of-way be deemed approved if BIA fails to take action within 60 days because existing remedies for inaction can be expensive and time-consuming and may delay critical tribal projects for which rights-of-way are needed. Other commenters, such as the Western Energy Alliance, also requested that applications be deemed approved, but suggested a timeframe of 120 days.

*Response:* The final rule does not incorporate a "deemed approved" approach for new rights-of-way because BIA is statutorily required to review and issue a determination of whether to grant rights-of-way over and across Indian land.

*Comment:* Several commenters requested that a fixed deadline be inserted rather than requiring BIA to "promptly" notify an applicant whether the application is complete at PR 169.119(b) (FR 169.123(b)). These commenters noted that the timeline for BIA review of the application does not begin until after BIA confirms receipt of the complete application.

*Response:* The final rule retains the term "promptly" in order to allow the necessary flexibility for BIA personnel, while conveying that such notification should occur as soon as feasible.

*Comment:* A few tribal commenters requested that the rule require tribal consent be provided before the clock starts for approval of the right-of-way.

*Response:* The rule specifies that the application must include the record of consent. See proposed and final § 169.102(b)(5).

##### b. Process for Granting Right-of-Way (PR 169.119/FR 169.123)

*Comment:* A tribal commenter stated that PR 169.119(a) should include a reference to cultural protection requirements.

*Response:* Final § 169.123(a)(2) adds a reference to cultural protection requirements as well as historic preservation requirements.

*Comment:* A few tribal commenters requested that PR 169.119 require the application package to include a completed tribal application and/or agreement with the tribe. One commenter stated that the applicant should be required to provide the tribe with a copy of the application upon filing.

*Response:* The tribe may require its own application or agreement to determine whether to grant consent. Likewise, the tribe may require a copy of the application as a condition of its consent. Record of consent is a required component of the application under the final rule, so the final rule does not separately require a tribal application.

*Comment:* A commenter requested changes to PR169.119 to delete the provision saying grantees must satisfy tribal “land use” measures and mitigation (citing *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408 (1989)).

*Response:* The final rule retains the provision saying BIA may require modifications or mitigation measures necessary to satisfy tribal land use requirements. The case cited by the commenter is inapplicable because it applies to fee land, whereas these regulations apply to trust or restricted land.

*Comment:* A few commenters requested clarification of PR 169.119(d) regarding who receives copies of grants and of denials. One commenter stated that BIA should be required to provide the grant within 10 days of the request.

*Response:* The final rule addresses a typographical error to clarify that only the denial of an application is automatically provided to all parties. The final rule does not establish a timeframe in which BIA must provide a copy of the grant, though it is expected that BIA will respond within 10 days.

*Comment:* A tribal commenter recommended a process similar to the one contained in the leasing regulations to allow approval timelines to proceed while NEPA compliance processes are underway. Another commenter requested more clarity about how the process for approval is integrated with the schedule for BIA compliance with NEPA and other environmental requirements.

*Response:* Information necessary to facilitate BIA’s compliance with NEPA must be included in the application. The final rule does not add the provision set forth in the leasing regulations providing for a formal “acknowledgment review” but BIA may provide a review of documentation pending preparation of NEPA documentation and any valuation to

provide greater certainty as to the viability of a right-of-way project pending completion of the application.

#### c. BIA Decision To Grant a Right-of-Way (PR 169.120/FR 169.124)

*Comment:* A commenter stated that the description of when BIA will grant a right-of-way should be more specific. Another commenter stated that this section has the potential to create problems for applicants because, as a general rule, a right-of-way is in the best interest of the applicant versus the landowner. A commenter stated that this section should give special consideration for rights-of-way for landowners who otherwise would have no viable option for obtaining critical utility service.

*Response:* The section establishing the criteria BIA will consider in determining whether to approve a grant is necessarily general to ensure applicability to all types and circumstances surrounding right-of-way applications. While the right-of-way will likely benefit the applicant because the applicant has some need for the right-of-way, BIA will look to compensation and other factors to determine whether the grant is also in the best interest of the Indian landowner. The final rule provides special consideration if the right-of-way provides utility service, as explained above.

*Comment:* A few commenters stated that the BIA should be required to defer to the tribe’s determination fully, rather than “to the maximum extent.” One tribe supported the language that BIA will defer to the tribe absent a “compelling reason” not to defer, and stated that this is a clear improvement over the existing rule. Other commenters stated that BIA should not restrict itself in denials, and that the language implies that denials are institutionally disfavored. A few commenters suggested listing conditions or events that could serve as a basis for not deferring to Indian landowners’ determination that a grant is in their best interest or that could serve as the basis for denial. One tribal commenter suggested a separate provision stating that the deference requirement applies to all aspects of the right-of-way process unless deference clearly violates Federal law.

*Response:* Under this rule, BIA will generally defer to the tribe’s determination. The phrase “to the maximum extent” is included to allow for those exceedingly rare situations in which BIA cannot accord full deference while meeting its trust responsibility. The language attempts to provide

greater certainty to applicants that, if they comply with legal and regulatory requirements, including obtaining landowner consent, BIA will generally approve the grant (absent a “compelling reason” or finding that the grant is not in the best interest of the Indian landowners). Compliance with legal and regulatory requirements is a prerequisite to BIA approval. The final rule does not list conditions or events that could serve as the basis for disapproval because the “compelling reason” and “best interest” determinations are fact-specific.

*Comment:* A few tribal commenters stated that the rule should require the tribe to concur in a BIA determination regarding an Indian landowner’s best interest, because the tribe should determine the best interests of its members.

*Response:* The rule does not require tribal concurrence in BIA’s best interest determination for individual Indian landowners. The tribe’s relationship with its members is beyond the scope of this regulation.

*Comment:* A commenter requested deletion of the provision in PR 169.120(d) allowing BIA to issue separate grants for one or more tracts traversed by the right-of-way because separate grants would result in cumbersome management, impact bonding requirements, and complicate compliance with other regulatory requirements. This commenter stated that one right-of-way grant should be issued for all tracts traversed by the right-of-way.

*Response:* BIA currently has the discretion to grant either one right-of-way for all of the tracts traversed by the right-of-way, or issue separate grants. This provision merely makes explicit that BIA has this discretion because there may be circumstances in which it would be less burdensome for BIA to issue separate grants.

#### d. Contents of the Grant (PR 169.121/FR 169.125)

*Comment:* A few tribal landowners suggested requiring the grant to incorporate conditions and restrictions not just in consents, but also in any tribal application and agreement between the tribe and the applicant.

*Response:* The tribe is free to include any conditions it wishes in its consent, which may incorporate conditions and restrictions in its tribal application and agreement.

*Comment:* Several tribal commenters stated that PR 169.121 should clarify that tribal jurisdiction is preserved and that the grant itself should specify that tribal authority is preserved. A commenter stated that the grant should

include a statement that the tribe will have reasonable access to the subject lands to verify grantee's compliance with any of the tribe's conditions of consent and to protect public health and safety.

*Response:* The final rule includes the suggested provisions at FR 169.125(a) and (c)(1).

*Comment:* A tribal organization suggested the rule should state that the landowners reserve all uses of a right-of-way for any purpose other than the purpose stated in the grant and that the landowners may consent to future grants for those uses if they do not unreasonably interfere with the grantee's authorized use of the right-of-way.

*Response:* The landowner necessarily reserves all uses and rights that it does not convey. The landowner may consent to rights-of-way or agree to leases for such uses that meet the requirements in FR 169.127 or 25 CFR part 162, respectively.

*Comment:* Several commenters stated that the requirement to "restore" the land to the original condition at PR 169.121(b)(3)(iii) and (ix) is difficult, if not impossible, and that reclamation of the land is a more reasonable standard consistent with other regulatory schemes. A tribal commenter stated that it has difficulty obtaining the agreement of grantees to restore. Several commenters stated that the restoration should not be "as nearly as may be possible" but instead should require use of "best efforts." Another commenter stated that the provision requiring restoration "as much as reasonably possible" should instead read "as much as possible" and should be consistent with the earlier provision requiring restoration.

*Response:* The current regulation requires that the applicant stipulate that it will "restore the lands as nearly as possible to their original condition upon completion of construction the extent compatible with the purpose for which the right-of-way was granted" and "that upon revocation or termination of the right-of-way, the applicant shall, so far as is reasonably possible, restore the land to its original condition." Current § 169.5(d) and (i). The proposed rule included substantively the same provisions, requiring the grantee to "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," and "restore [the] land to its original condition, as much as reasonably possible, upon revocation or termination of the right-of-way." PR

169.121(b)(3)(iii) and (ix). The final rule retains the requirement for restoration as the default but allows the parties to negotiate for reclamation or some variation of the standard for restoration provided in the regulations, if appropriate, in order to address comments that restoration to the land's original condition may not be possible in all circumstances.

*Comment:* An energy company commenter stated that the regulation should allow for abandoning natural gas pipelines in place where doing so would be less expensive and create less risk of damage to resources.

*Response:* As discussed in the prior response, the parties may negotiate for alternatives to restoration of the land to its original condition, if appropriate.

*Comment:* A tribal commenter stated that PR 169.121(b)(3) should state that the grant must require the grantee to perform soil conservation and weed control, and prevention and suppression of fires, as required by current 169.5.

*Response:* The final rule encompasses soil conservation in its requirement to "not commit waste" and encompasses weed control, and prevention and suppression of fires in its requirement to "clear and keep clear" the land within the right-of-way.

*Comment:* A few tribal commenters requested that the grantee be required to notify the tribe, in addition to BIA, of the grantee's address at all times.

*Response:* The final rule adds at § 169.125 a requirement for the grantee to notify the tribe, for grants on tribal land, of the grantee's address.

*Comment:* Several tribal commenters requested adding a requirement for the grantee to inform BIA and the tribe of any filing of bankruptcy or receivership and require the grantee to demonstrate its financial capacity to carry out the responsibilities under the right-of-way grant.

*Response:* The final rule adds a requirement that the grantee inform the BIA and tribe, for tribal land, if it files for bankruptcy or is placed in receivership. Tribes may also ask for additional documents to demonstrate financial capacity, as a condition of consent.

*Comment:* One commenter stated that the tribe should evaluate and approve any ground-disturbing activity because, in the past, significant events such as oil spills have left landowners with no authority to impose corrective action.

*Response:* The tribe may enact a law requiring tribal approval of any ground-disturbing activity outside of the BIA approval process for rights-of-way.

*Comment:* One commenter noted that PR 169.121, stating that the grantee has

no right to any of the products or resources of the land, may conflict with some existing grants issued under legislation other than 25 U.S.C. 323–328.

*Response:* The provisions will be included in all new grants issued. If there is an existing grant under legislation other than 25 U.S.C. 323–328, FR 169.125 will not apply unless and until a new grant is issued.

*Comment:* Tribal commenters stated that PR 169.121 should be expanded to include cultural items and resources and to include a statement requiring activity under the grant to cease if historic properties, archaeological resources, human remains, or other cultural items are encountered.

*Response:* The rule includes a provision to address cultural items and resources. See FR 169.125(c)(4). Any archaeological resources, human remains, or other cultural items recovered on Indian land are the property of the Indian landowner or tribe. 43 CFR 7.13; 43 CFR 10.6.

*Comment:* A tribal commenter requested that the rule specify that tribes can initiate enforcement actions for violations of tribal law.

*Response:* The final rule, by clarifying that the tribe retains jurisdiction over the land subject to the right-of-way, indicates that the tribe may initiate enforcement actions for violations of tribal law.

#### e. Preference for Employment of Tribal Members

*Comment:* Several tribal commenters stated their support for the provision at PR 169.122, allowing grants to include the tribe's preference for employment of tribal workers, as provided by tribal law. One of these commenters noted this affirmation of tribal employment preference laws helps increase tribal employment and eradicate discrimination. A few tribal commenters noted that tribal law may require a preference even if the grant does not specify it, and therefore requested that the regulation note that failure to specifically reference the requirement does not excuse compliance. Another tribal commenter requested identifying specific areas in which the preference is permitted, such as preference in employment, subcontracting and use of the right-of-way.

Several non-tribal commenters stated their objections to this provision as an "unreasonable interference in hiring practices" and "unrelated to easement tasks." Others stated their concerns with this provision's interplay with applicable labor laws and agreements (e.g., requirements to use unionized

labor, contract bidding requirements). Some asked for more specification (e.g., what percentage would be required, what qualifications are required) and exclusions (e.g., for part-time positions, for grants over tribal land only). A few of these commenters requested edits to allow for preference to Indians generally.

*Response:* Each tribe may establish requirements for employment preferences for tribal members; applicants should refer to tribal law to identify percentages and other information such as Tribal Employment Rights Ordinances. Tribe-specific employment preferences as provided in these regulations are based on political classification, not based on race or national origin. They run to members of a particular federally-recognized tribe or tribes whose trust or restricted lands are at issue and with whom the United States holds a political relationship. These preferences are rationally connected to the fulfillment of the Federal Government's trust relationship with the tribe that holds equitable or restricted title to the land at issue. These preferences also further the United States' political relationship with Indian tribes. Tribes have a sovereign interest in achieving and maintaining economic self-sufficiency, and the Federal Government has an established policy of encouraging tribal self-governance and tribal economic self-sufficiency. A tribe-specific preference in accord with tribal law ensures that the economic development of a tribe's land inures to the tribe and its members. Tribal sovereign authority, which carries with it the right to exclude non-members, allows the tribe to regulate economic relationships on its reservation between itself and non-members. See, generally, *Equal Employment Opportunity Commission v. Peabody Western Coal Company*, 773 F.3d 977 (9th Cir. 2014) (upholding tribal preferences in leases of coal held in trust for the Navajo Nation and Hopi Tribe, but also citing with approval the use of such preferences in business leases). These regulations implement the established policy of encouraging tribal self-governance and tribal economic self-sufficiency by explicitly allowing for tribal employment preferences. If there is a reason that the applicant is not able to comply with tribal laws regarding employment preferences, the applicant may negotiate with the tribe on this matter when negotiating for the tribe's consent.

*12. Process for Rights of Way Applications Within or Overlapping Existing Rights of Way, or "Piggybacking" (PR 169.123/FR 169.127, 169.128)*

*Comment:* Several tribal commenters supported the proposed provision clarifying whether a new right-of-way is required for use within or overlapping an existing right-of-way. Many of these noted that there have historically been many unauthorized uses of rights-of-way, through unlawful "piggybacking," on Indian land. Examples they provided included utilities using a right-of-way established for one utility use (e.g., a water line) for a different utility use (gas pipeline). Some suggested strengthening this section to include criteria allowing piggybacking only where it directly benefits and serves the tribal community. A few suggested allowing only uses specified in the grant, and deleting the allowance for "uses within the same scope" as too broad and having the potential to be exploited by grantees. Some of these tribal commenters stated that the default should prohibit piggybacking, unless the Indian landowners choose to include uses within the same scope in a particular grant. Several commenters argued that this provision should be deleted in its entirety.

Those opposed to the provision requiring a new right-of-way stated that it "immensely and unnecessarily burdens applicants whose rights-of-way would not impede the existing facilities and existing right-of-way, amounts to double and triple charging for the same right-of-way, and should not be required if the new use is permitted by applicable law.

A few tribal commenters stated that the provision should specify that a new right-of-way is required to enlarge or expand the right-of-way, such as when a different type of service will be installed or there is a substantial change in the nature and use, such as replacing a 14kV distribution line with a 69kV transmission line. Commenters disagreed, even in given examples, on whether certain piggybacking should require a new right-of-way. For example, a tribal commenter stated that siting utilities within road and railroad rights-of-way without compensating the landowners for the additional use should be prohibited. In contrast, a city commenter stated that the rule should clarify that utility lines located in a right-of-way established for a road should be considered an incidental use of the right-of-way not requiring consent or compensation where the consumer is using and paying for the utility service.

