

**THE BIA'S NEW RIGHT-OF-WAY  
REGULATIONS – 25 CFR PART 169**

**BUREAU OF INDIAN AFFAIRS  
WESTERN REGIONAL OFFICE  
NOVEMBER 2016**

# The New Framework

- On November 19, 2015, BIA published a Final Rule to completely overhaul 25 CFR Part 169 (most of which previously dated back to 1969), and the Effective Date of the new rule was extended from December 21, 2015, to April 21, 2016, by follow-up publications in the Federal Register on December 21, 2015, and March 21, 2016.
- The Final Rule separates Part 169 into (six) subparts, and eliminates the separate sections with specific requirements that formerly applied to grants made under statutes which pre-dated the 1948 Act (without “superseding” any pre-existing grants made under other authorities); under the Final Rule, all future grants made under general authority must be made under the 1948 Act, which authorizes grants by the Secretary, on terms required by the new regulations and defined by grantee application and owner consent.
- The Final Rule incorporates many of the changes made in the Part 162 Revision of BIA’s long-term surface leasing regulations in early 2013, including deference to tribal negotiations on economic terms and the imposition of strict time lines for BIA processing of applications.
- Three “consultation” sessions were held during the summer of 2014, following the publication of the Proposed Rule in June 2014, and approximately 175 comments were submitted (primarily by tribes and industry groups); the 40-page Preamble to the Final Rule provides a thorough analysis of the comments, and guidance in interpreting certain provisions in the Final Rule, and a BIA Work Group has been established to provide standardized implementation guidance.
- The Final Rule addresses only the requirements for obtaining an express Grant of Easement (with a separate subpart on Service Line Agreements), and generally does not address the various other scenarios whereby rights-of-way may be (or may have already been) obtained by implication, prescription, reservation, “piggy-backing” or condemnation (all in limited, fact-specific circumstances).
- The Final Rule’s “procedural” provisions (relating to post-grant actions, as enumerated in an April 6, 2016, Federal Register publication, and in a BIA website chart) will generally apply to the administration and enforcement of pre-existing easements unless the terms of those easements (or the statutes under which they were granted) are in conflict; applications pending as of the effective date of the Final Rule will be processed under the former Part 169 regulations (unless those applications are re-submitted), and made subject to the same “procedural provisions” rule/exception.

# Subparts Comparison

- Subpart A includes Definitions and General Provisions, beginning at Section 169.1 and including sections on taxation, jurisdiction, applicable law, and standing to appeal.
- Subpart B covers Service Line Agreements, beginning at Section 169.51 and defining a “service line” as 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 structure.”
- Subpart C is titled “Obtaining a Right-of-Way,” with provisions beginning at Section 169.101 and separated by subheadings for Application, Consent, Compensation and Grant.
- Subpart D is titled “Duration, Renewals, Amendments, Assignments, and Mortgages,” with provisions beginning at Section 169.201 and separated by four subheadings (with Duration and Renewals combined in the first, followed by Amendments, Assignments and Mortgages, respectively).
- Subpart E is titled “Effectiveness,” with provisions beginning at Section 169.301 and covering BIA inaction and front-end “denial” (and the right to appeal from either), the effective date of the grant, and recordation.
- Subpart F is titled “Compliance and Enforcement,” with provisions beginning at Section 169.401 and covering BIA cancellation and right to appeal (and also including an authorization for negotiated remedies and a “discretionary” provision on trespass).

# New Definitions

- The detailed but outdated map requirements in the former Part 169 have been replaced simply by a new definition of “Map of Definite Location,” defined as “a record of survey executed by a professional surveyor or engineer [under federal or state authority], showing the location, size, and extent of the right-of-way and other related parcels, . . . with reference to the public land surveys”; the definition also requires a “showing [of] existing facilities adjacent to the proposed project” (an apparent reference to multiple users/grantees within the same or adjoining taking areas).
- Minimum compensation for non-negotiated transactions is effectively defined as “market value”(FMV), but without reference to any non-USPAP Appraisal Standards (such as the “Yellow Book” on federal land acquisitions) which might more clearly define the applicable rules on “value in use,” offsetting benefits, term easements, etc.
- The Proposed Rule incorporates some definitions from ILCA/AIPRA that do not seem to be needed, while properly characterizing (the “sliding percentage” consent rules in) ILCA, in the body of the rule, as “supplementary authority.”
- The definitions of “easement,” and “right of way,” refer to “authorized use or control” for a “specific, limited purpose,” while the new definition of “trespass” refers to “unauthorized use or occupancy”; “abandonment” is defined for the first time, to require an affirmative act of “relinquishment” (sufficient to show intent).
- “Tribal Utilities” (along with other 100% tribally-owned and operated entities) must document the location of their facilities, but are not strictly required to obtain easements across tribal land; as defined in the Rule, “tribal utilities” must only be “majority-owned” and “controlled” by the tribe.
- “Assignment” is defined as a transfer of all of the grantee’s rights and obligations to another individual or entity, but mergers – as well as other “change in control” transactions - are made exempt from the new owner consent and BIA approval requirements for assignments (although notice/recordation will still be needed); the Preamble makes clear that transfers to “affiliates” (undefined, but presumably meaning entities under “common control”) will still require consent and approval.

