



# Rights-of-Way the Right Way: An Insider's Guide to Cutting through Red Tape

**Jessie D. Young, Esq., Senior Counselor to the Assistant Secretary – Indian Affairs,  
U.S. Department of the Interior**

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## Overview of Presentation:

- Right-of-Ways
- Service Line Agreements
- Leases

# Bureau of Indian Affairs Jurisdiction: Regional Offices





# RIGHT-OF-WAYS



## Do you need a Right-of-Way (ROW)?

- Are you are a person or legal entity who is not an owner of the Indian land?
- Is the land that you want the ROW held in trust for an Indian tribe and/or Individual Indians?
- Do you want to develop broadband infrastructure by digging trenches, deploying fiber, constructing towers, deploying existing equipment on existing towers and utility poles.

If you answered YES to all three questions, then you need a ROW that complies with **25 C.F.R. Part 169**.

# What do you need to know about ROWs?

- **Applicable Laws**: ROWs approved under 25 C.F.R. 169 are subject to all applicable federal and tribal laws. *(25 C.F.R. 169.9)*
- **Possessory Interest**: A ROW is a non-possessory interest in land, and title does not pass to you. *(25 C.F.R. 169.10)*
- **Jurisdiction**: The ROW does not diminish the Indian tribe's jurisdiction over the land and any person or activity within, the ROW. *(25 C.F.R. 169.10)*
- **Tax**: Tribes retain the power to tax the land, any improvements on the land, or any person or activity within, the ROW. *(25 C.F.R. 169.10)*

# Obtaining a ROW: Step 1: The TSR

- Get a copy of the Title Status Report (TSR) *(25 C.F.R. 169.106)*
  - Submit a written request to us to stating that it is for the purpose of negotiating a ROW and requesting all the following information:
    - Names and addresses of the individual Indian landowners or their representatives.
    - Information on the location of the parcel.
    - The percentage of undivided interest owned by each individual Indian landowner.

*Keep in mind that there are different requirements when the tribe is the majority landowner and when the majority landowner are Individual Indians.*

# Obtaining a ROW: Step 2: The Application

- The Application must identify *(25 C.F.R. 169.102)*:
  - Your information
  - The tract(s) or parcel(s) affected by the ROW (*see* TSR)
  - The general location, purpose, and duration (*typically up to 50 years*) of the ROW
  - The ownership of permanent improvements associated with the ROW and the responsibility for constructing, operating, maintaining, and managing permanent improvements. (*see 25 C.F.R. 169.105*)



# Obtaining a ROW: Step 2: The Application

- The Application must also include:
  - An accurate legal description of the ROW and its boundaries (survey)
  - A map of definite location of the ROW
  - **Bond(s), insurance, and/or other security (25 C.F.R. 169.103)**
  - Record that notice of the ROW was provided to all Indian landowners
  - **Record of consent (25 C.F.R. 169.107) or a statement requesting a ROW without consent**
  - **A valuation**
  - If you are a Corp., LLC, partnership, joint venture, or other legal entity, information such as organizational documents, certificates, filing records, and resolutions, demonstrating that:
    - The representative has authority to execute the application;
    - The ROW will be enforceable against the applicant; and
    - The legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located;
  - Environmental and archaeological reports, surveys, and site assessments, as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements
  - If required by the tribe, a statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law

## Step 2: The Application - Bonding

- **Bond(s), insurance, and/or other security (25 C.F.R. 169.103)**
  - Your ROW must include payment of bonds, insurance, or alternative forms of security with your application for a ROW in amounts that cover all of the following:
    - Unless a one-time payment, the highest annual rental specified in the ROW.
    - The estimated damages resulting from the construction of any permanent improvements.
    - The estimated damages and remediation costs from any potential release of contaminants, explosives, hazardous material or waste.
    - The operation and maintenance charges for any land located within an irrigation project.
    - 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.

