

ROAD RIGHTS OF WAY OVER INDIAN LANDS



What is a Right of Way?

- Generally, a right of way occurs when a “landowner” gives a “user” the right to use or to pass over the owner’s land without transferring ownership of the land to the user.
 - A landowner can be an individual, tribe or group of individuals who share interest in an allotment or parcel of land.
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Why is a Right of Way granted over Tribal and or Indian Trust Allotted Lands?

- Normally, a right of way is sought for a public purpose by tribal, local, state or federal governments for roads, railroads, utilities or other public access needs.
- For example, utility companies seek rights of way for placement of equipment, such as telephone poles and power lines, water lines and meters, to provide services to their customers.

Indian Right of Way Act of 1948

- Despite their complexity, the 1948 statutes did have positive outcomes for tribes and allotment owners.
 - The most significant of these statutes requires that tribes organized under the IRA must give consent for rights of way across Indian lands.
 - In addition, the regulations expand the consent requirement to all tribes, not just IRA tribes. This included the Navajo Nation
 - The 1948 laws also make clear that landowners must be justly compensated at fair market value for rights of way. However, they also allow most rights of way to be perpetual, unless the granting document says otherwise.
 - This is important to address when granting a right of way. Landowners should /must insist on a time limit, or it will be perpetual by default.

25 C.F.R. 169; Rights-of-Way over Indian Lands

- These regulations cover all types of easements including those required for State and local highways.
- The process of acquiring easements over Native American lands is similar to the steps required to obtain property not held in trust: the acquiring Agency identifies land requirements; surveys the proposed acquisition; identifies ownerships; appraises the property and conducts negotiations.
- The main difference when lands are held in trust for Native Americans is that the recourse to use eminent domain is generally not available, except in rare instances. No authority exists for using condemnation to acquire Tribal lands and allotted lands are rarely condemned since jurisdiction is retained in the Federal courts.

1971 BIA Manual for ROWs on Indian Lands

- These regulations gave landowners opportunities to negotiate new or renewed rights of way.
- The compensation section requires that not less than fair market value must be paid, (*unless waived in writing,*) and the Secretary “shall obtain and advise the landowners of the appraisal information to assist them . . . in negotiations for a right of way or renewal.”
- The regulations further state that the applicant must pay landowners all damages resulting from surveys or the construction and maintenance of the facilities.

Rights of Way

- The historic use of a Right of Way does not necessarily mean that the state has exclusive jurisdiction over the Right of Way.
- In some cases, Rights of Way have been presumed by the state. If the state claims a Right of Way exists, they should produce the documentation showing BIA approval.

ROW Document Elements

- Date or finite time for the ROW
 1. Watch out for perpetual ROWs (or ROWs with no end)
 2. There may be an argument depending on date of creation of a ROW that if not date is set for expiration, then it may be perpetual. Must look at original statutory authority.
- Accurate Legal Descriptions of the ROW. Is the ROW actually where it is supposed to be?
- Construction or landscape changes to implement the ROW
- Which government will have jurisdiction over the ROW and related activities?

LAND STATUS of Eastern Navajo Agency:

<u>TYPE AND CATERFORY</u>	<u>ACREAGE</u>
1. Navajo Indian Reservation (District 15)	184,562.00
2. Navajo Tribal Trust Land	766,105.03
3. Navajo Tribal Fee (Taxable)	387,284.46
4. Canoncito Band of Navajos	60,428.27
5. Alamo Band of Navajos	29,821.82
6. Individual Indian Allotments (Trust)	623,354.21
7. U.S. Government Reserve (withdrawn by Executive Orders, Public Land Orders, Departmental Orders, Secretarial Orders and Departmental Purchases)	160,776.98
8. Public Land (Leased by the Navajo Tribe and Individual Navajo Indians)	330,196.02
9. Public Land (Permitted to Individual Navajo Indians by The Bureau of Land Management)	166,005.00
10. New Mexico State Lands (Leased by the Navajo Tribe)	98,098.50
GRAND TOTAL - ACRES	2,806,632.29