# Owner Consent

- In the Final Rule, tribes are authorized to grant permission to access tribal land to conduct pre-application activities (land survey, environmental assessment, cultural resources investigation, etc.), without a BIA signature (consistent with the 2013 changes in Part 162, generally exempting “permitting” from the scope of that rule).
- Sections 169.101(c) and 169.107(b), when read together, appear to allow BIA to grant access rights and permission to survey on allotted land (where all of the owners have been contacted but the permission of all cannot be obtained); cf. the Part 162 Revision’s suggestion that BIA generally lacks such permitting authority.
- The Final Rule, for the first time, attempts to give meaning to the “too numerous/no substantial injury” grant authority in the 1948 Act, by adopting a modified version of the ILCA definition of “highly fractionated land” (50 or more owners) to define the “too numerous” requirement.
- Where the “too numerous/no substantial injury” authority is utilized, sixty days prior actual notice to the owners would be required, and a determination of “no substantial injury” (i.e., minimal ground disturbance and no apparent environmental or safety risk) would have to be documented; an application relying on such authority will not be considered to be “complete” (for the purpose of “starting the clock” on final action) until the notice period has run.
- The Final Rule expressly requires the consent of a tribe owning even a small interest in an allotment, effectively amending the “majority consent” rules in the 1948 Act and clarifying ambiguous language in Section 219 of ILCA (at least in the right-of-way context).
- The Final Rule requires that consent be sought from all owners, and expressly provides that an individual consent will be binding on successors-in-interest (unless revoked by those successors prior to final action).

# Owner Consent Contd.

- The Final Rule authorizes the BIA to consent on behalf of owners whose whereabouts are unknown (“WAU”), and count those interests toward the requisite majority of the total trust ownership, effectively combining the two “majority interest” consent authorities in the 1948 Act (consistent with the consent provisions in ILCA).
- In exercising the individual “consent on behalf” authorities (cf. the “too numerous” authority covering entire tracts) , which extend not only to WAU individuals but also to undetermined heirs (i.e., pending estates), adjudicated incompetents, orphaned minors, and those who have given the BIA Power of Attorney, the statutory “no substantial injury” provision (not incorporated in the Final Rule) has historically required only adequate consideration and security (irrespective of the level of ground disturbance being authorized).
- The Final Rule, for the first time, broadly recognizes individual Powers of Attorney to grant consent on behalf of owners (as well as the consent power of specially-authorized attorneys).
- The Final Rule attempts to address the issue of Life Tenant vs. Remainderman consent, which recently arose in the Adakaj case at Navajo (holding that Remainderman consent was required for an interest to be “counted,” even if the Life Tenant had consented).
- The Final Rule requires the consent of both Life Tenant and Remainderman in order to “count” an interest, but does not address the issue of whether a Remainderman who is asked to consent must be advised as to how much of his/her compensation will be shared with (or, in the case of a Life Estate without Regard to Waste, paid entirely to) the Life Tenant, in the absence of an agreement.
- The Final Rule indicates that the allocation of compensation between Life Tenant and Remainderman (other than in cases where the Life Estate is without Regard to Waste) will be based on the creation instrument, an agreement between the parties, or Part 179, in that order (with the IRS allocation tables cross-referenced in Part 179 generally being applicable to right-of-way compensation, unless the term is limited to say 20 years or less).

