United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

National Policy Memorandum

Office of Trust Services
Division of Real Estate Services

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Title: Streamlining the Rights-of-Way Application Processes for Broadband Infrastructure Projects Across Indian Trust and Restricted Land

1. Purpose

This memorandum establishes the Bureau of Indian Affairs' (BIA) comprehensive policy framework based on BIA's regulations for the efficient and effective processing of Rights-of-Way (ROW) applications to build broadband infrastructure in all areas within our jurisdiction, with a focus on rural unserved and underserved Tribal communities.

Background:

Broadband infrastructure is essential to support economic growth, education, healthcare, and overall development of Tribal communities, allowing businesses to thrive and facilitating participation in the digital and modern age. Broadband includes various technologies such as fiber optics, transmission lines, wireless, cable, internet, satellite, etc., and is crucial to establishing or enhancing connectivity to Tribal communities.

To enhance connectivity, existing infrastructure such as Federal and State highways, local roads, and BIA roads are often used to expand access for wireless broadband technology. Obtaining ROWs for broadband networks is necessary for deploying new broadband projects on Tribal or individually owned Indian trust or restricted lands.

2. Scope

This policy applies to all BIA programs and employees, as well as Tribal contract or compact programs and employees per 25 CFR 169.8, involved in the ROW application processes for broadband infrastructure projects on trust or restricted lands.

3. Policy and Procedure

It is BIA's policy to comply with all Federal laws and regulations as well as Department of the Interior (DOI) policies regarding the processing of ROW applications for broadband infrastructure projects.

When BIA receives a ROW application, the package must be encoded into the system of record within three (3) business days. A review of the package must be completed within seven (7) business days as to whether the package is complete or incomplete. Upon completion of the review, BIA will promptly provide a written notice to the applicant either that the application is complete or identify the missing application supporting documents.

Within 60 days of BIA's receipt of a complete package, BIA will grant or deny the ROW, return the package for revision, or inform the applicant, in writing, that BIA needs additional review time. (25 CFR 169.123(b)(2)).

Immediately following BIA approval, the ROW must be submitted to the Land Title and Records Office (LTRO) with jurisdiction over the affected Indian land for official recording in the system of record. The ROW application, grant document, applicable Tribal authorization, map of definite location and any Tribal use agreement(s) connected to Tribal infrastructure and/or broadband project development agreements with States and other Federal agency(ies) must be filed with BIA for recording in the official system of record within 30 days of approval of the grant.

BIA will implement the following steps to simplify and streamline the processing of ROW applications that are part of, or related to, broadband infrastructure:

A. ROW Applications on Tribal Lands Where Tribe Owns 100% of the Tract.

1. If a Tribe or an entity wholly owned and operated by the Tribe that owns 100% of the trust or restricted interest in a tract is the applicant, then the applicant does not need BIA approval of a ROW on the Tribal land. (25 CFR 169.4(b)(1), 169.4(b)(3)(iii)). A ROW is not needed if the applicant has entered into a contract or agreement that encumbers Tribal land under 25 U.S.C. § 81.

2. If the applicant is a third party, including but not limited to a Tribal consortium or a Federal agency, then BIA approval of a ROW is required and the Tribe may exercise all regulatory permissions, including negotiating for any payment amount and the terms of consent, which ultimately become the terms of the ROW grant. (25 CFR 169.107(a)).

    a. BIA will defer to Tribes as much as possible, within the bounds of the DOI's trust responsibilities, to determine which ROW to grant, how much to compensate, and to identify enforcement provisions.

    b. Consistent with 25 U.S.C. § 325, the general trust relationship between the United States and Tribes and individual Indians, and deference to Tribal sovereignty, compensation granted to Tribal landowners must be just.

c. A ROW grant over Tribal land may provide for alternative forms of compensation and varying types of compensation (e.g., in-kind consideration, payments based on throughput or percentage of income, different types of payments at specific stages during the life of the ROW grant, such as fixed annual payments during construction, payments based on income during an operational period, and bonuses) and BIA will defer to the Tribe's determination that the compensation 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. (25 CFR 169.118(b)).

