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Rights-of-Way for Access On and Through Tribal Lands

Congress has constitutional authority over issues relating to *federally recognized Tribes* (hereinafter, *Tribes*), which it has used to regulate access on and through tribal lands. In addition, the federal government has a *federal trust responsibility* to protect tribal treaty rights, lands, assets, and water resources on behalf of Tribes and tribal citizens (e.g., *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942)). Pursuant to these mandates, the Bureau of Indian Affairs (BIA) within the Department of the Interior (DOI) oversees the process for granting *rights-of-way* (ROWs) on or through tribal lands. An ROW is a kind of easement, or nonpossessory legal right to use or control land for a particular purpose. An ROW provides a right to the easement holder to pass through property owned by another—in this case, tribal land. This CRS product discusses BIA’s ROW process and selected issues for Congress.

Overview of Tribal Lands

The federal trust responsibility and various statutes make tribal lands a unique form of property in the American legal system. Each Tribe’s geographic location and history with the United States may impact current tribal land holdings. Many Tribes have *reservations*, which include lands reserved for a Tribe (or multiple Tribes) by treaty, statute, or other agreement. For tribally owned land within reservations, or in certain cases an area of land constituting the Tribe’s former reservation as defined by the Secretary of the Interior (25 C.F.R. §151.2), Tribes generally have the ability to decide how those lands are used.

Tribal reservations may include a mix of tribal land types, such as *trust lands*, which are lands or interests in land that are held in trust by the federal government (BIA holds title to the land) for the benefit of a Tribe or tribal citizen. Trust lands generally may not be alienated or encumbered (sold, gifted, leased, etc.) without federal approval. Tribes or individual tribal citizens also may own *fee lands*, meaning they hold title to the land and the land is under their control (private property), or *restricted fee lands*, where the Tribe holds title to the land but the land generally may not be alienated or encumbered without federal approval.

BIA’s Right-of-Way Process

Individuals and entities must apply for an ROW on or through tribal trust or restricted fee land using the BIA process outlined in 25 C.F.R. Part 169. Applicants may include non-tribal individuals or entities such as private companies or federal, state, or local governments. Tribes, tribal-affiliated entities, and individual tribal citizens with partial interests in land that is partially owned by other Tribes or tribal citizens also must apply.

BIA’s ROW process sets forth two steps for individuals and entities interested in an ROW: (1) ask BIA for a Title Status

Report (TSR), which shows the current ownership, land status, and encumbrances on the tribal land parcel in question and (2) use information from the TSR to submit an ROW application to BIA. Among other things, the application must include the following components:

- **Location:** Applicants must identify the location of the tribal tract or parcel, including a map and legal description.
- **Purpose:** BIA regulations identify a non-exhaustive list of potential purposes, including railroads, public roads and highways, water control and use projects, oil and gas pipelines, electric transmission and distribution systems, telecommunications, broadband, and conservation easements.
- **Duration:** BIA defers to the Tribe on the duration of an ROW. If the landowner is an individual, however, BIA generally considers 20 years to be a reasonable limit for the initial term for ROWs for oil and gas purposes, and a maximum of 50 years, inclusive of the initial term and any renewals, for ROWs for all other purposes.
- **Valuation:** An ROW may allow for any payment amount negotiated by the Tribe, and BIA defers to the Tribe and does not require a valuation if the Tribe submits a tribal authorization.
- **Record of Notice and Consent:** Applicants must submit records showing that notice of the ROW was provided to all landowners and that the applicant obtained the consent of the relevant Tribe or individual landowners.

Before granting an ROW, BIA must determine (1) that the ROW is in the best interest of the tribal landowners and (2) that the ROW complies with applicable federal environmental, land use, historic preservation, and cultural resource laws. BIA must notify the applicant of its decision in writing. BIA also processes ROW amendments, assignments, and renewals.

Applicants seeking to install a service line on or through tribal lands must follow a separate process. A *service line* is a utility line running from a main line, transmission line, or distribution line that is used to supply telephone, water, electricity, gas, internet service, or other utility service to a house, business, or other structure. Service lines generally branch off from facilities for which an ROW must be obtained.

