



November 26, 2014

Submitted via email to: [consultation@bia.gov](mailto:consultation@bia.gov)

Ms. Elizabeth Appel  
Office of Regulatory Affairs and Collaborative Action  
US Department of the Interior  
1849 C Street NW  
MS 4141  
Washington, DC 20240

**RE: Docket No. BIA – 2014 – 0001 Solicitation of Comments for the Proposed Regulations for Rights-of-Way on Indian Land, Federal Register Vol. 79, No. 116, pg. 34455, June 17, 2014**

Dear Ms. Appel:

Western Energy Alliance (the Alliance) wishes to express concern regarding several aspects of the Proposed Rule for obtaining Bureau of Indian Affairs (BIA) rights-of-way (ROW) on Indian land. While the Alliance commends BIA's attempt to modernize 25 C.F.R. Part 169, we nevertheless believe that the regulation as currently proposed has fundamental flaws. We respectfully request that BIA: (a) withdraw the Proposed Regulations and begin anew; (b) withdraw the Proposed Regulations and initiate negotiated rulemaking; or (c) issue separate and distinct regulations for oil and gas exploration and production rights-of-way. In the event BIA does not withdraw the Proposed Regulations, the Alliance proposes specific modifications to address our concerns.

Western Energy Alliance represents over 480 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees. Many of our members develop oil and natural gas on Indian lands, and therefore have a vested interest in the outcome of the Proposed Rule.

Indian land rights-of-way are extremely important for many facets of the oil and natural gas exploration and production industry. BIA issues rights-of-way for well pad locations, ingress and egress access roads, gathering lines, transportation lines, and oil and gas related surface facilities. Put simply, mineral extraction within Indian country could not occur without BIA granted rights-of-way. Securing rights-of-way is an absolutely essential component in developing oil and natural gas resources. Without rights-of-way, the Alliance's membership would be unable to develop oil and gas resources, access production sites, transport resources away from production locations to processing facilities, and transport processed resources to markets.

We estimate that our industry seeks approximately seventy percent of all rights-of-way traversing Indian lands on an annual basis. This is clear when one examines the number of rights-of-way sought in a sample of energy producing Indian reservations, including the Fort Berthold Indian Reservation, North Dakota; Uintah and Ouray Indian Reservation, Utah; Jicarilla and Apache Reservation, New Mexico; and the Navajo Nation.

Mineral resource development within Indian country has historically provided economic benefits and significant revenue streams to tribes, their members, and their communities, but development is also plagued by significant delays and regulatory burdens. These barriers significantly impact the development of tribal and allotted mineral resources. Further, these barriers deter many companies from exploring and developing the abundant mineral resources found within Indian country. For these reasons, the Alliance believes BIA should further streamline the issuance of rights-of-way, and is of the opinion that the Proposed Regulations accomplish just the opposite.

The Alliance is also of the view that the Proposed Regulations are unlawful for a number of reasons. In this regard, attached as Addendum A is a position paper outlining concerns with the general legality of the Proposed Regulations. While the Alliance strongly supports BIA's attempt to modernize and revamp 25 C.F.R. Part 169, the Alliance, nevertheless, believes BIA has missed the mark in this instance. The observations contained in Addendum A offer but another reason why the Alliance requests that BIA withdraw the Proposed Regulations and begin anew to address rights-of-way on Indian lands.

Indian land rights-of-way are, as a rule, very limited in nature and disturb minimal acreage. Utilizing regulations similar to 25 C.F.R. Part 162 for oil and natural gas rights-of-way is ill-advised. 25 C.F.R. Part 162 regulates surface leasing, an activity that has little, if anything, in common with oil and natural gas industry rights-of-way. Surface leases generally involve significant above-ground surface disturbances and can impact a large amount of acreage. Oil and natural gas rights-of-way involve minimal acreage, and often encompass facilities located entirely under-ground. They are distinct from surface leases, and therefore should not be regulated similar to surface leases.

Many areas of Indian country have benefited from generations of mineral resource development, while other areas are on the cusp of unprecedented mineral development. We fear the Proposed Regulations, as currently drafted, will significantly impede industry's ability to develop Indian country mineral resources and preclude the economic benefits to the tribes.

The Alliance also believes it is important to remind BIA that the oil and natural gas industry is a rate of return business that supplies much-needed energy to America. The time between when a company acquires an asset and the time the asset reaches profitable production significantly impacts whether a company with commit time and resources. The time elapsed between the acquisition of Indian mineral assets and profitable production already significantly lags behind other assets on private, state and federal lands.

Furthering hindering Indian mineral resources through detailed, cumbersome, and unnecessary regulations will only further delay the development of tribal mineral resources and deter companies from pursuing opportunities in Indian country. The Proposed Regulations, therefore, accomplish the counterproductive goal of impeding the development of Indian mineral resources, and reducing economic opportunity for tribes and Indian allottees.

In an effort to assist BIA in the event BIA does not withdraw the Proposed Regulations, the Alliance suggests significant modifications to the Proposed Regulations below. The Alliance also outlines its views concerning how the Proposed Regulations will do anything but streamline the issuance of Indian land rights-of-way.

## **I. INTRODUCTION**

The Alliance views the Proposed Regulations as an additional burden on the ability of companies to perform business on Indian lands, and as an attempt to alter existing property rights, as well as contractual and legal understandings. The Proposed Regulations would require significantly more expense, consents, and approvals relating to the acquisition, retention, assignment, and mortgaging of rights-of-way; all of which would result in further delays in the granting and usage of Indian land rights-of-way for oil and gas development and transportation. Such new costs and delays will further discourage tribal and non-tribal operators from developing or utilizing Indian lands in a manner that benefits both Indian surface owners and mineral owners. As a result of the Proposed Regulations, the Alliance anticipates that development of Indian lands will decline precipitously and that residents of Indian reservations will be subjected to increased problems with the supply of energy services, and the likelihood that reservation-based income will be the object of severe and detrimental impacts. Due to the presence of these potential and likely outcomes from final promulgation of the Proposed Regulations, especially when coupled with the legal and other difficulties inherent in the Proposed Regulations, BIA and the Department should immediately withdraw the Proposed Regulations from further consideration in their present form.

## **II. THE PROPOSED REGULATIONS WILL *NOT* STREAMLINE THE ISSUANCE OF INDIAN LAND RIGHTS-OF-WAY.**

BIA suggests that the Proposed Regulations will “streamline the process for obtaining BIA grants of rights-of-way on Indian land,” 79 Fed. Reg. at 34455; however, nothing could be further from the truth. As BIA should be readily aware, currently all Indian land rights-of-way are governed by specific “form” documents that applicants are required to utilize when seeking to obtain such rights-of-way. See BIA, PROCEDURAL HANDBOOK, Grants of Easement for Rights-of-Way on Indian Lands (March 2006). This includes, but is not limited to, template forms for: (i) Indian landowner consents; (ii) right-of-way application forms; and (iii) right-of-way grants. However, the Proposed Regulations move away from these template forms and provide the parties to negotiate with one another as to the terms of the Indian landowner’s consent, the grantee’s responsibilities, and the terms of

the grant. Moving away from template forms will certainly slow-down the issuance of rights-of-way, particularly on individual Indian tracts.

For example, under the Proposed Regulations, a right-of-way applicant is required to provide all individual Indian tract owners, regardless of how numerous, notice that the applicant desires a right-of-way over a specific tract. See Proposed § 169.107(a). Thereafter, the applicant must garner the majority interest owners' consent to the issuance of the right-of-way. *Id.* Each individual landowner, however, is entitled to demand their own form of compensation in exchange for their consent. See Proposed § 169.110(a). An applicant is then required to obtain a "valuation" wherein the applicant can demonstrate to BIA that the compensation demanded by each individual landowner satisfies BIA's definition of "market value."<sup>1</sup> See Proposed § 169.110(c). The applicant then submits the right-of-way application to BIA; yet, because BIA permits Indian landowners to negotiate for any type of compensation, the processing of the application is far from complete.

Once BIA receives a right-of-way application that is not based on template forms, BIA will be required to review each individual consent, the negotiated and agreed to compensation, and guarantee that both match the proposed right-of-way grant.<sup>2</sup> In addition, BIA is required to confirm that the applicant's "compensation" offer to each landowner satisfies the "market value" as portrayed on the required "valuation" document. See Proposed §§ 169.002, 169.110(a), 169.115. Needless to say, such a review will take considerable time and resources. This is particularly true where an Indian landowner demands non-fiscal compensation, such as consideration in lieu of, in exchange for the landowner's consent. BIA's definition of "market value" incorporates the "fair market value standard." Nevertheless, the Proposed Regulations permit applicants and landowners to negotiate a variety of forms of compensation that may not conform to a traditional "fair market value" analysis. For example, if a landowner desires compensation in the form of consideration in lieu of, how is BIA going to determine that such consideration in lieu of equates to "fair market value." The Alliance posits that such an analysis may be impossible, and if not impossible, certainly requiring significant time and resources.

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<sup>1</sup> As is explained in Addendum A, the Alliance believes BIA misses the mark in demanding that applicants remit "market value." The 1948 Act does not require Indian landowners receive "fair market value" or "market value;" rather, the 1948 Act only requires the landowner to receive compensation that is "just." See 25 U.S.C. § 325.

<sup>2</sup> It is also unclear whether BIA or the applicant will be required to produce the specific right-of-way grant to conform to each unique right-of-way and Indian landowner demands. Regardless of who is required to produce the right-of-way grant, the production or review of the same, to guarantee the grant conforms to the specific Indian landowner consents, will take significant time and resources.

To further compound the situation, the Proposed Regulations require BIA to grant or deny the right-of-way application with sixty (60) days of notifying the applicant that the right-of-way application is complete. See Proposed § 169.119(b)(2). The Alliance has an extremely difficult time believing that BIA can perform the tasks outlined above within a sixty (60) day timeframe. This is particularly true when BIA receives less annual funding and is grossly understaffed.<sup>3</sup> Consequently, the Alliance contends the Proposed Regulations do not accomplish BIA's goal of streamlining the processing and issuance of BIA rights-of-way. This is true both with respect to the front end work required by an applicant, and the review and processing required by BIA personnel. For this reason, the Alliance requests that BIA revoke the Proposed Regulations and begins anew.

### III. WESTERN ENERGY ALLIANCE'S SECTION-BY-SECTION COMMENTS & PROPOSED REVISIONS

#### § 169.001 What is the purpose of this part?

The Western Energy Alliance (the "Alliance") is uncertain about the actual intent and purpose of the Proposed Regulations. For example, the Bureau of Indian Affairs ("BIA") states that the purpose of the Proposed Regulations is to streamline the procedures and conditions with respect to how rights-of-way are issued. This would not appear to be the case when BIA has dramatically increased the overall workload of right-of-way applicants, and BIA personnel. In this regard, in accordance with the Proposed Regulations, BIA will now be processing, reviewing, and recording assignments and mortgages. BIA has never engaged in such tasks previously and this additional workload – especially during times of budget constraints – will not streamline or expedite the right-of-way process. In addition, the Proposed Regulations require rights-of-way grantees to obtain new, and previously unnecessary, consents and approvals from the Indian landowners. Requiring grantees to obtain additional consents and approvals will not streamline the issuance, assignment, or mortgage of Indian land rights-of-way, and BIA will be required to review the completeness of those consents as well. The Alliance also believes that BIA cannot utilize only the authorities embodied in 25 U.S.C. §§ 323-328 in promulgating the new regulations. Put simply, BIA cannot pick and choose which statutes to implement. As BIA is well aware, there are other Indian lands rights-of-way statutes that BIA is legally obligated to follow. The Alliance also suggests BIA delete the phrase "government owned lands" from the Proposed Regulations because the term "Indian land" should encompass all government land held in trust or restricted status for Indian beneficiaries.

#### *The Alliance's Proposed Revisions to § 169.001 – What is the purpose of this part?*

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<sup>3</sup> The Alliance also notes that BIA's proposed five (5) year review and adjustments will also be utterly impossible to perform. See Proposed § 169.117(b). Put simply, BIA does not have the personnel or resources to perform all of its usual tasks, and new reviews and assessments. The Alliances also believes BIA's failure to conduct timely reviews and adjustments will subject BIA to potential trust liability litigation in the future.

(a) This part is intended to streamline the procedures and conditions under which we will approve (i.e., grant) rights-of-way over and across tribal lands, and individually owned Indian lands, ~~and Government-owned lands~~, by providing for the use of the broad authority under 25 U.S.C. 31123-328, ~~rather than the limited authorities under other statutes.~~

(b) This part specifies:

(1) Conditions and authorities under which we will approve rights-of-way on or across Indian land;

(2) How to obtain a right-of-way;

(3) Terms and conditions required in rights-of-way;

(4) How we administer and enforce rights-of-ways;

(5) How to renew, amend, assign, and mortgage rights-of-way; and

(6) Whether rights-of-way are required for service line agreements.

(c) This part does not cover rights-of-way on or across tribal lands within a reservation for the purpose of Federal Power Act projects, such as constructing, operating, or maintaining dams, water conduits, reservoirs, powerhouses, transmission lines or other works which must constitute a part of any project for which a license is required by the Federal Power Act.

(1) The Federal Power Act provides that any license that must be issued to use tribal lands within a reservation must be subject to and contain such conditions as the Secretary deems necessary for the adequate protection and utilization of such lands (16 U.S.C. 797(e)).

(2) In the case of tribal lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), the Federal Power Act requires that annual charges for the use of such tribal lands under any license issued by the Federal Energy Regulatory Commission must be subject to the approval of the tribe (16 U.S.C. 803(e)).

~~(d) This part does not apply to grants of rights-of-way on tribal land under a special act of Congress authorizing grants without our approval under certain conditions.~~

#### **§ 169.002 What terms do I need to know?**

The definitions utilized in the Proposed Regulations need to be fine-tuned. It is unclear whether an “easement” is different than a “right-of-way,” or why two distinct definitions are needed for the identical grant. Consistent with the U.S. Supreme Court’s interpretation of Indian land rights-of-way, the definition of a “right-of-way” should reflect that rights-of-way are transfers of real property interests to the grantee.

It is also unclear why the term “Indian” includes individuals who are “eligible to become a member of any Indian tribe.” The Alliance is unaware how this new definition will function in the real world, and whether such definition conflicts with the legal standards regarding for whom BIA may legally hold land in trust.

The definition of “market value” is also troublesome. The Alliance questions how tribal land and/or allotted land can be valued on “an open and competitive market” if there is no comparable land in the vicinity other than Indian land. Similarly, the Alliance believes the definition of “market value” should not focus on the principal of “fair market value,” but

on the statutory requirement that Indian landowners receive compensation that is “just.” See 25 U.S.C. § 325. The Alliance is of the opinion that compensation can be “just” and not necessarily be based on traditional “fair market value” principals. Similarly, as also addressed in greater detail below, Indian landowners, both tribal and individual allottees, should be permitted to waive the requirement that a valuation be performed. For example, the Alliance can easily imagine a situation where an Indian landowner desires to receive “just” compensation in the form of consideration in-lieu of. In such an instance, it would be useless to prepare a fair market valuation because it will be difficult if not impossible to measure whether the negotiated consideration in-lieu of equated to or surpassed a valuation based on a general real property fair market value analysis. BIA should simply defer to the compensation negotiated for and agreed to between applicants and Indian landowner, and thereafter, determine if such compensation is just, or in the Indian owner’s best interest.

The definition of “Indian tribe” or “tribe” should conform to 25 U.S.C. § 324 and only pertain to those tribes required to give their consent to a right-of-way.

The definition of “Indian land,” “Individually owned Indian land,” and “tribal land” need to include rights-of-way through Indian subsurface, non-mineral, estates because the Alliance’s members must obtain subsurface rights-of-way that utilize “pore-space” for directional and/or horizontal wellbores. These rights-of-way do not penetrate or produce minerals located in the Indian mineral estate; rather, such rights-of-way permit grantees to traverse the Indian subsurface estate for a specific purpose, generally the production of minerals in an adjoining tract.

The definition of “trespass” also fails to address potentially unintentional instances of trespass, or how potential tenancies-at-will may result from holdovers at the conclusion of the right-of-way term. Finally, the Alliance also believes there are words that are defined in this section that are not employed anywhere in the Proposed Regulations.

***The Alliance’s Proposed Revisions to § 169.002 – What terms do I need to know?***

Abandonment means the grantee has affirmatively relinquished a right-of-way (as opposed to relinquishing through non-use).

Assignment means an agreement between a grantee and an assignee, whereby the assignee acquires all or part of the grantee’s rights, and assumes all of the grantee’s obligations under a grant.

Avigation hazard easement means the right, acquired by government through purchase or condemnation from the owner of land adjacent to an airport, to the use of the air space above a specific height for the flight of aircraft.

BIA means the Secretary of the Interior or the Bureau of Indian Affairs within the Department of the Interior and any tribe acting on behalf of the Secretary or BIA under § 169.007 of this part.

Compensation means something bargained for ~~in return for an Indian landowner(s)' consent to BIA's grant of a right-of-way, and that the Secretary determines is just that is fair and reasonable under the circumstances of the agreement.~~

Constructive notice means notice:

- (1) Posted at the tribal government office, tribal community building, and/or the United States Post Office; and
- (2) Published in the local newspaper(s) nearest to the affected land and/or announced on a local radio station(s).

~~Easement means an interest in land owned by another person, consisting of the right to use or control, for a specific limited purpose, the land, or an area above or below it.~~

Encumbered account means a trust fund account where some portion of the proceeds are obligated to another party.

Fractional interest means an undivided interest in Indian land owned ~~in~~ tenancy in common by individual Indians or tribal landowners and/or fee owners.

~~Government land means any tract, or interest therein, in which the surface estate is owned and administered by the United States, not including Indian land.~~

Grant means the formal transfer of a right-of-way interest by the Secretary ~~to a grantee's approval.~~

Grantee means a person or entity to whom the Secretary grants a right-of-way.

Immediate family means, in the absence of a definition under applicable tribal law, a spouse, brother, sister, aunt, uncle, niece, nephew, first cousin, lineal ancestor, lineal descendant, or member of the household.

Indian means:

- ~~(1) Any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner as of October 27, 2004, of a trust or restricted interest in land;~~
- (2) Any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) and the regulations promulgated thereunder; and
- (3) With respect to the inheritance and ownership of trust or restricted land in the State of California under 25 U.S.C. 2206, any person described in paragraph (1) or (2) of this definition or any person who owns a trust or restricted interest in a parcel of such land in that State.

Indian land means any tract in which any interest in the surface ~~estate or subsurface~~ estate, ~~other than the mineral estate,~~ is owned by a tribe or individual Indian in trust or restricted status and includes both individually owned Indian land and tribal land.

Indian landowner means a tribe or individual Indian who owns an interest in Indian land.

Indian tribe or tribe means an Indian tribe ~~organized under the Act of June 18, 1934, as amended; the Act of May 1, 1936; or the Act of June 26, 1936 under section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a).~~

Individually owned Indian land means any tract, or interest therein, in which the surface estate ~~or subsurface estate, other than the mineral estate,~~ is owned by an individual Indian in trust or restricted status, ~~including tracts where the majority interest is held in trust or restricted status for individual Indians, and the minority interest is held in trust or restricted status for an Indian tribe.~~



In-kind compensation means payment is in goods, ~~or services,~~ or any other form of compensation rather than money.

Legal description means that part of the conveyance document of land or interest in land, which identifies the land or interest to be affected.

LTRO means the Land Titles and Records Office of BIA.

Map of definite location means a survey plat showing the location, size, and extent of the right-of-way and other related parcels, with respect to each affected parcel of individually owned land, or tribal land, ~~or Government land~~ and with respect to the public surveys under 25 U.S.C. 176, 43 U.S.C. 2, and 1764.

Market Value means the amount of compensation agreed to by an Indian landowner in exchange for his or her consent to BIA's grant of a right-of-way, and that the Secretary determines is just, that a right-of-way would most probably command in an open and competitive market.

Right-of-way means a real property interest granted by the United States to a Grantee legal right to cross tribal land, individually owned Indian land, or Government land for a specific purpose, including but not limited to building and operating a line or road. This term may also refer to the land subject to the grant of right-of-way.

Right-of-way document means a right-of-way grant, renewal, amendment, assignment, or mortgage of a right-of-way.

Secretary means the Secretary of the Interior or an authorized representative.

Section 17 corporation means an Indian corporation federally chartered under section 17 of the Act of June 18, 1934, 25 U.S.C. 4776.

Service line means a utility line running from a main line that is used only for supplying owners or authorized occupants or users of land with telephone, water, electricity, gas, internet service, or other home utility service.

Trespass means any willful, purposeful, reckless, or negligent unauthorized occupancy, use of, or action on ~~tribal or individually owned~~ Indian land.

Tribal authorization means a duly adopted tribal resolution, tribal ordinance, or other appropriate tribal document authorizing the specified action.

Tribal land means any tract, or interest therein, that is not individually owned Indian land, in which the surface estate or subsurface estate, other than the mineral estate, is owned by one or more tribes in trust or restricted status, and includes such lands reserved for BIA administrative purposes. The term also includes the surface estate and the subsurface estate, other than the mineral estate, of lands held in trust for an Indian corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477). The term does not include individually owned Indian land where the majority of the tract is held in trust or restricted status for individual Indians and the minority interest is held in trust or restricted status by an Indian tribe.

Trust account means a tribal account or Individual Indian Money (IIM) account for trust funds maintained by the Secretary.

Trust or restricted status means:

- (1) That the United States holds title to the tract or interest in trust for the benefit of one or more tribes or individual Indians; or
- (2) That one or more tribes or individual Indians holds title to the tract or interest, but can alienate or encumber it only with the approval of the United States because of limitations in the conveyance instrument, ~~under Federal law~~ or limitations in Federal law.

Uniform Standards of Professional Appraisal Practice (USPAP) means the standards promulgated by the Appraisal Standards Board of the Appraisal Foundation to establish requirements and procedures for professional real property appraisal practice.

Us/we/our means the BIA.

### **§ 169.003 To what land does this part apply?**

The Alliance appreciates BIA's clarification that rights-of-way over and across Indian owned fee land do not require BIA's involvement. The Alliance does, however, disagree with the Proposed Regulations concerning rights-of-way consented to by life-tenants. The Alliance believes that life-tenants should have the ability to consent to rights-of-way that will subsequently bind any remaindermen. The Interior Board of Indian Appeals (the "IBIA" or "Board") has previously determined that rights-of-way over or across Indian land must be consented to by both life tenants and remaindermen. The Board's decision was based on the silence in the current regulations, and the Board's earlier decision in *Enemy Hunter v. Acting Rocky Mountain Reg'l Dir.*, BIA, 51 IBIA 322 (2010), wherein the Board addressed a similar issue in the surface leasing context. Unlike the Proposed Regulations, the surface leasing regulations specifically define "Remainder interest" as an interest in Indian land. See 25 C.F.R. § 162.003. Similarly, the surface leasing regulations define an Indian landowner as any Indian or tribe that owns an interest in Indian land. *Id.* Hence, the surface leasing regulations specifically require that remaindermen consent to the issuance of surface leases.

The Proposed Regulations should not so require. It would be extremely difficult to value a right-of-way traversing Indian land subject to a life-estate that could cease at any time. For this reason alone, companies may avoid Indian lands burdened by a life estate. This is particularly true where the number of remaindermen are numerous. BIA continues to owe a trust obligation to life tenants, and creating a regulatory mechanism whereby those trust beneficiaries will receive no benefit of their life tenancy does not satisfy BIA's trust obligations. BIA should not promulgate regulations that support remaindermen at the expense of life tenants. When finalizing the Proposed Regulations, BIA should permit life tenants to consent to the issuance of a right-of-way that may exceed the duration of the life tenancy. The Alliance proposes that life tenants be permitted to burden the Indian land at issue for a twenty (20) year maximum.

#### ***The Alliance's Proposed Revisions to § 169.003 – To what land does this part apply?***

- (a) This part applies to Indian land ~~and Government land~~.

(1) We will not take any action on a right-of-way across fee land or collect compensation on behalf of fee interest owners. We will not condition our grant of a right-of-way across Indian land ~~or Government land~~ on the applicant having obtained a right-of-way from the owners of any fee interests. The applicant will be responsible for negotiating directly with and making any payments directly to the owners of any fee interests that may exist in the property on which the right-of-way is granted.

(2) We will not include the fee interests in a tract in calculating the applicable percentage of interests required for consent to a right-of-way.

(b) This paragraph (b) applies if there is a life estate on the land proposed to be subject to a right-of-way.

(1) ~~Unless otherwise provided in a will creating the life estate, w~~When all of the trust or restricted interests in a tract are subject to ~~at the same~~ life estate (created by operation of law), the life tenant may ~~consent to grant~~ a right-of-way over the land without the consent of the owners of the remainder interests ~~or our approval~~, subject to BIA's approval and grant, for no more than twenty (20) years; unless the Grantee obtains consents and/or ratifications of the existing right-of-way from a majority of the remainderman under a life estate~~the duration of the life estate.~~

(i) The right-of-way will terminate upon the expiration of the twenty (20) year term; unless the Grantee obtains consents and/or ratifications of the existing right-of-way from a majority of the remaindermen under a life estate~~life estate.~~

(ii) At the expiration of the life estate all compensation shall be remitted to the owners of the prior remainder interests.

(iii) ~~BIA~~The life tenant must record the right-of-way in the LTRO.

~~(iii) The grantee must pay compensation directly to the life tenant under the terms of the right-of-way unless the whereabouts of the life tenant are unknown, in which case we may collect compensation on behalf of the life tenant.~~

~~(iv) We may monitor the use of the land, as appropriate, and will enforce the terms of the right-of-way on behalf of the life tenant and the owners of the remainder interests, but will not be responsible for enforcing the right-of-way on behalf of the life tenant.~~

(v) We will not grant a right-of-way on behalf of the owners of the remainder interests or join in a right-of-way granted by the life tenant on behalf of the owners of the remainder interests, for a period exceeding twenty (20) years, except as needed to preserve the value of the land; unless the Grantee obtains consents and/or ratifications of the existing right-of-way from a majority of the remaindermen under a life estate.

~~(2) Unless otherwise provided in a will creating the life estate, w~~When less than all the majority interest of the trust or restricted ~~interests in a tract is~~ subject to a particular life estate (by operation of law), the life tenant's ~~may consent to grant~~ a right-of-way for his or her interest may be counted as part of the majority, however, the life tenant's consent must only be for a term not to exceed~~without the consent of the owners of the remainder interests, for twenty (20) years; unless the Grantee obtains consent and/or ratifications of the existing right-of-way from a majority of the remaindermen under a life estate~~the duration of the life estate, but the applicant must obtain the consent of the co-owners and our approval.

~~(i) The right-of-way over the life interest will terminate upon the expiration of the life estate.~~

- ~~(ii) We will not grant a right of way on the life tenant's behalf.~~
- ~~(iii) The right-of-way must provide that the grantee pays the life tenant directly, unless the life tenant's whereabouts are unknown in which case we may collect compensation on behalf of the life tenant.~~
- ~~(iv) The right of way must be recorded in the LTRQ.~~
- ~~(v) We may monitor the use of the land, as appropriate, and will enforce the terms of the right-of-way on behalf of the owners of the remainder interests, but will not be responsible for enforcing the right of way on behalf of the life tenant.~~
- ~~(3) We may grant a right of way for longer than the duration of a life estate with the consent of a majority of the owners of the remainder interests, and may consent on behalf of undetermined owners of remainder interests.~~
- (4) Unless otherwise provided in a will creating the life estate, where the owners of the remainder interests and the life tenant have not entered into a right-of-way or other written agreement approved by the Secretary providing for the distribution of rent monies under the right-of-way, the life tenant will receive payment in accordance with the distribution and calculation scheme set forth in Part 179 of this chapter only for the duration of the life estate.
- ~~(5) The life tenant may not cause or allow permanent injury to the land.~~
- ~~(6) The life tenant must provide a copy of their right-of-way consent to us and must record any right-of-way granted under paragraph (b)(1) of this section in the LTRQ.~~

**§ 169.004 When do I need a right-of-way to authorize possession over or across Indian land?**

The Alliance asks BIA to clarify the phrase “common law authorizes access.” As a rule, common law generally permits: (i) easements by necessity; (ii) implied easements; (iii) easements of convenience; and (iv) prescriptive easements. Is it BIA’s intent that the phrase be interpreted to grant individuals and entities such “common law” easements without BIA involvement?

**§ 169.005 – What types of rights-of-way does this part cover?**

The Alliance believes BIA should devote significant resources to revising this portion of the Proposed Regulations. First, the Alliance is unaware of the legal authority that permits BIA to only grant rights-of-way in accordance with 25 U.S.C. §323-328. BIA is well aware that Congress has enacted multiple statutes that authorize BIA to grants rights-of-way over Indian lands. BIA, if acting in contravention of this legislation, may not unilaterally determine which statutes to implement. This is particularly true where many of the statutes that BIA has unilaterally determined not to implement contain Congressional directives and terms that are in direct conflict with the Proposed Regulations. *See e.g.* 25 U.S.C. § 321 (limiting the amount of taxes that may be assessed against non-Indian pipeline grantees). Further, when enacting 25 U.S.C. § 323-328, Congress directly addressed whether BIA was required to continue to implement other Indian land right-of-way statutes by stating, in part, “Section 323 to 328 . . . shall not in any manner amend or repeal . . . any existing statutory authority empowering the Secretary to grant rights-of-

way over Indian lands.” 25 U.S.C. § 326. BIA cannot issue regulations that seek to repeal existing legislation through the pronouncement of regulations solely implementing 25 U.S.C. § 323-328. BIA does not and cannot possess such authority.

The Alliance also believes BIA is prohibited from retroactively implementing the Proposed Regulations to existing rights-of-way grants. The Proposed Regulations apply retroactively to existing right-of-way grants except where existing grants have language directly conflicting with the Proposed Regulations. Few, if any, existing right-of-way grants will include language regarding tribal authority over rights-of-way, including taxation authority, or limits on the grantees’ assignment or mortgaging ability. However, the Proposed Regulations will impose retroactive requirements on grantees that will severely alter the bargained for contact, including financial terms, contained in existing right-of-way grants. BIA cannot, and should not, impose the Proposed Regulations retroactively to existing grants. Such retroactive effect is legally impermissible, and would also materially alter terms agreed to by BIA, grantees, and landowners who gave their consent for the issuance of rights-of-way.

***The Alliance’s Proposed Revisions to § 169.005 – What types of rights-of-way does this part cover?***

~~(a) This part covers rights-of-way over and across Indian ~~or Government~~ land for all purposes, including both linear and non-linear surface uses., ~~for uses including but not limited to the following:~~~~

~~(1) Railroads;~~

~~(2) Public roads and highways; (3) Access roads;~~

~~(4) Service roads and trails essential to any other right-of-way purpose;~~

~~(5) Public and community water lines (including pumping stations and appurtenant facilities);~~

~~(6) Public sanitary and storm sewer lines (including sewage disposal and treatment plant lines);~~

~~(7) Water control and use projects (including but not limited to, flowage easements, irrigation ditches and canals, and water treatment plant lines);~~

~~(8) Oil and gas pipelines;~~

~~(9) Electric transmission and distribution lines (including poles, towers, and appurtenant facilities);~~

~~(10) Telecommunications, broadband, fiber optic lines; (11) Avigation hazard easements; or~~

~~(12) Conservation easements not covered by 25 CFR 84, Encumbrances of Tribal Land – Contract Approvals, or 25 CFR 162, Leases and Permits.~~

(b) BIA will grant rights-of-way using the authority in 25 U.S.C. ~~31213~~-328, and relying on supplementary authority such as 25 U.S.C. 2218, where appropriate, and this part covers all rights-of-way granted under that statutory authority. This part also covers existing rights-of-way that were granted under other statutory authorities prior to the effective date of this rule, except that the provisions of this part shall not apply to if the provisions of the preexisting right-of-way documents that are silent as to requirements that are imposed for the

~~first time by these regulations conflict with this part, the provisions of the preexisting right-of-way document govern.~~

**§ 169.006 Does this part apply to right-of-way grants I submitted for approval before \_\_\_\_\_.**

The Alliance reiterates its opposition to the Proposed Regulations having any form of retroactive effect. This is true both with respect to existing grants and right-of-way applications now pending. BIA's application of the Proposed Regulations to pending applications would, once again, materially alter the financial terms bargained for and considered when applying for a right-of-way grant, and could force applicants to acquire new and different consents that were not required when initially gaining the mandatory percentage of Indian landowner consents. Like existing rights-of-way grants, few, if any, pending applications will include terms concerning tribal taxation of non-Indian activities and property; however, the Proposed Regulations seek to make such activities and property subject to tribal taxation. BIA's efforts in this regard significantly modify the financial and other terms that were considered and agreed to when right-of-way grants were sought. Furthermore, many right-of-way applications pending BIA review and issuance have been awaiting such review for several months, if not years. Applying the Proposed Regulations to right-of-way applications that were negotiated several months or years in the past is inappropriate and improper, and, once more, totally alters the terms agreed to by the Indian landowners, prospective grantees, and BIA.

Similarly, when determining whether to approve pending right-of-way applications, BIA should determine whether the applications conform to the regulations in existence when the applications were submitted. As BIA is well aware, the Proposed Regulations greatly modify the current right-of-way regulations, and applying the Proposed Regulations to pending applications may render previously valid applications deficient in a variety of respects. Right-of-way applicants should not be required to engage in further administrative and regulatory analysis of pending applications simply because BIA did not and could not timely process their applications.

***The Alliance's Proposed Revisions to § 169.006 – Does this part apply to right-of-way grants I submitted for approval before \_\_\_\_\_.***

~~This part applies to all right-of-way documents.~~ If you submitted your right-of-way document to us for granting or approval before [EFFECTIVE DATE OF REGULATIONS], the qualifications in paragraphs (a) and (b) of this section do not also apply.