COMPANIES AND ENTITIES REQUESTING UTILITY RIGHTS OF WAY

- ❖ NAVAJO TRIBAL UTILITY AUTHORITY
- ❖ INDIAN HEALTH SERVICES / PUBLIC HEALTH SERVICES
- ❖ ELECTRICAL POWER COMPANIES, CDEC, JEMEZ ELEC COOP, GALLUP JOINT UTILITES, FARMINGTON ELEC, ETC
- ❖ OFFCIE OF FACILITY MAINTENANCE AND CONSTRUCITON (BIA)
- ❖ TELEPHONE COMPANIES

REQUIRED DOCUMENTS FOR A RIGHT OF WAY APPLICATION

LAND STATUS REQUEST & TSR's

TO DETERMINE THE LAND STATUS OF THE LAND WHICH THE ROUTE WILL PASS OVER AND THE LEGAL OWNERSHIP.

DUE TO “CHECKERBOARDED “ LAND STATUS, A ROAD RIGHT OF WAY CAN CROSS SEVERAL DIFFERENT TYPE OF LANDS.

REQUIRED DOCUMENTS FOR A RIGHT OF WAY APPLICATION

ARCHEOLOGICAL CLEARANCE

- ❖ The Antiquities Act as codified at [16 U.S.C. § 431](#) to [§ 433](#).
- ❖ Certain provisions of the Archaeological Resources Protection Act (Act) of 1979 (16 U.S.C. 470aa–11), in accordance with section 10(b) and consistent with uniform regulations promulgated under section 10(a), (43 CFR part 7, 36 CFR part 296, 32 CFR parts 229 and 1312) to provide guidance to officials of the Bureau of Indian Affairs (BIA) on the implementation of the Act as it pertains to their agency.

REQUIRED DOCUMENTS FOR A RIGHT OF WAY APPLICATION

ENVIRONMENTAL ASSESSMENT OR EIS

Authorities.

- ❖ National Environmental Policy Act of 1969 (NEPA). Section 102(2) of NEPA establishes procedures that are binding on all Federal agencies. The primary requirement is that an Environmental Impact Statement (EIS) be prepared for every major Federal action significantly affecting the quality of the human environment.

- ❖ Council on Environmental Quality Regulations. NEPA established the CEQ in the Executive Office of the President. The CEQ promulgated the Regulations for Implementing the Procedural Provisions of NEPA (40 CFR Parts 1500-1508). Appendix As stated in Executive Order 11991, the purpose of the regulations is:
"..... to make the Environmental Impact Statement process more useful to decision makers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives. [The Regulations] require impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses."

SURVEY (CENTERLINE) AND MAPS

Title 25: Indians, Part 169 - Rights of way over Indian Lands

§ 169.6 Maps.

- (a) Each application for a right-of-way shall be accompanied by maps of definite location consisting of an original on tracing linen or other permanent and reproducible material and two reproductions thereof. The field notes shall accompany the application, as provided in §169.7. The width of the right-of-way shall be clearly shown on the maps.
- (b) A separate map shall be filed for each section of 20 miles of right-of-way, but the map of the last section may include any excess of 10 miles or less.
- (c) The scale of maps showing the line of route normally should be 2,000 feet to an inch. The maps may, however, be drawn to a larger scale when necessary and when an increase in scale cannot be avoided through the use of separate field notes, but the scale must not be increased to such extent as to make the maps too cumbersome for convenient handling and filing.
- (d) The maps shall show the allotment number of each tract of allotted land, and shall clearly designate each tract of tribal land affected, together with the sections, townships, and ranges in which the lands crossed by the right-of-way are situated.

Title 25: Indians, Part 169 - Rights of way over Indian Lands

§ 169.7 Field notes.