*There are very limited times where we will waive this requirement*

## Step 2: The Application - Consent

- Consent or a statement requesting a ROW without consent (*25 C.F.R. 169.107*)
  - Tribal land
    - You must obtain tribal consent to a grant of ROW across tribal land.
  - Individually owned Indian land
    - You 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.
  - We may issue the grant of ROW without the consent of any of the individual Indian owners if all of the following are present:
    - 50+ landowners.
    - We determine the grant will cause no substantial injury to the land or any landowner.
    - We provide notice of our intent to issue the grant of ROW to all of the owners at least 60 days prior to the date of the grant.

## Step 2: The Application - Valuation

- **Valuation** *(25 C.F.R. 169.110, .112)*
  - Tribal land
    - Any payment amount negotiated by the tribe.
  - Individually owned Indian land
    - Payment of not less than fair market value.
  - We may approve less than fair market value IF:
    - The grantee is a utility cooperative and is providing a direct benefit to the Indian land; or
    - Individual Indian landowners waive this requirement AND we determine it is in the individual Indian landowners' best interest.



# Obtaining a ROW: Step 3: BIA Approval

- To grant a ROW, we must determine:
  - That the ROW is in the best interest of the Indian landowners
  - That the ROW complies with all applicable Federal environmental, land use, historic preservation, and cultural resource laws and ordinances.
- When we receive an **INCOMPLETE** application, we will promptly notify you in writing what is missing in the application.
- When we receive an **COMPLETE** application
  - We will promptly notify you in writing the date of our receipt of the complete package
  - Within **60 days** we will either:
    - Grant the ROW;
    - Deny the ROW;
    - Return the package for revision; or
    - Inform you in writing that we need additional review time.

# Obtaining a ROW: Step 4: Final Steps

- A ROW will be effective on the date we approve the ROW
- Either BIA or the tribe must record the ROW with the Land Title and Records Office.

# ROW Compliance and Enforcement

- BIA or the tribe with jurisdiction may investigate compliance of a ROW. (25 C.F.R. 169.402)
- If we determine there is a violation:
  - Non-Payment: Failure to pay compensation in the time and manner required by a ROW is a violation, and we will issue a notice of violation.
  - Other than Non-Payment: We will notify you of the violation, and give you 10 business days of the receipt of a notice of violation to:
    - Cure the violation and notify us, and the tribe for tribal land, in writing that the violation has been cured;
    - Dispute our determination that a violation has occurred; or
    - Request additional time to cure the violation.

*You are responsible for the obligations in the ROW until it expires, is terminated, or is cancelled.*

# SERVICE LINE AGREEMENTS



# Service Line Agreements

- A service line is a utility line running from a main line, transmission line, or distribution line that is used **only** for supplying internet service or other utility service to a house, business, or other structure.
- To obtain access to Indian land for service lines, the ROW grantee must file a service line agreement meeting the regulatory requirements. (*25 C.F.R. 169.51-56*)

# Overview of Service Line Agreements

- **The Agreement**: A service line agreement should address:
  - The utility provided
  - Who is getting the utility
  - The mitigation of any construction, reclamation, and restoration damages of the premises at the termination of the agreement. *(25 C.F.R. 169.53)*
- **Consent**: You must execute a service line agreement before you begin any work to construct service lines across tribal or individually owned Indian land. *(25 C.F.R. 169.54)*
- **Valuation**: No valuation is required. *(25 C.F.R. 169.55)*
- **Recording**: You must record the service line agreement with the Land Title and Records Office. *(25 C.F.R. 169.56)*
- **Notice to BIA**: An executed copy of service line agreement, the plat or diagram must be provided to us within **30 days** of executing the agreement. *(25 C.F.R. 169.56)*

# LEASES

## Do you need a Lease?

- Are you are a person or legal entity who is not an owner of the Indian land?
- Is the land that you want the lease held in trust for an Indian tribe and/or Individual Indians?
- Do you want to develop broadband infrastructure by developing a site location (e.g. fixed wireless broadband access, tower, or building)?