~~(a) If we granted or approved your right-of-way document before [EFFECTIVE DATE OF REGULATIONS], this part does not apply applies to that right-of-way document provisions of the right-of-way document conflict with this part, the provisions of this part shall not the right-of-way document govern.~~

(b) If you submitted a right-of-way document but we did not approve or grant it before \_\_\_\_\_, then:

(1) We will review the right-of-way document under the regulations in effect at the time of your submission; and

~~(2) Once we grant or approve the right-of-way document, this part shall not apply applies to that right-of-way document; however, if the provisions of the right-of-way document conflict with this part, the provisions of this part shall govern the right-of-way document govern.~~

**§ 169.007 May tribes administer this part on BIA’s behalf?**

The Alliance believes BIA should clarify this section of the Proposed Regulations. First, BIA should make clear that tribes administering this part do so solely on BIA’s behalf and by stepping into the shoes of BIA. Tribes may not administer this part in accordance with tribal law or make tribal law applicable to federal grants. Moreover, BIA should clarify that when acting in the role of BIA to administer this part, decisions rendered by the pertinent tribal officials are subject to BIA appeal and review. Finally, the last provision of this section, stating that “[a] Tribe . . . may . . . administer any portion of this part that is not . . . cancellation of a right-of-way,” conflicts with other portions of the Proposed Regulations that the Alliance believes should be deleted. In this vein, other portions of the Proposed Regulations permit tribes to unilaterally “terminate” rights-of-way.

***The Alliance’s Proposed Revisions to § 169.007 – May tribes administer this part on BIA’s behalf?***

A tribe or tribal organization may contract or compact under the Indian Self- Determination and Education Assistance Act (25 U.S.C. 450f *et seq.*) to administer any portion of this part on BIA’s behalf that is not a grant, approval, or disapproval of a right-of-way document, waiver of a requirement for right-of-way grant or approval (including but not limited to waivers of market value and valuation), cancellation of a right-of-way, or an appeal.

**§ 169.008 What laws apply to rights-of-way approved under this part?**

The Alliance believes this section of the Proposed Regulations must undergo significant alterations. First, many provisions of this section are in direct conflict with applicable federal case law. Federal case law is clear that rights-of-way over and across Indian lands constitute, for governance purposes, at the very least, alienated non-Indian land. See *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). In addition, rights-of-way over Indian lands do not create a consensual relationship between the Indian landowner and the grantee. See *Burlington Northern Railroad Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999) (“A right-of-way created by congressional grant is a transfer of a property interest that does not create a continuing consensual relationship between a tribe and a grantee”); see also *State of Mont. v. Dep’t of Transportation v. King*, 191 F.3d 1108 (9th Cir. 1999); *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996). These federal judicial decisions are further supported by BIA’s own template right-of-way grant that identifies the United States, through BIA, and not the individual Indian landowner, as the GRANTOR of the right-of-way. Second, federal judicial decisions are clear that tribes do not have authority to tax non-

Indian activities or property within rights-of-way. See *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). Third, the U.S. Supreme Court, contrary to the Proposed Regulations, has previously clarified that certain state taxes may apply to utilities that operate within Indian land rights-of-way. See *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005). Fourth, the Alliance is of the view that the Proposed Regulations, as a direct result of their conflict with existing federal case law, will breed unnecessary litigation. This is particularly true with respect to litigation between states and tribes, as well as litigation arising when tribes seek to impose tribal law and tribal taxation authority over non-Indians within non-Indian rights-of-way.

***The Alliance's Proposed Revisions to § 169.008 – What laws apply to rights-of-way approved under this part?***

~~(a)~~ In addition to the regulations in this part, rights-of-way approved under this part:

(1) ~~Are~~ subject to all applicable ~~Federal~~ laws;

~~(2) Are subject to tribal law, subject to paragraph (b) of this section; and~~

~~(3) Are not subject to State law or the law of a political subdivision thereof except that: (i) State law or the law of a political subdivision thereof may apply in the specific areas and circumstances in Indian country where the Indian tribe with jurisdiction has made it expressly applicable;~~

~~(ii) State law may apply in the specific areas and circumstances in Indian country where Congress has made it expressly applicable; and~~

~~(iii) State law may apply where a Federal court has expressly applied State law to a specific area or circumstance in Indian country in the absence of Federal or tribal law.~~

~~(b) Tribal laws generally apply to land under the jurisdiction of the tribe enacting the laws, except to the extent that those tribal laws are inconsistent with these regulations or other applicable Federal law. However, these regulations may be superseded or modified by tribal laws, as long as:~~

~~(1) The tribe has notified us of the superseding or modifying effect of the tribal laws;~~

~~(2) The superseding or modifying of the regulation would not violate a Federal statute or judicial decision, or conflict with our general trust responsibility under Federal law; and~~

~~(3) The superseding or modifying of the regulation applies only to tribal land.~~

~~(be)~~ Unless prohibited by Federal law, the parties to a right-of-way may subject that right-of-way to State or local law in the absence of Federal ~~or tribal~~ law, if the Indian landowners expressly agree, in writing, to the application of State or local law.

~~(cd)~~ An agreement under paragraph ~~(be)~~ of this section does not waive a tribe's sovereign immunity unless the tribe expressly states its intention to waive sovereign immunity in its consent to the right-of-way on tribal land.

~~(de)~~ ~~A right of way is an interest in land, but title does not pass to the grantee.~~ Unless otherwise expressly stated in the Indian landowner's ~~its~~ consent to the right-of-way ~~for tribal land, or in a tribal authorization for a right-of-way for individually owned Indian land,~~ the Secretary's grant of a right-of-way does not diminish to any extent ~~t~~:

~~(1) The Indian tribe's jurisdiction over the land subject to the right-of-way;~~



~~(2) The power of the Indian tribe to tax the land, any improvements on the land, or any activity related to, and not inconsistent with, the right-of-way;~~

~~(3) The Indian tribe's authority to enforce tribal law of general or particular application on the land subject to the right-of-way, as if there were no grant of right-of-way;~~

~~(4) The Indian tribe's inherent sovereign power to exercise civil jurisdiction over non-members on tribal land by regulating, through taxation, licensing, or other means, the activities of non-members who enter into consensual relationships with the Indian tribe or its members; or~~

(5) The character of the land subject to the right-of-way as Indian country under 18 U.S.C. 1151.

### **§ 169.009 What taxes apply to rights-of-way approved under this part?**

The Alliance's comments with respect to proposed § 169.008 apply with equal force to proposed § 169.009. Many of the proposed provisions of this section fail to comply with federal judicial decisions and seek to simplify very complex legal matters, such as state versus tribal taxation authority over non-Indians conducting business within non-Indian rights-of-way.

Moreover, the Alliance believes that BIA must adequately define "permanent improvements." The Alliance posits that no equipment or property within a right-of-way for any term less than an indefinite term can be defined as "permanent." For example, a compressor station within a gathering-line system, or certain equipment related to wellbores and well facilities, cannot be considered permanent improvements if the improvements must be removed at the expiration of the term of the right-of-way. Many jurisdictions have taken a similar stance for well over a hundred years. *See Kay County Gas Co. v. Bryant*, 135 Okla. 135 (1928) (holding that improvements, including buildings, warehouses, and habitations, which were all constructed within a right-of-way issued in accordance with 25 U.S.C. § 321 and approved by the Secretary were not permanent improvements to the reality but remained the sole property of the right-of-way grantee). For these reasons, the Alliance has deleted the word "permanent" throughout its proposed revisions to the regulations.

Further, regardless of how BIA defines "permanent improvements" or "improvements," federal case law is clear that Indian tribes may not "tax" non-Indian property within non-Indian rights-of-way over Indian land because the tribe's taxation efforts do not regulate non-Indian "activity" or "conduct," but rather merely tax non-Indian property. *See Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000); *see also Montana v. United States*, 450 U.S. 544 (1981); *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316 (2008).

### ***The Alliance's Proposed Revisions to § 169.009 – What taxes apply to rights-of-way approved under this part?***

(a) If permitted by applicable law, taxes may be assessed against:

- ~~(1) Land encompassed within rights-of-way;~~
- ~~(2) Improvements constructed within rights-of-way; and~~
- ~~(3) Activities conducted within rights-of-way.~~

~~Subject only to applicable Federal law, permanent improvements in a right-of-way, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.~~

~~(b) Subject only to applicable Federal law, activities under a right-of-way grant are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.~~

~~(c) Subject only to applicable Federal law, the right-of-way or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Possessory interests may be subject to taxation by the Indian tribe with jurisdiction.~~

#### **§ 169.010 How does BIA provide notice to the parties to a right-of-way?**

The Alliance appreciates BIA's clarification concerning how certain individuals and entities will receive notice when BIA is required to provide parties with the same. As will be noted below, however, the Alliance requests that BIA further clarify how right-of-way applicants and grantees may also notify pertinent parties when required. If BIA is permitted to notify individual Indian landowners through constructive notice, the Alliance sees no reason why right-of-way applicants and grantees should not be afforded similar opportunities.

#### ***The Alliance's Proposed Revisions to § 169.010 – How does BIA provide notice to the parties to a right-of-way?***

(a) When this part requires us to notify the parties of the status of our review of a right-of-way document (including but not limited to, providing notice to the parties of the date of receipt, informing the parties of the need for additional review time, and informing the parties that an application package is not complete):

(1) For rights-of-way affecting tribal land, we will notify the grantee and the tribe by mail; and

(2) For rights-of-way affecting individually owned Indian land, we will notify the grantee by [constructive noticemail](#) and, where feasible, ~~the individual Indian landowners~~ by ~~constructive notice or~~ mail.

(b) When this part requires us to notify the parties of our determination to approve or disapprove a right-of-way document, and to provide any right of appeal:

(1) For rights-of-way affecting tribal land, we will notify the applicant and the tribe by mail; and

(2) For rights-of-way affecting individually owned Indian land, we will notify the applicant by [constructive noticemail](#) and, ~~where feasible,~~ ~~the individual Indian landowners~~ by ~~constructive noticemail,~~ ~~or electronic mail.~~

**§ 169.011 May decisions under this part be appealed?**

The Alliance questions BIA's decision to prohibit right-of-way applicants from appealing BIA determinations not to grant rights-of-way. The Alliance does not understand why BIA would only permit Indian landowners to appeal BIA's decisions. Furthermore, the Alliance questions whether BIA may deny right-of-way applicants the ability to appeal right-of-way decisions. Section 5(b) of the Administrative Procedures Act ("APA"), 5 U.S.C. § 500 *et seq.*, guarantees all interested parties the opportunity for the submission and consideration of facts and arguments in response to agency determinations. Consistent therewith, 25 C.F.R. § 2.2 defines an "interested party" as "any person whose interest could be adversely affected by a decision in an appeal." Right-of-way applicants are certainly persons whose interest in obtaining rights-of-way over Indian lands could be adversely affected by a decision denying a right-of-way application. In addition, the Alliance can imagine numerous scenarios where the Indian landowner does not desire to appeal BIA's decision to the applicant's detriment. Importantly, many Indian landowners may not have the fiscal resources to appeal BIA's decision. As another example, an applicant could offer the Indian landowner greater compensation after the landowner previously consented to the prior right-of-way, thus if the prior right-of-way is denied, the landowner will have no reason to appeal the same. BIA's appeal mechanism should not operate to the detriment of legitimate applicants whose applications are denied for potentially ill-founded reasons.

The Alliance also believes BIA needs to clarify whether BIA's determination that a right-of-way application should be denied provides the applicant the ability to immediately challenge that determination before a federal tribunal. Section 10 of the APA permits persons legally wronged by agency determinations to seek federal judicial review. Section 10(c), however, requires persons to fully exhaust federal administrative remedies prior to seeking judicial review when required by statute or agency rule. Here it appears as though BIA has revoked its previous requirement that right-of-way applicants fully exhaust federal administrative remedies because applicants are no longer granted appeal rights. Thus, BIA's determination not to approve a right-of-way application or to deny an application may constitute a final agency action that is immediately subject to review in a federal judicial forum.

***The Alliance's Proposed Revisions to § 169.011 – May decisions under this part be appealed?***

~~(a) Appeals from BIA decisions under this part may be taken under part 2 [of this title](#), [of this chapter](#), except:~~

~~(1) Our decision to disapprove a right of way may be appealed only by an Indian landowner.~~

~~(2) Our decision to disapprove any other right-of-way document may be appealed only by the Indian landowners or the applicant.~~

~~(b) For purposes of appeals from BIA decisions under this part, "interested party" is defined as any person whose own direct economic interest is adversely affected by an action or decision.~~

**§ 169.012 How does the Paperwork Reduction Act affect this part?**

The Alliance has no comment on this section.

**§ 169.101 How do I obtain a right-of-way across tribal or individually owned Indian land?**

It is unclear to the Alliance why BIA would require a right-of-way applicant to notify all Indian landowners of an applicant's interest in obtaining a right-of-way, but only require the applicant to obtain a majority of the Indian landowner's consent. Such a requirement is, to say the least, burdensome, time-consuming, and unnecessary. The Alliance does not believe notifying all landowners will be useful. The Alliance also suggests that such notice requirements will further delay the issuance of rights-of-way. Finally, the Alliance believes that if BIA requires applicants to inform all Indian landowners of an applicant's desire to access the location, applicants should be permitted to utilize multiple notice mechanisms, such as constructive notice. BIA is afforded similar opportunities, see proposed § 169.010, and applicants should be as well.

***The Alliance's Proposed Revisions to § 169.101 – How do I obtain a right-of-way across tribal or individually owned Indian land?***

(a) To obtain a right-of-way across tribal or individually owned Indian land, you must submit a complete application to the BIA office with jurisdiction over the land covered by the right-of-way.

(b) If you must obtain access to Indian land to prepare information required by the application (e.g., to survey), you must obtain the consent of the Indian landowners in the following manner before accessing the land, but our approval to access is not required.

(1) For tribal land, you must obtain written authorization or a permit from the tribe.

(2) For individually owned Indian land, you must ~~notify all Indian landowners and~~ obtain the consent of the Indian landowners of the majority interest under § 169.107. Upon written request, we will provide you with the names, addresses, and percentage of ownership of individual Indian landowners, to allow you to obtain the landowners' consent [to survey](#).

(3) If the BIA will be granting the right-of-way across Indian land under § 169.107(b), then the BIA may grant permission to access the land.

**§ 169.102 What must an application for a right-of-way include?**

The Alliance believes that it should not be the applicant's responsibility to obtain a valuation of the proposed right-of-way. Traditionally, BIA has always been responsible for obtaining such valuations and the Alliance sees no reason to alter this well established course. Obviously applicants can, and likely will, obtain valuations, because waiting for BIA to obtain the same results in significant delays. Nonetheless, the burden should not rest on applicants in the first instance.

Additionally, the Alliance again questions the applicability of "tribal environmental and land use requirements" to right-of-way applications. See *Brendale v. Confederate Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); see also *Evans v. Shoshone-Bannock Land Use Policy Commission*, 736 F.3d 1298 (9th Cir. 2013). This is particularly true with respect to applications for rights-of-way over individual Indian land. Contrary to what BIA may believe, an individual Indian may not want an applicant to comply with tribal environmental and land use requirements.

The Alliance also questions whether BIA is potentially opening itself to liability by not requiring tribally-owned corporate entities to fulfill the same requirements as non-Indian corporate entities. The Alliance suspects that BIA owes the Indian landowners the same fiduciary standards regardless of whether the right-of-way is being sought by a tribal or non-Indian corporate entity.

Finally, as discussed in the Alliance's Addendum A, the Alliance is of the opinion that BIA's deletion of standard application forms, as well as other right-of-way documents, will significantly delay BIA's review and right-of-way grant. Specificity in each right-of-way will require an extremely detailed review of each application, thereby delaying the issuance of right-of-way grants.

In addition, and by way of example, as of the date of the comment deadline, the Fort Berthold Agency only has one BIA staff member reviewing right-of-way applications. This is despite the fact that the Fort Berthold Agency is inundated with new right-of-way applications each day. This situation proves that the new system will do anything but streamline the issuance of rights-of-way.

***The Alliance's Proposed Revisions to § 169.102 – What must an application for a right-of-way include?***

- (a) An application for a right-of-way must identify:
- (1) The applicant;
  - (2) The tract(s) or parcel(s) affected by the right-of-way;
  - (3) The general location of the right-of-way;

- (4) The purpose of the right-of-way;
  - (5) The duration of the right-of-way; and
  - (6) The ownership of ~~permanent~~ improvements associated with the right-of-way and the responsibility for constructing, operating, maintaining, and managing ~~permanent~~ improvements under § 169.105.
- (b) The following must be submitted with the application:
- (1) An accurate legal description of the right-of-way, its boundaries, and parcels associated with the right-of-way;
  - (2) A map of definite location of the right-of-way and existing facilities adjacent to the proposed project, signed by a professional surveyor or engineer (this requirement does not apply to easements covering the entire tract of land);
  - (3) A bond ~~meeting the requirements of § 169.103;~~
  - (4) Record of consent for the right-of-way meeting the requirements of § 169.106 for tribal land, and § 169.107 for individually owned Indian land;
  - (5) If applicable, a valuation meeting the requirements of § 169.111;
  - (6) If the applicant 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, demonstrating that:
    - (i) The representative has authority to execute the application;
    - (ii) The right-of-way will be enforceable against the applicant; and
    - (iii) The legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located;
  - (7) Environmental and archeological reports, surveys, and site assessments, as needed to facilitate compliance with applicable ~~law~~ ~~Federal and tribal environmental and land use requirements.~~
- ~~(c) There is no standard application form.~~

#### **§ 169.103 What bond must accompany the application?**

The Alliance is of the opinion that this section of the Proposed Regulations is unclear and needs substantial clarification and revision. In short, a right-of-way applicant should be able to meet the provisions requirements through a nationwide bond, a reservation-wide bond, or through a self-insurance bonding. The requirements embodied in this section could require rights-of-way applicants to secure extremely large bonds that would result in significant liquid capital being set aside and removed from expenditure on Indian lands. In addition, it is unclear whether an applicant must secure a bond for each segment of Indian land that a proposed right-of-way would traverse, or whether the applicant must only secure one bond for all the individual tracts traversed by the entire right-of-way. In the event the required bonds would be numerous (i.e. one for each tract of land traversed) or extensive, the Alliance believes that such requirements will motivate right-of-way applicants to avoid Indian lands. This is particularly true for utility companies or major interstate electric and natural gas transmission companies that do not want, or cannot permit, capital to be deterred from their intended purpose. BIA should: (i) clarify how the bonding requirements embodied in the Proposed Regulations will work in reality; (ii) clarify

whether companies may utilize nationwide bonds, reservation-wide bonds, or self-insured bonding for rights-of-way; and (iii) make a determination if requiring a large number of costly bonds to ensure performance under right-of-way grants is in the best interest of Indian landowners.

***The Alliance's Proposed Revisions to § 169.103 – What bond must accompany the application?***

(a) You must include payment of a performance bond or alternative form of security with your application for a right-of-way.

(b) Subject to the Secretary's discretion, an applicant may file bonds in the amount of ~~in an amount that covers:~~

~~(1) \$75,000 for a Statewide bond;~~

~~(2) \$150,000 for a Nationwide bond; or~~

~~(3) Any amount required by tribal ordinances, or resolution; however, the applicant may demonstrate to BIA that such tribal amount is excessive and the Secretary may determine the appropriate bond requirement. The highest annual rental specified in the grant, unless compensation is a one-time payment;~~

~~(2) The estimated damages resulting from the construction of any permanent improvements;~~

~~(3) The operation and maintenance charges for any land located within an irrigation project; and~~

~~(4) The restoration and reclamation of the premises to their condition at the start of the right-of-way or some other specified condition.~~

~~(c) The performance bond or other security must be deposited with us and made payable only to us, and may not be modified without our approval, except for tribal land in which case the bond or security may be deposited with and made payable to the tribe, and may not be modified without the approval of the tribe.~~

(d) The grant will specify the conditions under which we may adjust the security or performance bond requirements to reflect changing conditions, including consultation with the Indian tribal landowner and grantee for tribal land before the adjustment.

(e) We may require that the surety provide any supporting documents needed to show that the performance bond or alternative form of security will be enforceable, and that the surety will be able to perform the guaranteed obligations.

(f) The performance bond or other security instrument must require the surety or the grantee to provide notice to us at least 60 days before canceling a performance bond or other security. This will allow us to notify the grantee of its obligation to provide a substitute performance bond or other security before the cancellation date. Failure to provide a substitute performance bond or security is a violation of the right-of-way.

(g) We may waive the requirement for a performance bond or alternative form of security if the Indian landowners of the majority of the interests request it and we determine a waiver is in the Indian landowners' best interest. For Indian tribal land, we will defer, to the maximum extent possible, to the Indian landowner(s)' tribe's determination that a

waiver of a performance bond or alternative form of security is in the Indian landowner(s)'s best interest.

~~(h)~~ We will accept a performance bond only in one of the following forms:

(1) Certificates of deposit issued by a federally insured financial institution authorized to do business in the United States;

(2) Irrevocable letters of credit issued by a federally insured financial institution authorized to do business in the United States;

(3) Negotiable Treasury securities; ~~or~~

(4) Surety bonds issued by a company approved by the U.S. Department of the Treasury; ~~or-~~

(5) Grantee's certificate of self-insurance subject to the Secretary's approval.

~~(i)~~ We may accept an alternative form of security approved by us that provides adequate protection for the Indian landowners and us, including but not limited to an escrow agreement and assigned savings account.

~~(j)~~ All forms of performance bonds or alternative security must, if applicable:

(1) Indicate on their face that BIA approval is required for redemption;

(2) Be accompanied by a statement granting full authority to BIA to make ~~an immediate~~ claim upon or sell them if the grantee violates the right-of-way;

(3) Be irrevocable during the term of the performance bond or alternative security; and

(4) Be automatically renewable during the term of the right-of-way.

~~(k)~~ We will not accept cash bonds.

#### **§ 169.104 What is the release process for a performance bond or alternative form of security?**

The Alliance does not believe that BIA must "confirm" with the Indian landowner whether BIA should release a bond. Surely BIA can determine in its own right whether the bond should be released. In this regard; (i) what if BIA and the Indian landowner disagree about whether a bond should be released - will BIA simply defer to the Indian landowner's determination; (ii) may a right-of-way grantee appeal or challenge BIA's determination regarding bond release; and (iii) how will BIA "confirm" with hundreds of individual Indian landowners that a bond should be released where the bond impacts a right-of-way traversing numerous individual Indian allotments?

#### ***The Alliance's Proposed Revisions to § 169.104 – What is the release process for a performance bond or alternative form of security?***

Upon expiration, abandonment, termination, or cancellation of the right-of-way, the grantee may ask BIA in writing to release the performance bond or alternative form of security. Upon receiving the grantee's request, BIA will:

(a) ~~Consult~~ confirm with the grantee and the tribe, for tribal land or, where feasible, with the Indian landowners for individually owned Indian land, that the grantee has complied with all grant obligations; and



(b) Release the performance bond or alternative form of security to the grantee, unless we determine that the bond or security must be redeemed to fulfill the contractual obligations.

**§ 169.105 What requirements for due diligence must a right-of-way grant include?**

The Alliance is of the view that this section of the Proposed Regulations will not work in the context of oil and gas operations on Indian lands. First, the Alliance suggests that BIA incorporate a “force majeure” provision in this section whereby a right-of-way grantee’s failure to adhere to set deadline may be excused for actions beyond the grantee’s control. For example, a grantee could obtain a right-of-way from BIA, but as a result of matters beyond the grantee’s control, the grantee may be unable to garner the Bureau of Land Management’s (“BLM”) timely approval of an application for permit to drill (“APD”) a well within the right-of-way. In such a situation, it would be wasteful for the grantee to construct an access road, well pad location, and potential gas, oil, or water gathering lines if the grantee is uncertain as to when the APD will be approved. Similarly, at times operators within the oil and gas industry will be required to rotate drilling and completion rig schedules for reasons beyond the grantees’ control. The grantee should not have to conform to arbitrary construction deadlines that could unnecessarily disturb surface lands. Further, grantees should not be required to notify all Indian landowners when construction may not be commenced within the original timeframes. This is particularly true with individual allotments that may be highly fractionated. It would be wasteful and onerous to require the grantee to inform one-hundred (100) percent of Indian landowners in such situations. BIA should, accordingly, either include a “force majeure” provision in the proposed § 169.105 or simply remove the provision from the Proposed Regulations. In the event BIA declines to remove § 169.105 from the Proposed Regulations, the Alliance suggests revisions to the section along the lines set forth below.

***The Alliance’s Proposed Revisions to § 169.105 – What requirements for due diligence must a right-of-way grant include?***

- (a) If ~~permanent~~ improvements are to be constructed, the right-of-way grant must include due diligence requirements that require the grantee to complete construction of any ~~permanent~~ improvements within the schedule specified in the right-of-way grant or general schedule of construction, and a process for changing the schedule ~~by mutual consent of the parties~~; provided that the grantee shall not be held responsible for delays or casualties (force majeure events) occasioned by causes beyond the grantee’s control. If construction does not occur, or is not expected to be completed, within the time period specified in the grant, the grantee must provide ~~the Indian landowners and~~ BIA with an explanation of good cause as to the nature of any delay, the anticipated date of construction of facilities, and evidence of progress toward commencement of construction.
- (b) Failure of the grantee to comply with the due diligence requirements of the grant is a violation of the grant and may lead to cancellation of the right-of-way under § 169.408.
- (c) BIA may waive the requirements in this section if such waiver is in the best interest of the Indian landowners.

**§ 169.106 Must I obtain tribal consent for a right-of-way across tribal land?**

As detailed in the Alliance's Addendum A, the Alliance believes BIA may only require applicants to obtain consent from those tribes specifically identified in 25 U.S.C. § 324. Likewise, consistent with 25 U.C.S. § 2218, tribal consent is not required for rights-of-way traversing individually owned Indian lands where the majority interest in such tracts is held in trust or restricted status for individual Indians, and the minority interest is held in trust or restricted status of an Indian tribe.

***The Alliance's Proposed Revisions to § 169.106 – Must I obtain tribal consent for a right-of-way across tribal land?***

The applicant must obtain tribal consent, in the form of a tribal authorization from those tribes whose consent is required by 25 U.S.C. § 324 to a grant of right-of-way across tribal land.

A Grantee is not required to obtain a tribe's consent for a right-of-way traversing individually owned Indian lands where the minority interest is held in trust or restricted status for an Indian tribe because such individually owned Indian lands are not tribal land.

**§ 169.107 Must I obtain individual Indian landowners' consent to a grant of right-of-way across individually-owned land?**

The Alliance believes several of the portions of this section are extremely positive and will assist in streamlining the issuance of rights-of-way over individual Indian lands. For example, the Alliance commends BIA for recognizing that many individual Indian lands are burdened by dozens, hundreds, or even thousands of fractional interests. The Alliance is of the view that the contents of § 169.107(b)-(c) are positive developments that should continue in the final regulations. As referenced above, the Alliance does question, though, why a right-of-way applicant is required to provide notice to one-hundred percent of the Indian landowners, but only obtain the consent from the majority interest owners. In addition, the locations of many fractional interest owners are unknown, even to BIA. How can an applicant be required to inform one-hundred percent of the Indian landowners if the location of many landowners is completely unknown. Likewise, if such notice requirements remain in the Proposed Regulations, the Alliance requests that BIA clarify that right-of-way applicants, like BIA, may utilize constructive notice and other forms of notice when required to inform one-hundred percent of Indian landowners of the applicant's desire to obtain a right-of-way.

The Alliance believes proposed § 169.107(b)(4) should be deleted because it will further delay the issuance of rights-of-way. The Proposed Regulations purport to streamline the issuance of rights-of-way and guarantee that the same will be reviewed and approved in no more than sixty (60) days. Requiring BIA to provide thirty (30) day notice to all one-hundred percent of individual Indian landowners will further delay the issuance of rights-of-way and likely guarantee that no right-of-way will be issued within sixty (60) days.

The Alliance is, however, confused by the proposed § 169.107(d). In this regard: (i) when will an Indian tribe that possess a minority interest in an individual allotment not be treated as a party to an issued right-of-way traversing the same; (ii) why would an Indian tribe that possesses a minority interest in an allotment be treated differently from any other minority interest landowner; (iii) why would an Indian tribe and its minority interest not be bound by the issuance of the right-of-way?<sup>4</sup> Does this mean that the minority interest tribal landowner could exclude the grantee from the allotment or otherwise refuse to recognize the grantee's right to use the right-of-way? For these reasons, the Alliance believes § 169.107(d) should be modified as below or deleted from the Proposed Regulations.

***The Alliance's Proposed Revisions to § 169.107 – Must I obtain individual Indian landowners' consent to a grant of right-of-way across individually-owned land?***

(a) Except as provided in paragraph (b) of this section, the applicant must notify the majority interest of the Indian landowners ~~individual Indian landowners~~ through constructive notice or mail, and must obtain consent from the owners of the majority interest in each tract affected by the grant of right-of-way.

(b) We may issue the grant of right-of-way without the consent of any of the individual Indian owners if:

(1) The owners of interests in the land are so numerous that it would be impracticable to obtain consent;

(2) We determine the grant will cause no substantial injury to the land or any landowner for which the Indian landowner is not being compensated;

(3) We determine that all of the landowners will be adequately compensated for consideration and any damages that may arise from a grant of right-of-way; ~~and~~

~~(4) We provide notice of our intent to issue the grant of right-of-way to all of the owners at least 30 days prior to the date of the grant using the procedures in § 169.010.~~

(c) For the purposes of this section, the owners of interests in the land are so numerous that it would be impracticable to obtain consent, where there are:

(1) 50 or more, but less than 100, co-owners of undivided trust or restricted interests, and no one of such co-owners holds a total undivided trust or restricted interest in the parcel that is greater than 10 percent of the entire undivided ownership of the parcel; or

(2) 100 or more co-owners of undivided trust or restricted interests.

~~(d) The right-of-way will not bind a non-consenting Indian tribe, except with respect to the tribally owned fractional interest, and An Indian tribe possessing a minority interest in~~

<sup>4</sup> The Alliance understands that some individuals have taken the position that the 1948 Act specifically prohibits BIA from granting a right-of-way over individually owned Indian lands where a tribe possesses a minority interest without the tribe's consent. See 25 U.S.C. § 324. These individuals, however, fail to read 25 U.S.C. § 2218(a)(1) which reads "[n]otwithstanding any other provision of law, the Secretary may approve any lease or agreement that affects individually owned allotted land." (Emphasis supplied). See also 25 U.S.C. §§ 2218(c), (d)(1)(A), (d)(2)(A), (f), and (g).

individually owned Indian land need not the non-consenting to the grant of a right-of-way traversing such individually owned Indian land. Indian tribe will not be treated as a party to the right-of-way; however, the non-consenting Indian tribe will be entitled to pro-rate payment consistent with its minority interest in the individually owned Indian land. Nothing in this paragraph affects the sovereignty or sovereign immunity of the Indian tribe possessing a minority fractional interest in the individually owned Indian land traversed by the right-of-way.

(e) Successors are bound by consent granted by their predecessors-in-interest, except for consents granted by life tenants that exceed twenty (20) year grants pursuant to § 169.003.

#### **§ 169.108 Who is authorized to consent to a right-of-way?**

The Alliance believes that BIA needs to define the phrase “the grant will cause no substantial injury to the land.” The phrase, as currently utilized, is unclear and open to vast and differing interpretations.

#### ***The Alliance’s Proposed Revisions to § 169.108 – Who is authorized to consent to a right-of-way?***

(a) Indian tribes, adult Indian landowners, and emancipated minors, may consent to a right-of-way affecting their land, including minority undivided interests in fractionated tracts.

(b) The following individuals or entities may consent on behalf of an individual Indian landowner:

- (1) An adult with legal custody acting on behalf of his or her minor children;
- (2) A guardian, conservator, or other fiduciary appointed by a court of competent jurisdiction to act on behalf of an individual Indian landowner;
- (3) Any person who is authorized to practice before the Department of the Interior under 43 CFR 1.3(b) and has been retained by the Indian landowner for this purpose;
- (4) BIA, under the circumstances in paragraph (c) of this section; or
- (5) An adult or legal entity who has been given a written power of attorney that:
  - (i) Meets all of the formal requirements of any applicable law under § 169.008;
  - (ii) Identifies the attorney-in-fact; and
  - (iii) Describes the scope of the powers granted, to include granting rights-of-way on land, and any limits on those powers.

(c) BIA may give written consent to a right-of-way, as long as we determine that the grant will be in the Indian landowner’s best interest~~cause no substantial injury to the land or any landowner~~, and BIA’s~~that~~ consent shall~~must~~ be counted in the majority interest under § 169.107, on behalf of:

- (1) The individual owner, if the owner is deceased, and the heirs to, or devisees of, the interest of the deceased owner have not been determined;
- (2) An individual whose whereabouts are unknown to us, after we make a reasonable attempt to locate the individual;

- (3) An individual who is found to be non compos mentis or determined to be an adult in need of assistance who does not have a guardian duly appointed by a court of competent jurisdiction, or an individual under legal disability as defined in part 115 of this chapter;
- (4) An orphaned minor who does not have a guardian duly appointed by a court of competent jurisdiction; and
- (5) An individual who has given us a written power of attorney to consent to a right-of-way of their land.

**§ 169.109 How much monetary compensation must be paid for a right-of-way affecting tribal land?**

The Alliance is of the opinion that § 169.109 should be deleted from the Proposed Regulations. First, as addressed elsewhere herein, BIA has traditionally not required right-of-way applicants or grantees to obtain valuations. *Compare* proposed § 169.109(b) to § 169.109(c). Second, § 169.109(c) incorrectly indicates that a right-of-way may still be obtained even if the applicant cannot satisfy § 169.109(a)-(b). The Alliance assumes that BIA did not intend such a reading. Put simply, § 169.109(c) is repetitive, unnecessary, and misleading.

***The Alliance's Proposed Revisions to § 169.109 – ~~What~~How much monetary compensation must be ~~remitted~~paid for a right-of-way affecting tribal land?***

(a) A right-of-way affecting tribal land may allow for any ~~compensation payment amount~~ negotiated by the tribe, and we will defer to the tribe and ~~determine the compensation is just not require a valuation~~ if the tribe submits a tribal authorization expressly stating that it:

- (1) Has negotiated compensation satisfactory to the tribe;
- (2) ~~Believes the compensation is just~~ ~~Waives valuation~~; and
- (3) Has determined that accepting such negotiated compensation ~~and waiving valuation is in the tribe's~~ best interest.