Field notes of the survey shall appear along the line indicating the right-of-way on the maps, unless the maps would be too crowded thereby to be easily legible, in which event the field notes may be filed separately on tracing linen in such form that they may be folded readily for filing. Where field notes are placed on separate tracing linen, it will be necessary to place on the maps only a sufficient number of station numbers so as to make it convenient to follow the field notes. The field notes shall be typewritten. Whether endorsed on the maps or filed separately, the field notes shall be sufficiently complete so as to permit the line indicating the right-of-way to be readily retraced on the ground from the notes. They shall show whether the line was run on true or magnetic bearings, and, in the latter case, the variation of the needle and date of determination must be stated. One or more bearings (or angular connections with public survey lines) must be given. The 10-mile sections must be indicated and numbered on all lines of road submitted.

PERMISSION TO SURVEY & CONSENT FOR R/W

Title 25: Indians Part 169 – Rights of way over Indian lands

§ 169.3 Consent of landowners to grants of right-of-way.

(a) No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.

(b) Except as provided in paragraph (c) of this section, no right-of-way shall be granted over and across any individually owned lands, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the owner or owners of such lands and the approval of the Secretary.

(c) The Secretary may issue permission to survey with respect to, and he may grant rights-of-way over and across individually owned lands without the consent of the individual Indian owners when

(1) The individual owner of the land or of an interest therein is a minor or a person non compos mentis, and the Secretary finds that such grant will cause no substantial injury to the land or the owner, which cannot be adequately compensated for by monetary damages;

(2) The land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant;

(3) The whereabouts of the owner of the land or an interest therein

Title 25: Indians, Part 169 – Rights of way over Indian Lands

§ 169.12 Consideration for right-of-way grants.

Except when waived in writing by the landowners or their representatives as defined in §169.3 and approved by the Secretary, the consideration for any right-of-way granted or renewed under this part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate. *The Secretary shall obtain and advise the landowners of the appraisal information to assist them (the landowner or landowners) in negotiations for a right-of-way or renewal.*

APPRAISAL APPROVAL FROM OFFICE OF APPRAISAL WITH OFFICE OF SPECIAL TRUSTEE

The Office of Appraisal Services (OAS) was created in June 2002. The transfer of responsibility for the appraisal function to the Office of Special Trustee provides independence for the appraisers both in practice and form, for the Indian land evaluation program, to provide impartial estimates of market value for a specific variety of real property interests held in trust or owned in restricted status for Indian Tribes, individual Indians and the United States Government. Federal regulations governing Indian Trust land transactions require an evaluation setting forth a value as part of the decision process. The types of land transactions include, but are not limited to residential, commercial, industrial, recreational, agricultural and other types of leases; rights of way land sales and/or exchanges grazing and range permits and assessment of trespass damages.

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS

Washington, DC. 20240

Real Estate Services JUN 292007

Memorandum

To: Regional Director, Navajo Region

From: Director, Bureau of Indian Affairs

Subject: Request for Waiver of Regulation - 25 CFR Part 169.12

Please be advised that the Assistant Secretary - Indian Affairs pursuant to 25 CFR 1.2 granted the request for the Navajo Nation and individual landowners to waive the regulatory requirements found at 25 CFR Part 169.12.

The granting of the waiver will allow the landowners to waive the requirement for an appraisal when the Indian landowners have agreed to waive compensatory consideration of the fair market value and to forego the requisite appraisal. This approval will allow the utility and roadway providers to proceed with the application for rights-of-way for the purpose of installing utilities or roadways.

This approved action has been determined to be in the best interests of the landowners.