*Response:* The final rule maintains the proposed requirement that a use not specified or stated within the scope of an existing right-of-way requires new consent and approval for the new use. The language "within the same scope" is intended to provide flexibility with regard to uses that are not foreseeable but are comparable (for example, a grant for an underground telephone line that is later used for an underground fiber optic line). Examples of uses that would not be within the same scope are a grant for a railroad being used for telecommunications, a grant for a road being used for utility lines, or a grant for an above-ground electrical wire being used for buried electrical wires. The final rule does not add a review of whether the new use will benefit the landowners because the BIA and the landowners consider this factor when issuing the original grant, so any use within that scope should likewise benefit the landowners. The Department has determined that maintaining this proposed section is important to specify that a right-of-way grant is not *carte blanche* to do whatever the grantee desires with the land, but rather is a grant for certain uses. Uses outside the scope of those specified uses constitute trespass.

*Comment:* A few tribal commenters suggested clarifying that grantees must obtain an amendment to allow third parties to use the right-of-way, if the right-of-way does not clearly contemplate use by third parties, even if the third party will be using the right-of-way for the purposes stated in the right-of-way.

*Response:* The final rule clarifies that, even when the use is the one specified in the grant or within the same scope, certain procedures must be followed if the grantee wishes to allow a third party unauthorized by the grant to use the right-of-way. The final rule clarifies that the grantee must obtain an assignment to allow someone other than the grantee to use the right-of-way for the use specified or within the same scope of the use specified in the grant.

*Comment:* A commenter stated that this provision is silent on whether additional compensation is required.

*Response:* Where piggybacking requires a new right-of-way, compensation is generally required. Where piggybacking requires an amendment or assignment to the right-of-way, the landowners may demand compensation as a condition of their consent.

*Comment:* A commenter requested that the current 169.05 language requiring that the application identify the "specific use" be reinserted.

*Response:* Final § 169.125 requires that the grant specify the use(s) it is authorizing.

*Comment:* One commenter stated that BIA appears to be trying to sidestep *United States v. Oklahoma Gas & Electric*, 318 U.S. 206 (1943). This commenter also questioned whether the phrase “before the effective date of this part” is intended to state that the Supreme Court’s decision will no longer be applicable.

*Response:* The case cited by this commenter does not apply because it is interpreting statutes other than the 1948 Act (25 U.S.C. 323–328). Those other statutes explicitly referred to State law, which the 1948 Act does not. These regulations rely on and interpret the 1948 Act.

*Comment:* A commenter stated that piggybacking should be disallowed without limitation, regardless of whether it is allowed by State law. Other commenters stated that BIA has for years taken the position that the 1948 Act supersedes the 1901 Act.

*Response:* The final rule does not disallow piggybacking entirely, because there may be circumstances in which piggybacking is in the best interest of the Indian landowners. The provision that the commenters are referring to, with regard to the 1901 Act, is deleted in the final rule because a new grant issued within or overlapping an existing grant would be issued under the 1948 Act, rather than the 1901 Act.

*Comment:* One commenter expressed concern about allowing a new use in a right-of-way for electric transmission systems, and suggested requiring the consent of the current grantee to determine whether the use will interfere with the existing use. A few commenters suggested deleting PR 169.123(b)(2), which would require that the new use not interfere with the existing use or requires the grantee’s consent, because if the use is not within the scope of the existing right-of-way, then the existing grantee has no authority to authorize or refuse the use. These commenters claim the right-of-way is not a possessory interest.

*Response:* The final rule requires the grantee’s consent at FR 169.128 to ensure that the new use does not interfere with the existing grantee’s right-of-way. While the interest in the right-of-way is not a possessory interest, the grantee has the right to use the right-of-way for the specified purpose without interference.

### 13. Location in Application and Grant Differ From Construction Location (PR 169.124/FR 169.129)

*Comment:* A tribal commenter supported PR 169.124, saying it is a practical and reasonable approach that would have helped past situations in which the tribe attempted to correct an inaccurate legal description. Other commenters stated that the applicant should be required to obtain a new right-of-way grant if there is a change in location.

*Response:* This provision is included in the final rule to address unforeseen circumstances before construction. The commenters’ assertion that the applicant should be required to obtain a new right-of-way grant whenever there is a change in location indicates a concern that this section could be abused. For this reason, the final rule adds that the BIA and the tribe, for tribal land, must determine that the change in location is only a minor deviation, and that, if it is not, then the grantee must seek a new or amended right-of-way grant.

*Comment:* One commenter suggested streamlining the process by requiring an amendment rather than an entirely new right-of-way, allowing BIA to consent on behalf of landowners if BIA consented to the initial grant, and allowing for a recalculation of compensation rather than requiring a new valuation.

*Response:* The final rule allows an option for an amendment to the existing right-of-way in appropriate circumstances. Provisions for BIA consent on behalf of landowners are provided in the regulatory sections governing consent. The final rule also allows for a recalculation of compensation with landowner consent.

*Comment:* A tribal commenter stated that any change in location should require landowner consent, and may require additional compensation, a change in bonding, and other conditions. Another tribal commenter stated that a change in location that will require construction outside an approved corridor should require prior tribal consent. A commenter expressed concern about whether the section excuses negligence when a grantee fails to stay within the boundaries identified in the grant and allows potentially major errors to be corrected with landowner consent and other requirements only in BIA’s discretion. Other commenters stated that consent should be required only if the change in location is material and significant and that requiring consent to minor changes could bring operations to a standstill if the landowner declines to grant consent.

*Response:* As explained above, the final rule clarifies that this provision applies to minor deviations in location, and that any other changes in location would require a new or amended right-of-way grant. Whether a change in location is a “minor deviation” is a matter of judgment. An example of a “minor deviation” would be a change in location of a few feet in an expanse of undeveloped land whereas a change in location of a 10 or more feet, or even a few feet, in a highly developed area may not be considered a minor deviation.

*Comment:* A few commenters suggested including a requirement to provide notice to the tribe or to all Indian landowners. Other commenters suggested adding that revisions may also be subject to additional bonding and NEPA compliance requirements.

*Response:* FR 169.129 provides that BIA will work with the tribe, for tribal land, to determine what the change in location requires and adds that additional actions may be necessary to comply with applicable laws.

*Comment:* A few commenters had questions about this section, such as whether grantees must notify BIA even if the survey accounts for the discrepancy in location.

*Response:* If a survey is inaccurate, the grantee must notify the BIA to determine whether the change in location is a minor deviation.

*Comment:* One commenter claimed to have received grants that contain incorrect information in the past, and suggested the rule should provide the grantee the opportunity to review the document before it is officially issued.

*Response:* The final rule does not specify that the grantee may review the document before it is issued, but grantees are welcome to maintain an open line of communication with BIA, and BIA may, in its discretion, provide grantees with the opportunity to review.

### 14. Bonding (PR 169.103/FR 169.103)

*Comment:* Several commenters suggested adding flexibility to the bonding provisions to allow for nationwide bonding and self-insurance. Others requested specifically adding an insurance requirement or bonding requirement to cover contaminants and explosives. At least one tribal commenter stated that tribes should have the option to determine whether bonding or insurance is more appropriate to address potential environmental damage. A few commenters opposed the requirement for bonding, stating that the tribal landowner may end up paying the costs, and suggested allowing for a waiver. One commenter supported the

provisions allowing for bonding, while others stated that the provisions raise more questions than they answer.

*Response:* The final rule retains the requirement for bonding but adds flexibility allowing for insurance or bonding to cover contaminants and includes a provision allowing for waiver of bonding and security requirements.

*Comment:* A commenter noted that this section requires a surety to provide notice to BIA before cancelling a bond or surety, but does not require notice to the tribe, and stated that the rule should require notice to the tribe.

*Response:* The final rule requires the surety to also provide notice to the tribe for bonds or sureties for rights-of-way on tribal land.

### Subpart C—Terms, Renewals, Amendments, Assignments, Mortgages

#### 1. Term (Duration)

*Comment:* Several commenters, including tribal commenters, supported having BIA defer to the tribe on the reasonableness of the term (duration) of the right-of-way. A few tribes suggested that the rule should establish default terms that apply, as in the current part 169, which limits oil and gas pipelines to 20 years and electric power lines to 50 years. Some suggested the default terms should apply whenever the tribe has not determined that a longer term is necessary or the right-of-way use does not provide significant service to the reservation. Commenters supportive of limiting the duration of grants pointed out that economic, technological, environmental, and other factors change what might have been an appropriate term for a right-of-way when originally granted, and limiting the term will ensure a reexamination consistent with tribal rights and interests.

Several commenters suggested different uses for the proposed table showing terms for each right-of-way use. One tribal commenter suggested clarifying that the terms in the table are maximum term lengths, not minimum or recommended term lengths. A tribal commenter suggested adding general criteria for granting terms longer than those specified in the table (e.g., infrastructure or service benefits to landowners, projects that will benefit all landowners).

*Response:* Tribes are free to rely on the terms provided as guidelines for individually owned Indian land, but the rule does not require those terms; instead, the rule provides that BIA will defer to any term the tribe deems appropriate.

*Comment:* Many commented on the terms proposed for rights-of-way over or

across individually owned Indian land, as summarized here:

- Oil and gas pipelines—A few commenters stated that the proposed 20-year term for gas and oil pipelines is appropriate, but most other commenters stated that 20 years is unrealistic and too short, suggesting at least 40 or 50 years.

- Electric distribution lines—Some commenters stated that electric distribution lines should be permitted in perpetuity; one suggested 50 years, and others stated that 50 years is too long.

- Utilities, in general—Commenters who are providers of utilities stated that the grants should be in perpetuity (see discussion below); one suggested commercial utilities should have terms of 40 years. An electric cooperative suggested a 50-year right-of-way for electric cooperatives providing service to the tribe.

- Telecommunications and broadband or fiber optic lines—A commenter suggested the term for telecommunications and fiber optic lines should be commensurate with that of other utilities; another suggested 50 years; others suggested 10 years.

- Railroads—Some commenters stated that terms for railroads and roads should be limited to 75 years, rather than in perpetuity.

- Conservation easements—A tribal commenter stated that conservation easements are usually in perpetuity, even though the table says “consistent with use.”

- Other—Several commenters stated that most rights-of-way should be limited to 20 years.

*Response:* The final rule recommends a maximum term of 50 years for all rights-of-way other than oil and gas and conservation easements. The final rule retains the recommended maximum duration of 20 years for gas pipelines as a baseline; however, if longer durations are appropriate in certain circumstances, BIA will review the request to determine if the longer duration is in the best interest of the Indian landowners. For conservation easements, the final rule retains the recommendation for duration consistent with use. The Department determined these terms are appropriate as guidelines. The final rule also specifies that there may be circumstances in which a different term may be appropriate, for example, if a Federal agency requires a different term.

*Comment:* Several commenters, including several tribal commenters, stated that the rule should eliminate “in perpetuity” terms for rights-of-way on Indian land. These commenters asserted

that allowing a perpetual right-of-way violates the trust responsibility, fails to preserve the ability to change the grant in changed circumstances, fails to account for future generations, is not appropriate in the context of the history of Indian landowners not being fairly compensated for rights-of-way, and erodes tribal jurisdiction. One commenter stated that the maximum term should be the shortest period that provides sufficient certainty and/or opportunity for the grantee to recover costs. One commenter stated that perpetuity may be appropriate if it will forever benefit the landowners.

A few electric cooperatives (e.g., NM Rural Electric Cooperative Association) stated that allowing a grant in perpetuity would reduce the impact of substantial fees that tribes assess on the cooperatives, benefiting all cooperative members, including tribal members, and eliminating the uncertainty in planning for affordable rates by eliminating the prospect of having to renew at prices that have no ceiling. One electric cooperative stated that the line should be in perpetuity if it serves the tribal community, in contrast to transmission lines that go over and across tribal lands.

Likewise, public utilities argued that public utility transmission and distribution lines and appurtenant facilities should have a perpetual term because shorter terms could undermine the utility’s ability to provide affordable, essential utility service to the public. The utilities argued that they may be forced to choose a more expensive route, where a perpetual grant is ensured, rather than face the prospect of having to relocate the line at some point in the future when the grant expires. A city commenter stated that the rule should require BIA to grant easements in perpetuity if a professional engineer provides a map certifying certain circumstances, including that the water and sewer system serve the entire community with the consent of landowners.

One commenter suggested that, instead of allowing “in perpetuity,” the grant should state that if the right-of-way is abandoned for its original purpose, then it reverts to the landowners.

*Response:* The final rule does not recommend “in perpetuity” for any type of right-of-way because the underlying parcel is trust property for which the Department owes an ongoing trust responsibility that is undermined if the Department abandons the ability forever to review the grant in certain intervals to address changed circumstances. While it is possible that under some



circumstances BIA could determine that a perpetual term is in the best interest of the individual Indian landowners, BIA expects those circumstances would be rare.

*Comment:* A commenter stated that the rule should clarify when, how and under what criteria the BIA will decide the overall term of the right-of-way and whether the term complies with applicable legal authorities. Another commenter stated it is unclear how closely the BIA will conform to the table of guidelines when examining terms on individually owned Indian land.

*Response:* The proposed and final rules provide for flexibility in establishing the term (duration) of a right-of-way by providing that BIA will defer to the tribe's determination that a term is reasonable, and by providing guidelines for reasonable terms for individual Indian landowners. See FR 169.201.

*Comment:* A power administration commenter noted that it has existing rights-of-way in perpetuity and asked how the grant would be impacted if the new rule requires a shorter term.

*Response:* The rule provides a guideline for determining whether a term is reasonable in light of the purpose of a right-of-way for individually owned Indian land. It does not affect any existing grant terms.

*Comment:* NorthWestern Energy requested treating all natural gas lines as utility gas lines and treating pipelines carrying oil and other petroleum products separately. A few tribal commenters suggested the opposite, clarifying that "utility gas lines" mean natural gas lines serving a tribal member or the tribe, and not transmission lines of a natural gas utility company.

*Response:* Proposed and final § 169.201 treat utility gas lines (a term of 50 years) separately from other gas pipelines (with a term of 20 years). Whether a natural gas line is treated as a utility gas line generally depends upon whether it is carrying processed gas ready for use by the consumer or unprocessed gas from the wellhead.

*Comment:* Several commenters requested clarifications on different uses specified in the proposed table of terms.

*Response:* The final rule deletes the table of terms based on specific rights-of-way uses.

*Comment:* A few commenters advocated for applying the same terms to both tribal and individually owned land to provide certainty to enable the applicant to justify the capital investment in the necessary improvements. One urged the Department to rethink the distinction and allow individual landowners the

same latitude to reach agreement on appropriate terms, in the same manner as for a tribal right-of-way, alleviates confusion regarding how terms should be applied to fractionated parcels with both tribal and individual owners, and provides greater flexibility to address specific factual circumstances. A few commenters suggested deleting the table and simply providing that the BIA will defer to the landowners' determination that the term is reasonable. A few commenters stated that BIA should consult with the tribe on what a reasonable term will be for rights-of-way that will cross both individually owned Indian land and tribal land.

*Response:* The final rule explicitly provides that the BIA will consider the duration negotiated by the tribe for tribal land when reviewing rights-of-way that also cross individually owned Indian land (or are located on fractionated land with both tribal and individual ownership). BIA encourages tribes and individual Indian landowners to consult with one another on reasonable terms for rights-of-way affecting both their interests.

## 2. Holdovers

*Comment:* A commenter stated that holdovers should be allowed if the landowner consents to the grantee's continued use for a period of less than 7 years and the grantee has submitted an application for a renewal or a new right-of-way. Several commenters suggested adding that a grantee may temporarily maintain the right-of-way pursuant to an agreement with the tribe or majority of landowners during good faith negotiations concerning renewal, and that the grantee will not be considered to be in trespass if it has filed an application for renewal.