(b) The tribe may request, in writing, that we determine market value, in which case we will use a valuation in accordance with § 169.111. After providing the tribe with the market value, we will defer to a tribe's decision to allow for any compensation negotiated by the tribe.

~~(c) If the conditions in paragraph (a) or (b) of this section are not met, we will require that the grantee provide for market value based on a valuation in accordance with § 169.111.~~

**§ 169.110 How much monetary compensation must be paid for a right-of-way affecting individually owned Indian land?**

The Alliance is of the view that it is unnecessary to set out the various forms of compensation that might be paid to a beneficial owner to acquire consent. The Alliance also suggests that Indian landowners should be permitted the opportunity to waive, in writing, both: (i) the receipt of just compensation; and (ii) a valuation of the proposed right-of-way. Individual Indian landowners are capable of determining whether the

valuation and just compensation should be waived for a multitude of potential reasons. BIA will still review the proposed right-of-way and compensation to determine that the issuance of the right-of-way is in the Indian landowner's best interest. The Alliance can envision situations where Indian landowners may wish to waive both the valuation and receipt of just compensation, and BIA should permit individual Indian landowners the opportunity to determine how their land should be utilized. Furthermore, the Alliance believes only the majority interest owners should be required to waive both valuation and just compensation. The Alliance cannot fathom why an applicant would need one-hundred percent of the interest owners to waive a valuation and/or just compensation, but only require the majority interest owner's consent to the issuance of a right-of-way. The Alliance, accordingly, suggests that BIA modify § 169.110(a) – (c), and delete § 169.110(d) from the Proposed Regulations.

***The Alliance's Proposed Revisions to § 169.110 – WhatHow-much-monetary  
compensation must be remittedpaid for a right-of-way affecting individually owned  
Indian land?***

~~(a)~~ A right-of-way affecting individually owned Indian land requires compensation that BIA determines is just~~must require payment of not less than market value before any adjustments, based on a fixed amount, a percentage of the projected income, or some other method,~~ unless paragraphs (b) ~~or (c)~~ of this section permits otherwise a lesser amount. The grant must establish how the compensation fixed amount, percentage, or combination will be calculated and the frequency at which compensation the payments will be remitted made. ~~Compensation will include market value and may include additional fees, such as throughput fees, severance damages, franchise fees, avoidance value, bonuses, or other factors.~~

~~(b)~~ We will defer to the majority interest owners' consent and to the maximum extent permissible, and may approve a right-of-way affecting individually owned Indian land that provides for less than just the payment of nominal compensation, ~~or less than a market value,~~ if:

(1) The majority of the Indian landowners execute a written waiver of the right to receive just compensation market value; and

(2) We determine it is in the Indian landowners' best interest, based on factors including, but not limited to:

(i) The grantee is a member of the immediate family, as defined in § 169.002, of an individual Indian landowner;

(ii) The grantee is a co-owner in the affected tract;

(iii) A special relationship or circumstances exist that we believe warrant approval of the right-of-way; or

~~(iv)~~ We have waived the requirement. The grantee will construct improvements, or remit other forms of compensation, benefitting the Indian landowners, and we determine it is in the best interest of the landowners to grant the right-of-way for a valuation under paragraph (d) of this section.

(c) The majority interest owners of individually owned Indian land may request, in writing, that we determine market value, in which case we will use a valuation in accordance with §

169.111. After providing the majority interest owners with the market value, we will defer to the majority interest owners' decision to allow for any compensation negotiated, including compensation as permitted under paragraph (b) of this section.

(c) We will require a just compensation valuation, unless:

(1) The majority 100 percent of the Indian landowners submit to us a written request to waive the just compensation valuation requirement, and we determine such a waiver is in the Indian landowners' best interest; or

(2) We waive the requirement under paragraph (d) of this section.

(d) The grant must provide that the non-consenting Indian landowners, and those on whose behalf we have consented under § 169.108(c), or granted the right-of-way without consent under § 169.107(b), receive just compensation market value, as determined by a valuation, unless we waive the requirement because the tribe or grantee will construct infrastructure improvements, or remit another form of compensation, benefitting the Indian landowners, and we determine it is in the best interest of all the landowners.

#### **§ 169.111 How will BIA determine market value for a right-of-way?**

Consistent with the Alliance's comment above with respect to § 169.110, the Alliance suggests that this section be modified to reflect that the majority interest owners of individual Indian lands may also waive or request that a valuation not be prepared for a proposed right-of-way over those individuals' allotment. Individual Indians, like Indian tribes, should be permitted the authority to determine the best and most efficient use of their individual Indian land outside the paternalistic eye of the United States.

#### ***The Alliance's Proposed Revisions to § 169.111 – How will BIA determine market value for a right-of-way?***

(a) If requested by the Indian landowners possessing a majority interest in Indian land, w~~We~~ will use a market analysis, appraisal, or other appropriate ~~valuation~~ method to determine the market value before we grant a right-of-way affecting individually owned Indian land or, ~~at the request of the tribe,~~ for tribal land.

(b) We will either:

(1) Prepare, or have prepared, a market analysis, appraisal, or other appropriate valuation method; or

(2) Use an approved market analysis, appraisal, or other appropriate valuation method from the Indian landowners or grantee.

(c) We will defer to the Indian landowners' request, in writing, that a market valuation need not be prepared, and we will not require that a market valuation be prepared or reviewed prior to granting a right-of-way when such requests are received.~~use or approve use of a market analysis, appraisal, or other appropriate valuation method only if it:~~

~~(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary under 25 U.S.C. 2214 and complies with Departmental policies regarding appraisals, including third party appraisals; or~~

~~(2) Has been prepared by another Federal agency.~~

**§ 169.112 When are monetary compensation payments due under a right-of-way?**

The Alliance supports BIA's decision to permit Indian landowners to determine whether to receive their bargained for compensation as a one-time lump sum payment or in increments. However, the Alliance requests that grantees have thirty (30) days to remit compensation to the Indian landowners. Many grantees are large companies that typically take thirty (30) days to ninety (90) days to remit compensation based on invoices. For this reason, the Alliance requests that grantees be permitted at least thirty (30) days to remit the required compensation after receipt of a BIA invoice.

***The Alliance's Proposed Revisions to § 169.112 – When ~~mustare-monetary~~ compensation be remitted ~~payments-due~~ under a right-of-way?***

(a) If compensation is a one-time, lump sum payment, the grantee must make the payment at least within thirty (30) 10 days after receipt of an invoice from BIA for payment to remit the required compensation of our grant of the right of way.

(b) If compensation is to be paid in increments, the right-of-way grant must specify the dates on which all payments are due. Payments are due at the time specified in the grant, regardless of whether the grantee receives an advance billing or other notice that a payment is due. Increments may not be more frequent than quarterly.

**§ 169.113 Must a right-of-way specify who receives monetary compensation payments?**

The Alliance does not support BIA's decision to permit Indian landowners to receive right-of-way compensation directly. As BIA is aware, generally, grantees remit right-of-way payments directly to the United States, and the United States subsequently distributes that money to the appropriate recipients. Applicants and grantees receive Indian landowner's addresses from BIA based on title-status-reports. Generally, interests in Indian lands are no recorded in county records. In addition, Indian probate proceedings are only recorded in the LTRO, not in the county. Therefore, numerous instances could arise where grantee direct payment to Indian landowners could arrive at the wrong address – for example if a grantor moves and fails to inform the grantee – or where a grantee continues remitting compensation to a deceased individual because the grantee is not aware of a probate proceeding. Thus, the Alliance believes compensation should be remitted directly to the United States on behalf of Indian landowners and that such compensation should be distributed similar to the mechanism implemented by the Department's Office of Natural Resources Revenue concerning royalty payments.

***The Alliance's Proposed Revisions to § 169.113 – Must a right-of-way specify who receives ~~the remitted monetary compensation payments?~~***

(a) A right-of-way grant must specify that whether the grantee will make payments directly to the Indian landowners (direct pay) or to us on their Indian landowners' behalf.

~~(b) The grantee may make payments directly to the Indian landowners if:~~

~~(1) The Indian landowners' trust accounts are encumbered accounts;~~



- ~~(2) There are 10 or fewer beneficial owners; and~~  
~~(3) One hundred percent of the beneficial owners (including those on whose behalf we have consented) agree to receive payment directly from the grantee at the start of the right-of-way.~~  
~~(b) If the right-of-way document provides that the grantee will directly pay the Indian landowners, then:~~  
~~(1) The right-of-way document must include provisions for proof of payment upon our request.~~  
~~(2) When we consent on behalf of an Indian landowner, the grantee must make payment to us on behalf of that landowner.~~  
~~(3) The grantee must send direct payments to the parties and addresses specified in the right-of-way, unless the grantee receives notice of a change of ownership or address.~~  
~~(4) Unless the right-of-way document provides otherwise, payments may not be made payable directly to anyone other than the Indian landowners.~~  
~~(5) Direct payments must continue through the duration of the right-of-way, except that:~~  
~~(i) The grantee must make all Indian landowners' payments to us if 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement; and~~  
~~(ii) The grantee must make an individual Indian landowner's payment to us if that individual Indian landowner dies, is declared non compos mentis, owes a debt resulting in an encumbered account, or his or her whereabouts become unknown.~~

**§ 169.114 What form of monetary compensation is acceptable under a right-of-way?**

The Alliance requests that BIA clarify whether this section only applies to payments made to BIA for Indian landowners or whether grantees must also adhere to this section when making payments directly to Indian landowners.

***The Alliance's Proposed Revision to § 169.114 – What form of monetary compensation is acceptable under a right-of-way?***

- ~~(a) For payment of monetary compensation to either BIA or the Indian landowners, when permitted, our preferred method of payment is electronic funds transfer payments. We will also accept:~~  
~~(1) Money orders;~~  
~~(2) Personal checks;~~  
~~(3) Certified checks; or~~  
~~(4) Cashier's checks.~~  
~~(b) We will not accept cash or foreign currency.~~  
~~(c) We will accept third-party checks only from financial institutions or Federal agencies.~~

**§ 169.115 May the right-of-way provide for non-monetary or varying types of compensation?**

The Alliance is of the view that BIA could, and should, delete subsections (1) and (2) of this section. These provisions are superfluous in that the provisions do not expand upon provision (a). The Alliance believes that it would be more efficient, and still legally correct, for BIA simply to state that “A Right-of-way grant may provide for any form of compensation agreed to by the Indian landowner in exchange for the Indian landowner’s consent to the issuance of the right-of-way.” This succinct statement permits Indian landowners to request any form of compensation. Furthermore, the Alliance believes the requested modification better permits Indian landowners to receive many forms of compensation not anticipated by the Proposed Regulations. As written, right-of-way applicants and Indian landowners may believe subsections (1) and (2) act to the exclusion of other forms of compensation.

***The Alliance’s Proposed Revisions to § 169.115 – ~~May the right of way provide for non-monetary or varying~~ Types of compensation.?***

(a) A right-of-way grant may provide for the following, subject to the conditions in paragraphs (b) and (c) of this section:

(1) ~~All alternative forms of compensation, including but not limited to, in-kind consideration and payments based on throughput or percentage of income;~~ or

(2) ~~Varying types of compensation at specific stages during the life of the right of way grant, including but not limited to, fixed annual payments during construction, payments based on income during an operational period, and bonuses.~~

~~(b) For tribal land, we will defer to the tribe’s determination that the compensation under paragraph (a) of this section is in its best interest, if the tribe complies with § 169.109 of this part submits a signed certification or tribal authorization stating that it has determined the compensation under paragraph (a) of this section to be in its best interest.~~

(c) For individually owned land, we may grant a right-of-way that provides for compensation under paragraph (a) of this section if we determine that it is in the best interest of the Indian landowners, and the parties comply with § 169.110 of this part.

**§ 169.116 Will BIA notify a grantee when a payment is due for a right-of-way?**

The Alliance requests that this section be modified to require BIA to issue invoices in all instances. BIA has traditionally issued invoices to right-of-way grantees. Not issuing invoices may result in more confusion and manipulation than contemplated. Generally, rights-of-way are not immediately void upon failure to pay, and grantees are provided a cure period. Hence, if BIA does not issue invoices, a situation could arise where BIA is forced to send cure notices to grantees. The Alliance is if the view that the issuance of invoices would better streamline the process and eliminate the need for BIA to dispatch cure notices when grantees, for whatever reason, do not timely remit the right-of-way compensation.

***The Alliance’s Proposed Revisions to § 169.116 – Will BIA notify a grantee when a payment is due for a right-of-way?***

We will ~~Upon request of the Indian landowners, we may~~ issue invoices to a grantee in advance of the dates on which payments are due under the right-of-way. The grantee's obligation to make these payments in a timely manner will not be excused if invoices are not issued, delivered, or received.

**§ 169.117 Must a right-of-way grant provide for compensation reviews or adjustments?**

The Alliance is of the opinion that this section is excessive and unnecessary. Rights-of-way are not surface leases. As a rule, unless a right-of-way applicant is planning to develop a major intrastate or interstate transmission or distribution network, rights-of-way are used for small projects that disturb minimal acreage. Applicants, therefore, generally remit compensation to Indian landowners in one-time, up-front, lump sum payments. The Alliance does not believe that BIA should engage in reviews and adjustments. BIA does not have the personnel or fiscal resources to perform reviews and adjustments, and because rights-of-way normally disturb so little acreage on each given tract, it would be inefficient for BIA to engage in the same. Phrased differently, the fiscal compensation that each tract owner could receive from reviews and adjustments would likely be only cents on the dollar. BIA should not expend significant time and resources for little gain.

Additionally, if this section remains in the Proposed Regulations, the Alliance believes that subsection (d) requires clarification. For example: (i) why must only the Indian landowner consent to an adjustment; and (ii) why is the grantee's consent not also required? The Alliance presumes that this provision is intended to protect Indian landowners in the event the review and adjustment decreases the value of the right-of-way. Yet, what if the review and adjustment dramatically increases the value of the right-of-way? Why does BIA not provide the grantee any sort of protection? It seems convoluted and inequitable that BIA would include regulatory mechanisms in the Proposed Regulations that only benefit one party, to the exclusion and/or detriment of the other.

***The Alliance's Proposed Revisions to § 169.117 – Must a right-of-way grant provide for compensation reviews or adjustments?***

(a) For a right-of-way grant affecting Indian land, no periodic review of the adequacy of compensation or adjustment is required, unless the tribe or the majority interest owners negotiates for reviews or adjustments.

~~(b) For a right-of-way grant of individually owned Indian land, no periodic review of the adequacy of compensation or adjustment is required if:~~

~~(1) Payment is a one-time lump sum;~~

~~(2) The term of the right-of-way grant is 5 years or less;~~

~~(3) The grant provides for automatic adjustments; or~~

~~(4) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to, the following:~~

~~(i) The right-of-way grant provides for payment of less than market value;~~

~~(ii) The right-of-way grant provides for most or all of the compensation to be paid during the first 5 years of the grant term or before the date the review would be conducted; or~~

~~(iii) The right-of-way grant provides for graduated rent or non-monetary or varying types of compensation.~~

~~(b) If the tribe or the majority interest owners negotiate for the conditions in paragraph (b) of this section are not met, a review of the adequacy of compensation, must occur at least every fifth year, in the manner specified in the grant. The grant must specify:~~

~~(1) When the reviews will take place~~

(2) When adjustments take effect;

~~(3) Who can make adjustments;~~

~~(4) What the adjustments are based on; and~~

~~(5) How to resolve disputes arising from the adjustments.~~

(d) When a review results in the need for adjustment of compensation, the Indian landowners and the grantee must consent to the adjustment ~~in accordance with § 169.107~~, unless the grant provides otherwise.

#### **§ 169.118 What other types of payments are required for a right-of-way?**

The Alliance requests that this section be deleted from the Proposed Regulations because the section is confusing and needless. Put simply, determining the entities that have jurisdiction to assess additional taxes and fees is not a simple task. In this regard, and as an example, the provision directs that grantees “must pay” the amounts assessed by undisclosed jurisdictions. Rhetorically: (i) does this mean that the right-of-way may be cancelled if the grantee refuses to pay; (ii) what if the grantee challenges the entity’s jurisdiction and authority to assess additional taxes and fees; and (iii) could the right-of-way be cancelled during such a challenge because the grantee “must pay?”

Next, it is unclear who will calculate the “damages” referenced in subsection (b) and how such damages will be calculated. In the event either wishes to do so, a grantee or Indian landowner should be able to challenge these calculations.

#### ***The Alliance’s Proposed Revisions to § 169.118 – What other types of payments are required for a right-of-way?***

(a) The grantee may be required to pay additional fees, taxes, and assessments associated with the use of the land, as determined by entities having jurisdiction, ~~except as provided in § 169.009~~. The grantee must pay these amounts to the appropriate office, if applicable.

~~(1) In the event the grantee challenges the imposition of additional fees, taxes, or assessments, the grantee shall not be deemed to be in violation of the grant until a final decision is rendered regarding the grantee’s challenge.~~

(b) In addition to the compensation for a right-of-way provided for in paragraph (a) of this section, the applicant for a right-of-way will be required to pay all damages incident to the

survey of the right-of-way or incident to the construction or maintenance of the facility for which the right-of-way is granted.

(1) The grantee and the Indian landowner may agree that the additional compensation contemplated in paragraph (b) is embodied in and a part of the negotiated compensation that the grantee agrees to remit to the Indian landowner in exchange for the Indian landowner's consent to the right-of-way.

**§ 169.119 What is the process for BIA to grant a right-of-way?**

The Alliance suggests that this section of the Proposed Regulations is in need of significant revisions and modifications. First, the Alliance disagrees with BIA's statement that right-of-way grantees must satisfy tribal "land use" measures and mitigation. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Reservation*, 492 U.S. 408 (1989); see also *Evans v. Shoshone Bannock Land Use Policy Commission*, 736 F.3d 1298 (9th Cir. 2013). Second, the Alliance is unsure why BIA has introduced a new regulatory mechanism that is different than inaction appeals under 25 C.F.R. § 2.8. The Alliance feels that it is highly unlikely that BIA will be able to review and approve hundreds of right-of-way applications within sixty (60) days. Rather than include a new inaction mechanism, the Alliance requests that BIA modify the Proposed Regulations so that a complete right-of-way application is deemed approved within one-hundred and twenty (120) days unless BIA denies the application within the one-hundred and twenty (120) day timeframe. Third, it is less than clear why only right-of-way applicants may take appropriate action under proposed § 169.304. BIA has granted "some" parties appeal rights under certain portions of the Proposed Regulations and subsequently denied the same rights in other provisions of the Proposed Regulations. This inconsistency should and must be addressed. Fourth, subsection (d) conflicts with other portions of the Proposed Regulations. In this section, subsection (d) suggests right-of-way applicants will be granted Part 2 appeal rights if a right-of-way application is denied; however, other provisions of the Proposed Regulations state that applicants will not be afforded appeal rights if an application is denied. The Alliance recommends that applicants always be afforded appeal rights, regardless of the action or non-action taken on an application.

***The Alliance's Proposed Revisions to § 169.119 – What is the process for BIA to grant a right-of-way?***

(a) Before we grant a right-of-way, we must determine that the right-of-way is in the best interest of the Indian landowners. In making that determination, we will:

- (1) Review the right-of-way application and supporting documents;
- (2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, ~~land use laws, and ordinances~~; and
- (3) Require any modifications or mitigation measures necessary to satisfy applicable law ~~any requirements including any other Federal or tribal land use requirements.~~

(b) Upon receiving a right-of-way application, we will ~~promptly~~ notify the applicant within thirty (30) days whether the package is complete. A complete package includes all the information and supporting documents required under this subpart, including but not

limited to, an accurate legal description for each affected tract, and NEPA review documentation and valuation documentation, -where applicable.

(1) If the right-of-way application package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of an application package within thirty (30) days of receipt, the application package will be deemed complete ~~parties may take action under § 169.304.~~

(2) If the right-of-way application package is complete, we will notify the parties of the date of our receipt of the complete package. Within one-hundred and twenty (120) days ~~60 days~~ of that receipt date, we will grant or deny the right-of-way, return the package for revision, or inform the applicant in writing that we need additional review time. If we inform the applicant in writing that we need additional time, then:

(i) Our letter informing the applicant that we need additional review time must identify our initial concerns and invite the applicant to respond within fifteen (15) days of the date of the letter; and

(ii) We will have no more than thirty (have-30) days from sending the letter informing the applicant that we need additional time to grant or deny the right-of-way.

(iii) We may only inform the applicant that we need additional time to review the right-of-way application once.

(c) The right-of-way will be granted to the applicant at the conclusion of the one-hundred and twenty (120) day review period if the applicant:

(1) Received a notice from us informing the applicant that the application package was complete; and

(2) The applicant has not received a letter:

(i) Granting the right-of-way;

(ii) Denying the right-of-way;

(iii) Seeking revisions to the right-of-way application; or

(iv) Requesting additional time to review the application.

(d) If we request more time to review the right-of-way application, the right-of-way will be granted at the conclusion of the additional thirty (30) day review period if the applicant:

(1) Received a notice from us informing the applicant that the application package was complete; and

(2) The applicant has not received a letter:

(i) Granting the right-of-way;

(ii) Denying the right-of-way; or

(iii) Seeking revisions to the right-of-way application.~~If we do not meet the deadlines in this section, then the applicant may take appropriate action under § 169.304.~~

(d) We will provide any right-of-way grant or denial and the basis for the determination, along with notification of any appeal rights under part 2 of this chapter to the parties to the right-of-way. If the right-of-way is granted, we will provide a copy of the right-of-way to the grantee and to the tribal landowner and, upon written request, make copies available to the individual Indian landowners.

#### **§ 169.120 How will BIA determine whether to grant a right-of-way?**

The Alliance commends BIA's statement that BIA will defer, to the maximum extent possible, to the Indian landowner's consent. The Alliance requests, however, that subsection (d) be deleted. The Alliance does not believe it makes sense for BIA to issue tract specific rights-of-way in all instances. Issuing tract specific rights-of-way would result in cumbersome management and could also impact, for example, bonding requirements and render complying with other requirements of the Proposed Regulations more difficult.

***The Alliance's Proposed Revisions to § 169.120 – How will BIA determine whether to grant a right-of-way?***

(a) We will grant a right-of-way unless:

(1) The required consents have not been obtained from the parties to the right-of-way under § 169.106 and § 169.107; or

(2) ~~The requirements of this subpart have not been met; or~~

(3) We find a compelling reason to withhold the grant in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the right-of-way is in their best interest.

(c) We may not unreasonably withhold our grant of a right-of-way.

(d) We ~~will~~may grant one right-of-way for all of the tracts traversed by the right-of-way, ~~or we may issue separate grants for one or more tracts traversed unless by the right of way.~~

**§ 169.121 What will the grant of right-of-way contain?**

The Alliance suggests that subsection (b)(1) may conflict with rights-of-way previously granted in accordance with legislation other than 25 U.S.C. § 323-328; specifically legislation that granted rights-of-way to railroad companies and others. Many of those right-of-way grants do not include language that directly conflicts with the Proposed Regulations. The Alliance also suggests that revisions to (b)(2) and (b)(3)(v) are in order. Proposed (b)(2) states that violations of federal law will be considered violations of the right-of-way grant. Thereafter, (b)(3)(v) requires grantees to comply with applicable law. In this regard: (i) would a grantee's refusal to comply with a jurisdictional authority's "inapplicable" law result in a violation of the right-of-way; and (ii) again, what if a grantee challenged a jurisdictional authority's power to impose certain laws?

The Alliance also suggests that the word "restore" be revised, and the word "reclaimed" be used instead. The term "restore" may imply that the land subject to a right-of-way grant will be returned to a pre-right-of-way condition in all respects. To avoid confusion and to avoid imposing impracticable and infeasible post-right-of-way requirements, the Alliance requests the more precise term "reclaim" be utilized. Likewise, the Alliance also suggests that terms "expiration," "abandonment," and "cancellation" be used in proposed (b)(3)(9), because these terms are more accurate than the terms "revocation" and "termination."

***The Alliance's Proposed Revisions to § 169.121 – What will the grant of right-of-way contain?***

- (a) The grant will incorporate the conditions or restrictions set out in the [Indian landowner's consents](#), ~~obtained pursuant to §169.106 for tribal land and §169.107 for individually owned Indian land~~
- (b) The grant will state that:
- (1) The grantee has no right to any of the products or resources of the land, including but not limited to, timber, forage, mineral, and animal resources, unless otherwise provided for in the grant;
- (2) BIA may treat any provision of a grant that violates Federal law as a violation of the grant, [thereby allowing BIA to initiate cancellation proceedings with respect to the same](#); and
- (3) The grantee must:
- (i) Construct and maintain the right-of-way in a professional manner consistent with industry standards;
- (ii) Pay promptly all damages and compensation, in addition to the performance bond or alternative form of security made pursuant to §169.103, determined by the BIA to be due the landowners and authorized users and occupants of land as a result of the granting, construction, and maintenance of the right-of-way;
- (iii) [Reclaimstore](#) the land as nearly as may be possible to its original condition, upon the completion of construction, to the extent compatible with the purpose for which the right-of-way was granted, unless otherwise negotiated by the parties;
- (iv) Clear and keep clear the land within the right-of-way, to the extent compatible with the purpose of the right-of-way, and dispose of all vegetative and other material cut, uprooted, or otherwise accumulated during the construction and maintenance of the project;
- (v) Comply with all applicable laws and obtain all required permits;
- (vi) Not commit waste;
- (vii) Repair and maintain improvements consistent with the right-of-way grant;
- (viii) Build and maintain necessary and suitable crossings for all roads and trails that intersect the improvements constructed, maintained, or operated under the right-of-way;
- (ix) [Reclaimstore](#) land, [to the extent practicably possible](#), to its original condition, ~~as much as reasonably possible~~, upon [expiration, abandonment, revocation](#) or [cancellationtermination](#) of the right-of-way, unless otherwise negotiated by the parties;
- (x) At all times keep the BIA informed of the grantee's address;
- (xi) Refrain from interfering with the landowner's use of the land, provided that the landowner's use of the land is not inconsistent with the right-of-way; and
- (xii) Comply with due diligence requirements under § 169.105.
- (4) Unless the grantee would be prohibited by law from doing so, the grantee must also:
- (i) Hold the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the applicant's use or occupation of the premises; and



(ii) Indemnify 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 release or discharge of any hazardous material from the premises that occurs during the term of the grant, regardless of fault, with the exception that the applicant is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.

(c) The grant must attach or incorporate by reference maps of definite location reviewed in accordance with the Standards for Indian Trust Land Boundary Evidence.

(d) The grantee's ['s failure to comply with the requirements of this section may be grounds for BIA to initiate cancellation proceedings concerning the grant.](#)

**§ 169.122 May a right-of-way contain a preference consistent with tribal law for employment of tribal members?**

This provision is of upmost importance to the Alliance and its members. As BIA is likely aware, many tribal employment preference laws prohibit the use of union labor. Unfortunately, many oil and gas operations, larger intrastate and interstate pipelines, and electrical transmission lines can only be constructed utilizing union labor. Thus, if this provision continues unchanged, such companies and pipelines and transmission lines could be forced to avoid Indian lands. The Alliance suggests that this provision be modified to reflect that right-of-way grantees will generally agree to extend an employment preference to Indians for employment opportunities on Indian lands. Requiring grantees to comply with a specific tribal employment laws, as compared to a generalized preference, would prohibit certain entities from viewing Indian lands as economic and viable options. In addition, due to long running litigation of which BIA is certainly aware, the Alliance believes requiring grantees to comply with tribal specific political affiliation preference is a questionable decision. Grantees should not be forced to extend a preference, that at the moment, the U.S. Equal Employment Opportunity Commission views as unlawful. Including a more "general preference" in the Proposed Regulations would avoid many of these issues.

***The Alliance's Proposed Revisions to § 169.122 – May a right-of-way contain a preference consistent with tribal law for employment of tribal members?***

~~A grant of right-of-way over Indian land may include a provision ,consistent with tribal law, requiring the grantee to give a general preference to qualified Indiantribal members, with respect to employmentbased on their political affiliation with the tribe.~~

**§ 169.123 Is a new right-of-way grant required for a new use within or overlapping an existing right-of-way?**

Once more, the Alliance is of the opinion that BIA is attempting to generate challenges to existing federal case law through the Proposed Regulations. Here, BIA appears to be seeking to side-step *United States v. Oklahoma Gas & Electric*, 318 U.S. 206 (1943). See also *United States v. Mountain States Telephone and Telegraph Co*, 434 F.Supp. 625 (1977).

In addition, the Alliance is uncertain as to why the phrase “before the effective date of this part” is included in the Proposed Regulations. It would appear that BIA intends for this phrase to declare that *Oklahoma Gas and Electric* only applies to certain rights-of-way issued “before the effective date” of the Proposed Regulations. Does this mean that, in BIA’s opinion, the U.S Supreme Court’s decision is no longer be applicable after the effective date of the Proposed Regulations?

Further, a current grantee should be permitted to unreasonably withhold its consent to the issuance of a new right-of-way within the grantee’s right-of-way. It is, after all, the grantee’s property right. Finally, in the event BIA will be defining what may or may not be “unreasonable,” the Alliance presumes that will be an appealable decision; either under the Proposed Regulations or Part 2 of Title 25.

***The Alliance’s Proposed Revisions to § 169.123 – Is a new right-of-way grant required for a new use within or overlapping an existing right-of-way?***

(a) If you propose to use all or a portion of an existing right-of-way for a use not specified in the original grant of the existing right-of-way, or not within the same scope of the use specified in the original grant of the existing right-of-way, you must request a new right-of-way within or overlapping the existing right-of-way for the new use, unless the new use is permitted by applicable law.

(b) We may grant a new right-of-way within or overlapping an existing right-of-way if it meets the following conditions:

(1) The applicant follows the procedures and requirements in this part to obtain a new right-of-way; and.

~~(2) The new right-of-way does not interfere with the use or purpose of the existing right-of-way or the applicant has obtained the consent of the existing right-of-way grantee. The existing right-of-way grantee may not unreasonably withhold consent.~~

~~(3) If the existing right of way was granted under the Act of March 3, 1901, 25 U.S.C. 311, to a State or local authority for public highways, before the effective date of this part, we may grant the new right of way only if it is not prohibited by State law.~~

**§ 169.124 What is required if the location described in the original application and grant of right-of-way differs from the construction location?**

The Alliance suggests that if engineering or other complications require grantees to change the location of rights-of-way, Indian landowner consent is only required if the change in location is significant. Requiring grantees to obtain landowner consent to minor changes in location could subject grantees to significant liabilities and damages if the grantee proceeds with construction and the landowner subsequently declines to grant his or her consent for minor changes in location.

***The Alliance's Proposed Revisions to § 169.124 – What is required if the location described in the original application and grant of right-of-way differs from the construction location?***

(a) If there were engineering or other complications that prevented construction within the location identified in the original application and grant, we will determine whether the change in location requires one or more of the following:

- (1) An amended map of definite location;
- (2) Landowner consent, such consent only to be required if the change in location is deemed significant;
- (3) A valuation;
- (4) Additional compensation; and/or
- (5) A new right-of-way grant.

(b) If we grant a right-of-way for the new route or location, the applicant must execute instruments to extinguish the right-of-way at the original location identified in the application.

(c) We will transmit the instruments to extinguish the right-of-way to the LTRO for recording, as well as the new right-of-way grant for the new route or location.

**§ 169.201 How long may the term of a right-of-way grant be?**

It is unclear, at least from the Alliance's perspective, why rights-of-way in perpetuity are not provided for in the Proposed Regulations. Within the pipeline context, pipelines are limited to twenty (20) year terms by 25 U.S.C. § 321; however, the Proposed Regulations purport to only implement 25 U.S.C. § 323-328. 25 U.S.C. § 323-328 does not include a limitation as to the duration of rights-of-way granted thereunder. Again using pipelines as an example, there are very few pipelines that will be operational for twenty (20) years or less. Therefore, BIA should not limit pipeline rights-of-way to only twenty (20) years when BIA is, allegedly, no longer implementing 25 U.S.C. § 321. Similar to pipelines, very few oil and gas operations will require rights-of-way for less than forty (40) to fifty (50) years, including well locations, etc. The Alliance, therefore suggests that the parties be permitted to freely negotiate right-of-way durations, and that BIA defer to those parties negotiations and arrived at transactions.

***The Alliance's Proposed Revisions to § 169.201 – How long may the term of a right-of-way grant be?***

(a) All rights-of-way granted under this part are limited to the time periods stated in the grant.

(b) ~~For tribal land, we~~ we will defer to the Indian landowner's/tribe's determination that the right-of-way term, including any renewal, is reasonable.

~~(c) For individually owned Indian land, we will review the right of way term, including any renewal, to ensure that it is reasonable, given the purpose of the right-of-way. We will use the following table as guidelines for what terms are reasonable given the purpose of the right-of-way:~~

Purpose	Term
Railroads	In-Perpetuity
Public roads and highways	In-Perpetuity
Access roads	25 years, with renewal option
Service roads and trails essential to any other right of way purpose	Consistent with use
Public and community water lines (including pumping stations and appurtenant facilities)	In-Perpetuity
Utility Gas Lines	In-Perpetuity
Public sanitary and storm sewer lines including sewage disposal and treatment plants	In-Perpetuity
Water control and use projects (including but not limited to dams, reservoirs, flowage easements, irrigation/ditches and canals and water treatment plants)	In-Perpetuity
Oil and gas pipelines	20 years
Electric power projects, generating plants, switchyards, electric transmission and distribution lines (including poles, towers, and appurtenant facilities)	50 years
Telecommunication lines	30 years
Broadband or fiber optic lines	30 years
Avigation hazard easements	20 years
Conservation easements	Consistent with use

(c) A right-of-way may not be extended by holdover, unless:

(1) The right-of-way grant provides otherwise;

(2) The Indian landowner consents to the grantees continued use for a period of less than seven (7) years;

(3) ~~The grantee has made an application to BIA for a new or renewed right-of-way, a right-of-way may not be extended by holdover.~~

**§ 169.202 Under what circumstances will a grant of right-of-way be renewed?**

The Alliance’s only comment with regard to this section applies to the phrase “change in . . . duration of a right-of-way.” The Alliance is confused by this phrase. In the event a right-of-way was originally issued for a ten (10) year term and the parties want to renew the right-of-way for a fifteen (15) year term, the parties should not be forced to seek a new right-of-way from BIA as opposed to a renewal. This seems unnecessary when the longer term will result in no change to an existing right-of-way, except as to the term thereof.