d. For a ROW crossing multiple Tribal lands, the applicant must obtain Tribal consent from each Tribe whose land the ROW will be crossing, in the form of a Tribal authorization and a written agreement with the Tribe, if the Tribe so requires, to a grant of ROW across the Tribal land. The consent document may impose restrictions or conditions; any restrictions or conditions automatically become conditions and restrictions in the grant. (25 CFR 169.107(a)). The ROW grant could be utilized as one grant for all the tracts traversed by the ROW. (25 CFR 169.124(d)).

B. ROWs Crossing Individual Indian Owned Allotted Lands.

1. If the applicant is an Indian landowner who owns 100 percent of the trust or restricted interests in the land, then the applicant does not need BIA approval of a ROW on the land. (25 CFR 169.4(b)(1)).

2. If the applicant is a third party, including but not limited to a Tribe, Tribal utility, Tribal consortium, or Federal agency, then the applicant must obtain a ROW from BIA, with the consent of the owners of the majority interest in the land. (25 CFR 169.4(a), 169.107(b)).

   a. An Indian landowner on individually owned land is also known as an allottee.

   b. The individual Indian owners may negotiate the terms of their consent and any payment amount, including in-kind compensation, and may waive the valuation requirement.

   c. Consistent with 25 U.S.C. § 325, the general trust relationship between the United States and Tribes and individual Indians, and deference to Tribal sovereignty, compensation granted to individual Indian landowners must be just.

   d. BIA may grant a ROW over individually owned Indian land that provides for an alternative form of compensation or varying type of compensation if BIA determines that it is in the best interest of the Indian landowners. (25 CFR 169.118(c)).

   e. The ROW may be approved for the negotiated amount per 25 CFR 169.112.

f. BIA 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 BIA records on the date the application is submitted to BIA. (25 CFR 169.107(c)).

g. The applicant must notify all individual Indian landowners and must obtain written consent from the owners of the majority interest in each tract affected by the grant of ROW. (25 CFR 169.107(b)).

h. If the Tribe already owns the majority of the interests, consent of the other fractional owners is not required, but the applicant must notify the co-owners.

i. BIA may grant a ROW without the consent of any of the individual Indian owners if all the conditions at 25 CFR 169.107(b)(1) are met.

C. ROW Applications Crossing Over Multiple Tracts.

1. Applicants may submit one ROW application with supporting documentation for multiple contiguous tracts, if applicable.

2. BIA will issue one grant for all of the tracts traversed by the ROW for the broadband infrastructure project, if applicable.

D. Maintenance.

1. ROW uses listed in 25 CFR 169.5(a) include the right to access the ROW to manage vegetation, inspect, maintain, and repair equipment, and conduct other activities that are necessary to maintain the ROW use. (25 CFR 169.5(b)). With regard to operations, upgrade, and replacement of equipment, generally these activities would be allowed, but if they expand or change the use of the ROW, then an amendment to the existing grant or a new ROW grant is required.

2. Applicants may request to change technology from underground copper telephone line to underground fiber optic line as a "maintenance activity." However, 25 CFR 169.127(c) identifies this as an example of a new use of a ROW that is within the same scope as the original ROW and not a maintenance activity.

E. New ROW Use Within or Overlapping an Existing ROW.

1. Grantees may use all or a portion of an existing ROW for a use not specified in the original grant of the existing ROW only if it is within the same scope of the use specified in the original grant of the existing ROW. (25 CFR 169.127(a)).

2. If a grantee proposes to use all or a portion of an existing ROW for a use not specified and not within the same scope as the original ROW, and the new use <u>will not require ground disturbance</u>, then the grantee must request an amendment to the existing ROW.

(25 CFR 169.127(a)(1)).