*Response:* The final rule addresses holdovers exclusively in FR 169.410, which states that while holdovers are not permitted, BIA will not enforce against holdover grantees if they are engaged in good faith negotiations.

## 3. Renewals (PR 169.201–169.202/FR 169.202)

*Comment:* Several commenters stated that there is no need for a renewal of a right-of-way, and instead the grantee should be required to submit a new application because conditions may have changed. Several commenters supported the language in PR 169.202 on renewals. Several other commenters opposed the requirement that the original grant allow for renewal and specify any compensation. A commenter stated the current approach, of allowing renewals regardless of

whether the original grant authorizes renewals, should be retained.

*Response:* The final rule allows for renewal where the grant explicitly allows for an automatic renewal or option to renew and certain other conditions are met. See FR 169.202.

*Comment:* A few commenters asked whether the terms outlined in § 169.201 include only the initial term or are inclusive of the renewal term.

*Response:* The final rule clarifies that guidelines for maximum terms are intended to apply to the entire duration of the grant, inclusive of the initial term and any renewals.

*Comment:* A commenter stated that the rule should not allow renewal without tribal notice or consultation.

*Response:* The proposed and final rules require landowner consent for renewals, unless the landowners agreed not to require consent for renewals in the original grant as provided for in § 169.202(b). The final rule requires notice to landowners for those circumstances in which the original grant allows for renewals without consent.

*Comment:* One commenter supported provisions allowing the original grant to provide for renewals without landowner consent. A few commenters requested clarification that the original grant must specify that consent is not needed for renewal; otherwise, grantees could argue that silence in the original grant allows for renewal without consent. Several tribal commenters stated that landowner consent should always be required for renewals, rather than allowing the original grant to allow for renewal without consent, because some landowners may be taken advantage of and not realize that they can oppose this type of provision. Another commenter expressed concern about having landowners bind future landowners by allowing for renewals without consent.

*Response:* Final § 169.202(b) specifies that the original grant must explicitly allow for renewal without consent. If the original grant is silent as to whether consent is required for renewals, then consent for the renewal is required.

*Comment:* Several commenters suggested adding a requirement that the grantee demonstrate that the right-of-way was neither abandoned nor in violation of any conditions in the grant. A commenter suggested amending paragraph (a)(1) to add that the grantee must comply with renewal requirements in the grant.

*Response:* The final rule adds a provision requiring that the grantee be in compliance with the grant and regulations as a condition of renewal.

*Comment:* We received several comments on whether the renewal should allow for any changes to the original grant's terms. A few commenters stated that the rule should provide flexibility to allow for minor changes to size, type, location, or duration of the right-of-way through an amendment, rather than through an entirely new application. A tribal commenter suggested that renewals should be allowed if there is no "material change." One commenter stated that requiring a new right-of-way application for every change, no matter how small, will lead to inefficiencies and detrimentally affect the modernization of energy infrastructure.

*Response:* The final rule allows for renewals only if there is no change; otherwise, the new right-of-way does not qualify as a "renewal." A grantee seeking to renew may do so and then separately request an amendment if there is a need to change the grant.

*Comment:* A tribal commenter stated that rights-of-way should be renewed only if the renewal includes additional compensation.

*Response:* The final rule requires additional compensation for renewals.

*Comment:* A commenter requested that no map be required for a renewal if there is no material change to the map that was filed with the original application. Another commenter stated that requiring certified surveys for renewals would be a significant cost.

*Response:* The final rule does not require a map or survey if the grantee attests that there is no change.

#### 4. Multiple Renewals (PR 169.203/FR 169.203)

*Comment:* Several commenters stated that this section should clarify that the multiple renewals are subject to the requirements of § 169.202. One tribal commenter suggested deleting this provision because it tends to provide for perpetual easements if the grants are automatically renewed.

*Response:* The final rule clarifies that the provisions of § 169.202 apply to each renewal. To address the concern regarding perpetual easements, the final rule provides that BIA will review the initial term and any renewal terms and determine whether, together, they are reasonable.

*Comment:* A commenter stated that this section should prohibit multiple renewals if the grant prohibits them.

*Response:* The final rule states that renewals must be explicitly authorized in the grant.

*Comment:* A commenter stated that the rule should retain the current § 169.25 for oil and gas pipelines

because the new rule will make renewals, amendments, assignments, and mortgages more difficult and time consuming.

*Response:* Current § 169.25 does not address the process for amendments, assignments, and mortgages for oil and gas pipelines. The Department has determined that establishing procedures for amendments, assignments, and mortgages for new rights-of-way is necessary to protect the landowner's right to obtain value from the trust resource. To the extent it addresses renewals, the current rule allows an initial term of 20 years and specifies a renewal period of 20 years. The Department will defer to tribes for right-of-way terms and renewals on tribal land. For rights-of-way on individually owned Indian land, BIA will use the guideline of 20 years as a maximum for a reasonable term for oil and gas pipelines to ensure a reexamination of the circumstances upon application for a new right-of-way at the end of that 20-year term, rather than an automatic renewal, to ensure protection of the landowner's right to obtain value from the trust resource.

#### 5. Amendments

*Comment:* A commenter stated that amendments should not be required for changes to accommodate a change in the location of permanent improvements to previously unimproved land within the right-of-way corridor, and that, instead, the rule should add that amendments are not required for "other administrative modifications." The commenter states that this term is used in part 150 and in IBIA decisions, establishing precedent.

Other commenters were concerned that allowing corrections to legal descriptions or other technical corrections without meeting consent requirements could encourage grantees to couch significant changes as "technical corrections." These commenters stated that there should be no exceptions to the consent requirements, and that the final clause of § 169.204(a) should be deleted.

A few tribal commenters stated that the prior notification to landowners should be required if BIA will be amending a grant to correct a legal description or make another technical correction without meeting consent requirements.

*Response:* The final rule adopts the suggested terminology and allows BIA to make "administrative modifications" upon request without landowner consent. BIA will review each request for an administrative modification and determine whether it is a more

significant change, requiring an amendment with landowner consent and BIA approval. The final rule requires that the grantee notify landowners of the administrative modification, but does not require prior notification because the administrative modification is, by its nature, a technical correction.

For other changes to the grant that are more significant than administrative modifications, the final rule provides that the grantee must obtain landowner consent and BIA approval.

Administrative modifications are intended to capture the category of changes that are clerical in nature and do not affect vested property rights or involve questions of due process. The final rule also states that if the change to the grant is material, BIA may require the grantee to obtain a new grant rather than merely amend the existing grant. An example of a material change to a grant would be changing the right-of-way use from a two-lane road to a six-lane highway. BIA will review each amendment request to determine whether it is a material change requiring a new right-of-way.

*Comment:* A commenter expressed concern with using the terms "permanent improvement" and "unimproved land" in PR 169.204(b) because they are not defined and are not used in the current rule. Another commenter opposed PR 169.204(b) because the grantees obtain rights to use the land encompassed by the right-of-way, and those rights include the right to amend the location of the improvements within the right-of-way without consent or approval. The commenter points out that it would be extremely time consuming and costly to require grantees to again secure consent and approval, adding hurdles. This commenter suggested instead only requiring the grantee to provide notice to BIA, for recording in the LTR0.

*Response:* The provision regarding moving permanent improvements to unimproved land has been deleted and replaced with a new standard for determining whether an amendment is required: whether the change is "material." Nevertheless, amendments are generally required for changing the location of permanent improvements because it is necessary for BIA to know the exact location of permanent improvements for its analysis under the National Environmental Policy Act and the National Historic Preservation Act.

*Comment:* One commenter asked how PR 169.204 works with PR 169.123 (new uses within or overlapping existing grants) where a grantee proposes to adjust its use within the same right of

way. This commenter stated that the grantee should be able to accomplish a minor change in use without having to request an entirely new right-of-way.

*Response:* The final rule updates PR 169.123 (FR 169.127) to clarify that a grantee that seeks to adjust its use within the same right-of-way may request an amendment of the right-of-way, while a grantee that seeks to use a right-of-way held by another individual or entity must obtain an assignment (if the use is within the same scope) or seek an entirely new right-of-way (if the use is not within the same scope).

*Comment:* A commenter suggested requiring notification of the date of BIA's receipt of a request for amendment and any BIA request for additional review time only to the amendment applicant, and not the landowners.

*Response:* The Department's trust obligation is to the landowners, rather than to the parties in general; therefore, the final rule requires notification to the landowners as well.

*Comment:* A few commenters suggested that an amendment should be deemed approved if BIA fails to take action within the required timeframe. A tribal commenter opposed allowing BIA to extend the timeframe unilaterally for review of amendments, and that the timeframe should instead be tolled if additional information or revision is necessary.

*Response:* The final rule does not allow amendments to be "deemed approved" because BIA must review the amendment to determine whether it requires a new right-of-way or triggers other Federal review. The final rule incorporates a process whereby the amendment will be elevated within BIA if BIA fails to take action within the required timeframe. This ensures accountability within BIA on meeting timelines.

*Comment:* A commenter stated that it is unclear when BIA approval of an amendment would not be required, and suggested either clarifying or deleting the phrase "if our approval is required" in PR 169.205(a).

*Response:* The provision cited by the commenter is deleted from the final rule. See FR 169.205.

*Comment:* A commenter stated that consent in PR 169.206 should refer back to PR 169.107 and PR 169.108, so that if BIA granted consent for the original right-of-way, it may consent for the amendment.

*Response:* The final rule adds the appropriate cross-references. See FR 169.206.

*Comment:* A commenter suggested limiting consent of grantee's sureties to only those securities that require consent of the surety for amendments to rights-of-way or similar documents.

*Response:* The final rule does not incorporate this limitation because BIA is not in the business of determining which surety's consent is required. The final rule does, however, clarify that the grantee's surety refers to the surety for the bonds or other security, rather than other sureties.

*Comment:* A commenter sought explanation of what would constitute a "compelling reason."

*Response:* The final rule does not define "compelling reason" because this phrase is intended to capture fact-specific circumstances that may not be foreseeable.

#### 6. Assignments

*Comment:* A few tribal commenters stated that the rule should allow for assignment of rights-of-way to other individuals or entities without BIA approval only where the original grant "expressly" allows for assignment. Otherwise, silence in the grant could be construed as allowing for assignments. Several other commenters (Western Energy Alliance, Enterplus Resources Corporation) stated that the rule should provide that rights-of-way are freely assignable without consent or approval, unless the grant states otherwise. One commenter stated that taking away the grantee's ability to sell, assign, or transfer its rights in a right-of-way significantly decreases the value to the grantee, potentially amounting to a "taking." Another commenter stated that the requirements for consent and approval erect new and time-consuming barriers to assignments where none currently exist, undermining the goal of "streamlining" the regulations. One commenter stated that, to the extent BIA approval of an assignment is necessary, it should be limited to ensuring the assignee has financial and technical capability to maintain the right-of-way. This commenter stated that the default should be to allow assignments, unless otherwise provided in the grant.

*Response:* The final rule states that landowner consent for assignments is generally required in all cases. This includes tribal consent for assignments of rights-of-way on tribal land. The final rule allows for assignment without BIA approval if the original grant allows for assignment without approval. An assignment is a conveyance of interest in Indian land, so the law generally requires BIA approval. While the current regulations are not clear on the process for assigning rights-of-way, the

final rule establishes a process in the interest of protecting the landowners' interests and in transparency. These requirements are parallel to the leasing regulations at part 162.

*Comment:* A few commenters, including energy companies, suggested clarifying when approval of and consent for an assignment is not required, and suggested that no approval or consent should be required when a grantee is fully acquired by a new entity, the grantee's name changes, the grantee changes as a result of a corporate merger, acquisition, transfer by operation of law, or assignment to affiliated entities or companies.

*Response:* The final rule incorporates the energy companies' suggestion that assignments that are the result of a corporate merger, acquisition, or transfer by operation of law not require consent and approval, because such "assignments" are not actually a conveyance of an interest in the Indian land. Record of these assignments must be submitted to BIA for recording, but no consent or approval is required. All other assignments, including assignments to affiliated entities or companies, require consent and approval (unless exempted under FR 169.207(b)).

*Comment:* A tribal commenter stated that it has been the practice in the energy industry for companies to obtain rights-of-way and then "flip" them at a large profit. Several other commenters pointed out that grants are currently freely assignable and stated that free assignability should continue because obtaining consent will be time-consuming, costly, and will significantly deter acquisition of rights-of-way on Indian land. A commenter stated that rights-of-way are negotiated with the understanding that the grantee may assign rights to other entities or mortgagors, and that the availability of this operational and financial opportunity is partially what makes the process of seeking a right-of-way worthwhile.

*Response:* The final rule provides that a grantee may assign a right-of-way only with consent and approval, unless other conditions apply, including that the grant expressly allows for assignments without further consent or approval. These procedures are necessary for all rights-of-way granted after the effective date of these regulations in order to ensure BIA is aware of authorized users of Indian land. If assignability is important to the grantee, the grantee should negotiate and pay for this right.

*Comment:* One commenter stated that the rule should allow the parties to waive consent to assignments and

mortgages, in addition to waiving BIA approval.

*Response:* The final rule allows the landowners to negotiate for a grant that expressly allows for assignments and mortgages without further consent.

*Comment:* A commenter suggested ensuring BIA is kept informed by providing that if the assignee fails to provide to BIA the assignment with supporting documentation within a month of finalizing the assignment, then the assignment is subject to cancellation.

*Response:* If BIA approval of the assignment is required, BIA will have documentation of the assignment. The final rule adds, for those circumstances in which BIA approval is not required, that the assignee and grantee must provide BIA with the documentation within 30 days of the assignment.

*Comment:* A tribal commenter suggested adding that the assignee must certify that its use of the right-of-way will remain the same as under the original right-of-way.

*Response:* The additional suggested language is unnecessary because the assignee will be bound by the terms of the original grant regardless of whether the grantee provides a certification.

*Comment:* A few commenters suggested requiring notice to landowners of any proposed assignment so they may negotiate an assignment fee.

*Response:* The rule requires consent for assignments in almost all instances; this provides landowners with the opportunity to negotiate for any additional compensation or assignment fee.

*Comment:* A commenter requested reducing the timeframe for BIA approval from 30 days to 20 days. Several tribal commenters stated that an assignment should be “deemed approved” if the BIA fails to act within the required timeframe.

*Response:* Assignments may not be deemed approved because they are, as a matter of law, equivalent to a new grant. The final rule retains the time for BIA approval at 30 days because the timeframes are intended to be outer bounds.

*Comment:* A few tribal commenters stated that any assignment that would reduce the coverage of the bond should be a ground for disapproving an assignment. A few other tribal commenters suggested adding that BIA may disapprove an assignment if it determines the assignee is not capable of performing the terms and conditions of the right-of-way.

*Response:* The regulations impose certain requirements for bonding. If the assignee cannot meet those

requirements, that failure could subject the grant to cancellation. The assignee must agree to be bound by the terms of the grant, which would include bonding requirements. BIA has discretion to deny an assignment if it determines that the assignee is not capable of performing the terms and conditions of the right-of-way and if that amounts to a compelling reason to deny the assignment.

#### 7. Mortgages

*Comment:* A few commenters stated that mortgaging of rights-of-way should not be permitted because they are not possessory interests. A tribal commenter stated that mortgaging a right-of-way interest is a new concept. One stated that mortgaging should be authorized only if there is “compelling empirical evidence” that such mortgages are necessary for Indian landowners to benefit economically. A few tribal commenters noted that the regulations are silent on issues of default, sale, or foreclosure on approved mortgages and expressed concern about what consequences foreclosure on the right-of-way interest may have on the Indian landowners. This tribal commenter stated that the requirement to obtain landowner consent for a mortgage is impracticable.