***The Alliance’s Proposed Revisions to § 169.202 – Under what circumstances will a grant of right-of-way be renewed?***

(a) The grantee may request a renewal (an extension of term without any other change) of an existing right-of-way grant and we will renew the grant as long as:

(1) The original right-of-way grant allows for renewal and ~~the grantee complies with any renewal requirements in the grant and specifies any compensation;~~

(2) The grantee provides us with a signed attestation that there is no change in size, type, ~~or location,~~ ~~or duration~~ of the right-of-way; and

(3) The grantee provides us with confirmation that landowner consent has been obtained, unless it is not required under paragraph (b) of this section.

(b) Consent is not required if the original right-of-way grant allows for renewal without the owners’ consent.

(c) We will record any renewal of a right-of-way grant in the LTRO.

(d) If the proposed renewal involves a change in size, type, ~~or location,~~ ~~or duration of the right-of-way~~, the grantee must reapply for a new right-of-way, in accordance with § 169.101, and we will handle the application for renewal as an original application for a right-of-way.

**§ 169.203 May a right-of-way be renewed multiple times?**

The Alliance supports the inclusion of this section in the Proposed Regulations to reflect that nothing prohibits rights-of-way from being renewed multiple times.

**§ 169.204 May a grantee amend a right-of-way?**

The Alliance appreciates BIA’s recognition that certain “technical corrections” may be made to granted rights-of-way without seeking the Indian landowner’s consent. The Alliance recommends that the words “administrative modification” be added to 25 C.F.R. § 169.204(a) because that term has previously been utilized by BIA in 25 C.F.R. Part 150, and is the subject of several IBIA decisions. The Alliance believes that including the phrase “administrative modification” in the Proposed Regulations would further clarify when such modifications may be sought and obtained without landowner consent.

The Alliance disagrees with § 169.204(b) because the Alliance does not understand why right-of-way grantees – who obtain real property rights to use the land encompassed by such rights-of-way – must obtain the Indian landowner’s consent and BIA’s consent to amend the location of improvements within the right-of-way. First, as BIA is well aware, it would be extremely time consuming and costly to require grantees to once again secure the Indian landowner’s consent to change the location of improvements within the right-of-way. This is particularly true because the Indian landowners have already consented to the grantee’s use of the entire right-of-way for whatever purpose the right-of-way was originally obtained. If a grantee obtains a right-of-way for a gas pipeline or a well-pad location, the grantee should not be required to seek and obtain the Indian landowner’s consent a second time if the grantee, for whatever reason, needs to install new improvements to fulfill the original purpose of the right-of-way or drill additional wells from the already disturbed well-pad location. Second, seeking and obtaining BIA’s approval is but another hurdle added to the right-of-way process that should not be required. Rather, the Alliance proposes that BIA only receive notice – for recording in the LTRO – or language be added that BIA’s approval of such amendments will not be “unreasonably” withheld.

***The Alliance’s Proposed Revisions to § 169.204 – May a grantee amend a right-of-way?***

(a) A grantee may request that we amend a right-of-way grant if the grantee meets the consent requirements in §169.106 for tribal land or §169.107 for individually owned Indian land and obtains our approval, except that a grantee may request that we amend a right-of-way to correct a legal description or make other technical corrections or administrative modifications without meeting consent requirements.

~~(b) An amendment is required to change any provisions of a right-of-way grant or to accommodate a change in the location of permanent improvements to previously unimproved land within the right-of-way corridor.~~

**§ 169.205 What is the approval process for an amendment of a right-of-way?**

The Alliance appreciates BIA’s inclusion of this section to streamline BIA’s approval of right-of-way amendments. The Alliance continues, however, to disagree with BIA regarding when such amendments should be required. The Alliance also finds the language in § 169.205(a) “If our approval is required” confusing. Based upon the language in proposed § 169.204, the Alliance is unaware of a situation where BIA’s approval to amend a right-of-way will not be required.

The Alliance believes grantees and prospective grantees should be afforded ample rights to appeal BIA determinations. *See also*, the Alliance’s comments with respect to § 169.303. Finally, who are the “parties” referenced in (a)? The only “parties” to a right-of-way grant are the United States and the grantee.

***The Alliance's Proposed Revisions to § 169.205 – What is the approval process for an amendment of a right-of-way?***

(a) When we receive an amendment for our approval, we will notify the ~~amendment applicant parties~~ of the date we receive it. ~~If our approval is required, w~~We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation (including but not limited to a corrected legal description, if any, and NEPA compliance) to approve or disapprove the amendment or inform the ~~parties~~~~amendment applicant~~ in writing that we need additional review time. Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

(b) Our letter informing the ~~amendment applicant parties~~ that we need additional review time must identify our initial concerns and invite the ~~amendment applicant parties~~ to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the ~~amendment applicant parties~~ that we need additional time to approve or disapprove the amendment.

(c) If we do not meet the deadline in paragraph (a) of this section, or paragraph (b) of this section ~~the amendment will be deemed granted if applicable, the grantee or Indian landowners may take appropriate action under § 169.304.~~

**§ 169.206 How will BIA decide whether to approve an amendment of a right-of-way?**

The Alliance is of the view that this section is internally inconsistent and contradictory. Specifically, the Alliance believes this section would be better understood if only § 169.206(c) were retained in the final regulations. The Alliance is of the opinion that the phrase “not unreasonably withhold approval” encompasses §§ 169.206(a), (b); thereby rendering those proposed provisions unnecessary and duplicative.

***The Alliance's Proposed Revisions to § 169.206 – How will BIA decide whether to approve an amendment of a right-of-way?***

~~We may disapprove a request for an amendment of a right-of-way only if at least one of the following is true:~~

- ~~(1) The Indian landowners have not consented;~~
  - ~~(2) The grantee's sureties have not consented;~~
  - ~~(3) The grantee is in violation of the right-of-way grant;~~
  - ~~(4) The requirements of this subpart have not been met; or~~
  - ~~(5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.~~
- ~~(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the amendment is in their best interest.~~
- (c) We may not unreasonably withhold approval of an amendment.

**§ 169.207 May a grantee assign a right-of-way?**

As BIA is aware, rights-of-way are freely assignable without Indian landowner consent or BIA approval. Such consent and approval is only required when expressly required by the right-of-way grant. This should continue. BIA's Proposed Regulations imposing a new requirement unilaterally modify existing rights-of-way, and will undoubtedly deter business within Indian country. Obtaining landowner consent to assignment will be time-consuming and extremely costly, and will significantly deter businesses from acquiring companies with Indian land rights-of-way. The Alliance suggests that landowner consent and BIA approval should only be required where the right-of-way grant expressly requires the same.

In addition, the Alliance believes that BIA should clarify when assignments are not required. For example, if a grantee is fully acquired by a new entity, that is not an assignment of interests but acquisition of the right-of-way by a successor-in-interest. The same should be true with respect to other common mechanics of corporate restructuring such as mergers and name changes.

Finally, in the event BIA seeks to make the Proposed Regulations of retroactive effect, such will call into question existing right-of-way assignments that were consummated without landowner consent or BIA approval. Surely, creating new uncertainty as to use rights in Indian lands is not an object of the Proposed Regulations.

***The Alliance's Proposed Revisions to § 169.207 – May a grantee assign a right-of-way?***

~~(a) Rights-of-way are freely assignable without Indian landowner consent or BIA approval, unless the grant includes language to the contrary. A grantee may assign a right of way by meeting the consent requirements in §169.106 for tribal land or §169.107 for individually owned Indian land and obtaining our approval, or by meeting the conditions in paragraph (b).~~

~~(b) The Assignee shall provide BIA notice of right-of-way assignments for recordation in the appropriate LTRQ. A grantee may assign a right-of-way without BIA approval only if:~~

~~(1) The original right-of-way grant allows for assignment without BIA approval; and~~

~~(2) The assignee and grantee provide a copy of the assignment and supporting documentation to BIA for recording in the LTRQ.~~

~~(c) Assignments do not include common forms of corporate restructuring including, but not limited to:~~

~~(1) Name changes;~~

~~(2) Corporate mergers or acquisitions; or~~

~~(3) Transfers by operation of law.~~

**§ 169.208 What is the approval process for an assignment of a right-of-way?**

The Alliance believes BIA's review time should be reduced from thirty (30) days to twenty (20) days in proposed § 169.208(a). It should not take BIA longer than twenty (20) days to review an assignment package, when one is required to be submitted for BIA review and approval, where the assignment package includes all the pertinent and required



information. The Alliance also believes grantees and prospective assignees should be afforded ample rights to appeal BIA determinations, this is particularly true because the assignor will have a vest real property interest in the form of an existing right-of-way. See also, the Alliance's comments with respect to proposed § 169.303.

***The Alliance's Proposed Revisions to § 169.208 – What is the approval process for an assignment of a right-of-way?***

(a) When we receive an assignment for our approval, we will notify the [assignor and assignee](#) ~~the parties~~ of the date we receive it. If our approval is required, we have [twenty \(20\)](#) ~~30~~ days from receipt of the executed assignment, proof of required consents, and required documentation to approve or disapprove the assignment. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the grantee or Indian landowners may take appropriate action under § 169.304.

**§ 169.209 How will BIA decide whether to approve an assignment of a right-of-way?**

Again, the Alliance is of the opinion that § 169.209(c) is sufficient and that §§ 169.209(a), (b) should be deleted from the final regulations.

***The Alliance's Proposed Revisions to § 169.209 – How will BIA decide whether to approve an assignment of a right-of-way?***

~~(a) We may disapprove an assignment of a right-of-way only if at least one of the following is true:~~

~~(1) The Indian landowners have not consented and their consent is required;~~

~~(2) The grantee's sureties have not consented;~~

~~(3) The grantee is in violation of the right-of-way grant;~~

~~(4) The assignee does not agree to be bound by the terms of the right-of-way grant;~~

~~(5) The requirements of this subpart have not been met; or~~

~~(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.~~

~~(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the assignment is in their best interest.~~

(c) We may not unreasonably withhold approval of an assignment.

**§ 169.210 May a grantee mortgage a right-of-way?**

Similar to the comments above relating to the assignment provisions of the Proposed Regulations, entities holding interests in Indian land have never been required to seek either the Indian landowner's consent or BIA's approval to mortgage the non-Indian interest. See *Seminole Tribe of Florida v. Eastern Regional Dir., BIA*, 53 IBIA 195 (2011). The Alliance believes the same should remain true with respect to mortgages unless the right-of-way grant specifically requires the Indian landowner's consent and/or BIA's

approval prior to the right-of-way being mortgaged. Requiring Indian landowner consent and BIA approval as the default will severely retard business within Indian country. Many non-Indian rights to use Indian land rights-of-way are pledged as security by businesses operating within Indian country. To be clear, grantees do not and cannot pledge Indian land as security, but only the non-Indian's right to use the same. In addition, requiring consent and approval of mortgages would severely impact potential acquisitions of assets within Indian country where financing is required. The reason for this is simple: no financier will extend credit to an entity acquiring Indian land rights-of-way if such financing/security is subject to the current or the perspective grantees obtaining Indian landowner consent and BIA approval.

The Alliance also observes that this proposed language, particularly in light of the Proposed Regulations retroactive nature, will impact or call into question existing mortgages related to rights-of-way.

***The Alliance's Proposed Revisions to § 169.210 – May a grantee mortgage a right-of-way?***

~~A grantee may mortgage a right-of-way without Indian landowner consent or BIA approval; unless the grant or landowner consent includes language to the contrary by meeting the consent requirements in §169.106 for tribal land or §169.107 for individually owned Indian land and obtaining our approval. BIA must be provided notice of such mortgages.~~

**§ 169.211 What is the approval process for a mortgage of a right-of-way?**

The Alliance has no comment on this section, but remains of the view that rights-of-way should be freely pledged unless contrary provisions appear in the grant. The Alliance, as before, believes grantees and prospective grantees should be afforded ample rights to appeal BIA determinations. *See also*, the Alliance's comments with respect to § 169.303.

**§ 169.212 How will BIA decide whether to approve a mortgage of a right-of-way?**

Again, the Alliance believes only § 169.212(d) should be required if BIA approval is required. All other portions of this section should be deleted.

***The Alliance's Proposed Revisions to § 169.212 – How will BIA decide whether to approve a mortgage of a right-of-way?***

~~(a) We may disapprove a right-of-way mortgage only if at least one of the following is true:  
(1) The Indian landowners have not consented;  
(2) The grantee's mortgagees or sureties have not consented;  
(3) The requirements of this subpart have not been met; or  
(4) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.~~

~~(b) In making the finding required by paragraph (a)(4) of this section, we may consider whether:~~

~~(1) The mortgage proceeds would be used for purposes unrelated to the right-of-way purpose; and~~

~~(2) The mortgage is limited to the right-of-way.~~

~~(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the mortgage is in their best interest.~~

(d) We may not unreasonably withhold approval of a right-of-way mortgage.

#### **§ 169.301 When will a right-of-way document be effective?**

In the Alliance's view, this section directly conflicts with 25 C.F.R. Part 2 and 43 C.F.R. Part 4. Furthermore, there could be serious consequences if the Regional Director, IBIA, or a federal court subsequently determined that a previously "effective" right-of-way should not have been effective. Presumably, neither BIA nor tribes or allottees wish to see a company expend significant capital in creating a well-pad and several oil wells only to learn two (2) years later that the IBIA determined the right-of-way was ineffective or defective. Also, in such a situation, a grantee could find themselves subject to potentially large trespass damages. Rights-of-way should, as before, be effective thirty (30) days following BIA's granting of the same.

#### ***The Alliance's Proposed Revisions to § 169.301 – When will a right-of-way document be effective?***

A right-of-way document will be effective thirty (30) days after on the date we grant approve the right-of-way document. A, even if an appeal is filed under part 2 of this chapter will stay the effectiveness of the grant.

#### **§ 169.302 Must a right-of-way be recorded?**

The Alliance points out that is it unclear whether there are ramifications in the event a right-of-way or other pertinent document is not submitted or recorded in the LTRO. BIA should instruct persons whether a failure to record a document in the LTRO will impact a grantee's right-of-way or subject the grantee to liability. Moreover, such an event should not damage the rights of a grantee when a failure to record resulted solely from BIA's internal actions or lack thereof.

#### ***The Alliance's Proposed Revisions to § 169.302 – Must a right-of-way be recorded?***

(a) Any right-of-way document must be recorded in our LTRO with jurisdiction over the affected Indian land.

(1) We will record the right-of-way document immediately following our approval or granting.

(2) In the case of assignments and mortgages, the assignee and mortgagee that do not require our approval under § 169.207(b), the parties must provide us with a copy of the

assignment and/or mortgage, and we will record the assignment and/or mortgage in the LTRO with jurisdiction over the affected Indian land.

(3) Our failure or neglect to timely record instruments with LTRO shall not affect the validity of the grant or other instrument.

(b) The tribe must record right-of-way documents for the following types of rights-of-way in the LTRO with jurisdiction over the affected Indian lands, even though BIA approval is not required:

(1) Grants on tribal land for a tribal utility that is not a separate legal entity under § 169.004;

(2) Grants on tribal land under a special act of Congress authorizing grants without our approval under certain conditions.

### **§ 169.303 What happens if BIA denies a right-of-way document?**

The Alliance, once more, questions why only Indian landowners are granted appeal rights. The Alliance believes this section, like others in the Proposed Regulations, conflicts with 25 C.F.R. Part 2 and 43 C.F.R. Part 4, and denies applicants certain due process protections. Furthermore, the Alliance also questions whether applicants would be permitted to immediately seek federal court review of a right-of-way denial before a federal court under section 10(c) of the APA. The Alliance is of the opinion that it would be better to permit all parties to challenge BIA determinations and fully develop a full and complete administrative record through administrative appeals.

#### ***The Alliance's Proposed Revisions to § 169.303 – What happens if BIA denies a right-of-way document?***

If we deny the right-of-way grant, renewal, amendment, assignment, or mortgage, we will notify the interested parties immediately and advise the interested parties and landowners of their individual or collective right to appeal the decision under part 2 of this chapter.

### **§ 169.304 What happens if BIA does not meet a deadline for issuing a decision on a right-of-way document?**

The Alliance is of the view that a more streamlined approach than the system proposed in this section would be for BIA to state that all complete right-of-way applications will be reviewed and either approved or denied within one-hundred and twenty (120) days. Thereafter, if a right-of-way is not approved or denied within the one-hundred and twenty (120) day timeframe, the right-of-way will be deemed automatically granted. One-hundred and twenty (120) days should provide BIA with sufficient time to review “complete” right-of-way applications. The Alliance’s proposed mechanism would better streamline BIA’s review and approval of “complete” right-of-way applications, and also avoid requiring grantees to potentially file multiple notices of appeal at multiple levels with BIA to force BIA to act.

In this respect, the Alliance reads this section as only requiring multiple BIA individuals to order/require the Superintendent to act. The proposed language does not permit the IBIA to “approve” a right-of-way application during the multiple review process; rather, it only permits the IBIA to order/require the Superintendent to take some action. In addition, it is highly likely that the Regional Director and BIA Director would take a similar approach because those individuals may not have the entire right-of-way application/record before them when determining whether the Superintendent should have acted. Hence, it is likely that neither the Regional Director nor the BIA Director will unilaterally approve a right-of-way application without consulting the BIA personnel at the local level. As such, perspective grantees could be forced to file multiple notices – thereby spending significant time and resources prosecuting the same – for little return. Moreover, such a time consuming and unnecessary process would also hurt Indian landowners, who, in many instances, are eagerly awaiting their negotiated and agreed-to compensation.

For these reasons, the Alliance believes a firm date whereby all right-of-way applications are deemed approved would be a better alternative than the language proposed in this section.

***The Alliance’s Proposed Revisions to § 169.304 – What happens if BIA does not meet a deadline for issuing a decision on a right- of-way document?***

~~(a) If a Superintendent does not meet [the one-hundred and twenty \(120\) day a](#)-deadline for granting or denying a right-of-way, ~~renewal, amendment, assignment, or mortgage~~, the [right-of-way application will be deemed approved and the right-of-way granted](#) parties may file a written notice to compel action with the appropriate Regional Director.~~

~~(b) The Regional Director has 15 days from receiving the notice to:~~

~~(1) Grant or deny the right-of-way; or~~

~~(2) Order the Superintendent to grant or deny the right-of-way within the time set out in the order.~~

~~(c) The parties may file a written notice to compel action with the BIA Director if:~~

~~(1) The Regional Director does not meet the deadline in paragraph (b) of this section;~~

~~(2) The Superintendent does not grant or deny the right of way within the time set by the Regional Director under paragraph (b)(2) of this section; or~~

~~(3) The initial decision on the right-of-way, renewal, amendment, assignment, or mortgage is with the Regional Director, and he or she does not meet the deadline for such decision.~~

~~(d) The BIA Director has 15 days from receiving the notice to:~~

~~(1) Grant or deny the right-of-way; or~~

~~(2) Order the Regional Director or Superintendent to grant or deny the right of way within the time set out in the order.~~

~~(e) If the Regional Director or Superintendent does not grant or deny the right of way within the time set out in the order under paragraph (d)(2), then the BIA Director must issue a decision within 15 days from the expiration of the time set out in the order.~~

~~(f) The parties may file an appeal from our inaction to the Interior Board of Indian Appeals if the Director does not meet the deadline in paragraph (d) or (e) of this section.~~

~~(g) The provisions of 25 CFR § 2.8 do not apply to the inaction of BIA officials with respect to a granting or denying a right-of-way, renewal, amendment, assignment, or mortgage under this subpart.~~

**§ 169.305 Will BIA require an appeal bond for an appeal of a decision on a right-of-way document?**

As referenced above, and in accordance with proposed § 169.303, only Indian landowners may appeal BIA determinations under this part. Furthermore, such appeals do not render the right-of-way grant ineffective or stayed. For this reason, the Alliance believes Indian landowners that appeal BIA determinations should always be required to post an appeal bond.

***The Alliance's Proposed Revisions to § 169.305 – Will BIA require an appeal bond for an appeal of a decision on a right-of-way document?***

~~(a) If an Indian landowner party appeals our grant or approval of decision on a right-of-way document, then the official to whom the appeal is made shall require the appellant to post an appeal bond in accordance with part 2 of this chapter. We will not require an appeal bond if the tribe is a party to the appeal and requests a waiver of the appeal bond.~~

(b) The appellant may not appeal the appeal bond decision. The appellant may, however, request that the official to whom the appeal is made reconsider the bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

**§ 169.401 What is the purpose and scope of this subpart?**

The Alliance is of the opinion that BIA should recognize the differences between intentional and unintentional acts. The Alliance does not believe that minor unintentional acts should immediately and always subject a right-of-way grantee to enforcement actions.

***The Alliance's Proposed Revisions to § 169.401 – What is the purpose and scope of this subpart?***

(a) This subpart describes the procedures we use to address compliance and enforcement related to rights-of-way on Indian land. Any abandonment, non-use, or violation of the right-of-way grant, including but not limited to encroachments beyond the defined boundaries, ~~accidental, willful, and/or incidental~~ trespass, ~~unauthorized new construction~~ or changes in use not permitted in the grant, and late or insufficient payment may result in enforcement actions.

(b) Accidental and/or incidental trespass beyond the defined boundaries of the right-of-way may result in enforcement actions; however, BIA will consult with the grantee and the tribe for tribal land, and where feasible, the owners of the majority interest for individual Indian land, prior to initiating enforcement actions to determine if such enforcement actions are required and if the trespass has been alleviated.

**§ 169.402 May BIA investigate compliance with a right-of-way?**

BIA should clarify or define the term “reasonable notice.” As referenced above, approved rights-of-way grants provide grantees with substantial real property rights and interests. One such right is excluding others from the land encompassed within the right-of-way and any personal property or permanent improvements located within the right-of-way. The Alliance understands and appreciates BIA’s need to enter rights-of-way on occasions; however, the Alliance believes BIA should clearly define how much notice BIA must provide to grantees prior to entering granted rights-of-way. This is particularly true for rights-of-way utilized in the oil and gas industry because entry within such rights-of-way without proper and significant advanced notice could pose significant health and safety risks to individuals working within the same and individuals seeking entry.

***The Alliance’s Proposed Revisions to § 169.402 – May BIA investigate compliance with a right-of-way?***

BIA may investigate compliance with a right-of-way.

(a) If an Indian landowner notifies us that a specific abandonment, non-use, or violation has occurred, we will promptly initiate an appropriate investigation.

(b) We may enter the Indian land subject to a right-of-way at any reasonable time, upon reasonable notice, and consistent with any notice requirements under applicable ~~tribal~~ law and applicable grant documents, to protect the interests of the Indian landowners and to determine if the grantee is in compliance with the requirements of the right-of-way.

**§ 169.403 May a right-of-way provide for negotiated remedies?**

This section is subject to the Alliance’s Addendum A. Put simply, the Alliance seriously questions the legality of permitting Indian landowners to “terminate” federally approved and granted rights-of-way where Indian landowners are not a party to the same. Aside from seriously questioning the legality of BIA’s approach, the Alliance also questions the wisdom of so doing. For example: (i) what will occur if BIA disagrees with a tribal court determination concerning the validity of a federal granted right-of-way; and (ii) how should a grantee react when it receives conflicting judgments in such situations? The Alliance believes this section should be deleted from the final rules. *See Citation Oil & Gas Corp. v. Acting Navajo Reg’l Dir., BIA, 57 IBIA 234 (2013) (holding BIA is not bound to enforce tribal law); see also Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (1983)*

(holding tribes should not be permitted to render decisions regarding federally approved real property interests that may conflict with BIA's determinations regarding the same).

***The Alliance's Proposed Revisions to § 169.403 – May a right-of-way provide for negotiated remedies?***

~~(a) The tribe and the grantee on tribal land may negotiate remedies for the event of a violation, abandonment, or non-use. The negotiated remedies must be stated in the tribe's consent to the right-of-way grant. The negotiated remedies may include, but are not limited to, the power to terminate the right-of-way grant. If the negotiated remedies provide one or both parties with the power to terminate the grant:~~

~~(1) BIA approval of the termination is not required;~~

~~(2) The termination is effective without BIA cancellation; and~~

~~(3) The Indian landowners must provide us with written notice of the termination so that we may record it in the LTRQ.~~

~~(b) The Indian landowners and the grantee to a right-of-way grant on individually owned Indian land may negotiate remedies, so long as the consent also specifies the manner in which those remedies may be exercised, by or on behalf of the Indian landowners of the majority interest under § 169.107 of this part. If the negotiated remedies provide one or both parties with the power to terminate the grant:~~

~~(1) BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented; and~~

~~(2) BIA will record the termination in the LTRQ.~~

~~(c) The parties must notify any surety or mortgagee of any violation that may result in termination and the termination of a right-of-way.~~

~~(cd) Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to us, as specified in the right-of-way grant. The landowners may request our assistance in enforcing negotiated remedies.~~

~~(e) A right-of-way grant may provide that violations will be addressed by a tribe, and that disputes will be resolved by a tribal court, any other court of competent jurisdiction, or by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing actions or proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.~~

**§ 169.404 What will BIA do about a violation of a right-of-way grant?**

As referenced above, the Alliance questions how BIA will determine if it is appropriate for BIA to “defer to ongoing actions or proceedings” described in § 169.403. BIA could, of course, opt not to defer to such proceedings, and if so choosing, the ramifications to the grant and a grantee's rights thereunder are left in legal limbo.

With respect to BIA's ability to cancel rights-of-way, the Alliance requests that grantees be provided the traditional thirty (30) days to cure any perceived deficiencies. It is unrealistic



for grantees to cure deficiencies in only ten (10) days, and BIA has always granted entities holding federally permitted interests in Indian lands thirty (30) days in which to cure such perceived deficiencies.

***The Alliance's Proposed Revisions to § 169.404 – What will BIA do about a violation of a right-of-way grant?***

~~(a) In the absence of actions or proceedings described in § 169.403 (negotiated remedies), or if it is not appropriate for us to defer to the actions or proceedings, we will follow the procedures in paragraphs (b) and (c) of this section.~~

~~(a)~~ If we determine there has been a violation of the conditions of a grant, other than a violation of payment provisions covered by paragraph (c) of this section, we will promptly send the grantee a written notice of violation.

(1) We will send a copy of the notice of violation to the tribe for tribal land, or, where feasible, provide constructive notice to Indian landowners for individually owned Indian land.

(2) The notice of violation will advise the grantee that, within ~~10~~ thirty (30) business days of the receipt of a notice of violation, the grantee must:

(i) Cure the violation and notify us, and the tribe for tribal land, in writing that the violation has been cured;

(ii) Dispute our determination that a violation has occurred; or

(iii) Request additional time to cure the violation.

~~(3) The notice of violation may order the grantee to cease operations under the right-of-way grant.~~

(c) A grantee's failure to pay compensation in the time and manner required by a right-of-way grant is a violation, and we will issue a notice of violation in accordance with this paragraph.

(1) We will send the grantees a written notice of violation promptly following the date on which the payment was due.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or, where feasible, provide constructive notice to the Indian landowners for individually owned Indian land.

(3) The notice of violation will require the grantee to provide adequate proof of payment within thirty (30) days of receipt of our written notice.

(d) The grantee will continue to be responsible for the obligations in the grant until the grant expires, ~~or is terminated~~ or is cancelled.

**§ 169.405 What will BIA do if the grantee does not cure a violation of a right-of-way grant on time?**

As referenced in the Alliance's Addendum A, as well as herein, the Alliance is wholly uncertain about the authority of BIA to defer to tribal law or permit Indian landowners to pursue remedies under tribal law with respect to perceived violations of federally granted interests in real property. In addition, this section is confusing because it continues to

smash both tribal remedies and federal remedies into the same section. The references to tribal remedies should be deleted.

The Alliance also believes that BIA should be required to consult with grantees – not only Indian landowners – prior to taking action if BIA feels the grantee has failed to cure perceived deficiencies. Such consultation with all parties may reduce potential administrative appeals while also garnering better compliance with right-of-way grant terms and conditions in a timely and efficient manner.

***The Alliance's Proposed Revisions to § 169.405 – What will BIA do if the grantee does not cure a violation of a right-of-way grant on time?***

(a) If the grantee does not cure a violation of a right-of-way grant within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the [grantee and the](#) tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:

- (1) We should cancel the grant;
- (2) The Indian landowners wish to invoke any [negotiated](#) remedies available to them under the grant;
- (3) We should invoke other remedies available under the grant or applicable law, including collection on any available performance bond or, for failure to pay compensation, referral of the debt to the Department of the Treasury for collection; or
- (4) The grantee should be granted additional time in which to cure the violation.

(b) Following consultation with the [grantee and the](#) tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, we may take action to recover ~~unremitted~~[unpaid](#) compensation and any associated late payment charges.

- (1) We do not have to cancel the grant or give any further notice to the grantee before taking action to recover unpaid compensation.
- (2) We may still take action to recover any unpaid compensation if we cancel the grant.

(c) If we decide to cancel the grant, we will send the grantee a cancellation letter by certified mail, return receipt requested, within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe for tribal land, and, [where feasible](#), will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

- (1) Explain the grounds for cancellation;
- (2) If applicable, notify the grantee of the amount of any unpaid compensation or late payment charges due under the grant;
- (3) Notify the grantee of the grantee's right to appeal under part 2 of this chapter, including the possibility that the official to whom the appeal is made may require the grantee to post an appeal bond;
- (4) Order the grantee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and
- (5) Order the grantee to take any other action BIA deems necessary to protect the Indian landowners.

(d) We may invoke any other remedies available to us under the grant, including collecting on any available performance bond, ~~and the Indian landowners may pursue any available remedies under tribal law.~~

**§ 169.406 Will late payment charges, penalties, or special fees apply to delinquent payments due under a right-of-way grant?**

The Alliance has not comment on this section.

**§ 169.407 How will payment rights relating to a right-of-way grant be allocated?**

The Alliance believes BIA must clarify that the Indian landowners “and” the grantee will share any payments not specifically addressed in the grant. As outlined in greater detail above, grantees obtain real property rights within rights-of-way, and hence, should share any payments arising from actions related to the same.

***The Alliance’s Proposed Revisions to § 169.407 – How will payment rights relating to a right-of-way grant be allocated?***

The right-of-way grant may allocate rights to payment for any proceeds, trespass damages, condemnation awards, settlement funds, and other payments between the Indian landowners and the grantee. If not specified in the grant, applicable policy, order, award, judgment, or other document, the Indian landowners ~~and~~ grantees will be entitled to receive these payments.

**§ 169.408 What is the process for cancelling a right-of-way for non-use or abandonment?**

The Alliance notes that under this section, a grantee is given thirty (30) days to respond to a notice of abandonment. The Alliance does not understand why thirty (30) days should be granted under this section and only ten (10) days under proposed § 169.404.

***The Alliance’s Proposed Revisions to § 169.408 – What is the process for cancelling a right-of-way for non-use or abandonment?***

(a) We may cancel, in whole or in part, any rights-of-way granted under this part ~~thirty (30)~~ days after mailing written notice to the grantee at its latest address, for any of the following causes:

- (1) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted; or
- (2) An abandonment of the right-of-way.

~~(b) If the~~ grantee fails to correct the basis for cancellation by the 30<sup>th</sup> day after we mailed the notice, or fails to respond to the notice, we will issue an appropriate instrument cancelling the right-of-way ~~and transmit it to the office of record pursuant to 25 CFR 150 for recording and filing.~~

(c) The cancellation notice shall notify the grantee of the grantee's right to appeal under part 2 of this chapter, including the possibility that the official to whom the appeal is made may require the grantee to post an appeal bond

**§ 169.409 When will a cancellation of a right-of-way grant be effective?**

The Alliance commends BIA on recognizing that cancellation determinations are ineffective pending administrative appeals of the same.

**§ 169.410 What will BIA do if a grantee remains in possession after a right-of-way expires or is terminated or cancelled?**

The Alliance, again, is of the opinion that this section should be modified to also recognize that BIA should consult with grantees prior to pursuing any remedies. For example, the grantee may actively be engaged in good-faith negotiations with the majority of the Indian landowners, yet, those Indian landowners may not have provided notice to BIA of the same. Likewise, the Alliance questions whether this section complies with 5 U.S.C. § 558(c).

***The Alliance's Proposed Revisions to § 169.410 – What will BIA do if a grantee remains in possession after a right-of-way expires or is ~~terminated or cancelled?~~***

If a grantee remains in possession after the expiration, abandonment, termination, or cancellation of a right-of-way, we may treat the unauthorized possession as a trespass under applicable law ~~in consultation with the Indian landowners.~~ Unless the grantee has submitted an application to us consistent with 5 U.S.C. § 558(c), or the Indian landowners of the majority applicable percentage of interests ~~under § 169.106 or 169.107 have notified us in writing that they~~ are engaged in good faith negotiations with the holdover grantee to renew or obtain a new right-of- way, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.

**§ 169.411 Will BIA appeal bond regulations apply to cancellation decisions involving right- of-way grants?**

The Alliance has no comment on this section other than to note that it is duplicative of other sections of the Proposed Regulations. The Alliance believes this information is already addressed and may be deleted from the Proposed Regulations.

***The Alliance's Proposed Revisions to § 169.411 – Will BIA appeal bond regulations apply to cancellation decisions involving right-of-way grants?***

~~(a) — Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will apply to appeals from right-of-way cancellation decisions.~~

~~(b) The grantee may not appeal the appeal bond decision. The grantee may, however, request that the official to whom the appeal is made reconsider the appeal bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.~~

**§ 169.412 What if an individual or entity takes possession of or uses Indian land without a right-of-way or other proper authorization?**

As referenced in the Alliance's Addendum A, the Alliance does not believe that the Proposed Regulations should reference tribal law or the applicability of the same. In fact, the Alliance suggests that such references may be unlawful for a multitude of reasons. Nonetheless, under this section, if there is a trespass or unauthorized use, "[t]he Indian landowners may pursue any available remedies under applicable law." The Alliance would appreciate clarification as to whether this is in addition to the remedies mentioned in § 169.403.