3. If a grantee proposes to use all or a portion of an existing ROW for a use not specified and not within the same scope of the original ROW and the new use will require ground disturbance, then the grantee must request a new ROW. (25 CFR 169.127(a)(2)).

4. Applicants that are not the grantee of the ROW may need an assignment of an existing ROW, or a new ROW. (25 CFR 169.127(b)).

5. In accordance with 25 CFR 169.128, BIA may grant a new ROW within or overlapping an existing ROW if:

    a. The applicant follows the procedures and requirements to obtain a new ROW; and

    b. The ROW does not interfere with the use or purpose of the existing ROW and the applicant has obtained the consent of the existing ROW grantee. The existing ROW grantee may not unreasonably withhold consent.

F. Amendments.

1. If the amendment changes the scope of the original ROW and the new use requires ground disturbance, then the grantee will need to submit a new ROW application. (25 CFR 169.127(a)(2)).

2. If the amendment changes the scope of the original ROW and the new use will not require any ground disturbance, the amendment can be reviewed and processed. (25 CFR 169.127(a)(1)).

3. BIA will review and verify any amendments requiring compliance with consent requirements in 25 CFR 169.107.

G. Assignments.

1. BIA will review the original ROW for express assignment language and applicability. BIA will also identify if the existing ROW language "expressly states" (direct and distinctly stated) that the grantee can assign the grant and under what conditions. If the existing language does not contain such language, the approval of the assignment must follow the regulations.

2. BIA will verify that the grantee/assignee has: complied with the conditions of the grant; provided the BIA with a notice of any violations, if any; submitted a new bond; obtained landowners' consent; and satisfied possible compensation requirements, prior to BIA approval and recording.

3. If the assignment is a result of a corporate merger, acquisition, or transfer by operation of law, then the assignment is excluded from these requirements, except that the assignee

must provide an original copy of the assignment and supporting documentation for recording in the LTRO within 30 days. (25 CFR 169.207(c)). The grant of easement or Tribal resolution should be reviewed to identify if the assignment still requires consent even if it meets the corporate merger, acquisition, or transfer by operation of law regulatory criteria.

H. Partial Assignments.

1. Realty staff will review the purpose of the partial assignment and/or determine if a ROW application should be submitted. A partial assignment may be used to authorize a third party to utilize an existing, approved grant of easement under certain conditions (25 CFR 169.127(b)). A partial assignment of ROWs will be reviewed and processed using the same standard assignment procedures discussed above.

2. Realty staff will review if the partial assignment's purpose/use is consistent with the original grant of easement's purpose/use. If it is identified that the partial assignment purpose is different and requires any ground disturbance, realty staff will notify the assignee to obtain a new ROW.

3. Realty staff will review the grant of easement to identify any conditions and/or obligations that are reoccurring such as payment, and if applicable, ensure that the partial assignment addresses whether the assignor (grantee) or assignee is the responsible party.

4. Realty staff will confirm that the partial assignment of a ROW adequately identifies the segment of the ROW that is being assigned for recordation purposes.

I. Providing Copies of ROW and/or Title Research.

1. It is important to verify the purpose of the original grant through examination of the original documents to confirm existing grant stipulations regarding amendments or assignments.

2. Grants for ROWs approved under 25 CFR Part 169 are provided to applicants. Therefore, applicants who operate and maintain ROWs should have original grants of ROWs. However, agencies may discover that current holders of ROWs may have difficulty referencing approved ROWs for the BIA to identify and to provide guidance upon.

3. If BIA's reasonable search of existing ROWs yields no records and the applicant is unable to also provide proof of an existing ROW approved under 25 CFR Part 169, the applicant may need to make a new application for ROWs.

4. Tribes and individual landowners may request copies of ROWs that cross the lands they have an ownership interest in.

5. Companies or third parties requesting copies of ROWs may be directed to make a request

under the Freedom of Information Act (FOIA), where appropriate.

