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DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 169

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RIN 1076-AF20

Rights-of-Way on Indian Land

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule; guidance on applicability.

SUMMARY: The Bureau of Indian Affairs (BIA) published a final rule on November 19, 2015, governing rights-of-way on Indian land, which stated that procedural provisions of the final rule would apply (with certain exceptions) to rights-of-way granted or submitted to BIA prior to the effective date of the final rule. This document provides guidance on what provisions the Department considers to be “procedural provisions” that are applicable to rights-of-way granted or submitted prior to the effective date of the final rule.

DATES: This guidance is effective on [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth Appel, Director, Office of Regulatory Affairs & Collaborative Action, Office of the Assistant Secretary – Indian Affairs, U.S. Department of the Interior (202) 273-4680; elizabeth.appel@bia.gov.

SUPPLEMENTARY INFORMATION: On November 19, 2015, BIA published a final rule addressing rights-of-way on Indian land and BIA land. *See* 80 FR 72492. In a document published December 21, 2015, BIA extended the effective date of the rule to March 21, 2016, in

response to requests from Tribes and industry. *See* 80 FR 79258. BIA again extended the effective date of the final rule to April 21, 2016. *See* 81 FR 14976 (March 21, 2016).

In § 169.7(b), the final rule states that its procedural provisions apply to rights-of-way that were granted prior to the final rule's effective date (with certain exceptions). Likewise, in § 169.7(c)(2), the final rule states that if an application for a right-of-way was pending as of the effective date of the final rule, and the applicant chose not to withdraw and resubmit the application on or after the final rule's effective date, the procedural provisions of the final rule apply (with certain exceptions) once BIA issues the right-of-way grant. In either situation, if the procedural provisions of the final rule conflict with the explicit provisions of the right-of-way grant or statute authorizing the right-of-way document, then the provisions of the right-of-way grant or authorizing statute will apply. In short, if a right-of-way was granted prior to the effective date of the rule, or an application for a right-of-way was pending as of the effective date of the rule, only the procedural provisions of the final rule apply to those grants and the other provisions do not apply to those grants. If an existing right-of-way is amended, assigned, or mortgaged, on or after the effective date of the rule, the final rule's procedural provisions apply to that amendment, assignment, or mortgage. An "existing right-of-way" is a grant issued before the effective date of the final rule, or a grant for which the application was pending on the effective date of the final rule is issued after the effective date of the final rule.

This document provides guidance regarding which provisions BIA considers procedural (and thus applicable to all right-of-way grants, regardless of when issued, and applicable to all amendments, assignments, and mortgages of existing right-of-way grants, unless the procedural provision conflicts with the explicit provisions of the right-of-way grant or authorizing statute).

Procedural Provisions in Final Rights-of-Way on Indian Land Rule

Subpart A - Purpose, Definitions, General Provisions

- § 169.12 How does BIA provide notice to the parties to a right-of-way?
- § 169.13 May decisions under this part be appealed?

Subpart B – Service Line Agreements

- [No procedural provisions] **Note:** If you have a service line that is not in compliance with the older version of the regulations, you may be in trespass.

Subpart C – Obtaining a Right-of-Way

- § 169.107 Must I obtain tribal or individual Indian landowner consent for a right-of-way across Indian land? **Note:** This provision is procedural only with regard to the grant of an amendment, assignment, or mortgage of an existing right-of-way after the effective date of the final rule; otherwise, it is prospective.
- § 169.109 Whose consent do I need for a right-of-way when there is a life estate on the tract? **Note:** This provision is procedural only with regard to the grant of an amendment, assignment, or mortgage of an existing right-of-way after the effective date of the final rule; otherwise, it is prospective.
- § 169.119 Will BIA notify a grantee when a payment is due for a right-of-way?
- § 169.127 Is a new right-of-way grant required for a new use within or overlapping an existing right-of-way?
- § 169.129 What is required if the location described in the original application and grant differs from the construction location?

Subpart D – Duration, Renewals, Amendments, Assignments, Mortgages

- § 169.202 Under what circumstances will a grant of right-of-way be renewed?
- § 169.203 May a right-of-way be renewed multiple times?
- § 169.204 May a grantee amend a right-of-way?
- § 169.205 What is the approval process for an amendment of a right-of-way?
- § 169.206 How will BIA decide whether to approve an amendment of a right-of-way?
- § 169.207 May a grantee assign a right-of-way?
- § 169.208 What is the approval process for an assignment of a right-of-way?
- § 169.209 How will BIA decide whether to approve an assignment of a right-of-way?
- § 169.210 May a grantee mortgage a right-of-way?
- § 169.211 What is the approval process for a mortgage of a right-of-way?
- § 169.212 How will BIA decide whether to approve a mortgage of a right-of-way?

Subpart E – Effectiveness

- § 169.301 When will a right-of-way document be effective?
- § 169.302 Must a right-of-way be recorded?
- § 169.303 What happens if BIA denies a right-of-way document?
- § 169.304 What happens if BIA does not meet a deadline for issuing a decision on a right-of-way document?
- § 169.305 Will BIA require an appeal bond for an appeal of a decision on a right-of-way document?

Subpart F – Compliance and Enforcement

- § 169.402 Who may investigate compliance with a right-of-way?
- § 169.404 What will BIA do about a violation of a right-of-way grant?
- § 169.405 What will BIA do if the grantee does not cure a violation of a right-of-way grant on time?
- § 169.406 Will late payment charges, penalties, or special fees apply to delinquent payments due under a right-of-way grant?
- § 169.407 How will payment rights relating to a right-of-way grant be allocated?
- § 169.408 What is the process for cancelling a right-of-way for non-use or abandonment?
- § 169.409 When will a cancellation of a right-of-way grant be effective?
- § 169.410 What will BIA do if a grantee remains in possession after a right-of-way expires or is terminated or cancelled?
- § 169.411 Will BIA appeal bond regulations apply to cancellation decisions involving right-of-way grants?
- § 169.412 When will BIA issue a decision on an appeal from a right-of-way decision?
- § 169.415 How will BIA conduct compliance and enforcement when there is a life estate on the tract?

All other provisions of the final rule are general statements or apply prospectively only. A chart providing more information on each provision and how it applies can be viewed at:

<http://www.bia.gov/WhoWeAre/AS-IA/ORM/RightsOfWay/index.htm>.

Dated: March 29, 2016.

Lawrence S. Roberts,

Acting Assistant Secretary – Indian Affairs.

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