***The Alliance's Proposed Revisions to § 169.412 – What if an individual or entity takes possession of or uses Indian land without a right-of-way or other proper authorization?***

If an individual or entity willfully and without the Indian landowner's permission takes possession of, or uses, Indian land without a right-of-way and a right-of-way is required, the unauthorized possession or use may be is a trespass allowing BIA to initiate enforcement actions under applicable law. An unauthorized willful use within an existing right-of-way may is also be a trespass allowing whereby BIA to initiate enforcement action under applicable law. We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. ~~The Indian landowners may pursue any available remedies under applicable law.~~

***Subpart F – Service Line Agreements***

The Alliance has no comment on this portion of the Proposed Regulations.

We sincerely appreciate the opportunity to provide these comments, and should you have any questions, please do not hesitate to contact me.


Sincerely,



Kathleen M. Sgamma  
Vice President of Government & Public Affairs

The following organizations are also signatories to these comments:

North Dakota Petroleum Council



Ron Ness, President

Montana Petroleum Association



Dave Galt, Executive Director

Public Lands Advocacy



Claire Moseley, Executive Director



## **ADDENDUM A**

As is evident from its Comment, the Alliance believes the Proposed Regulations adversely impact not only companies producing and transporting oil and gas on Indian lands, but also individual Indian landowners and tribes.<sup>1</sup> In this regard, the Alliance is of the opinion that the Proposed Regulations: (i) are of an unlawful retroactive character; (ii) are contrary to existing federal case law concerning jurisdiction, taxation, and right-of-way grantee real property rights within federally granted rights-of-way; (iii) exceed the authority of the Secretary (“Secretary”) of the Department of the Interior (“Interior” or the “Department”) as granted under the 1948 Rights-of-Way for All Purposes Act, 25 U.S.C. § 323-328 (the “1948 Act”); (iv) are arbitrary, capricious, and contrary to law; (v) will cause significant economic harm to Indian mineral owners and surface owners; (vi) will generate unnecessary litigation; (vii) fail to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (“NEPA”); (viii) fail to comply with applicable and controlling Executive Orders; and (ix) represent a breach of trust to individual Indians and tribes.

### **I. GENERAL COMMENTS**

#### **A. BIA’S PROPOSED REGULATIONS ARE UNLAWFULLY RETROACTIVE.**

Altering legal consequences arising from past action results in serious ramifications; hence, retroactive rulemaking, similar to retroactive legislation, has always been viewed with disfavor.<sup>2</sup> Legislation and administrative rules should never be construed to have retroactive effect unless their language specifically requires as much. For this reason, absent explicit language within federal legislation, such legislation should *never* be construed to grant agencies the power to promulgate retroactive rules.<sup>3</sup> Furthermore, even where a federal agency suggests there is a substantial justification for retroactive rulemaking, the agency and reviewing courts should always be reluctant to find such authority absent explicit statutory language.

Despite such well understood principals and authority, BIA has essentially proposed to engage in retroactive rulemaking. BIA’s Proposed Regulations state:

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<sup>1</sup> Similar to some of the Alliance’s members, several tribes own operating and transportation companies that engage in mineral development and transportation on both Indian and non-Indian lands. With respect to the tribally owned companies, the Proposed Regulations will impact those tribes in an identical manner to non-Indian companies doing business on Indian lands.

<sup>2</sup> See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (“Retroactivity is not favored in law.”).

<sup>3</sup> *Id.*; see also *Brimstone R. & Canal Co. v. United States*, 276 U.S. 104, 122 (“The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words.”).

BIA will grant rights-of-way using the authority in 25 U.S.C. 323-328 . . . and this part covers all rights-of-way granted under that statutory authority. This part also covers *existing rights-of-way* that were granted under other statutory authorities prior to the effective date of this rule, except that if the provisions of the preexisting right-of-way document conflict with this part, the provisions of the preexisting right-of-way document govern.<sup>4</sup>

Regardless of this supposed savings clause allowing right-of-way grants that conflict with the Proposed Regulations to control over the Regulations, BIA fails to address that very few, if any, existing grants contain terms that directly conflict with the Proposed Regulations. This is so because BIA is proposing requirements that did not exist at the time prior rights-of-way were sought or obtained. For example, it is doubtful any existing right-of-way grants address: (i) a tribe's ability to tax non-Indian activity or property located within rights-of-way; or (ii) requiring the consent of the beneficial owner for assignments and mortgaging of rights-of-way. However, the Proposed Regulations attempt to specifically recognize a tribe's ability to tax non-Indian activity and property, and to impose previously nonexistent consent provisions. Consequently, the Proposed Regulations include retroactive provisions that materially alter the bargained-for contractual rights embodied in *existing* 1948 Act rights-of-way, including the financial terms of the same, as well as grantees' legal understanding of the same. The Proposed Regulations, therefore, not only include retroactive provisions that are disfavored in law, but which are also not authorized by the 1948 Act.

The Secretary has the general authority to "prescribe any necessary regulations for the purpose of administering the provisions of [the 1948 Act]." 25 U.S.C. § 328. Importantly, this language does not include, or even hint at, the Secretary's authority to promulgate retroactive regulations similar to the Proposed Regulations. When comparing extremely similar legislative language, the United States Supreme Court ("Supreme Court") held that such language did not authorize retroactive rulemaking.<sup>5</sup> As the Court stated, "[t]he statutory provisions establishing the Secretary's general rulemaking power contain no express authorization of retroactive rulemaking."<sup>6</sup> Phrased differently, and based on the Court's pronouncement, an agency only possesses the authority to promulgate retroactive regulations where federal legislation expressly evidences such intent. In this instance, there is absolutely no legislative indication that Congress desired BIA to possess, nor did Congress grant, authority to implement retroactive regulations governing the 1948 Act. Therefore, the Proposed Regulations' imposition of unrequired obligations and duties

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<sup>4</sup> See 79 Fed. Reg. 34455, at 34464 (June 17, 2014) (emphasis supplied) (proposed 25 C.F.R. § 169.005(b)).

<sup>5</sup> See *Bowen*, 488 U.S. at 213, n. 3.

<sup>6</sup> *Id.* at 213.



cannot lawfully be applied to *existing* rights-of-way regardless of whether such rights-of-way contain terms that expressly conflict with the Proposed Regulations.

Furthermore, as BIA is aware, federal regulations are promulgated pursuant to the Administrative Procedures Act (the “APA”), 5 U.S.C. § 500 *et seq*, wherein a rule is defined as:

the whole or a part of an agency statement of general or particular applicability, *and future effect*, designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.<sup>7</sup>

As Justice Scalia has noted, “[t]he only plausible reading of the italicized phrase is that rules had legal consequences only for the future.”<sup>8</sup> Justice Scalia further recognized that the term “future effect” could not mean that a prospectively applied rule could alter preexisting expectations and regulatory requirements. In short, the phrase “future effect” would be meaningless if a federal agency could somehow promulgate a rule that only took effect in the future, yet once effective, morphed the law applied previously into new law.<sup>9</sup> Accordingly, neither the 1948 Act – the statute under which BIA alleges to promulgate the Proposed Regulations – nor the statute generally authorizing BIA to engage in rulemaking, the APA, permit BIA to engage in retroactive rulemaking. Restated, BIA may not apply the Proposed Regulations to *existing* rights-of-way where the application of the Proposed Regulations would undermine the bargained-for contractual rights expressed in the grants themselves, or alter the law applied in the past by creating new and previously unanticipated requirements for grantees.

Moreover, Interior has also long recognized that retroactivity is disfavored. The Interior Board of Indian Appeals (the “IBIA” or the “Board”), when discussing retroactive rulemaking, has ruled that although agencies require latitude to adjust regulations, and even reverse prior policy, an agency should, nevertheless, refuse to apply a new policy retroactively for one of two reasons.<sup>10</sup> First, “a departure from prior policy cannot stand

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<sup>7</sup> 5 U.S.C. § 551(4) (emphasis supplied).

<sup>8</sup> *Bowen*, 488 U.S. at 216 (Scalia concurring).

<sup>9</sup> *Id.* at 217. Such an approach is consistent with the 1947 Attorney General’s Manual on the APA (the “AG Manual”). *Bowen*, 488 U.S. at 218. The AG Manual reads, in part:

[T]he entire [APA] is based upon the dichotomy between rule making and adjudication . . . Rule making is agency action which regulations *future conduct* . . . it is essentially legislative in nature, not only because it operates in the *future* but also because it is primarily concerned with policy considerations . . . Conversely, adjudication is concerned with the determination of *past* and *present* rights and liabilities.

AG Manual, at 14 (emphasis supplied).

<sup>10</sup> *See Kautz v. Portland Area Dir., BIA*, 19 IBIA 305, 310 (1991).

when the agency fails to explain the reason for the change.”<sup>11</sup> Second, “under certain circumstances an agency [cannot] apply a new policy retroactively to parties who detrimentally relied on the previous policy.”<sup>12</sup> Further, as recognized by the Board, a party’s detrimental reliance on the procedures in place at the time of an initial agency decision is precisely the type of situation envisioned in considering whether a change in regulations can or should be applied retroactively.<sup>13</sup>

Here, parties holding *existing* rights-of-way satisfy both of the factors identified in *Kautz* that would preclude retroactive application of the Proposed Regulations. First, the preamble accompanying the Proposed Regulations is wholly devoid of an explanation as to why BIA: (i) incorporated policy changes in the Proposed Regulations; or (ii) is of the view that those policy changes should be applied to *existing* and yet issued right-of-way grants. Second, *existing* grantees expressly relied on prior BIA policy, controlling federal case law, and Board decisions when obtaining rights-of-way over Indian lands. A change in policy at this stage would unquestionably be detrimental to grantees that relied on past interpretations of policy by BIA, the IBIA, and federal courts. Thus, consistent with the factors outlined in *Kautz*, BIA is prohibited from applying the Proposed Regulations to *existing* rights-of-way and currently pending rights-of-way sought under the *existing* right-of-way regulations.

Additionally, after the Supreme Court’s decision in *Bowen*, the Department’s policy with respect to retroactivity has changed drastically. In this vein, in *Wadsworth v. Northwest Reg’l Dir.*, BIA, the IBIA quoted *Bowen* in determining that when enacting certain legislation, Congress did not “expressly convey to the Secretary the power to promulgate retroactive rules.”<sup>14</sup> As a consequence of this observation, the Board held “that, under *Bowen*,” the regulations at issue could not be applied retroactively.<sup>15</sup> Similarly, the Interior Board of Land Appeals, also an adjudicatory authority within the Department, positively cited and followed *Bowen* when determining that the Bureau of Land Management (“BLM”) could not apply a rule retroactively.<sup>16</sup> It is evident, therefore, evident that

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<sup>11</sup> *Id.* (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 842 (D.C. Cir. 1970), *cert denied*, 403 U.S. 923 (1971)).

<sup>12</sup> *Kautz*, 19 IBIA at 310 (citing *RKO General v. FCC*, 670 F.2d 215, 223 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982)). As noted below, it is arguable whether the Board’s decision in *Kautz* remains applicable to Interior decisions as to whether new regulations may be applied retroactively in light of the Supreme Court’s decision in *Bowen*. Subsequent to the decision in *Bowen*, the Board has never again positively cited *Kautz* or the propositions contained therein. Nonetheless, the Proposed Regulations fail both the more stringent retroactivity test outlined in *Bowen*, as well as the more lenient retroactivity standards referenced in *Kautz*.

<sup>13</sup> *Kautz*, 19 IBIA 310.

<sup>14</sup> 41 IBIA 172, 186 (2005).

<sup>15</sup> *Id.*

<sup>16</sup> *See Ely Shoshone Tribe*, 178 IBLA 37, 40-41 (2009).

Interior's own policy disfavors and prohibits the promulgation of retroactive regulations such as the Proposed Regulations – which include provisions that will retroactively alter grantees' contractual rights, duties, and obligations.

Previously, during the course of a separate rulemaking effort, and also after the Supreme Court's ruling in *Bowen*, BIA specifically addressed the retroactive effect of proposed regulations. In 1996, BIA published its final regulations implementing the Act of March 3, 1909, 25 U.S.C. § 396, and the Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C. §§ 396a-396g.<sup>17</sup> In finalizing the regulations, BIA included provisions which read: "[n]o regulation that becomes effective after the approval of a lease . . . shall operate to affect the duration of the lease . . . rate of royalty, rental, or acreage unless agreed to by all parties to the lease."<sup>18</sup> BIA recognized that although in some instances regulations may be modified that could affect *existing* federally approved contracts, there are some terms of those *existing* contracts that should not be retroactively amended. Furthermore, in the preamble to the final regulations, BIA again specifically addressed several tribal comments that favored regulations with a more broad retroactive effect.<sup>19</sup> BIA summarily dismissed the concept therein, and determined that the regulations at issue should not permit far reaching retroactive application. Mysteriously, BIA has proceeded down an entirely different path with respect to the Proposed Regulations.<sup>20</sup>

Under the precedent and policy discussed above, absolutely no provision of the Proposed Regulations should apply to, or seek to regulate, *existing* or pending rights-of-way or grantees. Grantees and applicants relied on *existing* Department policy, both in the form of in-place regulations and IBIA decisions, as well as governing federal case law, when seeking and obtaining *existing* and pending rights-of-way from BIA. BIA should not now pursue a path that operates detrimentally to the interests of those grantees; for as Justice Scalia concluded in *Bowen*:

A rule that has unreasonable secondary retroactivity—for example, altering future regulations in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule – may for that reason be arbitrary or capricious and thus invalid.

488 U.S. at 477 (internal quotations and citations omitted).

In sum, BIA's Proposed Regulations are unlawfully retroactive because: (i) the 1948 Act does not bestow BIA with authority to promulgate retroactive regulations; (ii) the APA

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<sup>17</sup> See 61 Fed. Reg. 35634 (July 8, 1996).

<sup>18</sup> 25 C.F.R. §§ 211.1(b), 212.1(b).

<sup>19</sup> See 61 Fed. Reg. at 35639.

<sup>20</sup> As should be evident from the discussion herein, the Alliance questions whether BIA has any ability to promulgate retroactive right-of-way regulations in light of the Court's ruling in *Bowen*.

likewise does not grant BIA authority to implement retroactive regulations; (iii) Supreme Court precedent is clear that retroactivity in the law is disfavored and unlawful in this instance; and (iv) the Department has routinely recognized that retroactive regulations cannot be implemented with respect to *existing* contract rights for a multitude of reasons. Consequently, the Proposed Regulations should not and cannot be implemented retroactively so as to apply to *existing* or pending rights-of-way.

**B. BIA’S PROPOSED REGULATIONS ARE UNLAWFUL TO THE EXTENT THEY CONFLICT WITH GOVERNING AND BINDING FEDERAL JUDICIAL PRECEDENT.**

Controlling federal case law is clear: federal agencies cannot circumvent federal judicial decisions through agency rulemaking. See *Maislin Industries v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990); see also *Neal v. United States*, 516 U.S. 284, 290-291 (1996). In addition, BIA recognizes that attempts to circumvent federal case law are disfavored;<sup>21</sup> nonetheless, the Proposed Regulations include many proposed provisions that seek to do just that.

**1. BIA’s Proposed 25 C.F.R. §§ 169.008(e) Conflicts with Controlling Federal Judicial Decisions.**

Despite a contrary declaration from the Supreme Court, the Proposed Regulations incorrectly assert that, pursuant to the 1948 Act, rights-of-way granted by the United States as fee landowner to non-Indian grantees, do *not* change the nature of the land subject to the right-of-way. In *Strate v. A-1 Contractors*, however, the Court affirmatively pronounced that 1948 Act rights-of-way create an interest in real property “equivalent, for nonmember governance purposes, to alienated, non-Indian land.”<sup>22</sup> Thus, when authorizing the issuance of rights-of-way traversing Indian lands “Congress has acted within its plenary power to bestow rights to a parcel of land upon one party, thereby limiting the rights of another to the same land.”<sup>23</sup> As a consequence, “a right-of-way created by congressional grant is a *transfer* of a property interest” to the grantee.<sup>24</sup> The Ninth Circuit has also recognized that when the United States grants 1948 Act rights-of-way to non-Indians, the “non-Indians have acquired property rights substantial enough to be considered ‘land alienated to non-Indians.’”<sup>25</sup> Within this framework, it is clear that the federal courts have conclusively affirmed that rights-of-way granted to non-Indians transfer such substantial interests in real property so as to render the land encompassed by the same equivalent to alienated non-Indian fee land.

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<sup>21</sup> See 79 Fed. Reg. at 34464 (proposed 25 C.F.R. § 169.008(b)) (the Proposed Regulations may be superseded or modified by tribal laws, as long as the superseding or modifying regulation “would not violate a Federal statute or *judicial decision*”) (emphasis supplied).

<sup>22</sup> 520 U.S. 438, 454 (1997).

<sup>23</sup> *Burlington Northern Railroad Co. v. Red Wolf*, 196 F.3d 1059, 1063 (9th Cir. 1999).

<sup>24</sup> *Id.* at 1064.

<sup>25</sup> *State of Montana Department of Transportation v. King*, 119 F.3d 1108, 1112 (1999).

Contrary to this controlling federal judicial precedent, proposed 25 C.F.R. § 169.008(e) reads, “[a] right-of-way is an interest in land, but title does not pass to the grantee.”<sup>26</sup> This statement, presumably, is an attempt to impose a limitation on the rights actually acquired by a grantee. While the grantee may not actually gain ownership of the lands underlying a right-of-way, the grantee, nevertheless, does acquire a substantial interest in the use of the land.

As case law makes clear, 1948 Act rights-of-way are not *granted* by Indian landowners; rather, rights-of-way are granted by the fee surface owner, the United States.<sup>27</sup> It is well settled that only Congress may *grant* an interest in Indian lands.<sup>28</sup> In enacting the 1948 Act, Congress vested the Secretary with the authority to *grant* rights-of-way over Indian lands.<sup>29</sup> Thus, when the Secretary *grants* a 1948 Act right-of-way to a non-Indian, the Secretary transfers a substantial interest in the underlying land to the non-Indian; thereby, vesting and bestowing real property rights to the parcel in the non-Indian, and limiting or revoking the rights of another – i.e. the Indian beneficial landowner. Consequently, both the explicit language embodied in the 1948 Act and the federal judicial precedent interpreting the same make it abundantly clear – and contrary to what proposed 25 C.F.R. § 169.008(e) appears to pronounce – that rights-of-way granted to non-Indians transfer substantial real property interests to non-Indians; such rights being of sufficient importance to change the nature of the land. BIA cannot circumvent this reality through artful regulatory drafting.

## **2. BIA’s Proposed 25 C.F.R. §§ 169.008(e)(1) and (3) Conflict with Controlling Federal Judicial Precedent.**

BIA also mischaracterizes the reach and breadth of tribal authority within 1948 Act rights-of-way. Proposed 25 C.F.R. §§ 169.008(e)(1), (3) reads:

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<sup>26</sup> 79 Fed. Reg. at 34464.

<sup>27</sup> See *North Dakota Telephone Cooperative v. Henry*, 278 F.Supp.2d 1015, 1023 (D. ND 2003) (“[T]he 1948 Act authorized the Secretary . . . to *grant* rights-of-way over Indian lands”) (emphasis supplied)). In addition, when enacting the 1948 Act, “Congress allowed the President, in his discretion, to require tribal consent as a condition for granting the right-of-way . . . However . . . the provision for tribal consent reflected congressional policy, *not* the limits on congressional action.” *Red Wolf*, 196 F.3d at 1064 (emphasis supplied).

<sup>28</sup> See 25 U.S.C. §§ 177, 348.

<sup>29</sup> As is discussed in greater detail in section B(3) hereof, the explicit language of the 1948 Act and its accompanying legislative history make it clear that 1948 Act rights-of-way are solely *granted* by the United States and *not* the Indian landowner. Thus, 1948 Act rights-of-way *grant* real property rights from the fee owner, the United States, to grantees.

Unless otherwise expressly stated in its consent to the right-of-way for tribal land . . . the Secretary's grant of a right-of-way does not diminish to any extent:

- (1) The Indian tribe's jurisdiction over the land subject to the right-of-way; [or]
- (3) The Indian tribe's authority to enforce tribal law of general or particular application on the land subject to the right-of-way, as if there were no grant of right-of-way;<sup>30</sup>

Again, it appears BIA has drafted this language in an improper attempt to circumvent federal case law.

As discussed above, federal judicial precedent is clear that 1948 Act rights-of-way granted to non-Indians render the land encompassed by the same "equivalent, for nonmember governance purposes, to alienated, non-Indian land."<sup>31</sup> As such, it is also beyond doubt that tribes are without jurisdiction to regulate non-Indian conduct on lands that have lost their Indian character and are viewed as "alienated, non-Indian land."<sup>32</sup>

The Supreme Court has repeatedly held, "[it is without question] that there is a significant territorial component of tribal power: a tribe has no authority over a nonmember until the nonmember enters *tribal land*."<sup>33</sup> Moreover, when a nonmember enters *tribal land*, it is generally accepted that the pertinent tribe has the right to exclude the nonmember, as well as "arguably the lesser included, incidental power to regulate non-Indian use of" tribal land.<sup>34</sup> Conversely, where an Indian tribe loses the right of absolute use and occupation of lands, the tribe no longer possesses the right to exclude others, and thereby loses the incidental power to regulate the use thereof by nonmembers.<sup>35</sup>

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<sup>30</sup> 79 Fed. Reg. at 34464.

<sup>31</sup> *Strate*, 520 U.S. at 454.

<sup>32</sup> It is plausible that, despite the federal case law discussed in this section, an Indian tribe could still exercise jurisdiction over a non-Indian on non-Indian land when the tribe demonstrates the applicability of one of the two *Montana* exceptions. See *Montana v. United States*, 450 U.S. 545, 565 (1981). The Alliance does not, however, address the *Montana* decision in this section of the Alliance's comments. Even so, in the event BIA determined that a *Montana* analysis was applicable to the discussion in this section and proposed 25 C.F.R. §§ 169.008(e)(1), (3), the analysis of *Montana* undertaken below in section B(4)(b) hereof, would be equally applicable.

<sup>33</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982).

<sup>34</sup> *South Dakota v. Bourland*, 508 U.S. 679 (1993).

<sup>35</sup> *Id.* at 687; see also *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 n.5 (2001) ("Only full territorial sovereigns enjoy the power to enforce laws against all who come within the sovereign's territory and Indian tribes can no longer be described as sovereigns in this sense") (internal quotations and citations omitted)).

With respect to 1948 Act rights-of-way, Indian landowners lose all use and occupation of at least a portion of the lands committed thereto; meaning the Indian landowners cannot exclude grantees from accessing and utilizing the same.<sup>36</sup> The Supreme Court's opinion in *Bourland* reveals much in this regard. In determining that a tribe was without jurisdiction to regulate non-Indian conduct on land had lost its tribal character, the Court concluded:

*Montana and Brendale* [v. *Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989)] establish that when an Indian tribe conveys ownership of its tribal lands . . . it loses any former right of absolute and exclusive use and occupation . . . The abrogation of this greater right . . . implies the loss of regulatory jurisdiction over the use of the land by others . . . Congress . . . eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe.<sup>37</sup>

The same holds true with respect to rights-of-way.

Once an Indian landowner consents to the United States' issuance of a right-of-way, the Indian landowner cannot: (i) exclude the grantee from the legally vested right-of-way; (ii) regulate the grantee's access to the right-of-way; or (iii) regulate the grantee's permitted use within the same. The reason for this is simple: the Indian landowner has previously consented to the grantee's access to and use of land within the right-of-way. It would strain reason for BIA to take a position to the contrary. Furthermore, federal case law prohibits BIA from interfering with legally cognizable interests in real property based on tribal objections.<sup>38</sup> It is evident, therefore, that tribes may not exercise tribal law on lands that have lost their Indian character.<sup>39</sup> The Supreme Court is abundantly clear: 1948 Act rights-of-way are beyond tribal territorial jurisdiction; as such, tribes may not regulate non-Indian activity within the same.<sup>40</sup> This remains true regardless of whether BIA desires

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<sup>36</sup> It should be noted that tribes do not have the authority to exclude nonmembers from individual Indian allotments. Thus, any authority tribes possess with regard to non-Indian activities within rights-of-way traversing allotted lands must arise from a source other than a tribe's ability to exclude.

<sup>37</sup> 508 U.S. at 689.

<sup>38</sup> See *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990) (holding United States liable for a taking where BIA refused to approve a mineral lessee's mining plan that complied with federal regulatory requirements but a tribe objected to the same); see also *Del-Rio Drilling Programs, Inc. v. United States*, 46 Fed. Cl. 683 (Ct. Cl. 2000) (holding United States liable for a taking where the United States unlawfully permitted an Indian tribe to exclude a lessee from its real property interests).

<sup>39</sup> See *Merrion*, 455 U.S. at 142; see also *MacArthur v. San Juan County*, 497 F.3d 1057, 1072 (10th Cir. 1007) (holding that Navajo Nation could not exercise jurisdiction over activities that occurred outside the of Navajo Nation's territorial jurisdiction).

<sup>40</sup> See *Strate*, 520 U.S. at 456.

it to be so. For these reasons, proposed 25 C.F.R. §§ 169.008(e)(1)(3) should be stricken from the Proposed Regulations.

**3. BIA's Proposed 25 C.F.R. §§ 169.008(e)(4) Conflicts with Controlling Federal Judicial Precedent.**

Perhaps the greatest evidence of BIA's attempt to inappropriately circumvent federal case law is the inclusion of proposed 25 C.F.R. § 169.008(e)(4), which states:

Unless otherwise expressly stated in its consent to the right-of-way for tribal land . . . the Secretary's grant of a right-of-way does not diminish to any extent:

(4) The Indian tribe's inherent sovereign power to exercise civil jurisdiction over non-members on tribal land by regulations, through taxation, licensing, or other means, the activities of non-members who enter into *consensual relationships* with the Indian tribe or its members.<sup>41</sup>

By including such language in the Proposed Regulations, BIA is attempting to posit that 1948 Act rights-of-way somehow create *consensual relationships* between the Indian landowners and the right-of-way grantees. Not surprisingly, establishing such a *consensual relationship* is one of the factors used to determine whether a tribe may exercise jurisdiction over non-Indians under the first *Montana* exception.<sup>42</sup> BIA, however, misses the mark by employing this circumvention tactic. Several federal courts have addressed whether 1948 Act rights-of-way create *consensual relationships*, and all have

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<sup>41</sup> 79 Fed. Reg. at 34464 (emphasis supplied). It should also be noted that proposed 25 C.F.R. § 169.008(e)(4) contains another legal error. Proposed 25 C.F.R. § 169.008(e)(4) appears to suggest that rights-of-way granted pursuant to the 1948 Act remain "tribal land." As the federal case law cited above demonstrates, nothing could be further from the truth.

<sup>42</sup> The first *Montana* exception reads as follows:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the *activities* of nonmembers who enter *consensual relationships* with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.

*Montana*, 450 U.S. at 565. The first *Montana* exception has been further broken-down into three factors that all must be present for a tribe to exercise jurisdiction over a non-Indian: (i) the presence of a *consensual relationship*; (ii) that the tribe seeks to regulate a non-Indian *activity*; and (iii) that the regulation the tribe seeks to enforce against the non-Indian activity has a "nexus" to the consensual relationship. These latter two elements will be discussed in greater detail below in section B(4)(b)(1) hereof.



determined they do *not*. Thus, BIA's statement that a 1948 Act right-of-way "does not diminish" a tribe's jurisdiction is plainly incorrect.

As an example of BIA's misstep, BIA should revisit the Federal District Court's decision in *North Dakota Telephone Cooperative v. Henry*, 278 F.Supp.2d 1015 (D. ND 2003). Therein, the Court pointedly stated that 1948 Act rights-of-way granted to non-Indians are "a Congressional grant [that] do[es] *not* equate to a 'consensual relationship' with the [Indian landowner] because federal law requires the [grantee] to obtain rights-of-way and provides a statutory mechanism to acquire a right-of-way."<sup>43</sup> This decision reinforces the correct understanding that 1948 Act rights-of-way are Congressional grants of real property administered through the Secretary. In fact, every right-of-way specifically identifies the United States – not the Indian landowner – as the GRANTOR. As the court in *Henry* instructed, the "[grantee] received authority to [traverse Indian land] from a *grant of legislative authority*."<sup>44</sup> In stark contrast to the wording of proposed 25 C.F.R. § 169.008(e)(4), the Secretary's grant *does* diminish a tribe's authority over the lands encompassed therein and activities occurring thereon, because such grants do not create *consensual relationships* between grantees and Indian landowners.

Other federal courts have also addressed this legal reality.<sup>45</sup> In *Big Horn County Elec. Coop., Inc. v. Adams*, the Ninth Circuit clarified that neither the Indian landowner's consent nor the actual grant between the United States and the grantee was sufficient to create a consensual relationship establishing tribal jurisdiction over a non-Indian.<sup>46</sup> Hence, federal judicial precedent unquestionably supports the fact that, contrary to BIA's proposed 25 C.F.R. § 169.008(e)(4), 1948 Act rights-of-way do diminish a tribe's jurisdiction with respect to non-Indian activities within the same, because the right-of-way does not represent a consensual relationship between the grantee and the Indian landowner.

The federal case law discussed above is consistent with the plain language of the 1948 Act. 25 U.S.C. § 323 reads, in part, "the Secretary . . . is empowered to *grant* rights-of-way . . . over and across any lands now or hereafter held in trust by the United States." (Emphasis supplied). Tellingly, every statute enacted by Congress to vest rights-of-way across Indian

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<sup>43</sup> *Id.* at 1023 (emphasis supplied).

<sup>44</sup> *Id.* at 1024 (emphasis supplied).

<sup>45</sup> See *Redwolf*, 196 U.S. at 1064 (holding that 1948 Act rights-of-way are "a transfer of a property interest that does *not create a consensual relationship*") (emphasis supplied); see also *King*, 191 F.3d 1108, 1113 (9th Cir. 1999) (holding that transfers of property interests under the 1948 Act created property interests and rights in the grantee, and did not establish a continuing consensual relationship between the grantee and the Indian landowner).

<sup>46</sup> 219 F.3d 944, 951 (9th Cir. 2000); see also *Burlington Northern Santa Fe Railroad Co. v. The Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 772 n. 5 (2003).

lands uses the term *grant*.<sup>47</sup> A review of the 1948 Act’s legislative history also sheds light on why the term “*grant*” is included within the legislation.

The 1948 Act was originally conceived solely as a legislative enactment permitting the Secretary to grant rights-of-way through restricted Osage Indian lands.<sup>48</sup> In response to the proposed legislation, the Senate requested insight from the Secretary. The Secretary responded by providing new proposed legislation that was applicable to all Indian lands. When transmitting the proposed legislation, the Secretary observed:

When it is discovered that an application for a right-of-way may not be granted under existing statutory authority, which is often the case, the right must then be obtained by means of easement deeds executed by the Indian owners and *approved* by the Secretary . . . The proposed legislation would *vest* the [Secretary with] authority to *grant* rights-of-way.<sup>49</sup>

As this legislative history makes evident, the 1948 Act bestowed the Secretary with the authority to *grant* rights-of-way, as compared to *approving* an action taken by the Indian landowner. The inclusion of the term “*grant*” in the 1948 is illustrative when comparing the 1948 Act to other legislation involving Indian lands.

For example, the statutes authorizing the leasing of Indian minerals do *not* bestow the Secretary with authority to *grant* mineral leases; instead, the legislation solely authorizes the Secretary to *approve* mineral leases entered into by Indian mineral owners.<sup>50</sup> Thus, in the mineral leasing context, the Indian landowner is the signatory – as the lessor – who vests a real property interest in the lessee subject to the Secretary’s approval.<sup>51</sup> In

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<sup>47</sup> See 25 U.S.C. § 311 (“The Secretary . . . is authorized to *grant* permission . . . to the proper State or local authorities for the opening and establishment of public highways [over Indian lands]”); 25 U.S.C. § 312 (“A right of way for railway . . . is *granted* to any railroad company”); 25 U.S.C. § 319 (“The Secretary . . . is authorized and empowered to *grant* a right of way [for telephone lines across Indian lands]”); 25 U.S.C. § 321 (“The Secretary . . . is authorized and empowered to *grant* a right of way [for pipelines across Indian lands]”) (emphasis supplied to all).

<sup>48</sup> See S. Rep. No. 823 (1948).

<sup>49</sup> *Id.* at 3-4 (emphasis supplied).

<sup>50</sup> See 25 U.S.C. § 396a, which reads in part, “[Tribal minerals] may, with the *approval* of the Secretary . . . be *leased* for mining purposes.” (Emphasis supplied). Similar language appears in each Indian mineral leasing statute. See 25 U.S.C. § 396 (All lands allotted . . . may by *said allottee* be leased for mining purposes”); see also 25 U.S.C. § 2102 (“Any Indian tribe . . . may *enter into* any [agreement] for the exploration for, or extraction . . . of [mineral resources]”) (emphasis supplied to all).

<sup>51</sup> See *Hall-Houston Oil Co. v. Acting Western Reg’l Dir.*, BIA, 42 IBIA 227, 231 (2006) (Indian mineral leases are “executed by the Indian mineral owners, not the Secretary”).

contrast, and in conformance with the 1948 Act, the Secretary – not the Indian landowner – is the signatory on right-of-way *grants* that vest real property rights in grantees.<sup>52</sup>

Accordingly, both federal case law and the 1948 Act instruct that rights-of-way granted by the Secretary do *not* create *consensual relationships* between grantees and Indian landowners. BIA cannot circumvent this legal reality through regulations that fail to properly interpret the legislative enactment such regulations are intended to implement, or that conflict with federal judicial precedent that properly interprets the pertinent legislation. For these reasons, BIA should strike proposed 25 C.F.R. § 169.008(e)(4) from the Proposed Regulations.