J. Waiver of Certain 25 CFR Part 169 Regulatory Requirements.

Under 25 CFR Part 169, waivers of certain ROW regulatory requirements, such as fair market value or bond/insurance requirements, are possible under specific conditions. Waivers are granted on a case-by-case basis, often deferring to individual Indian landowners or the Tribal decision and prioritizing the best interests of those affected.

1. Available Waivers for ROW Applications on Tribal Lands Where Tribe Owns 100% of the Tract

   a. *Compensation and Valuation* (25 CFR 169.110(a)). A ROW over or across Tribal land may allow for any payment amount negotiated by the Tribe, and BIA will defer to the Tribe and not require a valuation if the Tribe submits a Tribal authorization expressly stating that it:

      i. Has agreed upon compensation satisfactory to the Tribe;

      ii. Waives valuation; and

      iii. Has determined that accepting such agreed-upon compensation and waiving valuation is in its best interest.

   b. *Bond, Insurance, and/or alternative form of security* (25 CFR 169.103(f)(2)). BIA may waive the requirement for a bond, insurance, or alternative form of security by 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.

   c. *Due Diligence* (25 CFR 169.105(c)). BIA may waive the ROW due diligence requirements, if BIA determines, in writing, that a waiver is in the best interest of the Indian landowners.

2. Available Waivers for ROW Applications Crossing Individual Indian Owned Allotted Lands

   a. *Compensation* (25 CFR 169.112(b), (d)).

      i. BIA may approve a ROW over or across individually owned Indian land that provides for nominal compensation, or compensation less than a fair market value, if:

         I. The grantee is a utility cooperative and is providing a direct benefit to the Indian land; or

         II. The grantee is a Tribal utility; or

         III. The individual Indian landowners execute a written waiver of the right to receive fair market value and BIA determines it is in the individual Indian landowners' best interest, based on factors including, but not limited to:

(aa) The grantee is a member of the immediate family, as defined in 25 CFR 169.2, of an individual Indian landowner;

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

(cc) A special relationship or circumstances exist that BIA believes warrant approval of the ROW; or

(dd) BIA has waived the requirement for a valuation under 25 CFR 169.112(d).

ii. The grant must provide that the non-consenting individual Indian landowners, and those on whose behalf BIA has consented under 25 CFR 169.108(c), or granted the ROW without consent under 25 CFR 169.107(b), receive fair market value, as determined by a valuation, unless:

I. The grantee is a utility cooperative and is providing a direct benefit to the Indian land; or

II. The grantee is a Tribal utility; or

III. BIA waives the requirement because the Tribe or grantee will construct infrastructure improvements benefitting the individual Indian landowners, and BIA determines in writing that the waiver is in the best interest of all the landowners.

b. *Valuation* (25 CFR 169.112(c)). BIA will require a valuation to determine fair market value, unless:

i. 100 percent of the individual Indian landowners submit to BIA a written request to waive the valuation requirement; or

ii. BIA waives the requirement because:

I. The grantee is a utility cooperative and is providing a direct benefit to the Indian land; or

II. The grantee is a Tribal utility; or

III. The Tribe or grantee will construct infrastructure improvements benefitting the individual Indian landowners, and BIA determines in writing that the waiver is in the best interest of all the landowners.

c. *Bond, Insurance, and/or alternative form of security* (25 CFR 169.103(f)(1)). BIA may waive the requirement for a bond, insurance, or alternative form of security if the Indian landowners of the majority of the interests request it and BIA determines, in writing, that a waiver is in the Indian landowners' best interest considering the purpose of and risks associated with the ROW, or if the grantee is a utility cooperative and is providing a direct benefit to the Indian land or is a Tribal utility.

d. *Due Diligence* (25 CFR 169.105(c)). BIA may waive the due diligence requirements, if BIA determines, in writing, that a waiver is in the best interest of the Indian landowners.