# Compensation and Security

- The Final Rule provides for deference to tribes as to both the amount of compensation and the need for an appraisal, where tribal land is involved and the tribal resolution is specific as to the tribe's intent; individual landowners may also waive both compensation and appraisal, but only where the applicant is: (1) a utility cooperative or tribal utility; or (2) a co-owner, family member, or "special relation."
- The Final Rule purports to allow BIA to effectively waive compensation on behalf of "non-waiving" owners it may otherwise "consent on behalf of," where the grantee is a utility cooperative or tribal utility, or where the grantee will construct "beneficial" infrastructure improvements; such BIA waivers will presumably be limited to non-commercial, community projects, where offsetting benefits (including general benefits not recognizable under the "federal rule" in the "Yellow Book" (except through the application of the "before and after" rule)) have been documented by an appraisal.
- The Final Rule allows for non-monetary (negotiated) consideration, while also allowing negotiations for additional monetary consideration (beyond the appraised FMV), in the form of "percentage of income, throughput fees, franchise fees, avoidance value, bonuses, etc.;" FMV would include severance damages, the Final Rule's suggestions to the contrary notwithstanding.
- The Final Rule allows for the use of a "market analysis or other appropriate valuation method," suggesting that a "going rate" or "comparable easement" approach might be utilized to establish minimum compensation (especially in the case of term extensions), in addition to the traditional "before and after" appraisal method mandated by the 2005 "Holly Memo"; these alternative approaches would be consistent with OIG's September 2012 recommendations to OVS (generally criticizing other DOI agencies' reliance on rent schedules and the infrequency of adjustments in periodic payments, while also arguing that FMV should include "consideration of the grant's value to the grantee"), but – given the fact that allotted lands can be condemned and the fact that a singular approach is needed for valuations of tribal and allotted land - it is recommended that OAS revoke the Holly Memo and begin using alternative methods (where supported by the market), but that it document those findings in separate, non-FMV consultation reports (for negotiation purposes only).
- The review of applicant (or owner) appraisals by OST is now expressly authorized, and appraisals prepared/reviewed by OVS or other federal agencies would not need to be reviewed by OAS at all (consistent with the April 2012 "One Appraisal" policy memo executed by OAS and OVS), so long as those appraisals/appraisers conform to applicable DOI standards; the recently-enacted "Indian Trust Asset Reform Act" would similarly exempt "conforming" tribal/owner appraisals from OAS review.
- The Final Rule expressly allows periodic payments (with adjustments, as appropriate) through negotiations (with such payments to be bonded, along with estimated construction damages and reclamation costs (cf. the former Part 169)); however, no guidance is given as to how these estimates are to be made or when the reclamation security will be required, and the consenting landowners would have a broad "bond waiver" authority (subject to a discretionary "best interest" determination to be made by BIA, where allotted lands are involved).

# Application and Processing

- Under the Final Rule, no particular Application for Right-of-Way form is required, but the grantee, description, scope/purpose, term, and nature/ownership of improvements must be specified in any “application”; the BIA Work Group has developed a new (optional) standard form, also listing the required supporting documents, along with a checklist.
- The required supporting documents are listed in the Final Rule, including the Map, tribal resolution or owner consents, appraisal and bond or bond substitute (unless waived), applicant organizational documents, and evidence of compliance with NEPA and other applicable federal or tribal land use laws (but with no clarification as to the scope of the current categorical exclusion for right-of-way-related “renewals and conversions,” where there is no prior NEPA documentation).
- BIA’s standard of review is: (1) assurance of technical compliance with all legal requirements; and (2) a discretionary determination that the terms are in the Indian owner’s best interest.
- The Final Rule limits BIA’s discretion (as was the case with the Part 162 Revision), in that there must be a compelling reason to withhold action in order to protect the owners’ best interest, while also requiring deference to the owners’ determination of their own best interest “to the maximum extent possible.”
- The Final Rule also adopts the “time line” approach in the Part 162 Revision, with prompt (but time-unspecified) notification as to whether an application is complete first being required, and action on the application itself then being required within sixty days of receipt (subject to a 30-day extension period, if requested within the initial 60-day review period); perhaps problematically, the Final Rule (as explained in the Preamble) requires that actual notice of grants - as well as denials - be given to each landowner (despite the fact that even non-consenting owners will have received “front-end” notice from the applicant and post-grant notice from Interior via a Trust Asset Statement).
- If a decision is not made within the prescribed period, the Final Rule provides for expedited (15-day) appeals, with the Regional Director having the option to take direct action or order the Superintendent to act within a stated time frame; further appeals from inaction may be made to the BIA Director, who would have the same options.