**4. Proposed 25 C.F.R. § 169.008(b) is Not Authorized by the 1948 Act, and Conflicts with Federal Judicial Precedent.**

Proposed 25 C.F.R. § 169.008(b) should be deleted from the Proposed Regulations. Like the proposed provisions discussed above, proposed 25 C.F.R. § 169.008(b) attempts to circumvent well established federal judicial precedent in the hope of bestowing tribes with jurisdiction where none exists. Proposed 25 C.F.R. § 169.008(b) reads:

(b) Tribal laws generally apply to land under the jurisdiction of the tribe enacting the laws, except to the extent that those tribal laws are inconsistent with these regulations or other applicable Federal law. However, these regulations may be superseded or modified by tribal laws, as long as:

- (1) The tribe has notified us of the superseding or modifying effect of the tribal laws;
- (2) The superseding or modifying of the regulation would not violate a Federal statute or judicial decision, or conflict with our general trust responsibility under Federal law; and
- (3) The superseding or modifying of the regulation applies only to tribal land.<sup>53</sup>

This language purports to permit tribes to supersede the Proposed Regulations; however, with respect to non-Indians and non-Indian 1948 Act rights-of-way, it would be impossible for tribes to do so. As a general rule, absent express authorization by federal statute or

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<sup>52</sup> See *Black's Law Dictionary* which defines a "grantor" as "[o]ne who conveys property to another," and defines "grantee" as "[o]ne to whom property is granted." *Eighth Ed. Garner, Bryan A., 720 (2004)*. Similarly, "grant" is defined to mean "[t]o give or confer" or to "formally transfer (real property) by deed or other writing." *Id.*

<sup>53</sup> 79 Fed. Reg. at 34464. As noted previously, proposed 25 C.F.R. § 169.008(b) incorrectly suggests that tribes independently have jurisdiction within rights-of-way granted pursuant to the 1948 Act. 1948 Act rights-of-way are *not* "tribal lands" where tribal law may apply.

treaty, tribes do *not* possess jurisdiction over the conduct or activities of non-Indians.<sup>54</sup> As the Supreme Court has stated:

[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders []. [T]he inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe.<sup>55</sup>

Efforts by an Indian tribe to regulate or adjudicate matters involving non-Indians are always, therefore, “presumptively invalid.”<sup>56</sup> Although the Supreme Court provided two very narrow exceptions to this well-established rule, as will be detailed in this section, neither of the two exceptions vest tribes with jurisdiction over non-Indians within 1948 Act rights-of-way. As a result, BIA should not attempt to create jurisdiction where it does not exist, especially through regulations.

**a. No federal statute grants Indian tribes jurisdiction over non-Indians within 1948 Act Rights-of-Way.**

No express authorization by federal statute or treaty permits Indian tribes to exercise jurisdiction over non-Indians. As the Supreme Court noted in *Montana*:

[E]xercis[ing] tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive *without express Congressional delegation*.<sup>57</sup>

As such, Indian tribes may only exercise jurisdiction over non-Indians, thereby superseding the Proposed Regulations, if Congress has expressly delegated tribes such authority.<sup>58</sup> Congress has taken no such action.

**(1) The 1948 Act does not vest tribes with the right to supersede federal regulations governing rights-of-way.**

Proposed 25 C.F.R. § 169.008(b) would allow tribes to supersede the Proposed Regulations. Unlike certain other federal statutes, however, the 1948 Act is silent

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<sup>54</sup> See *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001); see also *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

<sup>55</sup> *Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316, 328 (2008) (citing *Montana*, 450 U.S. at 565) (internal quotations omitted).

<sup>56</sup> *Atkinson Trading Co.*, 532 U.S. at 648.

<sup>57</sup> *Id.* (emphasis supplied).

<sup>58</sup> See *Bourland*, 508 U.S. at 695 n. 15 (“[T]he reality [is] that after *Montana*, tribal sovereignty over nonmembers cannot survive without express Congressional delegation”) (internal quotations deleted) (emphasis in the original)).

concerning a tribe's ability to supersede federal control of rights-of-way. BIA should not interpret silence as legislative acquiescence. This is particularly true because in 1948, Congress knew how to include language vesting tribes with authority; however, Congress chose not to include such language in the 1948 Act.

Congress enacted the IMLA in 1938, approximately ten years prior to the 1948 Act. Unlike the 1948 Act, the IMLA includes language wherein Congress provided certain tribes with the ability to supersede the legislation and implement regulations. Specifically, 25 U.S.C. § 396b reads, in part:

the foregoing provisions shall in *no manner restrict* the right of [certain] tribes . . . to lease land for mining purposes . . . and in accordance with provisions of any constitution and charter adopted by [certain] tribes.<sup>59</sup>

It is by this verbiage that Congress provided certain tribes with the right to control leasing of tribal minerals, as well as the ability to supersede federal regulations governing the same.

Ten years later, however, Congress did *not* include IMLA like language in the 1948 Act. BIA cannot alter legislative intent or dictate that 1948 Act rights-of-way be controlled by unreasonable regulations allowing tribes to supersede either: (i) the provisions of the 1948 Act; or (ii) the regulations subsequently promulgated to implement the 1948 Act. Put simply, if Congress desired to bestow tribes with the ability to supersede the 1948 Act and its regulations, Congress was well aware of the language to be employed, and Congress declined to include such wording in the 1948 Act.<sup>60</sup> Consequently, unlike the IMLA, the 1948 Act does not permit certain tribes to supersede the legislation or regulations promulgated thereunder. BIA should not attempt to interpret Congress' silence in this regard as a grant of authority to tribes.<sup>61</sup> For this reason, amongst others, proposed 25 C.F.R. § 169.008(b) should be removed from the Proposed Regulations.

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<sup>59</sup> The word "certain" is utilized herein to refer to Indian tribes organized pursuant to the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461 *et seq.* Tribes organized under the IRA gained express legal rights to the exclusion of other tribes that opted to not reorganize under the IRA. In many Congressional pronouncements – particularly those from the first-half of the twentieth century – Congress explicitly separated IRA tribes from non-IRA tribes, and granted the former rights not afforded the latter.

<sup>60</sup> As will be discussed in greater detail below, *see* section C hereof, BIA's improper interpretation of the 1948 Act is questionable at best. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>61</sup> If not amenable to removing proposed 25 C.F.R. § 169.008(b), BIA should, at the very least, modify the same to conform to the regulatory provision implementing Congress' intent as embodied in the IMLA. *See* 25 C.F.R. § 211.29. BIA should make it clear that tribal laws superseding the Proposed Regulations "that (i) nullify the provisions of enacted legislation or judicial decisions that preclude the exercise of tribal authority; (ii) modify the

**(2) 18 U.S.C. § 1151 does not vest tribes with jurisdiction over non-Indians within Indian country.**

Although 18 U.S.C. § 1151 is often used to demarcate the civil and criminal jurisdictional boundary lines between federal, state, and tribal jurisdiction, the statute should not be viewed so broadly. 18 U.S.C. § 1151 defines “Indian country” to include:

All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation . . . all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.<sup>62</sup>

18 U.S.C. § 1151 does not, though, define the reach of a tribe’s “civil” jurisdiction with respect to non-Indians. Instead, the statute only defines the scope of an Indian tribe’s civil and criminal jurisdiction over Indians.

The confusion BIA seems to be operating under likely originates from *dicta* first found in *DeCoteau v. District County Court*, 420 U.S. 425 (1970), wherein the Supreme Court held that the State of South Dakota did not possess criminal jurisdiction over Indian offenders that committed certain criminal acts on individual Indian allotments. In dictum, the Court observed that:

If the lands in question are within [Indian country] jurisdiction is in the *tribe* and the *Federal government* . . . Even within “Indian country,” a State may have jurisdiction over some persons or types of conduct, but this jurisdiction is quite limited. While 1151 is concerned, on its face, only with criminal jurisdiction, *the Court has recognized that it generally applies as well to questions of civil jurisdiction.*<sup>63</sup>

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provisions of an existing right-of-way which constitute substantially the consideration of the right-of-way, or without which the right-of-way would not have been made; or (iii) provide for a regulatory taking, cannot be approved by the Secretary.” 61 Fed. Reg. 35634, 35652 (July 8, 1996). In addition, when clarifying tribal authority to supersede IMLA regulations, BIA pointedly prohibited tribes from enacting legislation that would modify *existing* IMLA mineral leases. BIA should, at a minimum, require the same here. It seems incomprehensible that in 1996, BIA recognized that it would be imprudent to modify *existing* IMLA leases through regulation, including superseding tribal authority, yet, eighteen years later, BIA has not recognized the same with respect to *existing* rights-of-way.

<sup>62</sup>The Proposed Regulations have likewise defined rights-of-way granted in accordance with the 1948 Act as “Indian country.”

<sup>63</sup>*DeCoteau*, 420 U.S. at 427, n.2 (emphasis supplied) (internal citations omitted).

The Court thus made a passing comment regarding a tribe's civil jurisdiction over the same Indians criminal offenders that were the subject of the Court's review. The Court did not make a broad statement regarding a tribe's criminal or civil jurisdiction regarding non-Indian activity within Indian country. Quite to the contrary, the Court *never* made a general statement regarding a tribe's civil jurisdiction over *non-Indians*, only a tribe's civil jurisdiction over *Indians*.

In 2001, the Court clarified the confusion raised by *DeCoteau*, and confirmed that 18 U.S.C. § 1151 did not vest tribes with authority to exercise jurisdiction over non-Indians.<sup>64</sup> Earlier, the Tenth Circuit held that a tribe had the authority to tax non-Indian activity on non-Indian land within a reservation, in part, because 18 U.S.C. § 1151 expressly granted tribes jurisdiction over all reservation lands.<sup>65</sup> The Supreme Court disagreed, and found the Tenth Circuit's reliance on 18 U.S.C. § 1151 as a legislative delegation of authority "misplaced."<sup>66</sup> The Supreme Court explained that 18 U.S.C. § 1151 is solely a legislative directive clarifying "jurisdiction over certain criminal acts in Indian country."<sup>67</sup> Regardless of whether BIA desires to reiterate that 1948 Act rights-of-way are Indian country – see Proposed 25 C.F.R. 169.008(e)(5) – the same being Indian country does not encompass statutorily conferred power authorizing tribes to exercise jurisdiction over non-Indians within 1948 Act rights-of-ways.

**b. Tribes cannot establish either *Montana* exception within 1948 Act rights-of-way.**

Efforts by tribes to regulate non-Indian activity or conduct are always presumptively invalid.<sup>68</sup> As the Supreme Court has stated:

[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders []. [T]he inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe.<sup>69</sup>

Absent a federal statute vesting tribes with jurisdiction, a tribe may only exercise jurisdiction over non-Indians in two very limited circumstances. The two very narrow exceptions have become known as the *Montana* exceptions, and read, in part:

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<sup>64</sup> *Atkinson Trading Co. Inc. v. Shirley*, 532 U.S. 645, 653 n. 5 (2001).

<sup>65</sup> *Id.* at 1257-1258 (10th Cir. 2000).

<sup>66</sup> *Id.*, at 653 n. 5.

<sup>67</sup> *Id.*; see also *Strate*, 520 U.S. at 457 (regardless of 18 U.S.C. § 1151, Court refused to permit a tribe to exercise civil jurisdiction over events arising within a 1948 Act right-of-way).

<sup>68</sup> *Atkinson Trading Co.*, at 648.

<sup>69</sup> *Plains Commerce Bank*, 554 U.S. at 328 (2008) (citing *Montana*, 450 U.S. at 565) (internal quotations omitted).

[First, an] Indian tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. Secondly, [an Indian] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians . . . when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the [Indian tribe].<sup>70</sup>

Tribes bear the burden to “establish one of the exceptions to *Montana*’s general rule that would allow an extension of tribal authority to regulate nonmembers.”<sup>71</sup>

In order for a tribe to supersede the Proposed Regulations, as BIA contemplates in proposed 25 C.F.R. § 169.008(b), a tribe must prove that one of the two *Montana* exceptions is satisfied. The chances of a tribe successfully carrying this burden are unlikely.

**(1) The first *Montana* exception is inapplicable to non-Indian activity within 1948 Act rights-of-way.**

The first *Montana* exception consists of three factors: (i) whether there is a consensual relationship; (ii) if a tribe is attempting to regulate non-Indian “activity;” and (iii) whether the non-Indian’s “activity” the tribe seeks to regulate has a “nexus” to the consensual relationship.<sup>72</sup>

With respect to the first factor of the first *Montana* exception, the federal judicial precedent is clear: 1948 Act rights-of-way do not create consensual relationships between grantees and Indian landowners.<sup>73</sup> Furthermore, a non-Indian’s consensual relationship with a tribe or tribal member unrelated to a 1948 Act right-of-way does not vest a tribe with jurisdiction to regulate the non-Indian’s right-of-way related “activity.” A non-Indian’s “consensual relationship in one area . . . does not trigger tribal civil authority in another – it is not in for a penny, in for a pound.”<sup>74</sup> Therefore, a tribe seeking to supersede the Proposed Regulations would have to demonstrate that the non-Indian the

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<sup>70</sup> *Montana v. United States*, 450 U.S. 565.

<sup>71</sup> *Plains Commerce Bank*, 544 U.S. 330 (citing *Atkinson Trading*, 532 U.S. at 654).

<sup>72</sup> See *Tribal Civil Jurisdiction Over Nonmembers: A Practical Guide for Judges*, 81 U. Colo. L.Rev. 1187, 1225-26 (2010) (Federal courts have routinely and systematically “followed [the Supreme Court’s decision in *Strate* admonishing] that the claim *must* arise from the consensual relationship”) (emphasis supplied)).

<sup>73</sup> See *Adams*, 219 F.3d at 951; see also *North Dakota Telephone*, 278 F.Supp.2d at 1023.

<sup>74</sup> *Atkinson Trading Co.*, 532 U.S. at 656 (internal citations omitted).



tribe sought to regulate had a separate consensual relationship, and such separate consensual relationship must also satisfy the third factor.

Under the third factor of the first *Montana* exception, the tribe must demonstrate that the non-Indian right-of-way related “activity” the tribe seeks to regulate has a “nexus” to the consensual relationship distinct from the right-of-way. It is difficult to fathom how a non-Indian could have a consensual relationship outside the right-of-way context, and yet that relationship would have a “nexus” to a non-Indian “activity” occurring within or related to a 1948 Act right-of-way, all of which must combined to vest a tribe with jurisdiction to regulate that specific “activity.”<sup>75</sup> Again, with respect to consensual relationships generating tribal jurisdiction, it’s a worthy reminder that it is “not in for a penny, in for a pound.”<sup>76</sup> Consequently, it is highly doubtful a tribe could ever demonstrate the presence of the first *Montana* exception, and thus allow a tribe to legally supersede the Proposed Regulations.

**(2) The second *Montana* exception is inapplicable to non-Indian conduct within federally granted rights-of-way.**

The second *Montana* exception should only be applied in “limited” circumstances, and “cannot be construed in a manner that would ‘swallow the [*Montana*] rule’ or ‘severely shrink it.’”<sup>77</sup> As the Supreme Court has observed, due to the seemingly broad scope and nature of the second *Montana* exception, when “[r]ead in isolation, [it] can be misperceived.”<sup>78</sup> The Ninth Circuit has further clarified this possibility by stating:

[V]irtually every act that occurs on the reservation could be argued to have some political, economic, health, or welfare ramification to the Tribe, the [second *Montana*] exception was *not* meant to be read so broadly.<sup>79</sup>

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<sup>75</sup> BIA should revisit the Supreme Court’s decision in *Strate* for further evidence that such a situation is beyond doubtful. In *Strate*, the Court held that a tribe was unable to exercise jurisdiction over a non-Indian under the first *Montana* exception regardless of that non-Indian’s consensual relationship with the tribe. The Court found that the consensual relationship “present[ed], no ‘consensual relationship’ of the qualifying kind.” *Strate*, 520 U.S. at 457.

<sup>76</sup> *Atkinson Trading Co.*, 532 U.S. at 656.

<sup>77</sup> *Plains Commerce*, 544 U.S. at 330 (quoting *Atkinson*, 532 U.S. at 654-655 and *Strate*, 520 U.S. at 458, respectively).

<sup>78</sup> *Strate*, 554 U.S. at 459; see also *County of Lewis v. Allen*, 163 F.3d 504, 515 (9th Cir. 1998) (*en banc*) (“Although broadly framed, [*Montana*’s second exception] is narrowly construed”).

<sup>79</sup> *Id.*, (Emphasis supplied); see also *Phillip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 943 (9th Cir. 2009) (holding that “generalized threat that torts by or against its members pose for any society [] is not what the second *Montana* exception is intended to capture”).

Likewise, the second *Montana* exception is only applicable when non-Indian “conduct” would “imperil” the tribal community and where exercise of tribal jurisdiction is absolutely necessary to “avert catastrophic consequences.”<sup>80</sup> Again, it is difficult to imagine a situation where a non-Indian’s “conduct” within a 1948 Act right-of-way could be construed to “imperil” or “destroy” a tribe’s community.

In addition, right-of-way grantees do not cause “momentous tragic event[s]” rising to “extreme misfortune” that could result in “utter overthrow” or “ruin” to tribal communities.<sup>81</sup> To suggest otherwise is utterly absurd. It is clear that tribal jurisdiction, with respect to 1948 Act rights-of-way, is *not* required to avert “catastrophic consequences” or “preserve ‘the right of reservation Indians to make their own laws and be ruled by them.’”<sup>82</sup> Put simply, tribes may not rely on the second *Montana* exception to demonstrate their legal ability to supersede the Proposed Regulations, and, thereafter, exercise jurisdiction over non-Indian conduct within the same.

Moreover, the second *Montana* exception is further inapplicable because the second *Montana* exception does not establish jurisdiction when a non-Indian’s conduct only threatens a specific tribal member or a specific parcel of property. The second *Montana* exception is only satisfied when a non-Indian’s conduct imperils the *entire* tribal community or the tribe as a *whole*. As the Ninth Circuit has reasoned:

[W]e reject Pease’s argument that the Tribe has jurisdiction under the second *Montana* exception. Although he concedes that this action directly concerns only his particular property, he argues that the overall impact of the loss of land . . . could be devastating to the Tribe [and] political integrity. The contention fails to establish a direct effect on the political integrity, the economic security, or the health or welfare of the *Tribe as a whole*.<sup>83</sup>

Therefore, to satisfy the second *Montana* exception and legally supersede the Proposed Regulations, a tribe must provide that a non-Indian’s conduct related to a 1948 Act right-of-way could result in catastrophic damages to the tribal community as a whole, as

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<sup>80</sup> *Plains Commerce*, 554 U.S. at 341. The Merriam-Webster Dictionary defines “imperil” as to “bring into peril.” Merriam-Webster’s Collegiate Dictionary, 620 (11th Ed. 2003). “Peril” is subsequently defined as to “expose to the risk of being . . . destroyed.” *Id.* at 920.

<sup>81</sup> Similarly, the Merriam-Webster Dictionary defines “catastrophe” as “a momentous tragic event ranging from extreme misfortune to utter overthrow or ruin.” Merriam-Webster’s Collegiate Dictionary, 194 (11th Ed. 2003).

<sup>82</sup> *Strate*, 544 U.S. at 459 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

<sup>83</sup> *Yellowstone County v. Pease*, 96 F.3d 1176, 1176-1177 (9th Cir. 1996) (emphasis in original).

compared to specific tracts of land or specific tribal members. It's questionable as to whether this could ever be done.

**c. Conclusion: Neither *Montana* exception can provide tribal jurisdiction over 1948 Act rights-of-way.**

As should be evident, it is nearly impossible to construct a situation where a tribe could legally exercise jurisdiction over non-Indians within 1948 Act rights-of-way. This is the case for several reasons. First, unlike the IMLA, the 1948 Act is silent regarding a tribe's ability to supersede the legislation and the regulations implementing the same.<sup>84</sup> Second, 18 U.S.C. § 1151 does not vest tribes with jurisdiction over non-Indians. Third, tribes are unable to satisfy either of the two *Montana* exceptions. Therefore, proposed 25 C.F.R. § 169.008(b) should be stricken from the Proposed Regulations, because tribal law is wholly inapplicable to 1948 Act rights-of-way. If BIA is unwilling to remove proposed 25 C.F.R. § 169.008(b) from the Proposed Regulations, BIA should, nevertheless, include therein a provision whereby a tribe must carry its burden and satisfy one of the *Montana* exceptions to supersede the Proposed Regulations.

**5. Proposed 25 C.F.R. §§ 169.008(e)(2), and 169.009 Conflict With Controlling Federal Case Law.**

Proposed 25 C.F.R. §§ 169.008(e)(2), 169.009 recognize a tribe's ability to tax non-Indians and non-Indian property within 1948 Act rights-of-way, reading, in part:

169.008(e):

The Secretary's grant of a right-of-way does not diminish to any extent:

(2) The power of the Indian tribe to tax the land, any improvements on the land, or any activity related to, and not inconsistent with, the right-of-way.

§ 169.009:

(a) Improvements may be subject to taxation by the Indian tribe with jurisdiction.

(b) Activities may be subject to taxation by the Indian tribe with jurisdiction.

(c) Possessory interests may be subject to taxation by the Indian tribe.<sup>85</sup>

The Proposed Regulations thus directly support a tribe's ability to tax non-Indians and non-Indian property within rights-of-way. However, federal case law is clear that tribe's do not possess such authority.<sup>86</sup>

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<sup>84</sup> As noted previously, because the 1948 Act does not include language permitting tribes to supersede the legislation or regulations implementing the same, any interpretation of the 1948 in such a manner is unreasonable. See *Chevron (Id.)*.

<sup>85</sup> 79 Fed. Reg. at 34464.

Federal case law dictates that 1948 Act rights-of-way are non-Indian real property interests.<sup>87</sup> Furthermore, federal courts have affirmatively held that tribes are prohibited from imposing taxes on non-Indian property within 1948 Act rights-of-way, because such taxes do not seek to tax non-Indian activity or conduct,<sup>88</sup> but solely non-Indian property.<sup>89</sup> Similarly, in 2003, approximately five years prior to the Supreme Court's decision in *Plains Commerce*, the Ninth Circuit held that tribal taxation of non-Indian property within a right-of-way was prohibited under the first *Montana* exception; admittedly leaving open the possibility that a tribe could potentially tax such property under the second *Montana* exception.<sup>90</sup> In *Plains Commerce*, the Supreme Court forever closed that door, however, therein severely restricting the applicability of the second *Montana* exception, and affirmatively declaring that tribes lack regulatory or adjudicatory jurisdiction over non-Indian property. In fact, the Court's decision in *Plains Commerce* closely aligned with another Ninth Circuit decision, *Adams*, wherein the Ninth Circuit invalidated tribal taxation efforts, and held:

The defendant's request for us to expand *Montana's* second exception would effectively swallow *Montana's* main rule, because virtually any tribal tax would then fall under the second exception, a result that the Supreme Court had never endorsed and which conflicts with the Supreme Court's view that tribal jurisdiction is limited.<sup>91</sup>

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<sup>86</sup> In fact, federal case law is so clear that the two leading treatises on Indian law both recognize that tribes are prohibited from taxing non-Indians within 1948 Act rights-of-way. See *Felix S. Cohen's Handbook of Federal Indian Law*, Cohen, Felix C., §8.04[2][b], 718-720 (2005 Ed. Supp. 2009) see also *American Indian Law in a Nut Shell*, Canby, William, C., 5th Ed., 308-09 (2009).

<sup>87</sup> See *Strate*, 520 U.S. at 454.

<sup>88</sup> As discussed in section II(4)(b) hereof, in order for a tribe to impose a tax against a non-Indian's activity or conduct within a 1948 Act right-of-way, the tribe would need to satisfy one of the *Montana* exceptions. As illustrated in section II(b)(4) it would be highly doubtful – particularly in light of the Supreme Court's holding in *Plains Commerce* – a tribe could ever demonstrate the applicability of the *Montana* exceptions to such non-Indian activity and conduct. Thus, proposed 25 C.F.R. § 169.09(b) is also invalid pursuant to federal case law.

<sup>89</sup> See *Adams*, 219 F.3d at 951 (“An ad valorem tax on the value of Big Horn's utility property is not a tax on the activities of a nonmember, *but instead* a tax on the value of the property owned by a nonmember, a tax that is *not* included within *Montana's* [] exception[s]”); see also *Plains Commerce*, 544 U.S. at 336-41 (holding that once land becomes non-Indian in nature, the land passes beyond a tribe's jurisdiction and control).

<sup>90</sup> See *Burlington Northern*, 323 F.3d 767.

<sup>91</sup> 219 F.3d at 951 (internal citations omitted).

Consequently, proposed 25 C.F.R. §§169.008(e)(2), 169.009(a), (c), all directly conflict with existing federal judicial decisions. Simply put, tribes are without jurisdiction to tax non-Indian property both in the form of 1948 Act rights-of-way and all non-Indian property within such rights-of-way. BIA should not seek to, once more, circumvent this existing precedent.

**C. BIA'S PROPOSED REGULATIONS CANNOT SURVIVE THE SUPREME COURT'S ANALYSIS OUTLINED IN *CHEVRON v. N.R.D.C.* BECAUSE THE 1948 ACT DOES NOT PERMIT BIA TO IMPLEMENT SPECIFIC PROVISIONS OF THE PROPOSED REGULATIONS.**

The APA<sup>92</sup> requires reviewing courts to “hold unlawful and set aside agency action, findings, and conclusions” that are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”<sup>93</sup> Put simply, a federal agency’s promulgation of regulations implementing federal legislation cannot exceed the authority delegated to the agency by the legislature.

In 1984, the Supreme Court issued the landmark decision concerning the above referenced proposition in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.<sup>94</sup> In *Chevron*, the Court articulated a two-part test for reviewing an agency’s statutory interpretation. First, has Congress “directly” spoken to the “precise” question at issue?<sup>95</sup> Second, if Congress has not done so, and the statute is “silent or ambiguous with respect to the specific issue,” then the question for the court is whether “the agency’s answer is based on a permissible construction of the statute.”<sup>96</sup> The 1948 Act – as well as similar right-of-way statutes BIA has inappropriately ignored – is silent, or at the very least ambiguous, with respect to specific provisions of the Proposed Regulations. Similarly, BIA’s interpretation of the 1948 Act, as evident from the improper provisions of the Proposed Regulations, is impermissible and unreasonable. For these reasons, BIA must cease its current rulemaking effort with respect to the Proposed Regulations.

Unlike some other federal statutes, the 1948 Act does *not* vest tribes with jurisdiction over non-Indian activities or conduct, nor does the 1948 Act recognize the applicability of tribal

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<sup>92</sup> 5 U.S.C. § 500, *et seq.*

<sup>93</sup> 5 U.S.C. § 706(2)(c).

<sup>94</sup> 467 U.S. 837 (1984).

<sup>95</sup> *Id.* at 842-43 (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress”).

<sup>96</sup> *Id.* at 843.

law or jurisdiction to rights-of-way granted by the Secretary. Those portions of the Proposed Regulations that (i) recognize the applicability of tribal law and jurisdiction over non-Indian rights-of-way and non-Indian activities within the same, (ii) seek to vest tribes with jurisdiction over non-Indians, and (iii) grant tribes the unilateral authority to terminate federally granted rights-of-way without the Secretary's involvement, are all impermissible and unreasonable interpretations of the 1948 Act.

**1. The Proposed Regulations Mirror Other BIA Regulations that Have No Application to Rights-of-Way.**

Rights-of-way traversing Indian lands are not surface leases, should not be treated like surface leases, and are not legislatively authorized by specific Indian surface leasing legislation. Nonetheless, despite this indisputable observation, when drafting the Proposed Regulations, BIA seems to have "copied" the most recent iteration of the Indian surface leasing regulations, *see* 25 C.F.R. Part 162, and "pasted" the same into proposed 25 C.F.R. Part 169. The problem with such an approach is that BIA's surface leasing regulations arise from separate and distinct legislative authority that is vastly different than the 1948 Act. To highlight these matters in greater detail – and to demonstrate why BIA's current interpretation of the 1948 Act is impermissible – it is worth reviewing the legislative authority supporting BIA's implementation of Indian surface leasing.

In 1993, Congress enacted the American Indian Agricultural Resources Management Act ("AIARMA"), 25 U.S.C. § 3701, *et seq.* The purpose of AIARMA was to permit the Secretary to "take part in the management of Indian agricultural lands, with the participation of the beneficial owners of the land."<sup>97</sup> Additionally, and unlike the 1948 Act, Congress directed the Secretary to "comply with tribal laws [] pertaining to Indian agricultural lands, including . . . [laws] to regulate land use or other activities under tribal jurisdiction;" and in doing so, the Secretary was also tasked with: (i) providing "assistance in the enforcement of such tribal laws;" and (ii) providing notice of the same to persons seeking to undertake activities on Indian agricultural land."<sup>98</sup> AIARMA was subsequently amended in 1994, and on June 17, 1996, BIA proposed regulations to implement AIARMA as amended.<sup>99</sup>

The preamble to BIA's proposed AIARMA regulations outline the AIARMA requirement that BIA recognize and enforce tribal law.<sup>100</sup> Also included in BIA's proposed AIARMA regulations was a provision entitled "tribal laws," wherein BIA stated that tribal laws may apply to Indian lands, and that consistent with AIARMA, tribal law could supersede the proposed AIARMA regulations.<sup>101</sup> Interestingly, omitted from BIA's proposed AIARMA regulations, was any recognition that tribes or Indian landowners could cancel agricultural

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<sup>97</sup> 25 U.S.C. § 3702.

<sup>98</sup> *Id.* at 3712.

<sup>99</sup> *See* 61 Fed. Reg. 30560.

<sup>100</sup> *See* 65 Fed. Reg. at 30562.

<sup>101</sup> *Id.* at 30565 (proposed 25 C.F.R. § 162.4).

leases absent the Secretary's involvement. Hence, BIA did not – regardless of BIA's recognition of tribal law as required by AIARMA – initially grant tribes the ability to unilaterally terminate Indian agricultural leases.<sup>102</sup> Within this limited framework, it appears that BIA's proposed AIARMA regulations properly interpreted Congress' directive to recognize and enforce tribal law with respect to Indian agricultural leases, but, nevertheless, still required the Secretary be the arbiter of when to cancel such leases.

On July 14, 2000, BIA again proposed regulations to further implement AIARMA.<sup>103</sup> BIA again clarified the AIARMA requirement that agricultural leasing of Indian lands must be "in accordance with . . . all tribal laws and ordinances."<sup>104</sup> Thus, BIA's second iteration of proposed AIARMA regulations retained provisions declaring, as authorized by AIARMA, that tribal law was applicable to such leases and persons obtaining the same.<sup>105</sup> On the other hand, unlike BIA's first proposed AIARMA regulations, the second iteration – potentially consistent with the AIARMA requirement to recognize and enforce tribal law – stated that if "a lease authorizes termination according to tribal or other law, or provides for the resolution of certain disputes through alternative dispute resolution methods [(i.e. tribal court)], the lease provisions will govern."<sup>106</sup> BIA promulgated the second version of the proposed AIARMA rules as final on January 22, 2001.<sup>107</sup> Consistent with a reasonable interpretation of AIARMA, BIA's AIARMA regulations both: (i) recognize tribal law and stipulate to BIA's enforcement of the same, even permitting tribes to supersede the proposed regulations;<sup>108</sup> and (ii) provided tribes with the authority to "terminate" agricultural leases if permitted by "tribal law" and the lease.<sup>109</sup>

Thereafter, on November 29, 2011, BIA proposed new regulations to revise 25 C.F.R. Part 162 in its entirety.<sup>110</sup> This proposed rulemaking expanded BIA's recognition of tribal law and the applicability of tribal laws to *all* Indian land surface leases as originally provided for in AIARMA.<sup>111</sup> On December 5, 2012, BIA promulgated the proposed regulations as final.<sup>112</sup> Therefore, by 2012, BIA had fully expanded and implemented Congress' original AIARMA pronouncements as applicable to all Indian surface leases. Phrased differently, by 2012, BIA utilized certain provisions of AIARMA – such originally only being applicable to Indian agricultural leases – to recognize and extend tribal law to all Indian surface leasing.

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<sup>102</sup> *Id.* at 30566 (proposed 25 C.F.R. §§ 162.17, 162.18).

<sup>103</sup> *See* 65 Fed. Reg. 43874.

<sup>104</sup> *Id.* at 43879.

<sup>105</sup> *Id.* at 43921 (proposed 25 C.F.R. § 162.4).

<sup>106</sup> *Id.* at 43930 (proposed 25 C.F.R. § 127).

<sup>107</sup> *See* 66 Fed. Reg. 7068, 7083.

<sup>108</sup> *Id.* at 7113 (25 C.F.R. §§ 162.108, 162.109)

<sup>109</sup> *Id.* at 7119 (25 C.F.R. § 169.240).

<sup>110</sup> *See* 76 Fed. Reg. 37784.

<sup>111</sup> *Id.* at 73794 (proposed 25 C.F.R. §§ 169.013, 169.014).

<sup>112</sup> *See* 77 Fed. Reg. 72440.

25 C.F.R. Part 162, apparently, has also acted as the regulatory template for the Proposed Regulations. The problem with BIA utilizing 25 C.F.R. Part 162 as its guide and format for the Proposed Regulations is that unlike AIARMA, the 1948 Act is silent regarding Congress' (i) recognition of the applicability of tribal law and jurisdiction over non-Indian rights-of-way and non-Indian activities within the same; (ii) bestowment upon tribes of jurisdiction over non-Indians; and (iii) granting tribes the unilateral authority to terminate federally granted rights-of-way if permitted under tribal law. As a consequence, BIA's attempt to "paste" 25 C.F.R. Part 162 – and its interpretation of AIARMA – into the Proposed Regulations is an impermissible act under the Supreme Court's decision in *Chevron*.

**2. The Proposed Regulation's Recognition and Application of Tribal Law and Jurisdiction to 1948 Act Rights-of-Way and to Non-Indian Conduct Are an Impermissible and an Unreasonable Interpretation of the 1948 Act.**

As outlined above, tribal law and jurisdiction are always presumptively invalid as applied to non-Indians within 1948 Act rights-of-way. It would be extremely difficult for BIA to demonstrate otherwise. Nevertheless, and irrespective of federal judicial precedent to the contrary, the Proposed Regulations: (i) recognize the applicability of tribal law to 1948 Act rights-of-way; (ii) seek to bestow tribes with jurisdiction over non-Indians within the same; and (iii) permit tribal law to supersede the Proposed Regulations.<sup>113</sup> Again, these provisions – as well as the vast majority of the Regulations – very closely follow the regulations found at 25 C.F.R. Part 162. However, 25 C.F.R. Part 162 arises from BIA's interpretation of AIARMA, which included explicit legislative language recognizing tribal law and its applicability to agricultural leases. The 1948 Act does *not* include such legislative language, and neither AIARMA nor its interpretive regulations apply to BIA rulemaking concerning the 1948 Act.

