



ROW in Indian Country

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Overview

- 25 CFR Part 169
- Types of Right of Ways
- Overview of BIA Approval Process
- Application
- Remedies
- Questions



ROW – 25 CFR Part 169

- Subpart A – Purpose Definitions, General Provisions
- Subpart B – Service Line Agreements
- Subpart C – Obtaining a ROW
- Subpart D – Duration, Renewals, Amendments, Assignments, Mortgages
- Subpart E – Effectiveness
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25 CFR Part 169

Rights-of-Way on Indian Land; Final Rule

169.5 – Types of ROW



- Public roads, access roads, parkways, alleys, service roads, highways, trails, etc.
- Electric transmission lines
- Telecommunication, broadband, and fiber optic lines
- Utility, water, drainage, and sewer lines
- Oil and gas pipelines
- Railroad easements
- Conservation easements
- ROWs include all inspection, maintenance, and repairs that are necessary to maintain the ROW

When do you need a ROW? (25 CFR 169.4)

Do you want to develop any infrastructure by potentially digging trenches, building roads or bridges, inserting fiber or pipelines, constructing towers or wire lines, or using existing towers, utility poles, or other aerial equipment?

IF YES



IF YOU ARE:	YOU NEED:
Not an owner/Part owner of tribal land	BIA Approval for ROW
A tribe or tribal entity that owns all or part of the tribal lands	BIA Approval for ROW
Individual Tribal landowner who owns 100% of land	No BIA Approval

Before BIA Approval

- Best Practices Include involving the tribe and tribal members early
- Best to have grant for ROW, in writing (usually by tribal council resolution), between entity needing ROW and the tribe/tribal members prior to going to BIA for approval



Grant ROW Document

Grant ROW must include the tribe and individual landowners (if any) conditions plus:

- The purpose or use the grant is authorizing
- Whether mortgages or assignments are permitted
- Specify who owns Permanent Improvements (if any)
- Duration of ROW (Oil & Gas: up to 20 years, all others: up to 50 years)

Grant ROW document language must include language that:

- Tribe will maintain its jurisdiction (169.10) and has the right to access.
- Grantee has no right to resources (timber, oil/gas, water, animal, etc.) unless explicitly authorized.
- BIA may treat any violations of Federal law as a violation of the Grant.
- That historic properties, archeological finds, human remains, and cultural items, if found, will stop all activity and be immediately reported to the BIA and the tribe.