# Term and Renewal

- The Final Rule defers to tribal negotiations in establishing the term of a new easement, while requiring that the term of an easement on allotted land be “reasonable”; where tribal and allotted land are both affected, any term negotiated by the tribe would presumably be considered reasonable.
- The Proposed Rule’s table defining (variable) terms for the various types of easements has not been included in the Final Rule to serve as a guide for determining “reasonableness,” but the Final Rule does stipulate that twenty years (including any renewal period) will generally be considered sufficient for pipelines (and that fifty years, including any renewal period, will generally be sufficient for all other types of easements (including new public highways (?))).
- Longer-than-”reasonable” terms may be permitted if the landowners would benefit from a longer term (e.g., community roads and utilities), or if required by another federal Agency (as a matter of policy, or just as a matter of law (?)).
- The Final Rule would clarify/modify prior case precedent by not requiring further consent/negotiation where “automatic” or unilateral renewal options – without any changes in terms - are exercised, unless the original grant provides therefor; a renewal within a reasonable maximum term may require that additional consideration be paid upon exercise, with the original grant specifying the amount of such consideration or the manner in which such amount will be determined, but unilateral options beyond a reasonable maximum term should generally not be authorized.
- Unlike most surface leases, a right-of-way may provide for more than one renewal option.
- Notably, the Final Rule requires that a grantee exercising a renewal option provide BIA with a signed affidavit to confirm that there has been no change in location or use (along with a recordable “renewal” instrument), in addition to providing the Indian owners with actual notice of the exercise of the option.

# Other Required Terms and Conditions

- Since no particular Application for Right-of-Way form is now required, the Final Rule requires that the boilerplate (construction, maintenance, restoration, indemnity, etc.) stipulations formerly included in the standard application form (and incorporated in grants of easement only by reference) now be directly included in grants made under the new rule; the Preamble indicates that BIA will develop a new Grant of Easement template (which the BIA Work Group has done), with placeholders for certain negotiated terms.
- The Final Rule requires that a construction schedule (and other “due diligence” requirements) be incorporated in the grant, effectively negating a (sometimes problematic) case precedent that imposed a standard two-year initial construction deadline based on the non-use provisions in the former regulations.
- The Final Rule requires that the grant specify whether the grantee may assign or encumber, and (if so) whether owner consent would be required.
- The Final Rule requires that the grant specifically address the issue of permanent improvements, including a declaration as to ownership during the term and any obligation to remove at the end of the term.
- The Final Rule includes more than a dozen mandatory provisions to be included in the grant, including an express acknowledgment of (if not consent to) tribal jurisdiction; the Final Rule requires protection of cultural properties, and the BIA Work Group’s Grant of Easement template requires compliance with any applicable NEPA “mitigation measures.”
- The Final Rule also provides for – but does not require - negotiated remedies (for “violations” (including unauthorized use), abandonment, and non-use, respectively) to be included in the grant, so long as such remedies are expressly stated in the authorizing resolution (and presumably accepted in writing by the prospective grantee, along with any other terms not found in the application or the regulations).

# Ancillary Agreements

- Significantly, the Final Rule allows assignments only with owner consent and BIA approval, unless expressly provided otherwise in the original grant; the Preamble to the Final Rule makes it clear that pre-existing grants that are silent on this point will hereafter require owner consent and BIA approval (notwithstanding the fact that past grants that did not restrict transfer were freely assignable), but that generic “successors and assigns” language in a pre-existing grant will be sufficient to make future assignments exempt from the new consent and approval requirements.
- Perhaps problematically (and without any apparent remedy for failure to comply (?)), the (Effective-Date-extended) Final Rule also imposed an obligation on the current holders of easements (that are not the grantees of record) to provide BIA with documentation of past assignments, by August 16, 2016.
- Even where a grant authorizes/allows assignment without consent and approval (or where an “assignment” occurs via a merger or stock purchase, or by “operation of law,” and is thus exempt from the new consent and approval requirements), the Final Rule requires recording of an “assignment” instrument within 30 days.
- For the first time, the Final Rule would expressly allow easements to be encumbered for financing purposes (the right to encumber – along with the right to assign - having previously been implied/assumed in most cases).
- The BIA’s standard of review for amendments, assignments, and financing documents is the same as for the original grant (i.e., approval can be withheld only for a compelling reason), so long as there are no outstanding defaults, adequate security is maintained/provided, any loan proceeds are used in connection with the project, and any required owner consent (presumably including consent from designated owner representatives, including BIA) has been obtained.
- The review period for amendments, assignments and financing documents is thirty days, with expedited appeals in the case of inaction being authorized in the same manner as is applicable to an initial Grant of Easement; none of these documents would be deemed approved in the case of inaction (cf. some of the counterpart provisions in the revised Part 162).