Enforcement of Rights-of-Way

BIA and federal courts generally have the authority to intervene and resolve ROW land disputes that arise between

tribal landowners and non-tribal entities. By statute, BIA has authority to enforce the terms of an agreement creating an ROW. For example, if an ROW grantee remains in possession of the land after an ROW expires or is canceled, BIA may treat it as a trespass. BIA may attempt to resolve the issue or take action to recover possession of the land. BIA also can request that the Department of Justice bring a civil enforcement action in federal court to enforce the agreement. In addition, Tribes or individual tribal citizens can bring enforcement actions in federal court to enforce the terms of an ROW agreement. In general, any violation of an ROW agreement can result in penalties including, but not limited to, cancellation of the grant. A federal court also can impose additional remedies, including barring the holder of the ROW from using or accessing the ROW and ordering the ROW holder to pay damages for trespass.

Selected Issues and Options for Congress

Timeliness of BIA Right-of-Way Processing

Tribes and other entities interested in obtaining ROWs across tribal lands have expressed concern about BIA's ability to approve ROWs in a timely manner. BIA's timeliness affects the ability of Tribes and tribal citizens to use and develop their lands for economic activities or services such as water and electricity. The Government Accountability Office (GAO) has reported that BIA delays in approving activities such as ROWs can delay projects and make them less attractive to investors.

In recent years, BIA has committed to streamlining its ROW approval process. In 2016, BIA updated its regulations to require BIA to "promptly" notify an applicant about whether the application is complete. In addition, BIA must now approve or disapprove an ROW application within 60 days of receiving a complete application, unless BIA returns the application for revision or needs additional review time. The regulations also outline consequences if BIA officials do not meet deadlines. BIA's ROW handbook refers to a checklist for its Realty staff to consistently process ROW applications. In 2022, BIA issued guidance in response to additional funding provided by laws such as the Infrastructure Investment and Jobs Act (P.L. 117-58); the guidance—which has been renewed twice and now will expire in April 2025—stated that it would determine the completeness of any ROW application for infrastructure projects within five business days. This guidance also stated that applicants could submit one ROW application for multiple contiguous tracts.

Despite these commitments, processing TSRs and ROW applications can take time. For example, BIA reports that the amount of time needed to prepare a TSR and approve an ROW application depends on the complexity of the land in question, including the number of tribal land owners and title documents. Depending on this complexity, BIA reports that preparing a TSR may take "as little as one hour to as much as several days." In addition, BIA has reported that staff shortages affect the agency's processing times for ROWs. GAO also found that incomplete title and land ownership data made it difficult to assess whether BIA staff met deadlines.

Congress has considered legislation to address the timeliness of BIA's ROW process. Bills introduced in the 117th (S. 3381) and 118th (H.R. 3579) Congresses proposed to address the timeliness of BIA's process by setting a deadline of 10 days for BIA to issue TSRs and 30 days for BIA to approve or disapprove an ROW application upon receipt. Other legislative options include making permanent some of the streamlining measures included in BIA's 2022 guidance (as extended) or allowing ROW applicants to pay BIA for expedited application processing. Providing additional appropriations for BIA Realty also may bolster capacity for ROW application processing and enforcement.

Further, in the 118th Congress, Congress has debated providing Tribes more authority to independently manage ROWs on their lands. Tribes may choose to administer BIA's ROW regulations under the Indian Self-Determination and Education Assistance Act (P.L. 93-638), but they lack authority to grant, approve, or disapprove an ROW. For example, S. 1322 would allow Tribes to issue ROWs without BIA approval if the ROWs are issued according to tribal ROW regulations approved by DOI. Congress also may consider some tribal suggestions to give Tribes access to BIA data to enable Tribes to issue their own (uncertified) TSRs. These stakeholders argue that change would increase transparency and improve processing times.

Right-of-Way Land Disputes

Renewal or renegotiation of soon-to-be-expired or expired ROWs can spark disputes. Two recent cases provide instructive examples. In 2023, a federal district court ordered the owner of an oil and natural gas liquids pipeline to pay damages of over \$5 million for trespass for maintaining a pipeline on tribal land after the ROW expired. The court also ordered the pipeline owner to shut down and remove the pipeline if the Tribe and the pipeline owner could not reach an agreement to extend the ROW. In 2024, a federal district court granted a preliminary injunction prohibiting the U.S. government from limiting access to roads through a tribal reservation that were used by private homeowners to access their homes. The ROW, held by a town, had expired a decade earlier, and the tribal council blocked access to the roads. The court held that the town and homeowners were likely to prevail on their claim that the Allotment Act of 1887 created implied rights of access across tribal land to land alienated from tribal ownership pursuant to the act.

Finally, although every ROW dispute is different, some tribal groups have asserted that BIA and the courts do not effectively protect their interests. Congress could consider some tribal requests for more comprehensive guidance on how BIA should handle ROW trespass disputes.

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