****And more requirements found in 169.125****

BIA Overview

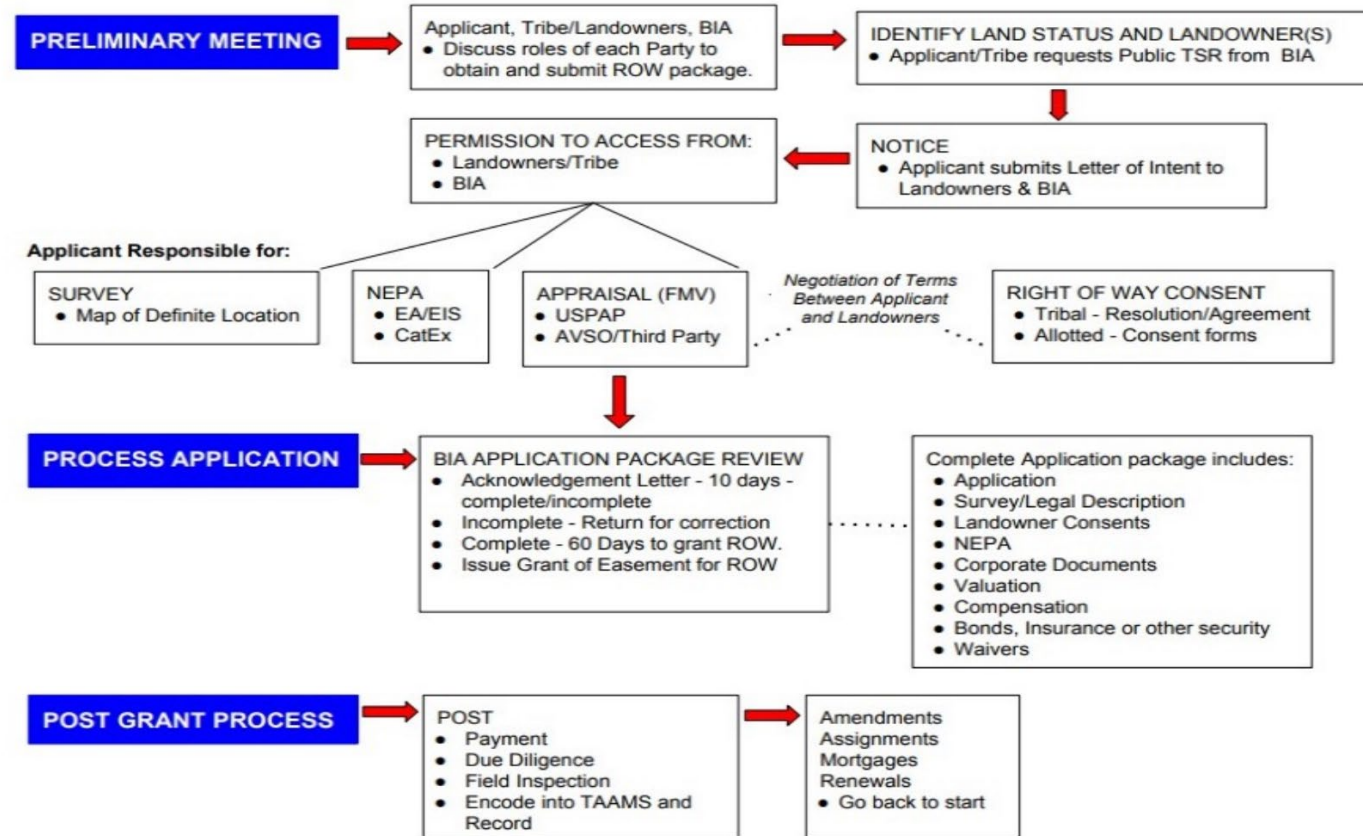
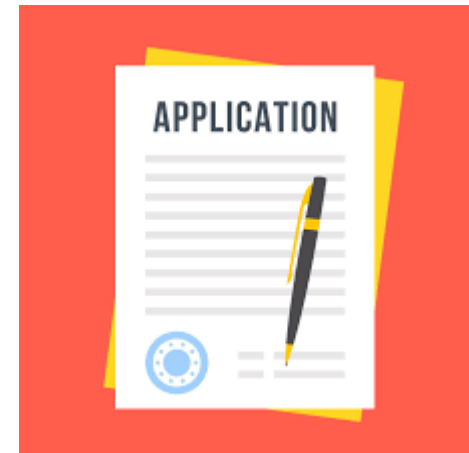


Image from Bureau of Indian Affairs

Overall BIA ROW Applications

Documents to Include:

- Accurate legal description of ROW, boundaries, and parcels associated with ROW
- Map of definite location (except when ROW covers entire tract of land) aka the SURVEY (do not need BIA approval to survey)
- Bonds, insurance, or other means of security (169.103)
- Proof that notice of ROW was provided to all Indian landowners
- Consents (169.107)
- Valuation, if applicable (169.114)



BIA ROW Checklist

- ROW Checklist used to when submitting BIA ROW application
- Found at: https://www.bia.gov/sites/default/files/dup/assets/asia/raca/pdf/ROW_Checklist-for-BIA_508.pdf

BIA RIGHT-OF-WAY CHECKLIST

Applicant: _____ Purpose: _____
 Land Status: Tribal Allotment Amendment Assignment Location: _____
 New Renewal Mortgage