Several commenters stated that mortgaging of the rights-of-way should be permitted without consent or BIA approval, unless the grant includes language to the contrary, because this is the current approach and that providing otherwise would be an “unworkable limitation.” These commenters state that requiring landowner consent and BIA approval add unnecessary burdens, and that when a grant is issued, it is with the understanding that the grantee may transfer rights to mortgagors and the availability of these operational and financial opportunities is what makes the process of seeking a grant worthwhile. One commenter stated, for example, that public utility mortgaging usually includes all facilities and interests owned by the utility, and this regulation would interfere with such financing. A commenter stated that the consent and approval requirements will “materially restrict development on Indian lands” because pipeline companies and others will be unable to obtain the borrowing base mortgages that are standard in the industry for financing and hedging against price volatility. These commenters point out that since the mortgage encumbers only the grantee’s interest, and not the interest of the Indian landowner, consent and approval are unnecessary.

*Response:* The mortgage of a right-of-way grant is a mortgage of the grantee’s right, it is not mortgaging the underlying Indian land. Mortgages of rights-of-way is not a new concept; such arrangements already exist. If a foreclosure of the mortgage were to occur, then an assignment of the grant would be necessary to reflect the name of the new grantee. While the mortgage does not directly impact the Indian land, it does potentially indirectly impact that land because it represents a conveyance of the interest in the right-of-way grant. As such, it requires BIA approval.

*Comment:* Several tribal commenters recommended that a mortgage be deemed approved if BIA fails to act on the request to mortgage within the timeframe. A tribe stated that this is necessary to prevent avoidable delays from affecting tribal economic development and community planning.

*Response:* The final rule does not incorporate a requirement that mortgages be deemed approved if BIA fails to act within the established timeframes because affirmative BIA approval is often required by mortgagees and lenders even if the regulations were to provide for a deemed approved process.

*Comment:* One tribal commenter stated that this section should refer to tribal laws that may apply to mortgages.

*Response:* The general section at FR 169.009 establishes that tribal law applies.

*Comment:* A commenter stated that consent of “grantee’s sureties” should be required only where the security document requires the surety to approve a mortgage transaction.

*Response:* The final rule clarifies that BIA must review only whether the sureties for the bonds required for the right-of-way have consented.

*Comment:* A commenter opposed the provision allowing BIA to consider the purpose of the use of the mortgage proceeds in making its decision to approve the mortgage. The commenter stated that it seems far-reaching to require the grantee to disclose this information.

*Response:* The final rule retains this provision to protect the interests of Indian landowners.

*Comment:* A few tribal commenters suggested changing the approval sections to state that BIA may approve a right-of-way unless the listed circumstances exist.

*Response:* The proposed and final rules state that BIA may disapprove the right of way only if the listed circumstances exist in order to provide certainty and predictability to applicants.

*Comment:* A commenter suggested adding to the list of factors for disapproval that the mortgage “would reduce the coverage of the performance bond or alternative form of security.”

*Response:* The final rule clarifies that the consent of the sureties for the bond is required.

#### Subpart D—Effectiveness

*Comment:* A few commenters (including the Western Energy Alliance) stated that the right-of-way document should be effective 30 days after the date it is granted rather than immediately and that, if an administrative appeal is filed, the effectiveness of the grant should be stayed because of the potential issues if an immediately effective right-of-way is later determined not to be effective. These commenters stated that the grantee may expend significant capital in improvements in the right-of-way only to learn, years later, that it does not have the right-of-way.

*Response:* The final rule does not adopt the proposed approach, making the grant effective immediately to provide certainty and promote economic productivity of Indian land. Otherwise, frivolous appeals may tie up the land’s productivity. Grantees may weigh any potential issues if the grant is later determined not to be effective in their decision on whether to invest while the appeal is pending and whether to file for an injunction.

*Comment:* One commenter stated that the effective date should be the date of execution, with the approval having a retroactive effect.

*Response:* The right-of-way is not effective until BIA grants it.

*Comment:* Several tribal commenters stated that PR 169.302 should allow for recording of a memorandum of right-of-way, rather than the right-of-way grant, where the parties wish to keep the details of the grant confidential.

*Response:* This is a broader issue regarding title records, which is governed by another regulation, 25 CFR 150.11. That provision will continue to govern this issue.

*Comment:* A tribal commenter requested an editorial change because the LTRO does not necessarily possess jurisdiction, requesting instead that the LTRO office be the one “that administers land transactions for the Indian land which is the subject of the right-of-way.”

*Response:* The terminology generally used refers to LTRO “jurisdiction” to refer to the geographical area, rather than to indicate any decision-making authority over the area. See 25 CFR 150.4.

*Comment:* A tribal commenter objected to having to record grants in the LTRO for tribal utilities that are not separate entities, because where the tribe itself provides the utility on tribal land, there is no right-of-way involved.

*Response:* The final rule retains the requirement to record grants in the LTRO, even for tribal utilities that are not separate entities, to ensure that there is a record of who is validly on the land.

*Comment:* A tribal commenter stated that the regulations should allow for recordation in tribally operated title record systems. A county commenter stated that rights-of-way should be recorded in the county recorder’s office, in addition to the LTRO.

*Response:* Parties may record documents in tribally operated record systems and/or county recorder’s offices, but the final rule requires recording in the LTRO because the LTRO is the official record of title for land held in trust or restricted status by the United States.

*Comment:* A commenter requested clarification on the ramifications of failing to record a document in the LTRO. The commenter requested adding to the regulations that BIA’s failure or neglect to timely record instruments with the LTRO shall not affect the validity of the grant or other instrument.

*Response:* The right-of-way is effective when granted; recording does not affect the right-of-way grant’s validity.

#### 1. Appeal Rights

*Comment:* Several commenters stated that applicants should have the right to appeal all decisions, and should receive notice of the right to appeal.

*Response:* In response to these comments, the final rule allows applicants to appeal denials of right-of-way grants and right-of-way documents. The leasing regulations limit the opportunity to appeal a denial of a lease to the landowners only, but rights-of-way are fundamentally different in that they could impact a number of landowners across several tracts, and here several commented that right-of-way applicants should be entitled to appeal, so the final rule allows for applicant appeals.

#### 2. Compelling BIA Action (PR 169.304/FR 169.304)

*Comment:* A commenter requested that the rule impose a timeframe on BIA to notify the applicant of receipt of a complete application, because the timeframes do not begin to run until the application is complete. This commenter also expressed concern about whether BIA, and compacting/

contracting tribes, could meet the timelines. Other commenters requested removing discretionary timeframes for BIA actions, providing no more than 60 or 120 days for BIA to act, and allowing any party to compel action. Several commenters suggested this section would be streamlined by allowing BIA 120 days to act and deeming the document approved if the BIA fails to act within the given timeframe.

*Response:* Based on our past experience, the timelines are reasonable, and provide certainty to applicants as to when a decision will be issued. The final rule does not incorporate a “deemed approved” approach for new rights-of-way because BIA is statutorily required to review and issue a determination of whether to grant rights-of-way over and across Indian land.

*Comment:* A tribal utility commenter suggested adding that BIA will be responsible for any losses that accrue due to a delay in approval of a right-of-way.

*Response:* The regulations provide a mechanism to compel BIA action if BIA does not meet the deadline for issuing a decision. Rather than making the agency responsible for losses resulting from a delay, the new rule adds certainty to timelines to allow applicants to better plan and avoid losses associated with timing.

*Comment:* One tribal commenter and a few other commenters suggested adding a “not to exceed” timeframe in the BIA Director’s order establishing a timeframe for the Regional Director or Superintendent to issue a decision.

*Response:* The final rule does not add a “not to exceed” timeframe because the rule maintains the BIA Director’s flexibility and discretion to manage priorities.

*Comment:* A few commenters suggested revising paragraph (c) to provide that “either party” may file a written notice to compel action, rather than requiring both parties to file a notice.

*Response:* The final rule incorporates this requested change.

*Comment:* A commenter asked for clarification as to whether the BIA Director would be making a decision or merely compelling BIA to make a decision.

*Response:* The rule allows for the BIA Director to do either, as appropriate.

*Comment:* A commenter stated that PR 169.304(g) should be deleted because there is no reason to prevent a party from availing itself of the process in 25 CFR 2.8 to compel action.

*Response:* This rule provides an alternative process intended to supplant

25 CFR 2.8 entirely, so a party is not required to submit a § 2.8 demand letter giving the official a certain time period to act before allowing an appeal. We acknowledge that the formal adjudication process before the Interior Board of Indian Appeals may not be the most appropriate or expeditious process when a BIA official fails to meet regulatory deadlines. Our hope is that inserting a supervisory official, the BIA Director, into the process will obviate the need for any further relief; and we may consult with tribes on the Board's role with respect to instances of BIA inaction in the future.

### 3. Appeal Bond

*Comment:* A commenter stated that the landowners should always be required to post an appeal bond because the right-of-way decision is not stayed, and that the provision stating that a bond is not required if the tribe waives it should be deleted.

*Response:* The final rule does not require landowners to post appeal bonds because the Department's trust obligation is to the landowner. Further, the rule allows for the opportunity for more front-end negotiations, which may result in fewer appeals.

*Comment:* A commenter requested an additional provision establishing a 60-day timeframe for BIA to issue a decision on an appeal of a right-of-way decision, similar to 25 CFR 162.473.

*Response:* The final rule adds this provision at FR 169.412.

### Subpart E—Compliance and Enforcement

*Comment:* One tribal commenter stated its strong opposition to deletion of the affidavit of completion requirement, stating that the requirement serves a useful purpose of notifying tribes and BIA when construction work is complete, facilitating tribes' and BIA's ability to inspect the completed right-of-way construction to ensure it complies with the grant.

*Response:* The final rule removes this provision, but tribes are free to negotiate with applicants to require filing notice of completion of construction work for any particular grant and tribal inspection of the completed right-of-way.

*Comment:* A commenter questioned whether multiple sections throughout the regulation that require compliance with tribal law will mean that the grantee is in violation of the grant if it challenges the authority of the tribe's jurisdiction to impose certain laws.

*Response:* The grantee may be in violation of a grant if it challenges the

authority of the tribe's jurisdiction to impose certain laws, depending upon the circumstances.

*Comment:* A commenter said that the rule contains unworkable deadlines for a grantee to vacate the property after cancellation of a grant.

*Response:* The order to vacate may be stayed if the grantee files an appeal.

*Comment:* A commenter requested recognition in the rule or preamble that electric transmission system providers have vegetative management obligations under Federal reliability standards that may require them to act outside the right-of-way boundaries to remove vegetation in specific incidences, and that these actions should not be subject to enforcement action for trespass.

*Response:* Reasonable and appropriate actions taken by grantees, such as utility providers, outside the boundaries of the right-of-way to comply with Federal requirements for vegetative management will not be considered trespass.

*Comment:* A commenter suggested deleting "unauthorized new construction" and instead stating that any changes in use not permitted in the grant may result in enforcement action.

*Response:* FR 169.401 specifies that any changes in use not permitted in the grant are subject to enforcement.

*Comment:* A tribal commenter requested broadening § 169.401 to apply to the violation of the "terms and conditions of a right-of-way document" rather than just a grant.

*Response:* The final rule specifies "right-of-way document."

*Comment:* The commenter requested clarification to confirm that the rule does not limit any existing property rights or causes of action.

*Response:* We agree that the rule does not limit any existing property rights or causes of action; moreover, FR 169.413 states that Indian landowners may pursue any available remedies under applicable law.

*Comment:* Several tribal commenters stated that the rule should clarify that the tribe with jurisdiction may investigate non-compliance in the same manner and to the same extent as the BIA, within the tribe's inherent sovereign rights. These commenters stated that the rule should explicitly provide for this right no matter how the noncompliance comes to light (not just upon the complaint of the landowner).

*Response:* The final rule adds that the tribe may investigate compliance consistent with tribal law. The rule does not impose an obligation on the tribe to investigate.

*Comment:* A commenter suggested stating only "applicable law" for notice

requirements, rather than "applicable tribal law."

*Response:* The final rule retains "tribal law" for specificity.

*Comment:* A commenter stated that the rule should define the term "reasonable notice" for entry onto the right-of-way, particularly for rights-of-way used by the oil and gas industry, because entry without significant advanced notice could pose health and safety risks. Several commenters stated that landowners should always have the right to enter their own land to inspect and protect, without prior notice or approval.

*Response:* Reasonable notice varies based on the circumstances. Landowners generally have the right to enter and inspect and protect without prior notice or approval so long as it is consistent with the terms and the conditions of the grant and does not interfere with grantee's efforts to carry out the purpose of the grant. Nevertheless, we encourage landowners to provide notice prior to entry for safety reasons.

*Comment:* Several tribal commenters suggested adding a definite timeframe, such as 30 days, rather than "promptly" for BIA to initiate an investigation when notified of an issue.

*Response:* Because BIA's ability to investigate potential violations varies with the availability of resources, the final rule does not add a specific timeframe.

#### 1. Abandonment

*Comment:* A tribal commenter stated that an investigation at PR 169.402 does not seem appropriate if the grantee voluntarily relinquishes or abandons his interest.

*Response:* The final rule clarifies that "abandonment" includes an act indicating an intent to give up and never regain possession of the right-of-way. Investigation may be appropriate to determine whether an act has occurred demonstrating an intent to give up and never regain possession of the right-of-way.

*Comment:* An electric transmission commenter stated that there are instances in which it needs to acquire rights-of-way but not use them for several years, e.g., in advance of construction or planned use while budgetary or environmental processes are undertaken. The commenter requested allowing the grantee to avoid cancellation for non-use by submitting written notice to the BIA that continued availability is essential and there is no intent to abandon the right-of-way.

*Response:* The grantee and landowner may negotiate such terms in the grant.

## 2. Negotiated Remedies (PR 169.403/FR 169.403)

*Comment:* A few tribal commenters supported the provision allowing the parties to establish negotiated remedies. One tribal commenter suggested that the rule should allow for negotiated remedies even for pre-existing grants that are silent on the issue.

*Response:* Adding negotiated remedies to a pre-existing grant that is silent on the issue would require an amendment to the grant.

*Comment:* A few commenters expressed concern with PR 169.403(e), which allows violations to be addressed by a tribe or resolved in tribal court but noted that many tribal agreements already incorporate these requirements. A tribal commenter stated strong support for allowing violations and disputes to be resolved by tribal court or through alternative dispute resolution.

*Response:* The rule lists this forum as an option for the grantee and landowners to consider when negotiating a grant.

*Comment:* An energy industry commenter stated that landowners may not legally “terminate” a Federal grant because the landowners are not a party to the grant. Likewise, this commenter stated that BIA does not have authority to permit landowners to pursue remedies under tribal law for violations of federally granted interests.

*Response:* The termination is, in essence, a withdrawal of the landowners’ continued consent, which is required by statute. Further, because the Secretary grants rights-of-way subject to such conditions as he may prescribe, the Secretary may approve of a grant with a condition allowing a tribe unilaterally to terminate a grant.

*Comment:* A few commenters suggested that the rule provide that the grantee negotiate solely with BIA regarding negotiated remedies, for efficiency and consistency, in situations involving multiple landowners.

*Response:* The remedies are negotiated between the grantee and the landowner because the landowner is the beneficial owner of the land.

*Comment:* A tribal commenter stated that PR 169.403 should add that the BIA will accept the tribal government’s decision on enforcement. Several commenters suggested adding that BIA will accept the decision of the other forums unless it violates the trust responsibility. A few commenters questioned how BIA will determine whether to defer to ongoing actions or proceedings.

*Response:* If the parties are addressing a compliance issue in tribal court or

other court of competent jurisdiction, through a tribal governing body or an alternative dispute resolution method, BIA generally will wait for those proceedings to close and defer to the outcome.