# Jurisdiction and Applicable Law

- The Final Rule adopts the Part 162 Revision’s approach to jurisdictional issues, purporting to preempt state jurisdiction (“subject only to applicable federal law”).
- The Final Rule expressly provides that any future grant “will clarify that it does not diminish the character of the land subject to the right-of-way as Indian Country under 18 U.S.C. § 1151,” and the Preamble makes clear that any prior, contrary case precedent (including Strate) is not to be considered “applicable federal law,” where the grant contains this express language.
- The Final Rule expressly states that right-of-way-related improvements, activities, and possessory interests will be taxable by the tribe having jurisdiction, but not by the state or any political subdivision thereof (the Preamble acknowledging that agreements on the tax issue may be needed in the future, to address the possibility of “double taxation,” while suggesting that this preemption will apply even to pre-existing grants (with “applicable federal [case] law” being given “limited precedential weight,” going forward, in light of the new rule)).
- The Final Rule also confirms the tribe’s general civil jurisdiction over non-members who have entered into a “consensual relationship” with the tribe (i.e., a grantee or assignee).
- The Final Rule makes tribal law generally applicable but does not allow tribal law to supersede or modify “non-statutory” provisions in Part 169 with respect to grants affecting tribal land (cf. the recent Part 162 Revision and the Proposed Rule for Part 169).
- The Final Rule makes state law generally inapplicable, but without the specific carveouts listed in Part 162 and the Proposed Rule for Part 169 (identifying circumstances in which state law might apply).

# Administration and Enforcement

- The Final Rule adopts the Part 162 approach to enforcement, providing for deference to negotiated remedies despite the fact that a grant made under the 1948 Act is a Secretarial action.
- The Final Rule cites abandonment, two years of non-use, and “violation” (including encroachment and unauthorized use, in addition to a breach of any standard or negotiated terms in the grant) as grounds for cancellation; any cancellation decision (regardless of the grounds therefor) will be effective 31 days after receipt by the grantee (or 41 days after mailing, if receipt is refused), subject to an “automatic stay” upon appeal.
- The Final Rule also includes provisions on “trespass,” in both the holdover and “pure trespass” context, while emphasizing that a third-party unauthorized use within a right-of-way may also be viewed as a trespass (and with all such trespasses being subject to discretionary remedies under applicable law, including BIA or tribal actions to recover possession and/or damages); the implications of these provisions are uncertain, given that: (1) thousands of “undocumented easements” were identified as “2415 Claims” in the early 1980’s (tolling the applicable statute of limitations on claims against non-federal trespassers), but largely remain “unresolved”; (2) most past damages claims against BIA for failure to enforce have been waived in the recent trust litigation settlements; and (3) all of BIA’s funding for such enforcement actions was “zeroed out” in FY 2012, and has not been restored.
- The Final Rule requires a standard 30-day cure period (following notice) for two years of non-use (which might be viewed as a type of “abandonment per se,” with a showing of intent not being required), and a 10-day standard cure period for “violations” (with consultation/communication with the landowners to precede a violation-based cancellation, as under the Part 162 Revision); by contrast, a cancellation based on abandonment will not need to afford a cure period, although such a cancellation will still be appealable.
- The Final Rule eliminates the Affidavit of Completion requirement in the former rule, and does not require as-builts or some type of Affidavit of Completion-type certification from the grantee to document the actual location of any improvements or crossings (although the Final Rule does require an amendment if the “construction location” changes).
- Payments may be made directly to tribes (rather than to BIA), but the Final Rule differs somewhat from BIA’s 2008 Direct Pay Policy in requiring proof of payment only upon BIA’s request; for allotted land, the Final Rule limits future “direct pay” arrangements to grants involving ten or fewer (unanimous, including BIA consenting “on behalf of”) owners; notably, the Final Rule does not contain any “advance deposit” requirements, as were found in the former rule, requiring only that payment be made “by the date of the grant.”