Again, AIARMA, *not* the 1948 Act, includes several legislative provisions that specifically address tribal law and the applicability of tribal law to surface leasing. Moreover, nothing contained in the 1948 Act's legislative history supports BIA's application of regulations interpreting AIARMA to rights-of-way.<sup>114</sup> As a result, BIA's attempt to impose AIARMA's directives as to tribal jurisdiction in the surface leasing arena to the Regulations is wholly inappropriate. AIARMA – and the regulations interpreting the same – simply has no application to 1948 Act rights-of-way, and, as such, any provisions of the Regulations – including proposed 25 C.F.R. §§ 169.008, 169.009 – incorporating AIARMA directives should be deleted.

**3. Arguably, Tribal law is *only* applicable to 1948 Act rights-of-way and non-Indian conduct if enacted by tribes organized under the IRA.**

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<sup>113</sup> See 79 Fed. Reg. 34455, 34464 (proposed 25 C.F.R. §§ 169.008, 169.009).

<sup>114</sup> See S. Rep. 823 (Jan 14, 1048)



The 1948 Act explicitly requires the consent of tribes organized under the Indian Reorganization Act of 1934 (“IRA”), 25 U.S.C. 461, *et seq.*, to the issuance of a right-of-way across those tribes’ lands.<sup>115</sup> Therefore, the inverse is also true – under the express terms of the 1948 Act, the Secretary may grant rights-of-way across tribal land without tribal consent if the tribe is not organized under the IRA.<sup>116</sup> The 1948 Act’s legislative history confirms that the Secretary and Congress only intended to bestow a right of consent on IRA tribes.<sup>117</sup> Where, as here, a statute specifically “names the parties who come within its provisions, other unnamed parties are excluded.”<sup>118</sup> Even if BIA could recognize tribal law and render the same applicable to rights-of-way and non-Indian conduct – something that the Alliance refutes – BIA may *only* do so for IRA tribes, because such tribes are the only tribes who, by way of Congressional acknowledgement, may demand the same when granting consent.<sup>119</sup>

No federal court has ever affirmatively determined that BIA must secure the consent from non-IRA tribes with respect to rights-of-way granted under the 1948 Act.<sup>120</sup> In *Southern Pacific Transportation Co. v. Watt*, the Ninth Circuit found that the Secretary could require a prospective grantee to obtain an IRA tribe’s consent to the issuance of a right-of-way

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<sup>115</sup> See 25 U.S.C. § 324.

<sup>116</sup> Interestingly, the Alliance is aware that some individuals have taken the position that 25 U.S.C. § 324, was implicitly modified or amended by the 2000 amendments to the IRA. The Alliance certainly questions such a position. The Alliance further questions such a position because these same individuals refuse to recognize the implicit modification or amendment of the 1948 Act by 25 U.S.C. § 2218 whereby the Secretary may grant rights-of-way over individually owned Indian land where a tribe possess a minority interest absent tribal consent. See Also 25 U.S.C. §§ 2218(a), (c), (d)(1), (f) and (g). Surely, if the amendments to the IRA implicitly modified the 1948 Act, the more express language found in the Indian Land Consolidation Act had a similar affect.

<sup>117</sup> See S. Rep. 823, at 4 (“The proposed legislation would vest in the Secretary [ ] authority to grant rights-of-way of any nature over Indian lands . . . The bill preserves the powers of those Indian tribes organized under the [IRA] with reference to the disposition of tribal land”).

<sup>118</sup> *Foxgord v. Hischmoeller*, 820 F.2d 1030, 1035 (9th Cir. 1987); *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (“The doctrine of *expression unius est exclusion alturius* ‘as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omission should be understood as exclusions’”).

<sup>119</sup> It goes without saying that the Proposed Regulations requirement that prospective grantees seek consent from non-IRA tribes is also clearly outside the express language of the 1948 Act. Requiring prospective grantees to obtain non-IRA tribal consent, therefore, also runs afoul of the *Chevron* decision and accompanying analysis.

<sup>120</sup> As will be discussed below, the same is true for the IBIA, absent one odd exception.

under the 1899 right-of-way act (“1899 Act”),<sup>121</sup> because the 1899 Act was silent on the topic and also provided the Secretary with general rulemaking authority.<sup>122</sup> The 1948 Act, however, is not silent on this topic. In fact, the Ninth Circuit even cited the IRA tribal consent language from the 1948 Act as further evidence that the prospective grantee in *Watt* would be required to obtain the tribe’s consent if alternatively seeking a right-of-way under the 1948 Act because the Indian landowner was an IRA tribe.<sup>123</sup> The Court’s decision in *Watt* thus involved an IRA tribe and a prospective grantee seeking a right-of-way in accordance with the 1899 Act, *not* the 1948 Act.

The IBIA cited the Ninth Circuit’s decision positively when reaching a similar conclusion in *Transwestern Pipeline Co. v. Acting Deputy Assistant Secretary – Indian Affairs*, 12 IBIA 40, 56 (1983). There, the IBIA determined that the Secretary – as a result of the Secretary’s general rulemaking authority – could require a prospective grantee to obtain a non-IRA tribe’s consent to the issuance of a right-of-way under the 1904 right-of-way act (the “1904 Act”).<sup>124</sup> Like the 1899 Act, the 1904 Act is silent concerning tribal consent; and, therefore, the Secretary’s requirement that an applicant obtain tribal consent was found valid.<sup>125</sup> The Board also distinguished its holding from rights-of-way issued under the 1948 Act, stating “the Ninth Circuit’s opinion [in *Southern Gas*] confirms the general principals of law that the Secretary may, by regulation, require tribal consent for rights-of-way *other than those sought under the [1948 Act]*.”<sup>126</sup> Importantly, neither the 1899 Act, nor the 1904 Act, include specific legislative language regarding IRA tribes. The 1948 Act, however, does.

The only authority to the contrary ignores the explicit language of the 1948 Act and fails to analyze the two cases above in any detail. In *Star Lake Railroad Co. V. Navajo Area Dir., BIA*, 15 IBIA 220, 239-241 (1987),<sup>127</sup> the IBIA – regardless of the explicit language in the 1948 Act – determined that BIA could require prospective grantees to obtain tribal

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<sup>121</sup> 25 U.S.C. §§ 312-318.

<sup>122</sup> 700 F.2d at 550, 552-553, *cert. denied*, 464 U.S. 960 (1983); *see also* 25 U.S.C. 312.

<sup>123</sup> *See* 700 F.2d at 553 n.1.

<sup>124</sup> 25 U.S.C. § 321.

<sup>125</sup> *Id.* at 54-56. Importantly, a major crux of the Board’s decision was also that, regardless of whether the IBIA disagreed with the Secretary’s duly promulgated regulations interpreting the 1904 Act, the IBIA is prohibited from declaring promulgated regulations invalid. *See* 12 IBIA at 56.

<sup>126</sup> *Id.* at 58; *see also Northern Natural Gas v. Minneapolis Area Dir., BIA*, 15 IBIA 124, 127 (1987) (Holding that a right-of-way applicant was required to obtain an IRA tribe’s consent prior to the issuance of a right-of-way under either the 1904 Act or the 1948 Act).

<sup>127</sup> The IBIA’s decision was affirmed, on other grounds, by both the District Court of the District of Columbia and the Court of Appeals for the District of Columbia. *See* 737 F.Supp. 103 (1990); *see also* 925 F.2d 490 (1991). Neither federal court addressed the IBIA’s findings with respect to the requirement that prospective grantees obtain non-IRA tribes consent to 1948 Act rights-of-way.

consent from non-IRA tribes even where the prospective grantee was seeking a 1948 Act right-of-way. The Board dismissed the two cases discussed above in a mere footnote, and failed to examine the IRA specific language in the 1948 Act. As such, the *Star Lake* decision should be afforded little weight.

Notwithstanding the IBIA's poorly reasoned determination in *Star Lake*, it is clear that all adjudicatory bodies tasked with reading 25 U.S.C. § 324, have determined that only IRA tribes must consent to the issuance of a 1948 Act right-of-way. In this vein, because only IRA tribes must consent to the issuance of such rights-of-way, only IRA tribes, assuming any tribe may do so, may require prospective grantees to recognize and adhere to tribal law and jurisdiction. BIA cannot seek to extend that power to non-IRA tribes where the express language of the 1948 Act prohibits such an interpretation.

**4. Permitting Tribes and Indian Landowners to Unilaterally Terminate Federally Granted Rights-of-Way Is an Impermissible and an Unreasonable Interpretation of the 1948 Act.**

The Proposed Regulations would add provisions permitting tribes and Indian landowners to unilaterally "terminate" 1948 Act rights-of-way without the Secretary's involvement.<sup>128</sup> These proposed provisions are an impermissible interpretation of the 1948 Act for several reasons. First, the 1948 Act is silent on the subject. Second, unlike AIARMA, the 1948 Act does not recognize tribal law or the application of the same to 1948 Act rights-of-way. In addition, providing Indian landowners with termination rights is contrary to existing federal judicial precedent that has never been supplanted by subsequent legislative action.

For example, in 1983, the Ninth Circuit affirmatively declared that— regardless of the express terms of a surface lease – tribes are prohibited from unilaterally terminating interests in real property absent the Secretary's approval.<sup>129</sup> The Court affirmed a prior Board decision that reached the same conclusion, wherein the Board noted:

In a related subject area, it is recognized that cancellation of rights-of-way over tribally owned trust land requires Departmental action . . . This requirement is provided by regulation even though the [1948 Act] expressly addresses only the authority of the Secretary to grant such rights-of-way.<sup>130</sup>

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<sup>128</sup> See 79 Fed. Reg. 34472 (proposed 25 C.F.R. §§ 169.403, 169.404).

<sup>129</sup> See *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075-1076 (9th Cir. 1983), cert. denied, 464 U.S. 1017.

<sup>130</sup> See *Kuykendall v. Phoenix Area Dir.*, BIA, 8 IBIA 76, 88 n.20 (1980); see also *Whatcom County Park Board v. Portland Area Dir.*, BIA, 6 IBIA 196, (1977); *Brown County, Wisconsin*, 2 IBIA 320 (1974).

The District of Columbia Circuit reached a similar conclusion when addressing an individual Indian landowner's ability to cancel a surface lease approved by the Secretary stating:

It is plan that allottees do not control the leasing of their lands. First, they can only grant those leases which the Secretary approves . . . Second, they can grant leases only on terms and forms that the Secretary dictates . . . Third, an allottee *cannot cancel a lease without the Secretary's prior approval.*<sup>131</sup>

Two federal courts have thus expressly addressed the inability of Indian landowners to terminate real property interests that were previously reviewed and approved by the Secretary. Instead, only the Secretary may cancel such leases.

Importantly, BIA has previously recognized the impact of this controlling precedent in other contexts. As referenced above, in 1996, BIA revised a portion of the regulations governing mineral leasing on Indian lands, and when addressing a tribe's ability to cancel a mineral lease stated:

The mineral lease approved by the Secretary concerns land the Department has a statutory obligation to protect. The Secretary will review any and all information an Indian mineral owner may have concerning whether or not a lease should be cancelled but the final decision to cancel must remain with the Secretary: *See Yavapai-Prescott.*<sup>132</sup>

In 1996, BIA was aware, as it should be now, that tribes could not legally terminate real property interests approved by the Secretary.

Yet, and in the face of this precedent, the regulations governing surface leasing on Indian lands have subsequently been modified to grant tribes the ability to unilaterally terminate such leases. So, what could have changed? The answer is simple.

The intervening action with respect to surface leases was the enactment of AIARMA, which: (i) recognizes tribal law; and (ii) renders the same applicable to Indian surface leases, including a tribe's authority to unilaterally terminate surface leases if such power exists under tribal law. AIARMA is not, however, applicable to 1948 Act, and BIA may not lawfully incorporate AIARMA's provisions – or its interpretive regulations – and make the same applicable to rights-of-way granted under the 1948 Act. To restate, the 1948 Act, in direct contrast to AIARMA, is silent regarding BIA's recognition of tribal law and the applicability of tribal law to rights-of-way. BIA cannot interpret silence as *carte blanche* for

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<sup>131</sup> See *Brown v. United States*, 86 F.3d 1554, 1561-1562 (1996) (internal citations omitted) (emphasis supplied).

<sup>132</sup> See 61 Fed. Reg. 35634, 35450 (July 8, 1996).

BIA to impose inapplicable statutory pronouncements upon grants given by the Secretary under the 1948 Act.

There are also additional reasons for BIA not seeking, especially by regulatory action, to bootstrap AIARMA's tribal jurisdiction authorizations to the realm of BIA granted rights-of-way. Indian landowners grant surface leases impacting their beneficially owned estate, and the Secretary is only tasked with reviewing and approving those leases. In direct and unequivocal contrast the real property interest at issue in the Proposed Regulations, are directly *granted* by the fee interest owner, the United States. While one might be able to argue that an Indian surface owner may have the legal authority to terminate a surface lease because the surface owner is the lessor, this simply cannot be true for rights-of-way. It is the United States, as the *GRANTOR* of rights-of-way, which is the only entity authorized to cancel rights-of-way. Indian landowners possess no contractual relationship with right-of-way grantees and as such, simply cannot exercise the power to terminate or cancel a contract to which they are not a party.

Finally, but certainly a matter of importance, BIA has also overstepped its authority – as well as directly contradicted federal judicial precedent – in proposing Regulations that permit Indian landowners to terminate rights-of-way, which are considered non-Indian property for governance purposes.<sup>133</sup> The Supreme Court has affirmatively declared that tribal courts are absolutely without jurisdiction to adjudicate matters related to non-Indian real property, including rights-of-way.<sup>134</sup> Likewise, the Eighth Circuit Court of Appeals has affirmed that tribal courts are without jurisdiction to adjudicate claims related to 1948 Act rights-of-way and individual allotted land.<sup>135</sup>

BIA should, therefore, delete the provisions of the Proposed Regulations that seek to grant Indian landowners the power to terminate 1948 Act rights-of-way without the Secretary's involvement.

**5. Conclusion: the Proposed Regulations are an impermissible agency action, unauthorized by Congress.**

The Proposed Regulations include requirements that reside outside the legal authority bestowed upon BIA by the 1948 Act. Specifically, the 1948 Act does not vest tribes with

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<sup>133</sup> See 79 Fed. Reg. at 34472 (proposed 25 C.F.R. § 169.403).

<sup>134</sup> See *Plains Commerce*, 554 U.S. 316 (2008); see also *Kuykendall v. Commissioner of Indian Affairs and Yavapai-Prescott Tribe*, 9 IBIA 90 (1981) (“The Board’s decision notes . . . tribal trust lands administered by the Secretary, was under the terms of the lease and applicable regulations . . . beyond the subject matter jurisdiction of the tribal court to determine”).

<sup>135</sup> See *Fredericks v. Mandel*, 650 F.2d 144 (1981) (holding that tribal court was without jurisdiction to condemn individual allotted land for a 1948 Act right-of-way without the participation of the fee owner, the United States).

jurisdiction over non-Indian activities or conduct, nor does the 1948 Act recognize the applicability of tribal law or jurisdiction with respect to rights-of-way. The 1948 Act is also silent with regard to a tribe's or an Indian landowner's ability to unilaterally terminate rights-of-way granted by the United States absent the Secretary's direct involvement. BIA should not interpret such silence as a broad and sweeping legislative acquiescence to tribal law and jurisdiction; especially when to do so flies in the face of authoritative precedent on both subjects.

BIA's Proposed Regulations, thus, also include several impermissible interpretations of the 1948 Act – as well as provisions in direct conflict with existing federal judicial precedent – including, but not limited to, proposed provisions that: (i) recognize the applicability of tribal law and jurisdiction over non-Indian rights-of-way and non-Indian activities within the same; (ii) seek to vest tribes with jurisdiction over non-Indians; and (iii) grant tribes the unilateral authority to terminate rights-of-way without the Secretary's involvement. These proposed provisions run contrary to the *Chevron* decision, and should be deleted from the Regulations.

**D. CONGRESS HAS NOT REPEALED 25 U.S.C. §§ 312-22, AND BIA CANNOT UNILATERALLY DECIDE TO NO LONGER ISSUE RIGHTS-OF-WAY UNDER THESE STATUTES OR TO CONVERT EXISTING RIGHTS-OF-WAY ISSUED UNDER THESE STATUTES TO RIGHTS OF WAY UNDER THE 1948 ACT.**

Per the Proposed Regulation's "Executive Summary of Rule," one of the purposes of the Regulations is to "[c]larify [] the authority by which BIA approves rights-of-way [,] and [e]liminat[e] outdated requirements specific to different types of rights-of-way."<sup>136</sup> Moreover, the Regulations are "intended to streamline the procedures and conditions under which we will approve (i.e. grant) rights-of-way over and across tribal lands, individually owned Indian lands, and Government-owned lands, *by providing for the use of the broad authority under 25 U.S.C. 323-328, rather than the limited authorities under other statutes.*"<sup>137</sup> Although "clarifying" and "streamlining" regulations are valuable and important objectives, the Alliance is concerned that BIA has overstepped its authority by unilaterally deciding that BIA will no longer be implement several current and valid legislative enactments.

The statutory provisions regarding rights-of-way over Indian lands are codified at 25 U.S.C. §§ 311-28. These statutes reflect a series of legislative acts conferring authority on the Secretary to process and approve rights-of-way over Indian lands.<sup>138</sup> They include specific provisions dealing with highways, railways, telegraph and telephone lines, pipelines, and

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<sup>136</sup> See 79 Fed. Reg. at 34455.

<sup>137</sup> *Id.* at 34461 (emphasis added).

<sup>138</sup> See Matthew C. Godfrey, Emily Greenwald, & David Strohmaier, *Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948-2006*, prepared for the United States Department of Interior (July 7, 2006) at 3-8.

related rights.<sup>139</sup> Each of these provisions has its own set of particular requirements that are not perfectly interchangeable with each other or with the 1948 Act. Nevertheless, BIA relies exclusively on the 1948 Act in the Regulations; to the total exclusion of other right-of-way statutes that undoubtedly remain applicable to Indian lands.

When Congress passed the 1948 Act, it expressly considered the possibility that the 1948 Act could replace, rather than supplement, the prior rights-of-way authorities, and rejected such a result.<sup>140</sup> Instead, Congress specified that “Sections 323 to 328 of this title shall not in any manner amend or repeal . . . any existing statutory authority empowering the [Secretary] to grant rights-of-way over Indian lands.”<sup>141</sup> Put simply, “[t]he 1948 Act does not, by its express terms, amend or repeal any existing legislation concerning rights-of-way across Indian lands.”<sup>142</sup>

Congress, in enacting the 1948 Act decided that rights-of-way should still be available to grantees under 25 U.S.C. §§ 311-22.<sup>143</sup> BIA certainly does not possess unbridled power to decide whether to apply a federal statute.<sup>144</sup> BIA has a duty to “execut[e]” and “carry [] into effect” these provisions, and to maintain the “rules and regulations” necessary to so do.<sup>145</sup> 25 U.S.C. § 326 and 25 U.S.C. § 317, leave little doubt that Congress expected and instructed BIA to continue issuing rights-of-way under specific authorities other than the

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<sup>139</sup> 25 U.S.C. §§ 311-322

<sup>140</sup> This is particularly important when comparing 25 U.S.C. § 321, to the Proposed Regulation’s new taxation provisions that purportedly permit Indian tribes to tax non-Indian grantees. For example, in the pipeline context, 25 U.S.C. § 321 specifically states:

The compensation to be paid . . . shall be determined in such manner as the Secretary of the Interior may direct . . . And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, *not exceeding \$5 for each ten miles of line* so constructed and maintained.

(Emphasis supplied). Thus, in the pipeline context, by enacting 25 U.S.C. § 321, Congress specifically limited the tax rate that could be imposed on pipeline grantees. BIA, through regulatory rulemaking, now seeks to circumvent the intent of Congress in that regard.

<sup>141</sup> 25 U.S.C. § 326.

<sup>142</sup> *Nebraska Pub. Power Dist. v. 100.95 Acres of Land in Thurston Cnty., Hiram Grant*, 719 F.2d 956, 959 (8th Cir. 1983); *see also, Blackfeet Indian Tribe v. Montana Power Co.*, 838 F.2d 1055, 1059 (9th Cir. 1988) (“Since effect can be given to both the 1904 and the 1948 Acts, both should be applied.”).

<sup>143</sup> 25 U.S.C. § 326.

<sup>144</sup> *See Massachusetts v. E.P.A.*, 549 U.S. 497, 532-33 (2007); *see also See 25 U.S.C. § 371* (“The Secretary of the Interior shall make all needful rules and regulations, not inconsistent with sections 312 to 318 of this title, for the proper execution and carrying into effect of all the provisions of said sections.”).

<sup>145</sup> *Id.*

1948 Act. BIA cannot now abandon its duties under the earlier statutes and opt to remove them from the right-of-way process.<sup>146</sup>

Further, the rulemaking process is not an appropriate tool for determining that these non-1948 Act statutory provisions, which Congress formally chose not to repeal, are confusing or outdated, or for BIA to refuse to implement.<sup>147</sup> A decision not to exercise statutory authority because “it would be unwise to do so at this time . . . rests on reasoning divorced from the statutory text.”<sup>148</sup> The fact that an agency has substantial discretion in how and when to apply its authority is also “not a roving license to ignore the statutory text.”<sup>149</sup> “It is but a direction to exercise discretion within defined statutory limits.”<sup>150</sup> Stated differently, “the fact that later-arising circumstances cause a statute not to function as Congress intended does not expand the congressionally-mandated, narrow scope of the agency’s power.”<sup>151</sup>

As a consequence, BIA’s motives for essentially repealing non-1948 Act right-of-way statutes out of existence notwithstanding, BIA simply is without authority to avoid its responsibilities under those statutes or to declare that entities seeking rights-of-way under those statutes are now prohibited from doing so. BIA should, accordingly, revise the Proposed Regulations to recognize the continuing effectiveness of every non-1948 Act right-of-way enactment, and promulgate regulations under which those statutes may be implemented.

**E. THE PROPOSED REGULATIONS ARE ARBITRARY, CAPRICIOUS, AND OTHERWISE NOT IN ACCORDANCE WITH LAW.**

**1. The Proposed Regulations Change Long-Standing Agency Policy and Binding Board Decisions Without Explanation.**

Under the APA, agency action must be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>152</sup> This standard also applies to an

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<sup>146</sup> 43 U.S.C. §§ 959, 961 also pertain to rights-of-way within Indian reservations, yet, BIA ignores these statutory provisions via the Proposed Regulations as well.

<sup>147</sup> *Terran ex rel. Terran v. Sec’y of Health & Human Servs.*, 195 F.3d 1302, 1312 (Fed. Cir. 1999) (“The Constitution does not authorize members of the executive branch to enact, amend, or repeal statutes.”).

<sup>148</sup> *Massachusetts v. E.P.A.*, 549 U.S. at 532.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*; see also *Texas v. United States*, 497 F.3d 491, 509-10 (5th Cir. 2007)(quotation omitted) (“[T]he authority Congress there delegated to the [BIA] only allows prescription of regulations that implement specific laws, and that are consistent with other relevant federal legislation.”).

<sup>151</sup> *Id.* at 504.

<sup>152</sup> 5 U.S.C. § 706(2)(A).



agency's attempt to modify long-standing policy by rescinding regulations embodying such policy. The Supreme Court has held that where an agency rule lacks sufficient explanation for its decision or failed to consider an important aspect of the problem, the agency action is arbitrary and capricious.<sup>153</sup>

**a. BIA is prohibited by administrative *res judicata* from changing prior policy determinations rendered by IBIA.**

The IBIA specifically recognizes the concept of administrative *res judicata*, whereby the Board, or an agency, is prevented from reconsideration of a final decision.<sup>154</sup> In the instant case, the Board has previously rendered numerous final decisions determining: (i) federal jurisdiction is supreme within rights-of-way;<sup>155</sup> (ii) BIA is not bound by tribal decisions involving the validity or enforceability or federally granted rights;<sup>156</sup> and (iii) rights-of-way are freely assignable and may be mortgage without additional consents or approvals.<sup>157</sup> At no point did BIA – who was a party in each matter – appeal the Board's final determinations. As such, these Board decisions are binding on BIA and administrative *res judicata* precludes BIA from altering the outcome of the decisions by simply promulgating contrary regulations.

**b. Prior BIA Policy Significantly Contrasts With the Proposed Regulations.**

The Proposed Regulations would: (i) alter requirements and consents for approval; (ii) apply arduous and impossible right-of-way assignment requirements (where prior policy endorsed freely assignable rights-of-way); (iii) impose extremely stringent right-of-way mortgage requirements; and (iv) provide for tribal jurisdiction (where prior policy endorsed solely the application of federal law and excluded tribal law). All of these proposed changes conflict with previously endorsed BIA and Board policy.<sup>158</sup> Frankly, these, and other, massive alterations in the Proposed Regulations appear without explanation or foundation. Such a drastic change in long-standing policy is simply

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<sup>153</sup> *Motor Vehicle Manufacturers Assoc'n v. State Farm Manual Automobile Ins. Co.*, 463 U.S. 29, 41-44 (1983); see also *Intr'n'l Ladies' Garent Workers' Union v. Donovan*, 722 F.2d 795, 799 (D.C. Cir. 1983).

<sup>154</sup> See *Lowe v. Acting Eastern Okla. Regional Dir.*, 48 IBIA 155, 157-158 (2008); see also *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); see also *Taylor v. Heckler*, 765 F.2d 872, 876 (9th Cir. 1985); *Scammerhorn v. Railroad Retirement Board of United States*, 748 F.2d 1008, 1010 (5th Cir. 1984).

<sup>155</sup> *Utu Utu Gwaitu Paiute Tribe*, 17 IBIA 78 (1989).

<sup>156</sup> See *Del-Rio*, 46 Fed. Cl. 683 (Ct. Cl. 2000)' see also *Citation v. Acting Navajo Reg'l Dir.*, BIA, 57 IBIA 234 (2013) (holding BIA is not required to comply with tribal law).

<sup>157</sup> *City of Elko*, 18 IBIA 54 (1989).

<sup>158</sup> See, e.g. *Utu Utu Gwaitu Paiute Tribe of Benton Paiute v. Sacramento Area Director*, 17 IBIA 78 (1989); *City of Elko, Nevada v. Acting Phoenix Area Director*, 18 IBIA 54 (1989).

improper when not supported in law or fact, and BIA has failed to inform those impacted by the changes as to the rationale underlying BIA's new and heretofore unknown policies.<sup>159</sup>

If not barred by administrative *res judicata*, BIA must at least explain the Proposed Regulations and provide supporting evidence for the contrary standards contained therein. A court reviewing the Proposed Regulations will require BIA to supply rationale for rescinding prior policies and rules, and will inquire as to whether BIA addressed other, reasonable options and explained why such options were rejected. Such an account is necessary to satisfy the "quintessential aspects of reasoned decision making."<sup>160</sup> If no such account is available – or if the explanation unsatisfactorily supports BIA's discretionary about-face – then the Regulations are arbitrary, capricious, and an abuse of discretion.<sup>161</sup> Because BIA has entirely failed to provide any explanation or evaluate any alternatives in its change to long-standing policy, the Regulations are arbitrary, capricious and an abuse of BIA's discretion.

## **2. BIA's Proposed Regulations Run Afoul of NEPA.**

### **a. Under NEPA, BIA Must Conduct an Environmental Assessments.**

NEPA<sup>162</sup> requires BIA to conduct, at the very least, an environmental assessment ("EA") of the Regulations' effects. NEPA's procedural requirements are triggered by a major federal action, such as the Proposed Regulations.. Furthermore, according to BIA's own internal procedures, NEPA documentation is required if: (i) BIA accomplishes a major federal action and BIA funding or approval is necessary to implement the action; (ii) the action will affect the human environment and can be meaningfully evaluated; and (iii) the action is not exempt from NEPA.<sup>163</sup> Thus, pursuant to BIA's own recommended analysis, NEPA documentation is required.

First, the Proposed Regulations qualify as a major federal action. The Council on Environmental Quality ("CEQ") regulations, which BIA has adopted, define a major federal action to include "new or revised agency rules, regulations, plans, policies, or

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<sup>159</sup> See *Motor Vehicle Manufacturers, Assoc'n*, 463 U.S. at 41-44.

<sup>160</sup> *Intrn'l Ladies' Garment Workers' Union*, 722 F.2d at 818.

<sup>161</sup> *Id.*

<sup>162</sup> 42 U.S.C. § 4321-4347.

<sup>163</sup> 59 IAM 3-H, § 2.1.

procedures.”<sup>164</sup> The Regulations clearly fit this definition and, therefore, require NEPA compliance.

Second, the Proposed Regulations will affect the human environment. CEQ Regulations state that “[h]uman environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment” and that effects shall include both direct and indirect.<sup>165</sup> As described throughout this comment, the Proposed Regulations will create significant environmental effects on the human environment. Right-of-way applicants will likely relocate or side-step rights-of-way over Indian lands, thereby creating significant impacts on the surrounding environment. Moreover, the application of tribal jurisdiction and law to rights-of-way could significantly impact the treatment of endangered species and species management programs on those lands. In addition, newly created consents and approvals, imposed for the first time in the Proposed Regulations, will alter how right-of-way applicants and grantees do business and change the extent of grantees’ property interests. Therefore, due to the clear effect on the human environment, NEPA documentation and process were required.

Third, and finally, NEPA documentation was required because the Proposed Regulations are not an exempt action. BIA has developed a list of Categorical Exclusions (“CEs”), which are categories of actions that BIA has determined do not have a significant effect on the quality of the human environment and for which neither an EA nor an Environmental Impact Statement (“EIS”) is required.<sup>166</sup> While BIA’s published list of CEs includes individual rights-of-way in certain limited situations, that exclusion is limited to individual rights-of-way (e.g., rights-of-way inside another right-of-way, service line agreements to an individual residence or building, and renewals, assignments and conversions of existing rights-of-way).<sup>167</sup> The exclusion does not cover, or excuse, the required NEPA analysis of the significant impact an entire change in policy will have on the human environment, and that encompasses the thousands of miles of rights-of-way that presently exist and will exist in the future.

**b. BIA’s Improper Assertion That NEPA Does Not Apply is Arbitrary, Capricious, and an Abuse of Discretion.**

The Proposed Regulations baldly state that “[t]his rule does not constitute a major Federal action significantly affecting the quality of the human environment because these are ‘regulations whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaning analysis and will later be subject to the NEPA process, either

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<sup>164</sup> 40 CFR 1508.18 (CEQ Regulations defining Major Federal Action); *see also* Indian Affairs National Environmental Policy Act Guidebook, 59 IAM 3-H, § 2.1.

<sup>165</sup> 40 CFR §§ 1508.18 (definition of human environment), 1508.08 (definition of effects).

<sup>166</sup> *See* 40 CFR 1508.4; 43 CFR 46.205; *see also* 59 IAM 3-H, § 4.

<sup>167</sup> 516 Department of Interior Manual 10.5.

collectively or case-by-case.”<sup>168</sup> This assertion is made without any substantiation or explanation and is false, misleading, and a clear abuse of discretion.

NEPA demands that agencies consider every significant aspect of environmental impacts associated with a proposed action, and, thereafter, inform the public that it has indeed considered environmental concerns in its decision-making process.<sup>169</sup> BIA could, and should, prepare a programmatic-level environmental impact statement (“PEIS”) to analyze the potential environmental effects of the Regulations and reasonable alternatives. BIA fails to substantiate, in any way, its contention that the environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful discussion. In fact, agencies often conduct PEIS in relation to proposed rules and agency action,<sup>170</sup> and the Regulations should be no different. The Proposed Regulations (in BIA’s own words) seek to “comprehensively update and streamline the process for obtaining BIA grants of rights-of-way on Indian land,” and a PEIS is necessary to evaluate alternatives in this comprehensive redrafting. Additionally, the case-by-case analysis that BIA alternatively proposes will lead to an insufficient and flawed consideration of environmental impacts. As stated above, BIA has determined that many federal grants of rights-of-way are Categorically Excluded from NEPA,<sup>171</sup> and, therefore, will never be subject to the NEPA process.

Because BIA fails to provide any explanation or support for its assertion that the environmental impacts of the Proposed Regulations are too broad for assessment and because NEPA and the Department’s own regulations generally require that an EA be conducted for proposed rules, BIA’s decision to not adhere to the NEPA process is arbitrary, capricious, and an abuse of discretion.

### **3. BIA’s Proposed Regulations Fail to Clearly Recognize Existing Limitations on Consent.**

In addition the new consent requirements for assignments and mortgages discussed in Section E.2. above, BIA’s Proposed Regulations also fail to clearly recognize existing

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<sup>168</sup> 79 CFR 34,460 (June 17, 2014) (citing 43 CFR 46.210(j)).

<sup>169</sup> See *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755 (9th Cir. 2014); *Native Village of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir. 2014); *Center for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012)(NEPA requires that the agency take a “hard look” at the likely effects of a proposed action; taking a ‘hard look’ includes considering all foreseeable direct and indirect impacts; and an EA must fully assess the cumulative impacts of a project or rule).

<sup>170</sup> See, e.g., U.S. Fish and Wildlife, ANPR/NOI, 79 Fed Reg 10,080 (February 12, 2014)(an Advance Notice of Proposed Rulemaking and Notice of Intent to prepare an EIS on regulatory options for management of activities associated with nonfederal oil and gas development on lands and waters of the National Wildlife Refuge System).