TIME FRAME FOR A TYPICAL ROAD RIGHTS OF WAY

PROJECT :ROAD RIGHT OF WAY CROSSING THREE SECTION OF TRIBAL TRUST LAND
AND SIX TRUST ALLOTMENTS WITH 670 OWNERS 6 MILES

LAND STATUS REQUEST & TSR's

5 TO 10 DAYS

PERM TO SURVEY & CONSENT FOR R/W

1 TO 3 YEARS

ARCHEOLOGICAL CLEARANCE

3 TO 8 MONTHS

ENVIRONMENTAL ASSESSMENT

12 MONTHS

SURVEY (CENTERLINE) AND MAPS

1 TO 2 MONTHS

APPRAISAL APPROVAL FROM OFFICE OF APPRAISAL WITH OFFICE OF SPECIAL TRUSTEE

60 TO 90 DAYS

PERMISSION TO CROSS OTHER R/Ws

3 MONTHS

NEGOTIATION FOR COMPENSATION

60 DAYS TO ?

AVERAGE TIME FOR OBTAINING RIGHTS OF WAY FOR ROAD PROJECTS

2 to 8 years

**APPLICATION IS SUBMITTED WITH ALL THE ABOVE DOCUMENTATION,
FOR A REQUEST OF A RIGHT OF WAY**

ISSUES:

TSR REQUEST

- LAND STATUS REQUEST-OWNERSHIP DATA NOT UPDATED
- CHANGE IN ROUTE BY APPLICANT
- CONSENT:
- OWNERSHIP CHANGES DUE TO PROBATE, SALES, GIFT DEED(S), PROBATE MODIFICATION
- ILCA PURCHASE PROGRAM

ENVIRONMENTAL ASSESSMENT & ARCH. CL

- INCORRECT LEGAL DESCRIPTION ON REPORT
- COMPANY NAME
- ADDITIONAL FIELD WORK AND RESEARCH REQUESTED FOR E.A. (EXAMPLE)

SURVEYED MAPS AND CENTERLINE DESCRIPTION:

- NO STATIONS INDICATED ON MAP OR CENTERLINE
- INCORRECT LAND STATUS ON MAP AND CENTERLINE
- POINT OF INTERSECTION WITH SECTION LINES (ENTER ONE TRACT OR SECTION TO ANOTHER)
- INCORRECT BEARING AND DISTANCES, LENGTH, ACRES,

CONSENTS

- INCORRECT DOCUMENTATION (FORGING NAME, INCORRECT SPELLING OF NAME, ONE WITNESS ON THUMBPRINTS, NO WITNESS ON SIGNATURE, NOT LISTING ALL BENEFICIARIES OF ALLOTMENT(S))
- NO DOCUMENTATION OF WHEREABOUTS UNKNOWN,
- DECEASED BENEFICIARIES-AFFIDAVIT OF DEATH, DEATH CERTIFICATE
- MINOR- NO BIRTHDATE OF MINOR OR CONSENT OF GUARDIAN
- POWER OF ATTORNEY (NOT ACCEPTABLE OF ROW CONSENT FORMS)
- INCORRECT DESCRIPTION OF THE RIGHT OF WAY ON CONSENT FORMS
- NO DATES ON CONSENT FORM(S)
- COMPANY OFFER-CERTIFICATION SHEET FOR THE CONSENT FORMS
- CONSIDERATION ON CONSENT FORM IN “LUMP SUM”-NOT BROKEN DOWN PER BENEFICIARIES INTEREST

APPRAISAL

- OBTAIN INFORMATION FROM OAS FOR THE SCOPE OF WORK FOR THE THIRD PARTY APPRAISER

PERMISSION TO CROSS

- NEED TO BE DONE BY THE COMPANY WHO HAS AN APPROVED ROW (ELECTRIC LINE, TELEPHONE LINE, WATERLINE, NATURAL GAS PIPELINE)

APPLICATION

- INCORRECT ALLOTMENT NUMBER OR TRIBAL TRUST LANDS
- INCORRECT LENGTH AND ACRES
- NO DESCRIPTION OF RIGHT OF WAY

NEGOTIATION OF RIGHT OF WAY

- BENEFICIARIES WHO WANT TO NEGOTIATE
- COMPANIES RESPONSE TO NEGOTIATE WITH BENEFICIARIES
- COMPANY REFUSING TO PAY COMPENSATION OR NEGOTIATE

OTHER ISSUES:

- ❑ BORROW PIT PERMITS MUST BE OBTAINED BEFORE CONSTRUCTION
- ❑ WATER USE PERMIT MUST BE OBTAINED BEFORE CONSTRUCTION
- ❑ LAND OWNERS REQUESTING FENCING AND CATTLE GUARD FOR RIGHT OF WAY
- ❑ COMPANY AGENTS MAKING PROMISES TO LANDOWNERS WITHOUT AUTHORIZATION FROM APPLICANT
- ❑ CHANGE IN COMPANY FOR CHAPTER OFFICIALS AND PERSONEL, RESULTING IN “LOST DOCUMENTS”, REQUIRING THE PROCESS TO BEGIN FROM STEP ONE

SERVICE LINE AGREEMENTS

SERVICE LINE AGREEMENTS DEFINITIONS AND REQUIRMENTS

✘ 25 CFR 169.22

+ (1) Service Line Agreement

- ✘ An agreement shall be executed by and between the landowner or a legally authorized occupant or user of the land and the applicant.
- ✘ A service line shall be for the sole purpose of supplying the individual owner or authorized occupant or user of land.

SERVICE LINE AGREEMENTS REQUIREMENTS/DEFINITIONS

✘ 25 CFR 169.22

+ (2) Land Owner or Authorized Occupant

- ✘ Documentation showing land ownership or authorization for residency or commercial use:
 - ✘ Approved Residential Lease
 - ✘ Approved Home site Lease
 - ✘ Resolution of the Resources Committee of the Navajo Nation Council, Resolution No. RCF-19-00, Exhibit A, Part IV, b. 2 requires an approved Home site Lease to process Utility Access and Service Line Agreements.
 - ✘ Approved Business Lease
 - ✘ Approved Mission Site Lease

SERVICE LINE AGREEMENTS REQUIREMENTS/DEFINITIONS

✘ 25 CFR 169.22

+ (3) Plat or Diagram

✘ Showing with particularity

- ✘ Location

- ✘ Size

- ✘ Extent

+ Service Line Agreement shall be filed with the Secretary before any improvements are made.

SERVICE LINE AGREEMENTS REQUIREMENTS/DEFINITIONS

× 54 BIAM - BIA Manual Supplement 7

+ Limited Rights

- × A Service Line Agreement is not a Grant of Easement
- × Applicants should be encouraged to obtain a right of way pursuant to the regulations in order to protect the facilities installed.

SERVICE LINE AGREEMENTS REQUIREMENTS/DEFINITIONS

× 54 BIAM - BIA Manual Supplement 7

+ Service Line Agreement Extent Restrictions

- × Its use is restricted to furnishing service across lands of the owner, authorized occupant or user for facilities within these lands and does not include or extent to lands which are not owned or not under the authorized occupancy or use.

SERVICE LINE AGREEMENTS PROBLEM AREAS

- ✘ Company Service Line Agreement

 - + Plat or Diagram Discrepancies

 - ✘ Incorrect Locations

 - ✘ Township

 - ✘ Ranges

 - ✘ Quarter Sections

SERVICE LINE AGREEMENTS PROBLEM AREAS

✘ Company Service Line Agreement

+ Service Line Agreement

- ✘ Cannot link to another Service Line Agreement
- ✘ Needs to extend off an approved easement
- ✘ Can only extend to a single or sole individual
- ✘ Needs a “Permission to Cross Existing ROW” if the line is crossing an established Right of Way. Too many variations of changes made to the Agreement

SERVICE LINE AGREEMENTS PROBLEM AREAS

- ✘ Purpose of Using Revised Form of Service Line Agreement
 - + Service Line Agreement
 - ✘ Misuse of Agreement as a substitute for a right of way
 - ✘ Grazing Permittees filing complaints that customers without approved leases are being served by Companies, without consultation with them. Complaints are made to the BIA, rather than to the companies.
 - ✘ Existing lines do not have approved rights of way, from which service lines are extended.
 - ✘ If the company proposes to sell their lines to NTUA, it should be a separate agreement.
 - ✘ Companies can not convey their service line equipment or line due to no existing right per the service line agreement

- ✘ Discussions