



New BIA Rule Could Have Unintended Consequences for Business in Indian Country

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The Bureau of Indian Affairs (BIA) has published a Final Rule to “comprehensively update and streamline the process for obtaining [BIA] grants of rights-of-way (ROWs) on Indian land, while supporting tribal self-determination and governance.” The rule becomes effective 30 days after publication of the Final Rule in the *Federal Register*.

The Final Rule replaces the existing BIA ROW regulations at 25 C.F.R. Part 169, which were promulgated over 40 years ago and most recently updated more than 30 years ago. According to the BIA, the Final Rule “reflects modern requirements for rights-of-way and the need for faster timelines and a more transparent process for BIA approval.” Moreover, the BIA asserts that the Final Rule “provide[s] more certainty to Tribes and the public, thereby promoting economic development and Tribal self-determination.”

While the BIA’s goals and intentions with the Final Rule are certainly laudable, and many provisions do simplify and expedite the process of negotiating and obtaining a ROW, certain changes made in the Final Rule may result in unintended consequences for both tribes and those trying to secure ROWs across Indian lands that could make the ROW process more complicated than it is now. What follows is a short summary of some of the most significant provisions of the Final Rule.

Retroactivity

Procedural provisions of the Final Rule are retroactive except where there is a conflict with specific language in the ROW grant or in an authorizing statute. While the Final Rule is not retroactive with respect to substantive provisions, the BIA does not actually articulate the difference between substantive and procedural provisions and the distinction between the two categories is not easily discerned. Accordingly, the Final Rule may lead to litigation between federally recognized Indian tribes and ROW grantees over which terms of an existing ROW agreement are substantive and which are procedural.

Duration of a ROW

The Final Rule vests with tribes the ability to negotiate the duration of a ROW grant. With respect to individual Indian landowners, the Final Rule provides general guidance for what it deems a “reasonable” ROW duration—20 years for oil and gas pipelines and 50 years for all other purposes. The Final Rule does state that the BIA will consider an alternative duration if it would benefit the Indian landowners, is required by another Federal agency, or if the ROW crosses tribal land and the tribe has negotiated a different duration.

Tribal Authority over ROWs

The Final Rule will require all future ROW grants to contain language affirming that a tribe (1) retains its existing jurisdiction over the land through which the ROW passes; (2) retains jurisdiction over activities and persons within the ROW; and (3) may have reasonable access to ROW lands to enforce conditions that a tribe included in the ROW grant. The BIA has noted in comments that it has not addressed the question of whether tribal laws apply to grants issued prior to the effective date of the Final Rule. However, the BIA has made clear that tribal law will apply to any assignment or amendment to an existing ROW grant.

Documentation of Prior Assignments

The Final Rule will require current assignees to provide the BIA with documentation of past assignments within 120 days of publication in the Federal Register. The purpose of the 120 day requirement is to allow the BIA and the landowners to update their records. Many past ROWs were assigned without the BIA or the landowner being notified—because the former BIA ROW regulations, unlike the Final Rule, did not require assignments to be approved by the land owner and the BIA. This new requirement may cause additional costs or administrative delays to ROW holders, who will now be required to trace the chain of title for their ROWs. It should be noted that “assignments that are the result of a corporate merger, acquisition, or transfer by operation of law are excluded” from the requirements that assignments must be approved by the grantors and the BIA.

Mortgaging a ROW

The Final Rule creates a significant new requirement with respect to mortgaging of ROWs. Under the prior rule, neither BIA nor grantee approval was required for mortgages of ROWs unless the ROW specifically required such approval. The Final Rule states that “a grantee may mortgage a ROW if the grant expressly allows mortgaging”, thereby encouraging the parties to address the mortgage issue in the grant document. The Final Rule provides that even if the grant expressly allows mortgaging, the grantee—in order to mortgage the ROW—must meet the consent requirements for the initial ROW unless the ROW provides for mortgages without consent. Since this provision applies to ROWs entered into prior to the effective date of the Final Rule, many existing ROW holders will find that their grants do not make any reference to mortgaging the ROW; this means that if existing ROW holders wish to mortgage ROWs in the future they will need to first amend the ROW to permit mortgaging and then obtain landowner and BIA consent to the specific mortgage.

Bonding

The Final Rule requires grantees to post a bond sufficient to cover the “estimated damages and remediation cost for any potential release of contaminants, explosives, hazardous material or waste.” This provision could increase substantially the bond required to construct an oil or gas pipeline across Indian lands. Since this provision is substantive it is not retroactive. However, it is unclear whether seeking assignment or amendment to the ROW grant would require the grantee to comply with the new bonding requirements or any other new substantive requirements contained in the Final Rule.

For more information

In addition to the provisions outlined above, the Final Rule includes many additional requirements with which tribes and entities seeking to do business with tribes should become familiar. Van Ness Feldman LLP has undertaken in-depth analysis of the Final Rule and is available to assist clients seeking to understand how the Final Rule will impact them. If you have any questions on the Final Rule, please contact [Edward Gehres](#), [Dan Press](#), [R. Scott Nuzum](#), or any other member of our [Native Affairs](#) practice group.

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