*Comment:* Several tribal commenters noted that the negotiated remedies must be stated in the “tribe’s consent,” but that the phrase is an undefined term, beyond the requirement that it be in the form of a tribal authorization. The tribe notes that the negotiated remedies would be in the tribal right-of-way agreement, rather than in the tribal resolution, and therefore requests clarifying “right-of-way agreement.”

*Response:* The final rule clarifies that the consent may include a written agreement. See FR 169.107.

*Comment:* Several commenters stated that a notification to sureties or mortgagees is a private matter determined by agreement between the party and surety or mortgagee and should not be addressed in the rule.

*Response:* The surety must be notified because it is the holder of the security, which ultimately protects the trust land. The final rule deletes “mortgagee.”

*Comment:* A tribal commenter requested that PR 169.403(d) clarify that the remedies are in addition to BIA’s cancellation remedy by stating “unless otherwise agreed to by the Indian landowners in their consents.”

*Response:* The right-of-way grant will incorporate any conditions in the consent of the Indian landowners.

## 3. BIA Enforcement (PR 169.404–169.405/FR 169.404–405)

*Comment:* A tribal commenter stated that PR169.404 should require consultation with the impacted tribe during the determination of whether there has been a violation and how the violation can be cured. A commenter stated that BIA should be required to consult with the grantee, rather than just the landowners, before taking enforcement actions.

*Response:* The final rule adds that the Department will communicate with the Indian landowners in determining whether a violation occurred. The final rule does not accept the suggestion to require BIA to consult with the grantee because the Department’s trust responsibility is to the landowners.

*Comment:* A commenter stated that individual Indian landowners should receive actual, rather than constructive, notice of the violations. A few commenters stated that the compliance and enforcement provisions throughout should require actual notice, rather than constructive notice to individual Indian landowners.

*Response:* The final rule adds that BIA will provide actual notice of cancellations to the landowners. Only the grantee receives notices of violation because the violation may be cured and have no impact on the grant or landowner.

*Comment:* Several tribal commenters requested the inclusion of deadlines for BIA to determine if there has been a violation (within 90 days of initiating the investigation) and to send the notice of violation to the grantee. The commenters stated that BIA should be required to adhere to strict timeframes when notified of right-of-way issues to fulfill its trust responsibility, especially given that right-of-way violations have been a historical and ongoing problem in Indian country. A few commenters stated that the rule should impose concrete requirements for BIA enforcement, rather than affording it latitude and discretion in determining what enforcement actions to take.

*Response:* Timeframes for investigation and enforcement depend upon the nature of the violation. Some violations will take more time to investigate than others; however, the final rule adds a section clarifying that BIA may take emergency action if there is a threat to Indian land.

*Comment:* A commenter requested that PR 169.404 allow grantees 30 days, rather than 10 days, to cure any deficiencies because BIA has always allowed 30 days in the past, 10 days is “unrealistic,” and a potential violation in a remote location may require logistical coordination not easily accomplished within 10 days.

*Response:* The grantee may request additional time to cure. See FR 169.404(b)(2)(iii).

*Comment:* A tribal commenter stated that the rule should allow tribes to acknowledge and address violations concurrently with BIA in the absence of negotiated remedies.

*Response:* Tribes may pursue any available remedies under tribal law or negotiated remedies.

*Comment:* A few commenters stated that this subpart should address violations by a tribe or individual Indian landowner.

*Response:* The right-of-way grant governs only the grantee’s actions; therefore, no enforcement process against landowners is needed.

*Comment:* A commenter suggested deleting PR 169.404(b) stating that the notice of violation may order the grantee to cease operations, because the grantee must first be afforded the opportunity to cure.

*Response:* In certain circumstances, it may be appropriate for the notice of

violation to require immediate cessation of operations. This provision gives BIA the discretion to determine whether the circumstances warrant immediate cessation, or cessation within another timeframe, as necessary to protect the trust resource. In FR 169.404(b)(2)(i), the notice provides the opportunity to cure.

*Comment:* A few commenters stated that PR 169.405(c)(4) should clarify that the time to vacate the property may be extended to accommodate the removal of infrastructure or instead provide that removal must occur within a “reasonable time.”

*Response:* The final rule retains 31 days as the default, but provides that parties may include different time periods in the grant and that longer time periods may be provided in extraordinary circumstances.

*Comment:* A commenter pointed out that PR 169.404(d) states that the grantee will be responsible for obligations in the grant until the grant expires, or is terminated, or is canceled, but there may be reclamation obligations that survive the end of the grant. The commenter stated that BIA should clarify that the grantee will be entitled to access the right-of-way to fulfill these ongoing obligations.

*Response:* FR 169.404(d) clarifies that there may be outstanding obligations that survive the end of the grant. FR 169.410 clarifies that the grantee may access the land to perform outstanding obligations.

*Comment:* A tribal commenter suggested revising PR 169.405 to provide that the right-of-way documents negotiated by the tribe and grantee are included in the term “grant” for the purpose of establishing the required time period to cure and establish available remedies.

*Response:* The final rule clarifies the definition of “grant” to include any changes made by right-of-way documents.

*Comment:* A commenter stated that the interest rate at § 169.406 is “unusually high.”

*Response:* The interest rate in 169.406 is the rate established by the Department of Treasury under the Debt Collection Act.

#### 4. Late Payment Charges (PR 169.407/FR 169.407)

*Comment:* One commenter asked whether life tenants are entitled to a portion of the proceeds under PR 169.407.

*Response:* Life tenants are free to negotiate if they wish to be entitled to a portion of the proceeds.

*Comment:* Several commenters requested amending PR 169.407 to

provide that only landowners are entitled to late payment proceeds or trespass damages because the grantee may pursue a separate action for damage to personal property if necessary.

*Response:* The final rule deletes “grantee” to provide that the landowners will receive proceeds if not specified in the applicable document.

#### 5. Cancellation for Non-Use or Abandonment (PR 169.408/FR 169.408)

*Comment:* A commenter stated that the rules should provide tribes authority to trigger cancellation for abandoned rights-of-way in accordance with self-governance.

*Response:* Under FR 169.402(a), the landowner may notify BIA of non-use or an abandonment to trigger investigation and ultimately cancellation.

*Comment:* A commenter stated that this section should require a right-of-way to be automatically terminated, rather than saying “BIA may cancel” if it is abandoned. A few tribal commenters stated that the *Brandt* decision of the U.S. Supreme Court (*Marvin M. Brandt Revocable Trust v. U.S.*, 134 S.Ct. 1257 (2014)) requires forfeiture, rather than just forfeiture in the case of abandonment. Several tribal commenters suggested adding that non-use or abandonment cannot be cured.

*Response:* The final rule retains BIA discretion in cancellation because additional steps are required for due process before the cancellation is effective. The *Brandt* case applies to abandonment of rights-of-way granted through public (not Indian) land under the General Right-of-Way Act of 1875, 43 U.S.C. 934. It is therefore inapplicable to rights-of-way under these regulations.

*Comment:* A commenter suggested adding that cancellation may occur if the grantee fails to respond to the notice. The commenter also stated that the notice should notify the grantee of the right to appeal under part 2, including the right to appeal the appeal bond, if required.

*Response:* The final rule states that failure to correct the basis for the cancellation includes a failure to respond, but adds a provision stating that the cancellation notice will include a notice of right to appeal under part 2. There are no appeals of appeal bonds.

*Comment:* A tribal commenter suggested separating non-use from abandonment in PR 169.408 to clarify the difference between the two processes (*i.e.*, if a grantee expressly abandons the right-of-way, BIA need not give 30 days written notice).

*Response:* The final rule redrafts this section to distinguish between

abandonment and non-use of the right-of-way and sets forth different processes for each.

*Comment:* A commenter questioned why 30 days is permitted to respond to a notice of non-use, while only 10 days is permitted for response to a notice of violation.

*Response:* The response period for notices of violation is 10 business days (FR 169.404), but is followed up with a cancellation letter (FR 169.405) that provides that cancellation will not be effective for 31 days. The 30-day period in the case of non-use or abandonment is immediately prior to cancellation.

*Comment:* A few tribal commenters stated that a 2-year non-use period is excessive, and suggested 6 months instead.

*Response:* The 2-year period affords sufficient time to establish that there is, in fact, non-use rather than a seasonal fluctuation in activity.

*Comment:* A commenter requested explicitly describing unauthorized uses to include piggybacking, overburdening, holdovers, and other unallowable uses that qualify as trespass.

*Response:* The final rule clarifies what piggybacking is unallowable, including overburdening (*see* FR 169.217), and when holdovers will be subject to enforcement for trespass (*see* FR 169.410). The definition of “trespass” addresses all remaining situations.

*Comment:* A tribal commenter requested a mandatory mechanism for grantees to return roads or highways to a tribal landowner upon the written request of the tribe.

*Response:* The final rule provides that the grant may address the disposition of permanent improvements the grantee constructs; this allows the Indian landowners and applicant to negotiate as to how permanent improvements should be handled.

#### 6. BIA Enforcement Against Holdovers (PR 169.410/FR 169.410)

*Comment:* A commenter stated that because its existing right-of-way grants are silent on the extension of the easement by holdover, the rule increases the risk that holdover grantees will be deemed to be in trespass, even where they are engaged in negotiations with the Indian landowners. Several commenters suggested stating that the grantee will not be considered to be in trespass while BIA is considering its application for a right-of-way, when the decision is on appeal, or the grantee has notified BIA that they are engaged in good faith negotiations. One commenter stated that, under 5 U.S.C. 558(c), the rule must allow for a holdover period while a renewal application is under



consideration by BIA. A tribal commenter suggested clarifying that grantees who are unauthorized holdovers are trespassers.

*Response:* The final rule states that while holdovers are not permitted, BIA will not enforce against holdover grantees if the parties notify BIA that they are in good faith negotiation. To ensure that the parties do not take advantage of that negotiation time to extend what would have otherwise been a more limited term, the negotiation time during which the grant is held over is counted against any new grant term.

*Comment:* A tribal commenter stated that it may be more helpful to clearly define what happens if a grantee remains in possession after expiration of a right-of-way term and clarify that the renewal will be effective on the approval date and will not relate back to the date of expiration.

*Response:* The grant is effective when BIA issues it, and the effective date does not relate back, but if a grant is ultimately renewed, then BIA generally will not pursue trespass for the time of negotiations.

#### 7. Trespass (PR 169.412/FR 169.413)

*Comment:* A commenter requested that only willful trespass be subject to enforcement action and that BIA consult with the grantee and landowners prior to initiating enforcement actions for any accidental or incidental trespass.

*Response:* The proposed rule and final rule definition of “trespass” is consistent with the definition of trespass on Indian land in leasing, forestry, and agricultural contexts. See e.g., 25 CFR 166.801. No compelling reason exists to differentiate between intentional and unintentional trespass in the right-of-way context.

*Comment:* A commenter requested clarification on whether the available remedies under applicable law referred to in PR 169.413 (trespass) are in addition to the remedies in PR 169.403 (negotiated remedies).

*Response:* The provision at FR 169.413 addresses the absence of a grant, so there is no document in which negotiated remedies would be set out.

*Comment:* A tribal commenter requested that the rule acknowledge that tribal governments may enforce tribal laws against trespass and collect damages, and that BIA will assist the tribal governments in enforcing the law.

*Response:* The final rule adds to 169.413 “including applicable tribal law” in response to this comment.

*Comment:* A commenter requested clarifying that one who refuses to obtain a right-of-way but uses the Indian land is in trespass.

*Response:* The provision at FR 169.413 addresses situations in which someone refuses to obtain a right-of-way.

*Comment:* A tribal commenter requested that the rule provide for BIA involvement in resolving disputes between tribes and applicants that have been occupying tribal land without authorization. The commenter stated that methods of determining past amounts due are often an insurmountable sticking point without BIA involvement.

*Response:* BIA will offer technical assistance to an Indian landowner upon request.

*Comment:* A commenter asked whether the rule could enforce a prohibition against ground-disturbing activities that disturb cultural sites.

*Response:* FR 169.125(c)(4) provides that if historic properties, archaeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with this grant, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the grantee will contact BIA and the tribe with jurisdiction over the land to determine how to proceed and appropriate disposition.

*Comment:* A commenter stated that the regulations should protect tribes who oppose energy development chemicals being used in the right-of-way. Another suggested clarifying that trespass may include pollution or environmental spills.

*Response:* FR 169.125(c)(6) provides for indemnification. Pollution and environmental spills are violations of the grant and any applicable law. Pollution or environmental spills may constitute trespass if the pollutants or contaminants enter other Indian land not covered by the right-of-way grant.

#### **Subpart F—Service Line Agreements (PR Subpart F (169.501–169.504)/Final Subpart B (169.51–169.57))**

*Comment:* Several commenters suggested changes to the definition of “service line.” Several electric cooperative commenters strongly disagreed with deleting the language restricting service lines to a certain voltage because of their concern that it would consolidate local electric distribution cooperatives with electric transmission power providers. Some suggested retaining the current limits of 14.5 kv and 34.5 kv and many in the electric industry suggested a limitation to 100 kv. One tribal commenter also opposed deleting the voltage limitation because of a concern that it creates a

loophole and makes enforcement more difficult.

While some suggested a more limited definition, several suggested an expansive definition that would apply to any distribution facilities on the reservation that provide service only to customers on the reservation, or any facility connected to a main line or other line necessary for providing utility service to customers. One suggested it be defined as uses that are not a “general expansion of the system by the provider.” Many of these comments were aimed at providing relief to tribal members requesting utility services and/or to non-profit, member-owned distribution cooperatives that provide utility service to tribal members. One commenter asserted that the definition of “service line” should include distribution lines, so that utilities would not be required to pay Indian landowners for rights-of-way and State utility commissions would not be required to allocate right-of-way costs associated with local distribution.

Many commenters requested more clarification on what qualifies as a distribution line requiring a right-of-way and what qualifies as a service line. Some stated that if a line is an extension of service to a certain property, it should be considered a service line, regardless of whether it is a water line, sanitary and storm sewer line, electric line or telecommunication line. A few commenters suggested deleting the word “home” to clarify that utility service may also be provided to non-residential buildings, while another suggested limiting to those lines that provide service to an individual building.

*Response:* The final rule clarifies the definition of service line in a new subpart B, which is relocated from proposed subpart F with changes. The final rule moves the provisions regarding service line agreements from subpart F to subpart B to reflect that sequentially, the determination of whether a service line agreement or right-of-way is appropriate occurs earlier. The current definition of “service line” includes a restriction of 13.5 kV and 34.5 kV, depending on the type of power line. The proposed definition would have eliminated the voltage restriction, in order to base the definition instead on the purpose of the line (used only for supplying owners or authorized occupants or users of land with telephone, water, electricity, gas, internet service, or other home utility service). See proposed § 169.002. The final rule reinserts the kV restriction to ensure that service line agreements are not used for power lines for which a

right-of-way grant would be more appropriate. The expansive definitions suggested by commenters are not appropriate because excluding nearly all lines from the requirement for just compensation would undermine Congress's intent. The final rule adopts a narrow interpretation of "service line" to restrict "service lines" to those lines that directly provide utility service to a house, business, or other structure, rather than lines that are distribution lines, from which single service lines may branch off. Once a service line serves multiple structures, it exceeds its scope, and becomes a distribution line for the purposes of the right-of-way regulations. The final rule does not incorporate the suggested language about general expansion of the system, because each service line itself could be considered an expansion of the system. To provide relief to those in need of electric service and those providing electric service, the rule instead provides a new, streamlined separate process for non-profit electric cooperatives and tribal utilities. An extension of service to a certain property would be a service line as long as the extension of service is from a main line, transmission line, or distribution line to a single property. This is consistent with past practice and the 2006 BIA Right-of-Way Handbook.