DATE:	DOCUMENTATION:	YES	NO	N/A
Preliminary Documents				
_____	Applicant's Letter of Intent to Obtain ROW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Title Status Report, Landowner Name and Address	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Permission to Survey from Landowners	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Field Inspection (Photos, Maps, etc.)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Right-of-Way Application Package				
_____	Acknowledgement Letter	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Incomplete/Complete Letter	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Consent(s):				
_____	Tribal Resolution	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Landowner(s) Consent to Grant ROW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Spreadsheet - consent percentage calculation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Superintendent/Regional Director per 25 CFR 169.108	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Maps:				
_____	Survey Plat/Legal description	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Location Map showing adjacent existing facilities	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Environmental Compliance:				
_____	Categorical Exclusion (CatEX)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Environmental Assessment (EA)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Finding of No Significant of Impact (FONSI)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Environmental Impact Statement (EIS)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Record of Decision (ROD)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	NHPA Section 106	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	ESA Section 7 review	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Valuation:				
_____	Valuation Report received	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Valuation Review requested (OASIS)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Certification of Valuation Review by OST Appraisal Services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Fair Market Value _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Applicant's Offer _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Letter(s) to Landowner(s) re: FMV	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Corporate Documents:				
_____	Authority of Officers to Execute Documents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Articles of Partnership or Association	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	State-certified corporate charter	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	License to do business (Tribe and/or State)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Waivers:				
_____	Valuation (Appraisal, market analysis, etc.)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Bond(s), insurance, and/or alternative form of security	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Compensation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Permission to cross existing rights-of-way, if applicable	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Decision				
_____	Findings and Recommendation Report for Decision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Letter - Notice of Intent to Grant b/c Landowners So Numerous (if applicable)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Letter - Approval or Denial with Appeal Right to Parties	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Payment - Lockbox or Proof of Payment for Direct Payment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Grant of Easement for ROW Approval Date: _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Distribution:				
_____	Applicant	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Tribe	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Landowner(s), if requested.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Post Decision				
Encode in TAAMS:				
_____	LAC: _____ TAAMS ID No. _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Contractor ID No. _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Scan Image	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	TIR Log	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Recording No. _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Construction Completion (Due Diligence)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	Final Field Inspection Report	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Prepared by: _____	Title: _____	Date: _____		

Obtaining a ROW through the BIA

After receiving Grant of ROW through the tribe

Obtaining a ROW: Step 1 – The TSR (169.106)

- Submit a written request to the BIA indicating the purpose is to obtain a ROW and requesting the following information regarding parcels in question:
 1. Names and addresses of the individual Indian landowners or their representatives.
 2. Information on the location of the parcel.
 3. The percentage of undivided interest owned by each individual Indian landowner.

NOTE: there are different requirements when the tribe is the majority landowner vs. when the majority landowner are individual landowners.



Obtaining a ROW: Step 2 Application

The Application must identify (169.102):

1. Information of Entity obtaining ROW
2. The tract(s)/parcel(s) affected by the ROW
3. Location, purpose, and duration (cannot extend past 50 years) of the ROW
4. Ownership of permanent improvements associated with the ROW and the responsibility for constructing, operating, maintaining, and managing permanent improvements. (169.105)

****There is No standard ROW application – Contact Your Regional BIA Office to Discuss ****



ROW Application (cont'd)

The Application must also include:

1. Bond(s), insurance, and/or other security (169.103)
2. Record that notice of the ROW was provided to all individual tribal landowners
3. Record of consent (169.107) or a statement requesting a ROW without consent
4. A valuation
5. Environmental and archaeological reports, surveys, and site assessments, as needed to comply with applicable Federal and tribal environmental and land use requirements
6. A written statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law (usually by resolution)



ROW Application – Bonding (169.103)

ROWs must include payment of bonds, insurance, or alternative forms of security with an application for a ROW

Bond amounts must cover the following:

1. Highest annual rental specified in the ROW (unless ROW is a one-time payment); PLUS
2. Estimated damages resulting from the construction of permanent improvements; PLUS
3. Estimated damages and remediation costs from potential release of contaminants, explosives, hazardous material, waste, etc.; PLUS
4. Operation and maintenance charges for land located within an irrigation project; PLUS
5. Restoration of the premises to their original condition prior to the ROW or reclamation to some other specified condition if agreed to by the landowners.

****NOTE: Bonds or Other Security must be deposited and made payable to the BIA.****

Insurance: Must identify both tribal landowners and the BIA as additional insured parties.

ROW Application – Consent (169.107)

Land owned by tribe (i.e. Tribal Trust land)

- Must receive consent from tribe to a grant of ROW across tribal land (received prior to stepping through BIA application).

Land owned by individual tribal members (i.e. allotments)

- Must notify all individual tribal landowners and must receive majority written consent from the owners in each tract affected by the ROW.