# Miscellaneous Rules

- Under the Final Rule, both the Indian landowner(s) and the applicant would have the right to appeal a BIA decision to “deny” an application for a new grant (cf. the Proposed Rule, which would have allowed such appeals only by landowners).
- Favorable decisions on applications would be appealable by other parties under 25 CFR Part 2, but those decisions would be immediately effective and standing would be limited to parties whose economic interests would be directly and adversely affected (presumably limiting the appeal rights of environmental and public interest groups).
- The Final Rule provides that all “right-of-way documents” must be recorded in the BIA’s Land Titles and Records Office (“LTRO”), and clarifies that such recording is required even where such documents do not require BIA action to create valid property rights (such as an assignment that is made exempt from approval, a resolution authorizing a tribal utility to construct on tribal land, or a grant made by a tribe that has a TERA which allows it to authorize pipelines or transmission lines on tribal land).
- The Final Rule on customer Service Line Agreements (which do not require BIA grant or approval) retains the former rule’s voltage limitations for power lines (cf. the Proposed Rule), and requires only a plat or diagram showing the boundary of the ownership or occupancy parcel, and the point of connection with the utility’s (documented) distribution line; in a departure from the former Part 169, these non-conforming, non-encumbering instruments are to be recorded at the LTRO, within 30 days after execution by the parties.
- The Final Rule requires that a grantee obtain a new right-of-way if its proposed use changes or expands, and same-use “piggy-backing” by third parties will be permitted only if the third party user obtains an assignment (with owner consent and possibly with additional compensation), but the Rule is unclear as to whether various telecommunications uses (e.g., phone and fiber) will be considered “same use” if the grant is not specific; if a third party’s use is not authorized in the underlying grant, the third party will need a new right-of-way (generally requiring the consent of – and compensation to - both the Indian owners and the original grantee), but the Preamble suggests that utilities installed within a “pre-1875 Act” railroad right-of-way or a “1901 Act” road right-of-way will continue to be recognized under prior case precedent (while “piggy-backing” for unauthorized purposes will be strictly prohibited within (old as well as new) “1948 Act” road rights-of-way).
- Despite “specific, limited purpose” language in the relevant definitions, and provisions requiring a new right-of-way where any “new use” requires ground disturbance, “utility corridor” and “road and utility” easements will presumably be permitted, without the need for either an assignment or a new right-of-way to authorize new construction by third parties that is within the (broad) scope of the original grant; the Final Rule also makes clear that all grants will include implied rights of access for maintenance purposes (but is silent on the issue of initial construction outside the taking area, suggesting that (limited-term-and-compensation) temporary construction easements will be needed).

# The New Part 169 - Top Ten Takeaways

- All future (“general authority”) grants must be made under the 1948 Act.
- Pre-existing grants are subject to the new “procedural provisions” re administration and enforcement (including owner consent and BIA approval requirements for future assignments, unless the grant contains “successors and assigns” language); prior, unrecorded assignments (including those that did not require owner consent or BIA approval) were to have been submitted for recording by mid-August 2016.
- Minimum compensation is defined as Fair Market Value, with deference to tribal negotiations on all economic terms (compensation, term, financial assurance), and general acceptance of market studies and “other appropriate valuation methods”; individual owners may waive compensation and appraisal where the applicant is a utility cooperative or a tribal utility, and “offsetting benefits” may be broadly recognized in determining FMV for community development projects.
- Tribes may grant permission to survey (for tribal land only) without BIA involvement, and there is no formal application for either Permission to Survey or Grant of Easement; BIA may grant permission to survey on allotted land, after prior notice to all of the landowners.
- For allotted land, BIA’s “consent on behalf of” powers are broadened and individual powers of attorney are recognized (with “majority interest” in the trust/restricted ownership of each tract being the standard, and individual consents being valid until/unless revoked).
- The right-of-way term, including any renewal period, must be “reasonable,” subject to “exceptions” based on private vs. public purpose and community benefit.
- “Piggy-backing” within “1948 Act” rights-of-way will not be allowed, with an assignment being required for any new (authorized use) user and a new right-of-way being required for any previously-unauthorized use within the right-of-way.
- Mandatory time frames will apply to the BIA’s review of proposed rights-of-way and ancillary agreements (with expedited appeals being the remedy for inaction), but no BIA grants or approvals will be deemed given.
- The Government’s view of the status of trust/restricted land subject to right-of-way as “Indian Country” is clarified (and mandated for inclusion in future grants), along with the Government’s views as to the jurisdictional implications of that clarification.
- Tribal Utilities and other tribally-owned/operated entities will not be required to obtain grants on tribal land, but must record an authorizing resolution and a description of project area.