*Comment:* Several tribal commenters stated that the rule should remove the requirement to record service line agreements with the LTRO because it imposes additional burdens, and instead require that they be filed with BIA. A tribal commenter stated that the recordation requirement is counterintuitive to the purpose of service line agreements, intended to be simple agreements between a single utility provider and an authorized occupant.

*Response:* The LTRO is the official title of record for Indian land and recording in the LTRO is necessary to provide notice of activities on the land. This is consistent with past practice and mirrors guidance provided in the 2006 Handbook.

*Comment:* Several electric cooperatives stated that prohibiting a service line from being extended from an existing service line, resulting in the need to obtain a new right-of-way, has on numerous occasions, created hardship for families who cannot construct a home nearby family members because they cannot bring power to the home without a new right-of-way.

*Response:* The final rule is consistent with the BIA Handbook. A service line can serve only one structure. A new

service line could be constructed branching from a right-of-way without requiring a new right-of-way if the new service line serves one structure. If more than one structure is served by a service line, then a right-of-way is required.

*Comment:* Several electric cooperatives stated that they should be exempt from provisions requiring consent for service lines.

*Response:* A service line agreement is executed by the owner(s) or authorized user(s) and the applicant; this is sufficient to show consent.

*Comment:* One commenter stated that service lines may serve an entire customer base, rather than just individuals.

*Response:* A customer base that is located in one building or structure may be served by a single service line, subject to the voltage limitations.

*Comment:* A commenter stated that requiring compensation for placement of service lines needed to provide utilities is not appropriate.

*Response:* The proposed and final rules do not require compensation but the owners or authorized users may negotiate for compensation as part of the service line agreement or agree that the service itself is compensation.

*Comment:* A commenter stated that service lines should expressly include rights-of-way among the authorized users, e.g., a right-of-way for a pipeline requiring electric service for cathodic protection units through a simple electric distribution line. That line should not require a full right-of-way application.

*Response:* See the discussion on "piggybacking," above.

*Comment:* A tribal commenter requested more specification on service line agreements and their allowable duration, how they must state the dimensions of the service line, whether sub-agreements are possible, what maintenance requirements are necessary, etc.

*Response:* The landowners (or authorized occupants or users) may negotiate these items in the service line agreement.

*Comment:* A commenter stated that the term "applicant" is misplaced because usually the tribe will request the agreement.

*Response:* The final rule replaces the term "applicant" with "utility provider."

*Comment:* A tribal commenter noted that many utility service lines have been constructed without agreements, and suggested the rule add language to require noncompliant utilities and other entities to enter into agreements with the tribal landowners.

*Response:* Unauthorized users or occupants of Indian land are encouraged to enter into agreements with landowners as they are otherwise subject to enforcement for trespass.

*Comment:* Several commenters stated that public utilities should be considered service lines because they are best able to provide affordable electrical and utility service to landowners under the service line agreement rather than the more onerous right-of-way procedures.

*Response:* The final rule allows utility cooperatives certain advantages (see above), but requires that they undergo the process for obtaining a right-of-way if they do not otherwise meet the definition of a "service line."

*Comment:* One tribal commenter requested clarification that a right-of-way is not required or allowed for service lines.

*Response:* The proposed and final rules clarify the requirements for service lines.

### III. 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 significant because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

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.*). There is no defined universe of small entities that may be affected by this rule because there are a myriad of reasons why an entity may seek a right-of-way over or across Indian land; however, we received comments on the proposed rule from the following entities, so we considered that some may qualify as small entities: State and local governments, electric cooperatives, gas and oil companies and associations, pipeline companies, power and water utilities, telecommunications companies and railroad companies. It is possible that some of these are small entities and that have or may seek a right-of-way over or across Indian land for a variety of purposes, but this rule does not impose any requirements in obtaining or complying with a right-of-way that would have a significant economic effect on those entities. This rule clarifies the processes and requirements for landowner consent and BIA approval and, to the extent the rule imposes requirements that were not explicitly required before, the rule allows the parties to negotiate otherwise in the grant. For example, many grants allow assignments without landowner consent or BIA approval. The final rule establishes, as a default, that consent and approval are required, but allows parties to agree otherwise and state otherwise in the right-of-way grant. (Additionally, the final rule includes a blanket exemption for assignments that are the result of a corporate merger, acquisition, or transfer by operation of law.) Further, the rule minimizes BIA interference with the market by providing that BIA will defer to tribes' negotiated compensation values, allowing more flexibility in allowing for non-monetary compensation, eliminating the need for BIA approval of surveys, and requiring only filing of service line agreements. The rule also relaxes requirements for utility cooperatives, some of which may qualify as small entities, to encourage them to develop Indian land; for example, by providing for waivers of compensation requirements and bonding requirements under certain conditions.

### 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. During the public comment period on the proposed rule from June to November 2014, we held several consultation sessions with federally recognized Indian tribes and received written input from 70 tribes. We have considered and addressed this tribal input in development of the final rule.

### I. Paperwork Reduction Act

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, prohibits a Federal agency from conducting or sponsoring a collection of information that requires OMB approval, unless such approval has been obtained and the collection request displays a currently valid OMB control number. Nor is any person required to respond to an information collection request that has not complied with the PRA. In accordance with 44 U.S.C. 3507(d), BIA submitted the information collection and recordkeeping requirements of the proposed rule to OMB for review and approval and provided the public with the opportunity to submit comments on the information collection. BIA received no comments addressing the information collection requirements and made no revisions to those provisions in the final rule, but did add a new information collection requirement (filing past assignments) in response to comments. OMB has reviewed and approved the information collections in the final rule, which are described below.

*OMB Control Number:* 1076-0181.

*Title:* 25 CFR 169, 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:* 1,550 on average (each year).

*Number of Annual Responses (On Average):* 2,200 (for applications); 50 (for responses to notices of violation); 50 (for responses to trespass notices of violations); 1,000 (for filing service line agreements); and 1,000 (for filing past assignments).

*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); 0.25 hours (for filing service line agreements); and 0.25 hours (for filing past assignments).

*Estimated Total Annual Hour Burden:* 2,750 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. This rule does not require BIA approval of any new types of major Federal actions, nor does it eliminate BIA approval of any types of major Federal actions.

#### *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.

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

Indians-lands, Reporting and recordkeeping requirements, Rights-of-way.

■ For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, revises 25 CFR part 169 to read as follows:

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

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

Sec.

- 169.1 What is the purpose of this part?  
 169.2 What terms do I need to know?  
 169.3 To what land does this part apply?  
 169.4 When do I need a right-of-way to authorize possession over or across Indian land?  
 169.5 What types of rights-of-way does this part cover?  
 169.6 What statutory authority will BIA use to act on requests for rights-of-way under this part?  
 169.7 Does this part apply to right-of-way grants submitted for approval before December 21, 2015?  
 169.8 May tribes administer this part on BIA's behalf?  
 169.9 What laws apply to rights-of-way approved under this part?  
 169.10 What is the effect of a right-of-way on a tribe's jurisdiction over the underlying parcel?  
 169.11 What taxes apply to rights-of-way approved under this part?  
 169.12 How does BIA provide notice to the parties to a right-of-way?

- 169.13 May decisions under this part be appealed?  
 169.14 How does the Paperwork Reduction Act affect this part?

#### **Subpart B—Service Line Agreements**

- 169.51 Is a right-of-way required for service lines?  
 169.52 What is a service line agreement?  
 169.53 What should a service line agreement address?  
 169.54 What are the consent requirements for service line agreements?  
 169.55 Is a valuation required for service line agreements?  
 169.56 Must I file service line agreements with the BIA?

#### **Subpart C—Obtaining a Right-of-Way**

##### **Application**

- 169.101 How do I obtain a right-of-way across tribal or individually owned Indian land or BIA land?  
 169.102 What must an application for a right-of-way include?  
 169.103 What bonds, insurance, or other security must accompany the application?  
 169.104 What is the release process for a bond or alternate form of security?  
 169.105 What requirements for due diligence must a right-of-way grant include?

##### **Consent Requirements**

- 169.106 How does an applicant identify and contact individual Indian landowners to negotiate a right-of-way?  
 169.107 Must I obtain tribal or individual Indian landowner consent for a right-of-way across Indian land?  
 169.108 Who is authorized to consent to a right-of-way?  
 169.109 Whose consent do I need for a right-of-way when there is a life estate on the tract?

##### **Compensation Requirements**

- 169.110 How much monetary compensation must be paid for a right-of-way over or across tribal land?  
 169.111 Must a right-of-way grant for tribal land provide for compensation reviews or adjustments?  
 169.112 How much monetary compensation must be paid for a right-of-way over or across individually owned Indian land?  
 169.113 Must a right-of-way grant for individually owned Indian land provide for compensation reviews or adjustments?  
 169.114 How will BIA determine fair market value for a right-of-way?  
 169.115 When are monetary compensation payments due under a right-of-way?  
 169.116 Must a right-of-way specify who receives monetary compensation payments?  
 169.117 What form of monetary compensation is acceptable under a right-of-way?  
 169.118 May the right-of-way provide for non-monetary or varying types of compensation?  
 169.119 Will BIA notify a grantee when a payment is due for a right-of-way?

- 169.120 What other types of payments are required for a right-of-way?  
 169.121 How will compensation be distributed among the life tenants and owners of the remainder interests?  
 169.122 Who does the grantee pay if there is a life estate on the tract?

#### **Grants of Rights-of-Way**

- 169.123 What is the process for BIA to grant a right-of-way?  
 169.124 How will BIA determine whether to grant a right-of-way?  
 169.125 What will the grant of right-of-way contain?  
 169.126 May a right-of-way contain a preference consistent with tribal law for employment of tribal members?  
 169.127 Is a new right-of-way grant required for a new use within or overlapping an existing right-of-way?  
 169.128 When will BIA grant a right-of-way for a new use within or overlapping an existing right-of-way?  
 169.129 What is required if the location described in the original application and grant differs from the construction location?  
 169.130 Must a right-of-way grant address ownership of permanent improvements?

#### **Subpart D—Duration, Renewals, Amendments, Assignments, Mortgages**

##### **Duration & Renewals**

- 169.201 How long may the duration of a right-of-way grant be?  
 169.202 Under what circumstances will a grant of right-of-way be renewed?  
 169.203 May a right-of-way be renewed multiple times?

##### **Amendments**

- 169.204 May a grantee amend a right-of-way?  
 169.205 What is the approval process for an amendment of a right-of-way?  
 169.206 How will BIA decide whether to approve an amendment of a right-of-way?

##### **Assignments**

- 169.207 May a grantee assign a right-of-way?  
 169.208 What is the approval process for an assignment of a right-of-way?  
 169.209 How will BIA decide whether to approve an assignment of a right-of-way?

##### **Mortgages**

- 169.210 May a grantee mortgage a right-of-way?  
 169.211 What is the approval process for a mortgage of a right-of-way?  
 169.212 How will BIA decide whether to approve a mortgage of a right-of-way?

#### **Subpart E—Effectiveness**

- 169.301 When will a right-of-way document be effective?  
 169.302 Must a right-of-way be recorded?  
 169.303 What happens if BIA denies a right-of-way document?  
 169.304 What happens if BIA does not meet a deadline for issuing a decision on a right-of-way document?

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

#### Subpart F—Compliance and Enforcement

- 169.401 What is the purpose and scope of this subpart?
- 169.402 Who may investigate compliance with a right-of-way?
- 169.403 May a right-of-way provide for negotiated remedies?
- 169.404 What will BIA do about a violation of a right-of-way grant?
- 169.405 What will BIA do if the grantee does not cure a violation of a right-of-way grant on time?
- 169.406 Will late payment charges, penalties, or special fees apply to delinquent payments due under a right-of-way grant?
- 169.407 How will payment rights relating to a right-of-way grant be allocated?
- 169.408 What is the process for cancelling a right-of-way for non-use or abandonment?
- 169.409 When will a cancellation of a right-of-way grant be effective?
- 169.410 What will BIA do if a grantee remains in possession after a right-of-way expires or is terminated or cancelled?
- 169.411 Will BIA appeal bond regulations apply to cancellation decisions involving right-of-way grants?
- 169.412 When will BIA issue a decision on an appeal from a right-of-way decision?
- 169.413 What if an individual or entity takes possession of or uses Indian land or BIA land without a right-of-way or other proper authorization?
- 169.414 May BIA take emergency action if Indian land is threatened?
- 169.415 How will BIA conduct compliance and enforcement when there is a life estate on the tract?

**Authority:** 5 U.S.C. 301; 25 U.S.C. 323–328; 25 U.S.C. 2201 *et seq.*

#### Subpart A—Purpose, Definitions, General Provisions

##### § 169.1 What is the purpose of this part?

(a) This part is intended to streamline the procedures and conditions under which BIA will consider a request to approve (*i.e.*, grant) rights-of-way over and across tribal lands, individually owned Indian lands, and BIA 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. This part is also intended to support tribal self-determination and self-governance by acknowledging and incorporating tribal law and policies in processing a request for a right-of-way across tribal lands and defer to the maximum extent possible to Indian landowner decisions regarding their Indian land.

(b) This part specifies:

(1) Conditions and authorities under which we will consider a request to

approve rights-of-way over 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 over 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 Indian Reorganization Act of 1934 (25 U.S.C. 476), 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 specifically authorizing rights-of-way on tribal land without our approval.

##### § 169.2 What terms do I need to know?

The following terms apply to this part:

**Abandonment** means the grantee has affirmatively relinquished a right-of-way (as opposed to relinquishing through non-use) either by notifying the BIA of the abandonment or by performing an act indicating an intent to give up and never regain possession of the right-of-way.

**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 § 169.008.

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

**Cancellation** means BIA action to end a right-of-way grant.

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

**Consent** means written authorization by an Indian landowner to a specified action.

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

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

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

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

**Grant** means the formal transfer of a right-of-way interest by the Secretary's approval or the document evidencing the formal transfer, including any changes made by a right-of-way document.

**Grantee** means a person or entity to whom the Secretary grants a right-of-way or to whom the right-of-way has been assigned once the assignment is effective.

**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 individually owned Indian land and/or 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 in which the surface estate, or an undivided interest in the surface estate, is owned by one or more individual Indians in trust or restricted status.

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

*Life estate* means an interest in property held only for the duration of a designated person(s)' life. A life estate may be created by a conveyance document or by operation of law.

*LTRO* means the Land Titles and Records Office of BIA.

*Map of definite location* means a survey plat signed by a professional surveyor or engineer 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 BIA land and with reference to the public surveys under 25 U.S.C. 176, 43 U.S.C. 2 and 1764, and showing existing facilities adjacent to the proposed project.

*Permanent improvement* means pipelines, roads, structures, and other infrastructure attached to the land subject to the right-of-way.

*Right-of-way* means an easement or a legal right to go over or across tribal land, individually owned Indian land, or BIA 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; however, in all cases, title to the land remains vested in

the landowner. This term does not include service lines.

*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.

*Termination* means action by Indian landowners to end a right-of-way.

*Trespass* means any unauthorized occupancy, use of, or action on tribal or individually owned Indian land or BIA 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 in which the surface estate, or an undivided interest in the surface estate, is owned by one or more tribes in trust or restricted status. The term also includes the surface estate of lands held in trust for a tribe but reserved for BIA administrative purposes and includes the surface estate of lands held in trust for an Indian corporation chartered under section 17 of the Indian Reorganization Act of 1934 (25 U.S.C. 477).

*Tribal utility* means a utility owned by one or more tribes that is established for the purpose of providing utility service, and that is certified by the tribe to meet the following requirements:

- (1) The combined Indian tribe ownership constitutes not less than 51 percent of the utility;
- (2) The Indian tribes, together, receive at least a majority of the earnings; and
- (3) The management and daily business operations of the utility are controlled by one or more representatives of the tribe.