If your answer to all three questions is yes, then you need a lease that complies with **25 C.F.R. Part 162**.



# Obtaining a Lease: Step 1: The TSR

- Get a copy of the Title Status Report (TSR) (25 C.F.R. 162.011)
  - Submit a written request to us to stating that it is for the purpose of negotiating a lease and requesting the following information:
    - Names and addresses of the individual Indian landowners or their representatives;
    - Information on the location of the parcel; and
    - The percentage of undivided interest owned by each individual Indian landowner.

*Keep in mind that there are different requirements when the tribe is the majority landowner and when the majority landowner are Individual Indians.*

# Obtaining a Lease: Step 2: The Lease

- The Lease must identify: (25 C.F.R. 162.413)
  - The tract or parcel of land being leased (*see* TSR)
  - A legal description of the land (25 C.F.R. 162.418)
  - The purpose of the lease and authorized uses of the leased premises
  - The parties to the lease
  - The term of the lease (typically 50 years)
  - ***Information about permanent improvements***
  - Payment requirements and late payment charges, including interest;
  - ***Due diligence requirements***
  - ***Insurance requirements***
  - ***Bonding requirements***

# Obtaining a Lease: Step 2: The Lease (Cont.)

- The Lease **must** also identify: (25 C.F.R. 162.413)
  - The obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status.
  - There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises.
  - That you must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under 25 C.F.R. 162.014.
  - 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 lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the lessee will contact BIA and the tribe with jurisdiction over the land to determine how to proceed and appropriate disposition.
  - BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice, in accordance with 25 C.F.R. 162.464, to enter the leased premises for inspection and to ensure compliance.
  - BIA may, at its discretion, treat as a lease violation any failure by the lessee to cooperate with a BIA request to make appropriate records, reports, or information available for BIA inspection and duplication.
  - Unless the lessee would be prohibited by law from doing so, the lease must also contain the following provisions:
    - The lessee holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises.
    - The lessee indemnifies 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 the release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, with the exception that the lessee is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.

# Step 2: The Lease – Consent

➤ **Consent (25 C.F.R. 162.012)**

➤ **Tribal Land**: Will require tribal consent

➤ **Alaska**: Require consent of all of the Indian landowners in the tract.

➤ **All Other Fractionated Tracts**:

➤ The owners of the following percentage of undivided trust or restricted interests in a fractionated tract of Indian land must consent to a lease of that tract

If the number of owners is:	Required percentage of the undivided interest is:
1-5	90%
6-10	80%
11-19	70%
20+	Over 50%



## Step 2: The Lease – Permanent Improvements

### ➤ Permanent Improvements (25 C.F.R. 162.415, .413)

#### ➤ The lease must specify:

- Ownership of constructed permanent improvements Who is responsible for operating, maintaining, and managing permanent improvement

#### ➤ The lease must indicate whether each specific permanent improvement the lessee constructs will:

- Remain on the leased premises, upon the expiration, cancellation, or termination of the lease, in a condition satisfactory to the Indian landowners, and become the property of the Indian landowners;
- Be removed within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as closely as possible to their condition before construction of the permanent improvements; or
- Be disposed of by other specified means.

- A lease that requires the lessee 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.

## Step 2: The Lease – Due Diligence

- **Due Diligence (25 C.F.R. 162.417)**

- **If permanent improvements are constructed, the lease must include:**

- Requirement that the construction of any permanent improvements within the schedule specified in the lease or general schedule of construction, and a process for changing the schedule by mutual consent of the parties.
    - Failure of the lessee to comply with the due diligence requirements of the lease is a violation of the lease and may lead to cancellation of the lease.

*BIA may waive the requirements only if such waiver is in the best interest of the Indian landowners.*

## Step 2: The Lease – Insurance

- **Insurance (25 C.F.R. 162.437)**
  - **A lessee must:**
    - Provide insurance necessary to protect the interests of the Indian landowners and in the amount sufficient to protect all insurable permanent improvements on the premises.
    - Identify the Indian landowners and the United States as additional insured parties.
  - The insurance may include any type of insurance to protect the Indian landowners interests.

