



Rights of Way on Tribal Land

Indian Land Tenure Foundation
August 18, 2021

Margaret Schaff
303-443-0182

To Be Discussed Today

1. Current Events
2. History of Indian land rights impacting ROWs (easements)
3. ROW Management
4. Negotiation of New ROWs or renewals
 - ▣ Applicable Federal Law and Regulations
 - ▣ Valuation of ROWs
 - ▣ ROW Language

Q&A

Current Events

- ▣ Tribes and Industry are both dealing with many expired (and soon to expire) rights of ways on Indian lands, or lands affecting Indian Country.
- ▣ Allottees are also negotiating rights of ways, Rules are somewhat different for allottees.
- ▣ New federal Right of Way Rule was effective April 21, 2016.
- ▣ ROWs are Opportunities for Exercise of Tribal Sovereignty.
- ▣ Infrastructure legislation will spur many new facilities and upgrades to existing facilities.

Brief History of Tribal Land Rights

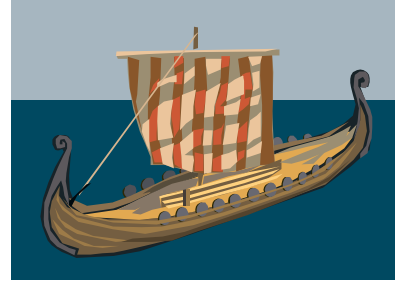


History of Tribal Rights to Negotiate Land Deals

(Misconception that tribes were given a limited right to negotiate by the US)

- Pre Columbian and Columbian International Laws - European Expansion & European/Christian International Law
- North America: Columbian Period to United States Constitution
- The Treaty Period (late 1700 through mid-1800)
- Allotment, then Reorganization, then Termination, then Self Determination

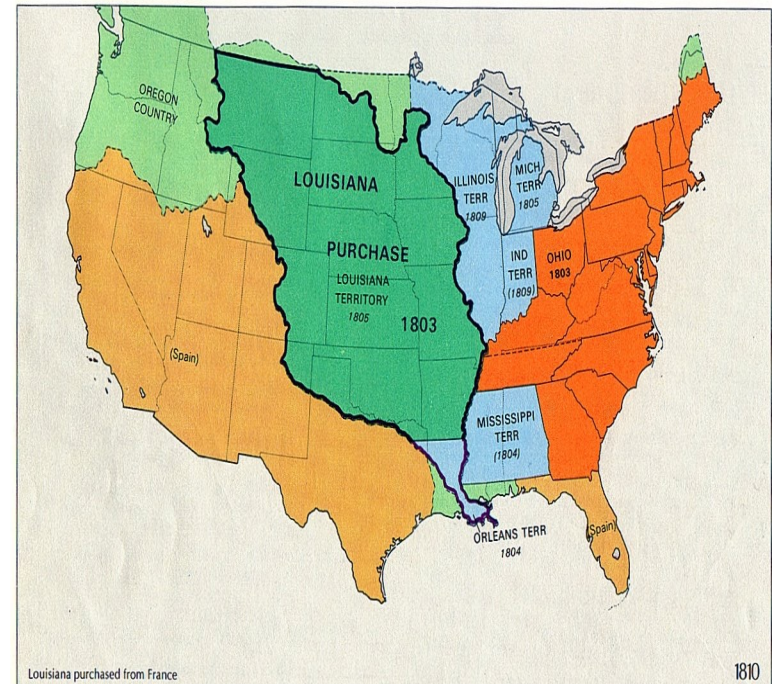
European Expansion & European/Christian International Law



- Even before 1000, the Roman Catholic Church established the idea of worldwide papal jurisdiction, and a universal Christian commonwealth.
- In 1400s, when maritime technology allowed greater range of travel for those in Europe, this law evolved into the “Doctrine of Discovery” so discovering governments could expand this rule. Numerous papal bulls divided lands among “discoverers”.
- “Discovery” of the mouth of any river gave the discovering government all rights of “Discovery” to all lands drained by that river.
- Right of “Discovery” included the *exclusive* right to buy lands from all “infidels” thereon, but the natives continued to *possess the lands* until this happened.

North America: Columbian Period to United States Constitution

- Different countries owned Discovery Rights on different river systems.
- The new United States obtained discovery rights for 13 colonies and continued to make sales agreements and began making treaties with the many tribes to obtain lands still possessed by the tribes.
- The new US added other “discovery rights” as time went along (Example: Louisiana Purchase and Lewis and Clark).