*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 and/or individual Indians; or

(2) That one or more tribes and/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.

*Utility cooperative* means a cooperative that provides public utilities to its members and either reinvests profits for infrastructure or distributes profits to members of the cooperative.

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

- (a) This part applies to Indian land and BIA land.
- (b) 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 BIA 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.
- (c) 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.

**§ 169.4 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:

If you are . . .	then you must obtain a right-of-way under this part . . .
(1) A person or legal entity (including a 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, and the tribe for tribal land, before crossing the land or any portion thereof.
(2) An individual Indian landowner who owns a fractional interest in the land (even if the individual Indian landowner owns a majority of the fractional interests).	from us, with the consent of the owners of other trust and restricted interests in the land, totaling at least a majority interest in the tract, and with the consent of the tribe for tribal land. You do not need to obtain a right-of-way from us if all of the owners (including the tribe, for tribal land) have given you permission to cross without a right-of-way.

If you are . . .	then you must obtain a right-of-way under this part . . .
(3) An Indian tribe, agency or instrumentality of the tribe, or an independent legal entity wholly owned and operated by the tribe who owns only a fractional interest in the land (even if the tribe, agency, instrumentality or legal entity owns a majority of the fractional interests).	from us, with the consent of the owners of other trust and restricted interests in the land, totaling at least a majority interest in the tract, 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 are authorized by:
    - (i) A lease under 25 CFR part 162, 211, 212, or 225 or permit under 25 CFR part 166;
    - (ii) A tribal land assignment or similar instrument authorizing use of the tribal land without Secretarial approval; or
    - (iii) Other, tribe-specific authority authorizing use of the tribal land without Secretarial approval; or
    - (iv) Another land use agreement not subject to this part (e.g., under 25 CFR part 84); or
    - (3) You meet any of the criteria in the following table:

You do not need a right-of-way if you are . . .	but the following conditions apply . . .
(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 § 169.56.
(iii) An independent legal entity wholly owned and operated by the tribe that owns 100 percent of the trust or restricted interests in the land.	The tribal governing body must pass a tribal authorization authorizing access without BIA approval and including a legal description, and you must submit both documents to BIA for our records.
(iv) Otherwise authorized by law .....	You must comply with the requirements of the applicable law.

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

(a) This part covers rights-of-way over and across Indian or BIA 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, even where they are appurtenant 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 (including pump stations, meter stations, and other appurtenant facilities);
- (9) Electric transmission and distribution systems (including lines, poles, towers, telecommunication, protection, measurement and data acquisition equipment, other items necessary to operate and maintain the system, and appurtenant facilities);
- (10) Telecommunications, broadband, fiber optic lines;
- (11) Avigation hazard easements;
- (12) Conservation easements not covered by 25 CFR part 84, Encumbrances of Tribal Land—Contract Approvals, or 25 CFR part 162, Leases and Permits; or

(13) Any other new use for which a right-of-way is appropriate but which is unforeseeable as of the effective date of these regulations.

(b) Each of the uses listed above includes the right to access the right-of-way to manage vegetation, inspect, maintain and repair equipment, and conduct other activities that are necessary to maintain the right-of-way use.

**§ 169.6 What statutory authority will BIA use to act on requests for rights-of-way under this part?**

BIA will act on requests for 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.

**§ 169.7 Does this part apply to right-of-way grants submitted for approval before December 21, 2015?**

(a) If your right-of-way grant is issued on or after December 21, 2015, this part applies.

(b) If we granted your right-of-way before December 21, 2015, the procedural provisions of this part apply except that if the procedural provisions of this part conflict with the explicit provisions of the right-of-way grant or statute authorizing the right-of-way document, then the provisions of the right-of-way grant or authorizing statute apply instead. Non-procedural provisions of this part do not apply.

(c) If you submitted an application for a right-of-way but we did not grant the

right-of-way before December 21, 2015, then:

(1) You may choose to withdraw the document and resubmit after December 21, 2015, in which case this part will apply to that document; or

(2) You may choose to proceed without withdrawing, in which case:

(i) We will review the application under the regulations in effect at the time of your submission; and

(ii) Once we grant the right-of-way, the procedural provisions of this part apply except that if the procedural provisions of this part conflict with the explicit provisions of the right-of-way grant or statute authorizing the right-of-way document, then the provisions of the right-of-way grant or authorizing statute apply instead. Non-procedural provisions of this part do not apply.

(d) For any assignments completed before December 21, 2015, the current assignee must, by April 18, 2016, provide BIA with documentation of any past assignments or notify BIA that it needs an extension and explain the reason for the extension.

(e) To the maximum extent possible, BIA will interpret any ambiguous language in the right-of-way document or statute to be consistent with these regulations.

**§ 169.8 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 on BIA's behalf 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 fair market value and valuation), cancellation of a right-of-way, or an appeal. Applicants may inquire at either the BIA office or the tribal office to determine whether the tribe has compacted or contracted to administer realty functions.

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

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

- (a) Are subject to all applicable Federal laws;
- (b) Are subject to tribal law; except to the extent that those tribal laws are inconsistent with applicable Federal law; and
- (c) Are generally not subject to State law or the law of a political subdivision thereof.

**§ 169.10 What is the effect of a right-of-way on a tribe's jurisdiction over the underlying parcel?**

A right-of-way is a non-possessory interest in land, and title does not pass to the grantee. The Secretary's grant of a right-of-way will clarify that it does not diminish to any extent:

- (a) The Indian tribe's jurisdiction over the land subject to, and any person or activity within, the right-of-way;
- (b) The power of the Indian tribe to tax the land, any improvements on the land, or any person or activity within, the right-of-way;
- (c) The Indian tribe's authority to enforce tribal law of general or particular application on the land subject to and within the right-of-way, as if there were no grant of right-of-way;
- (d) The Indian tribe's inherent sovereign power to exercise civil jurisdiction over non-members on Indian land; or
- (e) The character of the land subject to the right-of-way as Indian country under 18 U.S.C. 1151.

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

- (a) Subject only to applicable Federal law:
  - (1) 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;
  - (2) 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; and

(3) The right-of-way interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State.

(b) Improvements, activities, and right-of-way interests may be subject to taxation by the Indian tribe with jurisdiction.

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

When this part requires BIA to notify the parties of our intent to grant a right-of-way under § 169.107(b) or our determination to approve or disapprove a right-of-way document, and to provide any right of appeal:

- (a) For rights-of-way over or across tribal land, we will notify the applicant and the tribe by first class U.S. mail or, upon request, electronic mail; and
- (b) For rights-of-way over or across individually owned Indian land, we will notify the applicant and individual Indian landowners by first class U.S. mail or, upon request, electronic mail. If the individually owned land is located within a tribe's jurisdiction, we will also notify the tribe by first class U.S. mail or, upon request, electronic mail.

**§ 169.13 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 our decision to disapprove a right-of-way grant or any other right-of-way document may be appealed only by the applicant or an Indian landowner of the tract over or across which the right-of-way was proposed.

(b) For purposes of appeals from BIA decisions under this part, "interested party" is defined as any person whose land is subject to the right-of-way or located adjacent to or in close proximity to the right-of-way whose own direct economic interest is adversely affected by an action or decision.

**§ 169.14 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 1076-0181. 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—Service Line Agreements**

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

Service lines generally branch off from facilities for which a right-of-way must be obtained. A service line is a utility line running from a main line, transmission line, or distribution line that is used only for supplying telephone, water, electricity, gas, internet service, or other utility service to a house, business, or other structure. In the case of a power line, a service line is limited to a voltage of 14.5 kv or less, or a voltage of 34.5 kv or less if serving irrigation pumps and commercial and industrial uses. To obtain access to Indian land for service lines, the right-of-way grantee must file a service line agreement meeting the requirements of this subpart with BIA.

**§ 169.52 What is a service line agreement?**

Service line agreements are agreements signed by a utility provider and landowners for the purpose of providing limited access to supply the owners (or authorized occupants or users) of one tract of tribal or individually owned Indian land with utilities for use by such owners (or occupants or users) on the premises.

**§ 169.53 What should a service line agreement address?**

A service line agreement should address what utility services the provider will supply, to whom, and other appropriate details. The service line agreement should also address the mitigation of any damages incurred during construction and the restoration (or reclamation, if agreed to by the owners or authorized occupants or users) of the premises at the termination of the agreement.

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

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

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

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

We do not require a valuation for service line agreements.



**§ 169.56 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 of the service line with the distribution line. When the plat or diagram is placed on a separate sheet it must include the signatures of the parties.

**Subpart C—Obtaining a Right-of-Way Application****§ 169.101 How do I obtain a right-of-way across tribal or individually owned Indian land or BIA land?**

(a) To obtain a right-of-way across tribal or individually owned Indian land or BIA 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, but our approval to access is not required. 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.

(c) 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 (this requirement does not apply to easements covering the entire tract of land);

(3) Bond(s), insurance, and/or other security meeting the requirements of § 169.103;

(4) Record that notice of the right-of-way was provided to all Indian landowners;

(5) Record of consent for the right-of-way meeting the requirements of § 169.107, or a statement requesting a right-of-way without consent under § 169.107(b);

(6) If applicable, a valuation meeting the requirements of § 169.114;

(7) 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;

(8) Environmental and archaeological reports, surveys, and site assessments, as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements; and

(9) A statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law, if required by the tribe.

(c) There is no standard application form.

**§ 169.103 What bonds, insurance, or other security must accompany the application?**

(a) You must include payment of bonds, insurance, or alternative forms of security with your application for a right-of-way in amounts that cover:

- (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 estimated damages and remediation costs from any potential release of contaminants, explosives, hazardous material or waste;

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

(5) The restoration of the premises to their condition at the start of the right-of-way or reclamation to some other specified condition if agreed to by the landowners.

(b) The 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. Any insurance must identify both the Indian landowners and the United States as additional insured parties.

(c) The grant will specify the conditions under which we may adjust the bond, insurance, or security 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 bond, insurance, or alternative form of security will be enforceable, and that the surety will be able to perform the guaranteed obligations.

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

(f) We may waive the requirement for a bond, insurance, or alternative form of security:

(1) For individually owned Indian land, if the Indian landowners of the majority of the interests request it and we determine, in writing, that a waiver is in the Indian landowners' best interest considering the purpose of and risks associated with the right-of-way, or if the grantee is a utility cooperative and is providing a direct benefit to the Indian land or is a tribal utility.

(2) For tribal land, deferring, to the maximum extent possible, to the tribe's determination that a waiver of a bond, insurance or alternative form of security is in its best interest.

(g) We will accept a 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 or an assigned savings account.

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

(1) State 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 terms of the right-of-way grant;

(3) Be irrevocable during the term of the 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 bond or alternative form of security?**

Upon satisfaction of the requirements for which the bond was security, or upon expiration, termination, or cancellation of the right-of-way, the grantee may ask BIA in writing to release all or part of the bond or alternative form of security and release the grantee from the obligation to maintain insurance. 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 applicable grant obligations; and

(b) Release all or part of the 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 § 169.405 or § 169.408.

(c) BIA may waive the requirements in this section if we determine, in

writing, that a waiver is in the best interest of the Indian landowners.

**Consent Requirements**

**§ 169.106 How does an applicant identify and contact individual Indian landowners to negotiate a right-of-way?**

(a) Applicants may submit a written request to us to obtain the following information. The request must specify that it is for the purpose of negotiating a right-of-way:

(1) Names and addresses of the individual Indian landowners or their representatives;

(2) Information on the location of the parcel; and

(3) The percentage of undivided interest owned by each individual Indian landowner.

(b) We may assist applicants in contacting the individual Indian landowners or their representatives for the purpose of negotiating a right-of-way, upon request.

(c) We will attempt to assist individual Indian landowners in right-of-way negotiations, upon their request.

**§ 169.107 Must I obtain tribal or individual Indian landowner consent for a right-of-way across Indian land?**

(a) For a right-of-way across tribal land, the applicant must obtain tribal consent, in the form of a tribal authorization and a written agreement with the tribe, if the tribe so requires, to a grant of right-of-way across tribal land. The consent document may impose restrictions or conditions; any restrictions or conditions automatically become conditions and restrictions in the grant.

(b) For a right-of-way across individually owned Indian land, the applicant must notify all individual Indian landowners and, except as provided in paragraph (b)(1) of this section, must obtain written consent from the owners of the majority interest in each tract affected by the grant of right-of-way.

(1) We may issue the grant of right-of-way without the consent of any of the individual Indian owners if all of the following conditions are met:

(i) The owners of interests in the land are so numerous that it would be impracticable to obtain consent as defined in paragraph (c) of this section;

(ii) We determine the grant will cause no substantial injury to the land or any landowner, based on factors including, but not limited to, the reasonableness of the term of the grant, the amount of acreage involved in the grant, the disturbance to land that will result from the grant, the type of activity to be conducted under the grant, the potential

for environmental or safety impacts resulting from the grant, and any objections raised by landowners;

(iii) 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

(iv) We provide notice of our intent to issue the grant of right-of-way to all of the owners at least 60 days prior to the date of the grant using the procedures in § 169.12, and provide landowners with 30 days to object.

(2) For the purposes of this section, the owners of interests in the land are so numerous that it would be impracticable to obtain consent, if there are 50 or more co-owners of undivided trust or restricted interests.

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

(c) We will determine the number of owners of, and undivided interests in, a fractionated tract of Indian land, for the purposes of calculating the requisite consent based on our records on the date on which the application is submitted to us.

**§ 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 over or across 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 § 169.9;

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

(iii) Describes the scope of the powers granted, to include granting rights-of-way on land or generally conveying or encumbering interests in Indian land, and any limits on those powers.

(c) BIA may give written consent to a right-of-way on behalf of an individual Indian landowner, as long as we

determine that the grant will cause no substantial injury to the land or any landowner, based on factors including, but not limited to, the amount of acreage involved in the grant, the disturbance to land that will result from the grant, the type of activity to be conducted under the grant, the potential for environmental or safety impacts resulting from the grant, and any objections raised by landowners. BIA's consent must be counted in the majority interest under § 169.107, on behalf of:

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

(3) An individual Indian landowner 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 individual Indian landowner who is an orphaned minor and who does not have a guardian duly appointed by a court of competent jurisdiction; and

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

**§ 169.109 Whose consent do I need for a right-of-way when there is a life estate on the tract?**

If there is a life estate on the tract that would be subject to the right-of-way, the applicant must get the consent of both the life tenant and the owners of the majority of the remainder interest known at the time of the application.

**Compensation Requirements**

**§ 169.110 How much monetary compensation must be paid for a right-of-way over or across tribal land?**

(a) A right-of-way over or across 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 agreed upon compensation satisfactory to the tribe;

(2) Waives valuation; and

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

(b) The tribe may request, in writing, that we determine fair market value, in which case we will use a valuation in

accordance with § 169.114. After providing the tribe with the fair 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 pay fair market value based on a valuation in accordance with § 169.114.

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

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

**§ 169.112 How much monetary compensation must be paid for a right-of-way over or across individually owned Indian land?**

(a) A right-of-way over or across individually owned Indian land must require compensation of not less than fair market value, unless paragraph (b) or (c) of this section permit a lesser amount. Compensation may also include additional fees, including but not limited to throughput fees, severance damages, franchise fees, avoidance value, bonuses, or other factors. Compensation may be based on a fixed amount, a percentage of the projected income, or some other method. The grant must establish how the fixed amount, percentage, or combination will be calculated and the frequency at which the payments will be made.