*BIA may waive the requirements only if such waiver is in the best interest of the Indian landowners or tribe.*

## Step 2: The Lease - Bonding

### ➤ Bonding (25 C.F.R. 162.434)

- A performance bond or alternative form of security **must** be in an amount sufficient to secure the contractual obligations including:
  - No less than:
    - The highest annual rental specified in the lease, if compensation is paid annually; or
    - If the compensation is not paid annually, another amount established by BIA.
  - The construction of any required permanent improvements.
  - The operation and maintenance charges for any land located within an irrigation project.
  - The restoration and reclamation of the leased premises, to their condition at the start of the lease term or some other specified condition.
- The bonding must be made payable to BIA and must be deposited with BIA. It may not be modified without our approval (*For tribal land, if the lease so provides, this may be deposited with the tribe and made payable to the tribe, and may not be modified without the approval of the tribe.*)
- The bonding must provide for conditions under which BIA may adjust security or performance bond requirements.
- The bonding document must provide for at least 60 days notice to BIA before canceling.

*BIA may waive the requirements only if such waiver is in the best interest of the Indian landowners or tribe.*



## Step 2: The Lease - Valuation

- **Valuation (25 C.F.R. 162.420-429)**

- **Tribal Land:**

- Any payment amount negotiated by the tribe.

- **Individually Owned Indian Land:**

- Fair market rental before any adjustments, based on a fixed amount, a percentage of the projected income.
    - The lease must establish how the fixed amount, percentage, or combination will be calculated and the frequency at which the payments will be made.

*BIA may waive the requirements only in limited circumstances.*

## Step 2: The Lease – Valuation Reviews or Adjustments

- **Compensation Reviews of Adjustments (25 C.F.R. 162.428)**
  - **Tribal land:**
    - The lease may provide for periodic review of the adequacy of compensation or adjustment.
  - **Individually Owned Indian Land:**
    - Typically will occur every fifth year, as specified in the lease.
    - Unless the lease provides otherwise, no periodic review of the adequacy of compensation or adjustment is required if:
      - If the term of the lease is 5 years or less;
      - The lease provides for automatic adjustments; or
      - We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment.

# Obtaining a Lease: Step 3: Submit Package

## ➤ Lease Package Requirements (25 C.F.R. 162.438)

- A lease executed by the Indian landowners or tribe and the lessee meeting the requirements discussed above.
- Statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law, if required by the tribe.
- Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements, including any documentation prepared under 25 C.F.R. 162.027(b).
  
- If appropriate:
  - A restoration and reclamation plan (and any subsequent modifications to the plan), Documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate the proposed project and the lessee's ability to successfully design, construct, or obtain the funding for a project similar to the proposed project.
  - A preliminary plan of development that describes the type and location of any permanent improvements the lessee plans to construct and a schedule showing the tentative commencement and completion dates for those improvements, if appropriate.
  
- If the lessee 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, that demonstrates that:
  - The representative has authority to execute a lease;
  - The lease will be enforceable against the lessee; and
  - The legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located.

# Obtaining a Lease: Step 4: BIA Approval

- **BIA Approval (25 C.F.R. 162.440)**
  - We must determine that the lease is in the best interest of the Indian landowners.
  - Upon receiving a business lease package, we will promptly notify the parties:
    - **Incomplete Package:**
      - Our letter will identify the missing information or documents required for a complete package.
    - **Complete Package:**
      - We will notify the parties of the date of our receipt.
      - Within 60 days of the receipt date, we will either:
        - Approve the lease,
        - Disapprove the lease,
        - Return the package for revision, or
        - Inform the parties in writing that we need additional review time.



# Obtaining a Lease: Step 5: Final Steps

- A ROW will be effective on the date we approve the ROW. (25 C.F.R. 162.442)
- Either BIA or the tribe must record the ROW with the Land Title and Records Office.

# Questions?