K. Secretarial Waivers.

Any other requests for a waiver of regulatory requirements not included in the section above will require Secretarial review and approval. Pursuant to 25 CFR 1.2, the Secretary has the authority to waive a regulatory requirement in the best interest of the Indian; however, a statutory requirement cannot be waived. This waiver authority is not delegated below the Assistant Secretary – Indian Affairs (AS-IA). All requests for a waiver that are not authorized by 25 CFR Part 169 must be submitted to the Regional Director (RD) for approval by the AS-IA. The RD will submit a concurrence memo to Central Office specifying that the waiver is in the best interest of the Indian landowner. The concurrence memo must include a Tribal authorization or other act of the governing body which adequately demonstrates that the Tribe has duly authorized the Secretarial waiver request. Secretarial waiver requests for broadband infrastructure projects should also contain, without limitation, the following information:

1. Justification for the waiver request;
2. Number of tracts of Tribal land and/or individual lands that the project will impact;
3. Description of the proposed compensation method that will be used to calculate compensation to landowners;
4. Description of the project, including the project's public purpose or benefit;
5. Total miles of the project; and
6. Number of households and businesses that the project will serve.

4. Definitions

Any terms used and not otherwise defined herein are defined as set forth in 25 CFR 169.2, or BIA's ROW Handbook, 52 IAM 9-H.

A. Broadband means high-speed, switched, broadband telecommunications capability that enables users to originate and receive high quality voice, data, graphics, and video telecommunications using any technology such as fiber, digital subscriber line (DSL), cable modem, wireless, satellite, and broadband over powerlines (BPL). Broadband also means the technology underlying telecommunications services such as voice, video, and data.

B. 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.

C. Indian land means individually owned Indian land and/or Tribal land.

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

E. 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.

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

G. Majority interest is more than 50 percent of the trust or restricted interests in a tract of Indian land.

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

I. 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).

J. 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.

K. 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.

5. Roles and Responsibilities

A. <u>Director, BIA (DBIA)</u> is responsible for ensuring that appropriate organizational arrangements, resources, and personnel are available to implement and maintain the BIA's Realty program. The DBIA serves as the Senior Accountable Official for this program and has primary responsibility for implementing and executing BIA programs in accordance with statute, regulation, and Departmental policy.

B. <u>Deputy Bureau Director (DBD), Field Operations, BIA</u> is responsible for disseminating policy directives and ensuring regional offices are held accountable for successful implementation, in alignment with the agency’s trust responsibility.

C. **DBD, Office of Trust Services (OTS), BIA** is responsible for the development of trust policy and procedures, and assisting in the dissemination of policy, training, and information to OTS managers and OFO.

D. **Chief, Division of Real Estate Services (DRES), OTS** is responsible for overall policy and guidance development within the division, including establishing Realty program policies and standards to comply with statutory and regulatory requirements; day-to-day oversight of the Realty program; ensuring technical assistance and training is provide to BIA regions as needed; conducting program reviews; and managing BIA's federal reporting requirements as they relate to the Realty program.

E. **Regional Director (RD)** serves as the Senior Accountable Official for the Realty program in their respective region and is responsible for reviewing and acting on any ROW applications that are not otherwise delegated to the BIA agency level. An RD is responsible for ensuring that policy guidance is available and followed by regional and agency staff.

F. **BIA Agency Superintendent** is responsible for managing their respective organization's Realty program compliance in day-to-day operations, coordinating reviews and communicating with applicants or landowners on ROW applications. Superintendents are responsible for implementing Realty responsibilities at the appropriate level as re-delegated by the DBD Field Operations or RD.

G. **Regional Realty Officer** is responsible for reviewing ROW applications that are not otherwise tasked to the BIA agency level and providing technical assistance throughout this process to the appropriate Superintendent as needed.

6. Approval

Digitally signed by BRYAN MERCIER
Date: 2025.09.03 17:20:09 -04'00'

Bryan K. Mercier Date
Director, Bureau of Indian Affairs