<sup>171</sup> 516 DM 10.5.

consent limitations related to tribally-owned fractional interests in allotted lands. Unlike tribal lands, which the United States holds in trust specifically and solely for a tribe, allotted lands are held in trust for a group of individual Indians.<sup>172</sup> Where an Indian tribe incidentally owns a portion of an allotment, the tribe is treated as a tenant in common and similar to an individual Indian owner, not a tribe.<sup>173</sup> Due to this difference, federal statutes clearly distinguish between the consent requirements related to tribal lands versus tribally-owned interests in allotted lands.<sup>174</sup> With respect to tribal land, tribal consent is required and the tribe is a party to the agreement; but, with respect to allotted land where a tribe incidentally possesses a fractionated interest, the tribe is a tenant in common with the other owners, consent is not required, and the tribe is not a party.<sup>175</sup> In fact, even in the context of a tribally-held undivided interest in allotted land, a tribe is not treated as a party agreements or leases on that land and consent is not required.<sup>176</sup>

Proposed § 169.107(d) impliedly recognizes this distinction by binding non-consenting Indian tribes with respect to any tribally-owned fractional interests. However, the regulations should clearly respect and maintain the distinction so as to expressly exclude tribal consent requirements for fractional interest in allotments. Similarly, proposed §§ 169.002, 106, 107, and 108 should all clearly articulate that tribal consent is required for a right-of-way across *tribal land*; yet, tribal consent is not required by a right-of-way across individually owned Indian land where a tribe possesses less than a majority interest in the same. Phrased differently, with respect to individually owned Indian land, tribal consent is only required where a tribe possesses the majority of the fractionated ownership of the same.

Similarly, 25 U.S.C. 357 permits the condemnation of allotted lands for “any public purpose” authorized by state law “in the same manner as land owned in fee may be

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<sup>172</sup> See *Cohen’s § 16.03[1]*. *U.S. v. Clarke*, 445 U.S. 253 (1980). Likewise, the Alliance understands that some individuals have taken the position that the 1948 Act specifically prohibits BIA from granting a right-of-way over individually owned Indian lands where a tribe possesses a minority interest without the tribe’s consent. See 25 U.S.C. § 324. These individuals, however, fail to read 25 U.S.C. § 2218(a)(1) which reads “[n]otwithstanding any other provision of law, the Secretary may approve any lease or agreement that affects individually owned allotted land.” (Emphasis supplied). See also 25 U.S.C. §§ 2218(c), (d)(1)(A), (d)(2)(A). Furthermore, 25 U.S.C. §§ 2218(f), (g) make it clear that the Indian Land Consolidation Act, 25 U.S.C. §§ 2213-2218, could have, and indeed did, modify portions of the 1948 Act because the 1948 Act is specifically not addressed in either provision.

<sup>173</sup> See, e.g., Indian Land Consolidation Act, 25 U.S.C. §§ 2213-2218.

<sup>174</sup> *Id.*

<sup>175</sup> See *Id.* at (b)(2)(B) and (d)(2)(B), limiting the treatment of an Indian tribe as the consenting owner of an interest in allotted land. See also, § 2213(a) which states that an Indian tribe “*may*, as a tenant in common with the other owners of the trust or restricted lands, lease the interest, sell the resources, [or] consent to the granting of rights-of-way.”

<sup>176</sup> 25 U.S.C. § 2213(c).

condemned and the money awarded as damages shall be paid.” As referenced above, allotted lands are *not* tribal lands. With respect to both land classifications, however, fee title is held solely by the United States. Hence, even if an individual Indian allotment is burdened by a tribal interest, such lands may still be condemned under state law because: (i) the land is, nevertheless, still an allotment; and (ii) Congress explicitly permitted condemnation actions against the fee title owner of allotments, the United States.<sup>177</sup>

The exclusive right to extinguish Indian title resides solely in the United States.<sup>178</sup> Congress may provide for the condemnation of Indian lands, and the taking of Indian tribal lands may be authorized by a general statute without a specific reference to such lands.<sup>179</sup> In exercising its plenary authority over Indian affairs, in 1887 Congress enacted the General Allotment Act.<sup>180</sup> The impacts of allotment are well addressed in federal case law. Tribal authority over the lands only extends to lands where tribes exercise “absolute and undisturbed use and occupation.”<sup>181</sup> After allotment, tribes no longer possess absolute and undisturbed use and occupation of lands allotted to individual Indians; meaning the same became lands owned by individual Indian as allotments, and not lands over which a tribe maintains complete beneficial ownership and control.<sup>182</sup> A tribe’s subsequent reacquisition of an interest in an allotment does not change the character or nature of the allotment, nor does the acquisition of a fractionated interest once again vest the tribal fractionated owner with absolute and undisturbed use and occupation; potentially to the exclusion of the rights of the individual Indians holding an interest in that same allotment.<sup>183</sup> Individual Indian allotments, regardless of potential fractionated tribal ownership in therein, are subject to condemnation in accordance with 25 U.S.C. § 357 because the land is allotted land held by individual owners, one of whom may an Indian tribe.<sup>184</sup>

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<sup>177</sup> See *State of Minnesota v. United States*, 305 U.S. 382 (holding that authorization to condemn property in which the United States has an interest confers by implication permission to sue the United States).

<sup>178</sup> *Johnson v. McIntosh*, 21 U.S. 543 (1823).

<sup>179</sup> See *United States v. 10.69 Acres of Land, More or Less, In Yakima County*, 425 F.2d 317, 320 (9th Cir. 1970); see also *Choate v. Trapp*, 244 U.S. 665 (1912).

<sup>180</sup> 25 U.S.C. § 331 *et seq.*

<sup>181</sup> *Montana v. United States*, 450 U.S. 544, 559 (1981); see also *South Dakota v. Bourland*, 508 U.S. 679 (1993) (holding that once tribal land passes out of tribal ownership, the tribe loses unilateral control over the same).

<sup>182</sup> See *Yakima v. Confederate Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 264 (1992) (holding that by enacting the Indian Reorganization Act, Congress “chose not to return allotted land to pre-General Allotment Act status” (emphasis in original)).

<sup>183</sup> See *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (holding unlawfully conveyed tribal land that was subsequently reacquired by the tribal owner was still subject to state and local law).

<sup>184</sup> A tribe’s fractionated interest in an allotment is also not protected by sovereign immunity. 25 U.S.C. § 357 is an explicit waiver of the United States sovereign immunity as

Furthermore, it is well understood that the United States possesses fee ownership of allotted lands and that 25 U.S.C. § 357 is a direct waiver of the United States sovereign immunity. For this reason, 25 U.S.C. 357 may be utilized to condemn allotted land irrespective of fractionated tribal ownership within the same, because the fee title holder, the United States, has waived its sovereign immunity from suit. It is well understood that “[p]roperty which the United States holds in trust for the Tribe cannot be taken without just compensation,”<sup>185</sup> but because the fee title owner has waived its immunity, fee title can be taken so long as the beneficial owner receives just compensation.

#### F. THE REGULATIONS VIOLATE THE TAKINGS CLAUSE OF THE CONSTITUTION

BIA has chosen to promulgate the Proposed Regulations at a time when rights-of-way on Indian lands may be of their highest importance to the economic well-being in the history of the United States. For this reason, any portions of the Proposed Regulations that would frustrate continued development of Indian lands, and thereby also adversely impact mineral development and energy transportation within the United States, should be viewed with substantial disfavor.<sup>186</sup> In this regard, it seems well recognized that:

America relies on an aging electrical grid and pipeline distribution systems, some of which originated in the 1880s. Investment in power transmission has increased since 2005, but ongoing permitting issues, weather events, and limited maintenance have contributed to an increasing number of failures and power interruptions. While demand for electricity has remained level, the availability of energy in the form of electricity, natural gas, and oil will become a greater challenge after 2020 as the population increases. Although about 17,000 miles of additional high-voltage transmission lines and significant oil and gas pipelines are planned over the next five years, permitting and siting issues threaten their completion.<sup>187</sup>

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the fee owner, *see Minn. v. U.S.*, 305 U.S. 382, and surely Congress would not intend to waive the supreme sovereign’s immunity and not the immunity of a secondary sovereign. Therefore, when a tribe reacquires an interest in individual allotted lands, the tribe accepts its interest knowing its sovereign immunity with respect to condemnation of the same has been expressly waived by Congress.

<sup>185</sup> *United States v. City of Pawhuska*, 502 F.2d 821 (10th Cir. 1974) (holding city could inadvertently condemn a tribe’s interest in subsurface minerals so long as the tribe received just compensation for the same).

<sup>186</sup> The Alliance believes this further exemplifies why BIA should have complied with NEPA and conducted, at a minimum, an EA analyzing the Regulations and potential alternatives.

<sup>187</sup> ASCE, 2013 Report Card for America’s Infrastructure: Energy, <http://www.infrastructurereportcard.org/a/documents/Energy.pdf>

As such, the Proposed Regulations should enhance the acquisition and processing of rights-of-way on Indian lands. Regrettably, as is illustrated below, that does not appear to be the case.

### **1. The Proposed Regulations are an Unlawful Taking.**

The Proposed Regulations, as previously noted, would apply tribal jurisdiction and hinder assignments of both existing rights-of-way and rights-of-way awaiting approval.<sup>188</sup> However, as the Supreme Court has made abundantly clear, 1948 Act rights-of-way are outside tribal territorial jurisdiction, such that tribes may not regulate non-Indian activity within the same.<sup>189</sup> The Court has also declared that the right to alienate interests in real property, such as rights-of-way, is one of the most fundamental property rights.<sup>190</sup> The character of the Proposed Regulations is, therefore, extraordinary.<sup>191</sup> By purporting to confer tribal jurisdiction over existing grantees and by imposing landowner and BIA consent requirements on grantee assignments and mortgaging of property interests – where no such jurisdiction or discretion existed before – BIA seeks to unilaterally subject grantees to tribal sovereignty and restrain alienation of grantees’ property interests embodied in *existing* rights-of-way. Indeed, the Proposed Regulations would bring grantees and tribes into privity where none existed before. As such, the Regulations will result in an unlawful taking of grantee’s private property.

The Takings Clause guarantees protection of private property rights from uncompensated government appropriation.<sup>192</sup> The Supreme Court has identified several theories under which a plaintiff may challenge a government regulation as an unconstitutional taking, including: (i) *per se* physical occupation;<sup>193</sup> (ii) categorical taking causing deprivation of all economically beneficial uses;<sup>194</sup> (iii) a regulatory taking;<sup>195</sup> and (iv) a land-use exaction taking.<sup>196</sup> While the first two theories may not be applicable here, the latter two undoubtedly come into play.

### **2. The Proposed Regulations Would Affect an Unlawful Regulatory Taking.**

As regards regulatory takings, the Supreme Court has found that a regulation which does not result in a physical occupation or total deprivation of property may, nonetheless,

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<sup>188</sup> 79 Fed. Reg. 34455, 34464.

<sup>189</sup> See *Strate*, 520 U.S. at 456.

<sup>190</sup> *Hodel v. Irving*, 481 U.S. 704, 716 (1987); *Babbitt v. Youpee*, 519 U.S. 234 (1996).

<sup>191</sup> *Hodel*, 481 U.S. at 716.

<sup>192</sup> U.S. Const., amend. V.

<sup>193</sup> See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>194</sup> See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>195</sup> See *Penn Central Transp. Co., v. City of New York*, 438 U.S. 104 (1978).

<sup>196</sup> See *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1994); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).



affect a taking.<sup>197</sup> To determine whether a regulatory taking has occurred, courts balance three factors identified in *Penn Central*, the "polestar" of regulatory takings jurisprudence.<sup>198</sup> *Penn Central* examined whether a regulation had gone "too far" in a manner which reached the core purpose of the Takings Clause, *i.e.*, to prevent government from forcing some people alone to bear public burdens which should be borne by the public as a whole. The *Penn Central* factors consist of:

- 1) "[t]he economic impact of the regulation on the claimant";
- 2) the extent of interference with "distinct investment-backed expectations"; and
- 3) "the character of the governmental action."<sup>199</sup>

The Court has explained that, under *Penn Central*, the aim of the analysis is to identify regulatory actions that are functionally equivalent to the classic taking, in which government directly appropriates private property or ousts the owner from her domain. Each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. Further, the inquiry "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."<sup>200</sup> Accordingly:

Whenever a governmental act coercively acquires entitlements—such as ownership, leasehold, or easement—either explicitly, by registering such rights in the government's or a third party's name, or implicitly, by using rights and prerogatives that are regularly considered to represent the core of such rights—by entering land to set up public facilities and thus undermining the right to exclude, by making certain interventionist decisions about the use of the resource, or by prohibiting or limiting

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<sup>197</sup> See, *e.g.*, *Penn Central*, 438 U.S. 104 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (stating, "[W]hile property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.").

<sup>198</sup> See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005); *Penn Central*, 438 U.S. at 104, 124-25, 127-28, 135; see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("Our polestar...remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings."); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Agency*, 535 U.S. 302, 336 (2002) (quoting "polestar" language); cf. Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729, 750- (2008).

<sup>199</sup> *Penn Central*, 438 U.S. at 124.

<sup>200</sup> See *Lingle*, 544 U.S. at 539-40.

certain forms of asset transfers—the owner's remaining rights are viewed as crippled.<sup>201</sup>

The Proposed Regulations, as noted above, purport to confer tribal jurisdiction upon grantees of existing rights-of-way, impose consent requirements upon assignments where none existed before, and otherwise modify existing property interests held by grantees. As indicated in *Loretto*, “property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury.”<sup>202</sup> The Proposed Regulations thus would affect a taking upon grantees by removing substantive rights in specific property obtained prior to the promulgation of the Regulations.<sup>203</sup>

### 3. The Proposed Regulations are an Unlawful Exaction Taking.

The Supreme Court has also recognized the notion of an exaction taking. An exaction taking occurs when a government places impermissible conditions on approval of a land use or activity. Such conditions can include unconstitutional exactions, in that “the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.”<sup>204</sup> Like regulatory takings, exaction takings require a balancing of several factors, including whether the:

- condition furthers a substantial/legitimate governmental interest;
- condition is related to the interest that is served (“essential nexus”); and
- impacts of the land use activity are roughly proportional to the condition imposed.<sup>205</sup>

That is, Court precedent “considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts.”<sup>206</sup> Court

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<sup>201</sup> Amnon Lehari, *The Taking/Taxing Taxonomy*, 88 TEX. L. REV. 1235, 1239-40 (2010) (citing *Loretto*, 458 U.S. at 434-36; *Wash. Legal Found.*, 524 U.S. 170; *Hodel*, 481 U.S. 715-17).

<sup>202</sup> *Loretto*, 458 U.S. at 436. See also *Florida Rock Industries, Inc. v. United States*, 45 Fed.Cl. 21 (1999) (A “partial taking” occurs when a regulation singles out a few property owners to bear burdens, while benefits are spread widely across the community.).

<sup>203</sup> See *Louisville Joint Stock Land Bank v. Radford*, 295 US 55, 590, 601-02 (1935); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 179 (Serious interference with the common and necessary use of property effects a constitutional taking.) (1871); cf. *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (A taking occurred when United States asserted total dominion and control over coal mines.).

<sup>204</sup> *Dolan*, 512 U.S. at 385.

<sup>205</sup> See *Dolan*, 512 U.S. at 387-91.

<sup>206</sup> *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999).

exaction precedents, as a result, "enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in 'out-and-out ... extortion' that would thwart the Fifth Amendment right to just compensation."<sup>207</sup>

Requiring grantees to consent to tribal jurisdiction or pay newly undefined "market values" as a condition of obtaining a right-of-way, likely qualify as the "out-and-out extortion" the Court's exaction precedents are designed to prevent.<sup>208</sup> After all, where nonmembers have a right to be in Indian country based upon land ownership, presumptions in favor of tribal jurisdiction are reversed.<sup>209</sup> What's more, requiring grantees to either accept tribal jurisdiction or pay handsomely to avoid it, does not further a substantial or legitimate governmental interest, insofar as BIA has identified no such governmental interest in imposing such conditions on grantees. Rather, requiring grantees to pay extortionate fees for of rights-of-way to a separate sovereign or individual landowners effectively allows BIA to evade the protections of the Takings Clause.<sup>210</sup> Accordingly, there can be no essential nexus between conditioning approval of a right-of-way grant to such a "consensual" exercise of tribal jurisdiction over non-Indians or the requirement of payment to avoid the same.

#### **G. Mineral Development Provides Substantial Economic Benefits to Tribes and Allottees.**

The mineral reserves underlying tribal and allotted lands are significant. According to the Governmental Accountability Office ("GAO"), 13.2 million barrels of oil were extracted and sold from Indian lands in 2010, with the number increasing to 19.4 million barrels in 2011.<sup>211</sup> In addition, 249.4 million cubic feet of dry natural gas was extracted and sold from Indian lands in 2010, and that number increased to 250 million cubic feet by 2011. Furthermore, in 2010, 130 million gallons of wet natural gas liquids was extracted and sold from Indian lands, and that number increased to 140 million gallons in 2011.<sup>212</sup> The total sales value of these minerals was approximately \$2 billion in 2010 and \$2.8 billion in 2011.<sup>213</sup> These sales generated approximately \$408 million in Indian royalties in 2010, and

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<sup>207</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013).

<sup>208</sup> *Koontz*, 133 S. Ct. at 2596 ("Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.").

<sup>209</sup> COHEN'S HANDBOOK OF FED. INDIAN L. § 7.02.

<sup>210</sup> *Koontz*, 133 S. Ct. at 2604.

<sup>211</sup> Governmental Accountability Office, *Mineral Resources: Mineral Volume, Value, and Revenue*, encl. 1 (GAO-13-45R, Nov. 15, 2012) [Hereinafter, GAO Report].

<sup>212</sup> *Id.* at 23.

<sup>213</sup> *Id.* at 27. Unfortunately, the GAO Report does not include a calculation regarding the total sales from oil and gas operators on Indian lands. That said, such sales are also not insubstantial. For example, Red Willow Production ("Red Willow"), an operator owned by

\$538 million in Indian royalties in 2011.<sup>214</sup> Tribal and allottee mineral production, and monies associated with the same, thus, continue to increase; as does the supply of the products of that mineral production to citizens of the United States.

But Indian royalty dollars do not reflect the totality of revenue obtained in the form of oil and gas operators paid lease bonuses, lease rental payments, and tribal severance taxes. As the GAO makes clear, the revenues derived from such bonuses and rentals are large.<sup>215</sup> Rentals for Indian minerals must be at least \$2 an acre.<sup>216</sup> Most tribal severance taxes, which are imposed on total sales minus royalties earned, range from 7% to 10%. Moreover, tribes should have collected approximately \$112 million in tribal severance taxes in 2010, and \$158 million in 2011, assuming a 7% severance tax. When combined with royalty payments, these severance taxes would have generated approximately \$515 million for Indian mineral owners in 2010, and \$696 million in 2011. Tribes use these monies to pay for education, healthcare, law enforcement, roads, and other social and civil programs that are of critical importance to economically-depressed tribal communities. Programs critical to tribes and their members thus depend upon whether operators choose to develop tribal and allotted minerals.

The evidence is clear that operators already experience much greater rates-of-return and subsequent profits when developing state and fee lands – even those immediately adjacent to Indian lands. For this reason, the Alliance is concerned that the burdens imposed by the Proposed Regulations will only exacerbate this problem.

BIA fails to account for the fiscal resources and labor burdens that the Proposed Regulations will impose. BIA has “limited available staff” to implement the Proposed Regulations.<sup>217</sup> Yet, the Regulations will require significantly more labor than the current regulations. For example, the Proposed Regulations require several new BIA approvals that have not previously been required. Each of these approvals must first garner a BIA

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the Southern Ute Indian Tribe, holds an interest in over 1800 operated and non-operated wells with net production in excess of 70 billion cubic feet of gas equivalent per year. While Red Willow has expanded operations outside of the Southern Ute Indian Reservation, the San Juan Basin (which includes mineral resources owned by the Navajo Nation, the Ute Mountain Ute Tribe, and untold numbers of Indian allottees) remains the backbone of the company, representing over 55% of total net production. Red Willow operates wells in three states and owns non-operated interests in wells in an additional six states, with some interests located on other Indian lands.

<sup>214</sup> *Id.* at 44; *see also* 77 Fed. Reg. at 31661 (noting that tribal royalty payments increased in 2012 to \$561 million).

<sup>215</sup> GAO Report, 31.

<sup>216</sup> *Id.* at 34. It should be noted that the vast majority of Indian mineral leases require higher rentals and bonuses in excess of 2 dollars per acre, with many Indian mineral leases requiring rentals and bonuses that range from \$25 per acre to over \$8,000 per acre.

<sup>217</sup> 77 Fed. Reg. at 31663.

employee's review to determine if approval is in the Indian landowners' best interest. As another example, the Regulations require BIA to conduct assessments and adjustments for rights-of-way over allotted land. This would require BIA personnel to engage in such assessments, consult with the Indian landowner concerning the same, and then send adjustment notices to grantees. BIA does not have the staff or budget to perform such actions.<sup>218</sup>

The Proposed Regulations thus guarantee a decline in revenue for tribes and Indian people, many of whom depend upon royalties from oil and gas leases for their economic wellbeing. If the Proposed Regulations are implemented in their current form, operators and investors will avoid tribal and allotted lands, and will instead invest their capital in state and fee minerals and state and fee energy transportation and supply systems, many of which are immediately adjacent to Indian lands and tribal communities.<sup>219</sup> The production of state and fee minerals and provision of energy to state and fee lands, to the exclusion of Indian lands and Native Americans, will but further deny Indian communities with a valuable source of revenue and cost effective energy.

#### **I. THE PROPOSED REGULATIONS REPRESENT A BREACH OF TRUST TO INDIAN LANDOWNERS.**

The Alliance believes that the Proposed Regulations constitute a breach of trust. An Indian tribe or an allottee can bring an action for breach of trust upon showing either that statutory language created such a trust and plenary control over the resource at issue, or that a source of law places specific fiduciary duties upon the Government.<sup>220</sup> Under *United States v. Mitchell (Mitchell II)*, the Secretary has an enforceable fiduciary obligation to Indian mineral owners as a result of the Federal government assuming control or supervision of tribal resources or funds.<sup>221</sup>

Notably, several Courts of Appeals have held that, unlike the legal regime applicable to Indian coal leases, the "more elaborate statutory and regulatory framework" for oil and

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<sup>218</sup> BIA likely would have a better understanding of the fiscal resources and additional staff BIA would require to implement the Proposed Regulations had BIA complied with its NEPA obligations.

<sup>219</sup> Despite whether the Proposed Regulations will greatly increase the costs of drilling, production, operations, and transportation, the Proposed Regulations will certainly increase the delay operators and others experience when attempting to drill wells on Indian lands and to transport that production to market. This delay alone can severely impact an operator's or oil and gas transporter's rate-of-return, and motivate an operator or transporter to deploy capital elsewhere outside of Indian communities.

<sup>220</sup> *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003).

<sup>221</sup> 463 U.S. 206, 224 (1983).

gas leases creates enforceable fiduciary duties against the Secretary under *Mitchell II*.<sup>222</sup> Moreover, the IMLA imposes an explicit duty upon the Secretary “to maximize tribal revenues from reservation lands,”<sup>223</sup> while the IMDA reaffirms the trust obligations of the Secretary with respect to Indian mineral development agreements.<sup>224</sup> The Secretary is, therefore, obligated to treat tribal and allotted oil and gas leases in the manner intended by Congress, *i.e.* to ensure that Indian mineral owners enjoy “the greatest return” from their property.<sup>225</sup> What’s more, *Yavapai-Prescott Indian Tribe v. Watt* requires the Secretary to protect the long-term interests of tribes through rules that afford lessees stable and predictable rights.<sup>226</sup>

Neither the substance nor the process for the Proposed Regulations comport with trust principles. After all, the decision to develop minerals is driven in part by risk factors which include regulatory, environmental, and compliance matters presented by a particular project or investment.<sup>227</sup> As explained above, existing regulations already discourage operators from developing tribal and allotted acreage. The Proposed Regulations would only exacerbate such difficulties in the face of clear evidence showing that regulations undermine and delay Indian mineral production.

This is not to say that Indian mineral revenues have not increased in last two years, as indicated above, but rather that the Secretary has failed to ensure that Indian mineral owners enjoy “the greatest return” from their property through stable and predictable rules. And, since neither the Secretary nor BIA have addressed or balanced these considerations, let alone focused on the fact that tribes and allottees depend, respectively, upon oil and gas revenue to provide critical services to their people and to provide the basis for their economic wellbeing, both the Secretary and BIA appear to have breached their fiduciary obligations in this rulemaking. What’s more, by omitting from this rulemaking the fact that BIA is “the agency of the Department charged with fulfilling the trust obligations of the United States,”<sup>228</sup> the Secretary may have doomed the Proposed Regulations from the very start. Consequently, the Proposed Regulations, in their present form, cannot and should not go forward.

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<sup>222</sup> *Id.*; *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 56 Fed. Cl. 639, 646 (2003); see also *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857 (10th Cir. 1986).

<sup>223</sup> *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985) (internal citations omitted).

<sup>224</sup> See 25 U.S.C. § 2103(e).

<sup>225</sup> *Kenai Oil & Gas, Inc. v. Dep’t of Int.*, 671 F.2d 383, 386 (10th Cir. 1982); S. Rep. No. 75-985, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. 75-1872, 75th Cong. 3d Sess. 2 (1938).

<sup>226</sup> 707 F.2d 1072, 1075 (9th Cir. 1983).

<sup>227</sup> Patrick Garver, *Investment Decision Making in the Extractives Industry in “Challenging” Places*, 58 ROCKY MT. MIN. L. INST. 2-1, 2-12 – 2-13 (2012).

<sup>228</sup> *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 374 (1968).

**J. THE PROPOSED REGULATIONS VIOLATE SEVERAL CONGRESSIONAL ACTS AND EXECUTIVE ORDERS.**

BIA, the Office of Information and Regulatory Affairs and the Office of Management and Budget (“OMB”) have failed to comply with several legislative act and Executive Orders (“E.O.”) when analyzing the Proposed Regulations.

**1. E.O. 12866 (Regulatory Planning and Review).**

BIA and OMB have failed to comply with the legal obligations imposed by E.O. 12866. Pursuant to E.O. 12866, OMB is required to determine whether a proposed regulation will have an annual effect on the economy of \$100 million or *adversely affect Tribal governments or communities*. As detailed above, the Proposed Regulations will significantly impact tribal communities and result in costs well over \$100 million annually. Specifically, the Proposed Regulations *will* significantly adversely affect tribes, tribal governments, tribal communities, Indian mineral owners, and individual tribal members.

In terms of direct effects, tribes and individual Indian allottees will not receive mineral royalties if operators are induced to move their oil and gas exploration and production away from Indian lands. The Proposed Regulations will, without question, motivate and influence operators to move their activities away from Indian lands in favor of state and fee lands. In terms of indirect effects, operators already experience numerous impediments to exploring for an producing Indian minerals. These obstacles are not the fault of tribes, but rather due to the bureaucratic oversight if the BIA and Bureau of Land Management. Nevertheless, Indian mineral owners must compete with state and fee lands when seeking to have their minerals developed. If the Proposed Regulations are implemented, many operators may simply move their activities to adjacent state and fee lands, both within and outside reservation boundaries. This could have a disastrous result for tribal governments, who rely on mineral royalty payments to provide much needed services to their members.<sup>229</sup>

The Proposed Regulations will also have an enormous adverse financial impact on tribal communities that rely on oil and natural gas development. For far too long, tribes and their members have lived in a perpetual state of poverty, with little or no opportunities for employment. In recent years, though, the landscape has begun to change. There is not a single oil and natural gas producing tribe which has not implemented a strong Tribal Employment Rights Ordinance (“TERO”). TEROs require operators and other businesses to extend an Indian preference in hiring and contracting when conducting business on or near Indian reservations. TEROs have helped establish a new entrepreneurial middle-class on many mineral-producing reservations. This new middle-class is comprised of small

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<sup>229</sup> It is also possible that mineral development on adjacent state and fee lands could forever drain Indian minerals and make any future production of Indian minerals impossible, because the resources had already been depleted.

individual Indian-owned businesses. If Industry leaves or lessens its activities on Indian lands because BIA has rendered it too difficult and too expensive to obtain, transfer, and mortgage Indian land rights-of-way, these businesses and their associated jobs will certainly perish. In part because of TERO requirements, hundreds of Tribal members nationwide are currently employed in oil and natural gas related jobs. These jobs, and individual Indian-owned businesses, will disappear if the industry moves their operations elsewhere and no longer extend an Indian preference. Communities that are beginning to lift themselves out of poverty should not be forced to endure further set-backs.

In light of the foregoing, it is unclear how BIA and OMB could have determined that the Proposed Regulations will not adversely impact tribal governments or communities. Furthermore, BIA has not presented any evidence that BIA or OMB even examined the economic impact that the Proposed Regulations could have on tribes and tribal communities. BIA should withdraw the Proposed Regulations and conduct the appropriate examination and analysis, which the Alliance believes will show that the Proposed Regulations will have a significant adverse impact on tribes, tribal governments, tribal communities, and tribal members.

## **2. E.O. 13175 (Tribal Consultation).**

Executive Order 3175 dictates that BIA may not issue a regulation that has tribal implications without engaging in consultation with tribal officials early in the regulatory process. BIA has failed to follow its own tribal consultation policy, and BIA's failure to do so has resulted in the creation of burdensome regulations. The Energy Policy Act of 2005 states the "Secretary of the Interior *shall* . . . involve and consult with Indian tribes."<sup>230</sup> Given the complexity and the significance of the Proposed Regulations BIA should have engaged in meaningful consultation with tribes prior to the drafting and publication of the Proposed Regulations, but completely failed to do so. BIA failed to consult with tribes regarding the Proposed Regulations until after the same were published in the federal register.

To satisfy its consultation obligations, BIA *must* comply with Interior's Policy of Consultation with Indian Tribes (the "Consultation Policy") and the December 1, 2011 affirmation of those policies by the Secretary as embodied in Secretarial Order No 3317. The Consultation Policy requires BIA to follow the "Stages of Consultation" when proposed regulations will have an impact on tribal resources. The stages include: (i) Initial Planning Stage; (ii) Proposed Development Stage; and (iii) Implementation of Final Federal Action Stage. The initial stage directs BIA to engage and involve tribe "as early as possible" and to provide tribes with sufficient information so as to allow tribes to fully engage and assist in the development of the regulations.<sup>231</sup> During the initial stage, BIA should identify and describe the issue BIA believes requires regulation, include tribes in a meaningful dialogue where BIA will consider tribal views, and potentially discuss alternatives. Here, BIA failed

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<sup>230</sup> 25 U.S.C. § 3501n. (emphasis supplied).

<sup>231</sup> The Consultation Policy § VII.E.1.



to engage in the initial stage; rather, BIA drafted and published the Proposed Regulations with no prior tribal involvement. Such action is contrary to the Consultation Policy because BIA is required to meet with tribes *prior* to publishing the Proposed Regulations in order to allow tribes to discuss the need for regulations and suggest potential alternatives.<sup>232</sup>

Even if BIA has complied with the initial stage, BIA also failed to comply with the Proposed Development Stage whereby BIA is required to work with tribes to develop a consultation timeline. Not only did BIA fail to work with tribes to develop a consultation timeline, but BIA also failed to account for the impact and complexity of the Proposed Regulations. Put simply, BIA has failed to comply with the Consultation Policy and Secretarial Order No. 3317.

### **3. Regulatory Flexibility Act.**

As referenced above, a substantial number of small businesses serve the oil and gas industry, including its exploration and production on Indian lands. As a result of TEROs, many of these businesses are owned by individual Indians. The Alliance is of the view that the Proposed Regulations will result in the oil and gas industry abandoning – or severely limiting – its operations and expenditures within Indian reservations. This is true because the Proposed Regulations will make it extremely more burdensome and expensive to obtain Indian lands rights-of-way, including bonding needed for the same, the transfer or assignment of the same, and the mortgaging of the same. If operators are unable to obtain rights-of-way for access roads and well pad locations, let alone gathering lines, operators will significantly decrease operations within Indian reservations and all small businesses serving the industry will suffer. Indian owned businesses will be particularly impacted because operators will no longer extend a TERO preference outside an Indian reservation. BIA failed to examine or even consider these negative impacts on small businesses in drafting the Proposed Regulations.<sup>233</sup>

### **4. E.O. 13132 (Federalism).**

The Proposed Regulations will undoubtedly have a substantial direct effect on states and on the distribution of power and responsibilities among the various levels of government. For example, proposed 25 C.F.R. §§ 169.108, 169.109 will result in substantial and direct effects on state and local governments. This is particularly true with respect to proposed

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<sup>232</sup> Likewise, the Alliance is of the view that meeting with tribes would have strengthened BIA's NEPA analysis or perhaps have required BIA to at least perform an EA where BIA considered reasonable alternatives as compared to the current Proposed Regulations.

<sup>233</sup> Again, BIA's failure or refusal to conduct a proper NEPA analysis likely impacted BIA's failure to examine the effects the Proposed Regulations could have on small businesses and Indian owned small businesses in particular. If BIA had completed a proper NEPA analysis, impacts to these small businesses would likely have been included.

25 C.F.R. § 169.109. As several state entities have made clear to BIA during the public comment period, BIA's Proposed Regulations would limit a state's authority to impose certain taxes on non-Indian property within federally granted rights-of-way. Specifically, many states impose *ad valorem* taxes, as well as others, against non-Indian property embraced within federally granted rights-of-way. The revenue collected from these taxes is subsequently generally distributed to the local governments and communities where the rights-of-way are present. However, the Proposed Regulations seek to limit, or entirely prohibit, states from imposing such taxes. If the Proposed Regulations continue down this path, the result will be significant to many jurisdictions.

**5. E.O. 12988 (Civil Justice Reform).**

Similar to the item discussed immediately above, the Proposed Regulations will result in extensive litigation. For example, states and local governments will certainly litigate the validity of proposed 25 C.F.R. § 169.109 that seeks to limit – or entirely prohibit – states from taxing non-Indian property and activities within 1948 Act rights-of-way. Similarly, as addressed above, the proposed provision seeking to extend tribal law and jurisdiction to non-Indian rights-of-way and non-Indian activities therein will certainly result in more litigation in both tribal forums seeking to impose such laws, as well as federal forums being asked to adjudicate the validity of such laws, as well as BIA's improper recognition of the same. Put simply, the Proposed Regulations are not drafted in a manner to minimize litigation.