****NOTE: Successors are bound by predecessor consent.****

BIA may issue the grant of ROW without the consent of any of the individual Indian owners/allottees if all of the following are present:

1. 50+ landowners.
2. ROW does not cause substantial injury to the land or any landowner.
3. BIA provides notice of their intent to issue the grant of ROW at least 60 days prior to grant date.
4. Landowners will be adequately compensated.

ROW Application – Valuation (169.110-.112)

Land owned by tribe

- Any payment amount negotiated by the tribe.

Land owned by individual tribal members

- Fair market value (or more).
- Industry is used to appraisal methodology via “comparable” properties.



BIA may approve less than fair market value IF:

1. The grantee is a utility cooperative and is providing a direct benefit to the tribe/tribal land; or
 2. Individual Indian landowners waive this requirement AND the BIA determines it is in the individual landowners' best interest.
- Other valuation factors: legal and customary purpose of lands, profitability of ROW and easement, any leverage for other issues, tribe’s need for infrastructure, tribe participation in ownership

ROW Application – Monetary Compensation (169.110-.111)

- Tribes may allow negotiated payment amount
- Tribes may NOT need a valuation if:
 1. Tribe has agreed that payment is satisfactory
 2. Tribe waives valuation
 3. Tribe determines that it is in its best interest



Compensation Reviews/Adjustments

- Periodic review is required unless the tribe negotiates for reviews/adjustments (i.e. 5-year incremental increases in Grant for ROW).
- Periodic review is always required for individual landowner parcels.

Step 3: BIA Approval



To grant a ROW, the BIA determines if:

- The ROW is in the best interest of the landowners
- The ROW complies with all applicable Federal environmental, land use, historic preservation, and cultural resource laws and ordinances.

When the BIA receives a COMPLETE application

- They will send a notification in writing acknowledging receipt.
- Within 60 days the BIA will either: (1) Grant the ROW; (2) Deny the ROW; (3) Return the application for revision; or (4) Inform applicant in writing that the BIA will need additional review time.

****NOTE: If BIA does not respond in a timely manner, then the applicant has the right to act under 25 CFR 169.304****

ROW Application – Payment (169.116)

Who Receives Payment?

- Grant must specify if money paid directly to the tribe, the landowners, or through the BIA.
- Money may be paid directly to the Tribe.
- Money may be paid directly to the Landowner, if:
 1. IIM Accounts are set up and free of debt
 2. Less than 10 Landowners
 3. All Landowners agree to Direct Pay



Step 4: Final Steps

- A ROW is effective on the date the BIA approves the ROW (169.301)
- The ROW Grant must be recorded with the Land Titles and Records Office (169.302).



Compliance & Enforcement

- Compliance can be investigated by BIA or tribe (individual landowner notifies BIA).
- ROW documents can list remedies for breach, including termination.
- BIA can process for violations without remedies listed.
- Late payment remedies can be specified in ROW documents.
- BIA may process for cancellation for non-use or abandonment.
- BIA may take action to recover possession if trespasses.



Compliance and Enforcement (169.402) Specifics

- If the BIA or tribe determine there is a violation for:
 1. Non-payment: Failure to pay compensation in the time and manner required by a ROW is violation, and BIA will issue a notice of violation
 2. Other than non-payment: BIA will notify of the violation, and give a 10 business days to fix violation, dispute the determination or request additional time to fix.



169.401 – ROW Negotiated Remedies

TRIBE MAY NEGOTIATE REMEDIES:	LANDOWNERS MAY NEGOTIATE REMEDIES:
For violations, abandonment, or non-use	Consent of landowner's majority interest
Remedies are stated in Grant for ROW	<i>If granted the power to Terminate ROW:</i>
BIA incorporated remedies into ROW Grant	BIA agreement is required
<i>If Tribe has power to Terminate ROW:</i>	BIA will record termination at LTRO
BIA approval is not required	Notify surety of any violations
Termination is effective without BIA	Landowners may request assistance from BIA or tribe
BIA will record termination at LTRO	
Notify surety of any violations	

Table from Native Village of Barrow

Violation Not Cured on Time (169.405)

BIA consults with Tribe or Landowner(s) to:

1. Cancel the ROW grant or give additional time to cure.
2. Use remedies available under the ROW grant.
3. Use other remedies under applicable law
4. If ROW grant is cancelled:
 - BIA may still recover unpaid compensation using other legal means.
 - BIA will send a cancellation letter to the Grantee.



Questions?



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