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

(1) The grantee is a utility cooperative and is providing a direct benefit to the Indian land; or

(2) The grantee is a tribal utility; or  
(3) The individual Indian landowners execute a written waiver of the right to receive fair market value and we determine it is in the individual 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 § 169.2, 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 to determine fair market value, unless:

(1) 100 percent of the individual 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 individual 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 fair market value, as determined by a valuation, unless:

(1) The grantee is a utility cooperative and is providing a direct benefit to the Indian land; or

(2) The grantee is a tribal utility; or

(3) We waive the requirement because the tribe or grantee will construct infrastructure improvements benefitting the individual Indian landowners, and we determine in writing that the waiver is in the best interest of all the landowners.

**§ 169.113 Must a right-of-way grant for individually owned Indian land provide for compensation reviews or adjustments?**

(a) For a right-of-way grant of individually owned Indian land, a review of the adequacy of compensation must occur at least every fifth year, in the manner specified in the grant unless:

(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 fair 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.

(b) 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.

(c) 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.

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

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

(b) We will either:

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

(2) Approve use of a 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.

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

Compensation for a right-of-way may be a one-time, lump sum payment, or may be paid in increments (for example, annually).

(a) If compensation is a one-time, lump sum payment, the grantee must make the payment by the date we grant the right-of-way, unless stated otherwise in the grant.

(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 if payments are made to us on the Indian landowners' behalf.

**§ 169.116 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 tribe if the tribe so chooses. The grantee may make payments directly to the Indian landowners if:

(1) The Indian landowners' trust accounts are unencumbered 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.

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

(a) If payments are made to us on behalf of the Indian landowners, 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.

(d) The grant of right-of-way will specify the payment method if payments are made by direct pay.

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

(a) A right-of-way grant may provide for alternative forms of compensation

and varying types of compensation, subject to the conditions in paragraphs (b) and (c) of this section:

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

(2) Varying types of compensation may include but are not limited to different types of payments at specific stages during the life of the right-of-way grant, such as 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 alternative form of compensation or varying type of compensation to be in its best interest.

(c) For individually owned land, we may grant a right-of-way that provides for an alternative form of compensation or varying type of compensation if we determine that it is in the best interest of the Indian landowners.

**§ 169.119 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.

**§ 169.120 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 application for use of the land or use of the land, as determined by entities having jurisdiction, except as provided in § 169.11. The grantee must pay these amounts to the appropriate office, as applicable.

(b) In addition to, or as part of, the compensation for a right-of-way under §§ 169.110 and 169.112 and the payments provided for in paragraph (a) of this section, the applicant for a right-of-way will be required to pay for all damages to the land, such as those incident to the construction or maintenance of the facility for which the right-of-way is granted.

**§ 169.121 How will compensation be distributed among the life tenants and owners of the remainder interests?**

If a will created the life estate and specifies how the compensation will be

distributed among the life tenants and owners of the remainder interests, those terms will establish the distribution. Otherwise:

(a) The owners of the remainder interests and the life tenant may enter 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; or

(b) If the owners of the remainder interests and life tenant did not enter into an agreement for distribution, the life tenant will receive payment in accordance with the distribution and calculation scheme set forth in part 179 of this chapter.

**§ 169.122 Who does the grantee pay if there is a life estate on the tract?**

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.

**Grants of Rights-of-Way**

**§ 169.123 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 adverse impacts, and ensure compliance with all applicable Federal environmental, land use, historic preservation, and cultural resource 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 of the information and supporting documents required under this subpart, including but not limited to, an accurate legal description for each affected tract, documentation of landowner consent, 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 applicant of the date of our receipt of the complete package. Within 60 days of our receipt of a complete package, 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 will issue a written determination granting or denying the right-of-way within 30 days from sending the letter informing the applicant that we need additional time.

(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 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, and provide notice under § 169.12.

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

Our decision to grant or deny a right-of-way will be in writing.

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

(1) The requirements of this subpart have not been met, such as if the required landowner consent has not been obtained under § 169.107; or

(2) 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.

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

(a) The grant will incorporate the conditions or restrictions set out in the Indian landowners' consents.

(b) The grant will address:

(1) The use(s) the grant is authorizing;

(2) Whether assignment of the right-of-way is permitted and, if so, whether additional consent is required for the assignment and whether any additional compensation is owed to the landowners;

(3) Whether mortgaging of the right-of-way is permitted and, if so, whether additional consent is required for the mortgage and whether any additional compensation is owed to the landowners; and

(4) Ownership of permanent improvements under § 169.130.

(c) The grant will state that:

(1) The tribe maintains its existing jurisdiction over the land, activities, and persons within the right-of-way under § 169.10 and reserves the right of the tribe to reasonable access to the lands subject to the grant to determine grantee's compliance with consent conditions or to protect public health and safety;

(2) 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;

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

(4) If historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with this grant, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the grantee will contact BIA and the tribe with jurisdiction over the land to determine how to proceed and appropriate disposition.

(5) The grantee must:

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

(ii) Pay promptly all damages and compensation, in addition to 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, or reclaim the land if agreed to by the landowners;

(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) Operate, 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 the land to its original condition, to the maximum extent reasonably possible, upon cancellation or termination of the right-of-way, or reclaim the land if agreed to by the landowners;

(x) At all times keep the BIA, and the tribe for tribal land, 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;

(xii) Comply with due diligence requirements under § 169.105; and

(xiii) Notify the BIA, and the tribe for tribal land, if it files for bankruptcy or is placed in receivership.

(6) 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.

(d) The grant must attach or include by reference maps of definite location.

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

A grant of right-of-way over or across 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.

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

(a) If you are the grantee, you may 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 only if it is within the same scope of the use specified in the original grant of the existing right-of-way.

(1) 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 and not within the same scope of the use specified in the original grant of the existing right-of-way, and the new use will not require any ground disturbance, you must request an amendment to the existing right-of-way grant.

(2) 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 and not within the same scope of the use specified in the original grant of the existing right-of-way, and the new use requires ground disturbance, you must request a new right-of-way.

(b) If you are not the grantee:

(1) You may use all or a portion of an existing right-of-way for a use specified in the original grant of the existing right-of-way or a use within the same scope of the use specified in the original grant of the existing right-of-way if the grantee obtains an assignment to authorize the new user; or

(2) You may 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 and not within the same scope of use specified in the original grant of the existing right-of-way if you request a new right-of-way within or overlapping the existing right-of-way for the new use.

(c) An example of a use within the same scope is a right-of-way for underground telephone line being used for an underground fiber optic line, and an example of a use that is not within the same scope is a right-of-way for a pipeline being used for a road or railroad.

**§ 169.128 When will BIA grant a right-of-way for a new use within or overlapping an existing right-of-way?**

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

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

(b) The new right-of-way does not interfere with the use or purpose of the existing right-of-way and the applicant

has obtained the consent of the existing right-of-way grantee. The existing right-of-way grantee may not unreasonably withhold consent.

**§ 169.129 What is required if the location described in the original application and grant differs from the construction location?**

(a) If engineering or other complications prevented construction within the location identified in the original application and grant, and required a minor deviation from the location identified in the original application and grant, then we and the tribe, for tribal land, 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 or, with landowner consent, a recalculation of compensation;

(4) Additional compensation or security; or

(5) Other actions required to comply with applicable laws.

(b) If BIA and the tribe, for tribal land, determine it is not a minor deviation in location, we may require a new right-of-way grant or amendment to the right-of-way grant.

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

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

**§ 169.130 Must a right-of-way grant address ownership of permanent improvements?**

(a) A right-of-way grant must specify who will own any permanent improvements the grantee constructs during the grant term and may specify under what conditions, if any, permanent improvements the grantee constructs may be conveyed to the Indian landowners during the grant term. In addition, the grant may indicate whether each specific permanent improvement the grantee constructs will:

(1) Remain on the premises, upon the expiration, cancellation, or termination of the grant, in a condition satisfactory to the Indian landowners, and become the property of the Indian landowners;

(2) Be removed within a time period specified in the grant, at the grantee's expense, with the premises to be restored as closely as possible to their condition before construction of the permanent improvements; or

(3) Be disposed of by other specified means.

(b) A grant that requires the grantee to remove the permanent improvements must also provide the Indian landowners with an option to take possession of and title to the permanent improvements if the improvements are not removed within the specified time period.

#### **Subpart D—Duration, Renewals, Amendments, Assignments, Mortgages**

##### **Duration & Renewals**

##### **§ 169.201 How long may the duration 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 is reasonable.

(c) For individually owned Indian land, we will review the right-of-way duration to ensure that it is reasonable, given the purpose of the right-of-way. We will generally consider a maximum duration of 20 years to be reasonable for the initial term for rights-of-way for oil and gas purposes and a maximum of 50 years, inclusive of the initial term and any renewals, to be reasonable for rights-of-way for all other purposes. We will consider a duration consistent with use to be reasonable for rights-of-way for conservation easements. We will consider durations different from these guidelines if a different duration would benefit the Indian landowners, is required by another Federal agency, or the tribe has negotiated for a different duration and the right-of-way crosses tribal land.

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

A renewal is an extension of term of an existing right-of-way without any other change.

(a) The grantee may request a renewal of an existing right-of-way grant and we will renew the grant as long as:

(1) The initial term and renewal terms, together, do not exceed the maximum term determined to be reasonable under § 169.201;

(2) The existing right-of-way grant explicitly allows for automatic renewal or an option to renew and specifies compensation owed to the landowners upon renewal or how compensation will be determined;

(3) The grantee provides us with a signed affidavit that there is no change in size, type, or location, of the right-of-way;

(4) The initial term has not yet ended;

(5) No uncured violation exists regarding the regulations in this part or the grant's conditions or restrictions; and

(6) The grantee provides confirmation that landowner consent has been obtained, or if consent is not required because the original right-of-way grant explicitly allows for renewal without the owners' consent, the grantee provides notice to the landowners of the renewal.

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

(c) If the proposed renewal involves any change to the original grant or the original grant was silent as to renewals, 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, unless the grant expressly prohibits multiple renewals, and subject to the duration limitations for individually owned land in § 169.201. The provisions of § 169.202 apply to each renewal.

##### **Amendments**

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

(a) An amendment is required to change any provisions of a right-of-way grant. If the change is a material change to the grant, we may require application for a new right-of-way instead.

(b) A grantee may request that we amend a right-of-way to make an administrative modification (*i.e.*, a modification that is clerical in nature, for example to correct the legal description) without meeting consent requirements, as long as the grantee provides landowners with written notice. For all other amendments, the grantee must meet the consent requirements in § 169.107 and obtain our approval.

##### **§ 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 grantee of the date we receive it. 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. Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

(b) If we need additional time to review, our letter informing the parties that we need additional time for review 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 to the amendment under § 169.107 and we have not consented on their behalf under § 169.108;

(2) The grantee's sureties for the bonds or alternative securities 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 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:

(1) Meeting the consent requirements in § 169.107, unless the grant expressly allows for assignments without further consent; and

(2) Either obtaining our approval, or meeting the conditions in paragraph (b) of this section.

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

(1) The original right-of-way grant expressly 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 within 30 days of the assignment.

(c) Assignments that are the result of a corporate merger, acquisition, or transfer by operation of law are

excluded from these requirements, except for the requirement to provide a copy of the assignment and supporting documentation to BIA for recording in the LTRO within 30 days and to the tribe for tribal land.

**§ 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 grantee of the date we receive it. If our approval is required, we have 30 days from receipt of the executed assignment, proof of any required consents, and any 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 to the assignment under § 169.107 and their consent is required;
- (2) Sufficient bonding and/or insurance are not in place;
- (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 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, if the grant expressly allows mortgaging. The grantee must meet the consent requirements in § 169.107, unless the grant expressly allows for mortgaging without consent, and must obtain our approval for the mortgage.

**§ 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 grantee 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 sureties for the bonds have not consented;
- (3) The requirements of this subpart have not been met; or
- (4) We find a compelling reason to withhold 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 E—Effectiveness**

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

(a) 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.

(b) The right-of-way document may specify a date on which the grantee's obligations are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

**§ 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 under § 169.4;

(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 and the applicant 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) Either party 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) of this section, 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 BIA 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 F—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 or right-of-way document, including but not limited to encroachments beyond the defined boundaries, accidental, willful, and/or incidental trespass, unauthorized new construction, changes in use not permitted in the grant, and late or insufficient payment may result in enforcement actions including, but not limited to, cancellation of the grant.

**§ 169.402 Who may investigate compliance with a right-of-way?**

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

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

(2) 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.

(b) The tribe with jurisdiction may investigate compliance consistent with tribal law.

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

(a) The tribe and the grantee on tribal land may negotiate remedies for a violation, abandonment, or non-use. The negotiated remedies must be stated in the tribe's consent to the right-of-way grant, which BIA will then incorporate into the grant itself. 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 tribe 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. 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 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. We will consult with the tribe for tribal land or, where feasible, communicate with Indian landowners for individually owned Indian land, and determine whether a violation has occurred.

(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, as well as any reclamation or other obligations that survive the end of the grant.

**§ 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, communicate 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 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, communication with Indian landowners for individually owned Indian land, we may take action to recover unpaid compensation and any associated late payment charges.

- (1) We need not cancel the grant or give any further notice to the grantee before taking action to recover unpaid compensation.
- (2) We may take action to recover any unpaid compensation even though 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 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 the timeframe reflected in the termination terms of the grant, or within 31 days of the date of receipt of the cancellation letter, or within such

longer period of time in extraordinary circumstances considering the protection of trust resources and the best interest of the Indian landowners, 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 land.

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

(e) We will issue an appropriate instrument cancelling the right-of-way and transmit it to the LTRO pursuant to 25 CFR part 150 for recording and filing.

**§ 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:

The grantee will pay . . . .	For . . . .
(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 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 a nonuse of the right-of-way for a

consecutive 2-year period for the purpose for which it was granted. If the grantee fails to correct the basis for cancellation by the 30th day after we mailed the notice, we will issue an appropriate instrument cancelling the right-of-way and transmit it to the LTRO pursuant to part 150 of this chapter for recording and filing.

(b) We may cancel, in whole or in part, any rights-of-way granted under this part immediately upon abandonment of the right-of-way by the grantee. We will issue an appropriate instrument cancelling the right-of-way and transmit it to the LTRO pursuant to part 150 of this chapter for recording and filing.

(c) The cancellation notice will notify the grantee of the grantee's right to appeal under part 2 of this chapter, including the possibility of that the official to whom the appeal is made will require the grantee to post an appeal bond.

**§ 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. When a cancellation decision is not immediately effective, 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, and is not accessing the land to perform reclamation or other remaining grant obligations, we may treat the unauthorized possession as a trespass under applicable law and will communicate with the Indian landowners in making the determination whether to treat the unauthorized possession as a trespass. Unless the parties have notified us in writing that they are engaged in good faith negotiations 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. The holdover time will be charged against the new term.

**§ 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 govern 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 When will BIA issue a decision on an appeal from a right-of-way decision?**

BIA will issue a decision on an appeal from a right-of-way decision within 60 days of receipt of all pleadings.

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

If an individual or entity takes possession of, or uses, Indian land or

BIA 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, including applicable tribal law.

**§ 169.414 May BIA take emergency action if Indian land is threatened?**

(a) We may take appropriate emergency action if there is a natural disaster or if an individual or entity causes or threatens to cause immediate and significant harm to Indian land or BIA land. Emergency action may include judicial action seeking immediate cessation of the activity resulting in or threatening the harm.

(b) We will make reasonable efforts to notify the individual Indian landowners before and after taking emergency action

on Indian land. In all cases, we will notify the Indian landowners after taking emergency action on Indian land. We will provide written notification of our action to the Indian tribe exercising jurisdiction over the Indian land before and after taking emergency action on Indian land.

**§ 169.415 How will BIA conduct compliance and enforcement when there is a life estate on the tract?**

(a) 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.

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

Dated: November 3, 2015.

**Kevin K. Washburn,**

*Assistant Secretary—Indian Affairs.*

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