The Treaty Period (late 1700 through mid-1800)

- Treaties are grants of rights FROM Indians which reserve all rights not granted.
- Treaties must be construed as tribes understood them and ambiguities construed in favor of Indians.
- Treaties placed the word of the federal government behind the recognition of tribal sovereignty. Treaties that were not ratified by Congress do not have the same force of law.
- During later part of the Treaty Period came the “Removal Period” where many tribes traded (often by force) lands in the East for lands in the West- often individuals were given acreage, rather than communal tribal acreage.
- Congress ended treaty making with Indian Tribes after the Civil War in 1871 (25 U.S.C. 71) Congress can abrogate treaties, but only explicitly.
- Pre 1871: Rights of ways across Indian lands were all obtained through “negotiations” that were ratified one-by-one by Acts of Congress Some treaties predate the US- tribes under Spanish rule has treaties with Spain and Spanish land grants which were to be honored under US rule.

Allotment Period (1887-General Allotment Act, 25 U.S.C. § 341) led to:

- 1871-1948: General statutes passed allowing Department of Interior to grant Rights of Way without consent of tribes.
 - Railroads, Highways, Telecommunications, Oil and Gas Pipelines, Electric Power and Communications, Hydroelectric Dams and Transmission all have separate statutes.
- Three Major Types of land on Reservations:
 - Reservation Trust and Fee Lands
 - Tribal Trust Lands are Federal Lands- Held in the name of the United States, in trust for the Tribe.
 - No federal authority exists to condemn tribal lands *unless* federal authority of general applicability approves a federal action and clearly overrides an applicable treaty. See *Nebraska Public Power District v. 100.95 Acres*, 719 F.2d 956 (8th Cir. 1983); Tribal trust lands may not be condemned by a state for public purposes- See *US v. 10.69 Acres of land*, 425 F.2d 317 (9th Cir. 1970).
 - Reservation Allotted Lands
 - Condemnation is allowed for allotments. See 25 USC § 357. Cases are brought in federal court; US is an indispensable party. See *Calhoun v. Sell*, 71 F.Supp 2nd 990 (USDC SD 1998)
 - Non-Indian Fee Owned Land
 - Subject to federal/state jurisdiction.

Post Allotment Reorganization led to:

- 1948: Comprehensive Rights of Way Laws 25 U.S.C. § 323-328
 - Tribal consent required, and fair market value required.
 - BIA Regulations apply: 25 CFR Part 169 (New rules effective 2016).



ROW Management

Summary - Best Practices for ROW Management

- ROW activities don't end with a ROW Agreement; they just begin.
- Designate tribal personnel for general ROW management.
- Clarify tribal goals related to the Infrastructure.
- Exercise jurisdiction over ROWs and infrastructure (taxation?).
- Develop or refine relevant tribal laws.
- Know the land ownerships along Infrastructure routes.
- Tribal coordination with allottees.
- Coordinate with other authorities such as BIA Realty.
- Gather and carefully review all ROW documents.
- Negotiate ongoing communications opportunities.

The screenshot displays a software interface with a data table. The table has columns for Name, Address, City, State, Zip, and various financial metrics. The data is color-coded with green, yellow, and red cells, likely indicating different levels of risk or status. A disclaimer at the top states: "The software uses data obtained from numerous public sources. Some areas of the country provide us with different levels of information. It is presented on an 'as is' basis. The software is not a substitute for a professional survey or appraisal. The software is not a substitute for a professional survey or appraisal. The software is not a substitute for a professional survey or appraisal."

Clarify Tribal Goals related to the infrastructure – Example Goals

- Safety and environmental protection
- Compensation for land rights (Mandated by law)
- Ongoing Communications with company– Umatilla example
- Ongoing income
- Jobs and/or training with the utility or company
- Services from the utility or company
- (Partial?) Ownership of the infrastructure (A preferred right to use interstate energy infrastructure is often not supported by federal energy regulations) – Morongo Example
- Entrance or activity requirements on reservation lands
- Reserved rights (agricultural, hunting, etc.), or uses within the easement, such as parallel facilities that don't interfere with easement rights
- For new easements, a tribe can negotiate much more flexibility about the actual facilities: Safety equipment or procedures, environmental mitigations, design, route adjustment, etc.

Management of Existing Rights of Ways by Tribes

- Importance of Records Inventory and Analysis of Existing Rights – Finding all the existing documents and GIS matching them to the facilities on your lands.
- Look at Who (rights transferred?) What (are rights limited?) When (term) Where (is it built in the right place?) How (procedures for activities on ROW).
- State, County, Federal interests can hide facilities.
- Literal reading of language in documents - Generally the rules of the construction of contracts applies. What law applies to construe contracts? Federal Law, Tribal Law.
- What is really on the ground?
- Assure that the tribe owns interests in allotments so the right to condemn is not available.
- Exercise Jurisdiction over facilities and lands.

Language to look for in Right of way Documents

- **LITERAL READING – interpreted as a contract**

- Size of Right of way
- Term - Perpetual or not? (Is it vague and indefinite?)
- Conditions
- Rights of ingress and egress
- Limitations on use (Any size of facilities? Any particular facility mentioned?)
- To whom is the right granted? Is there a chain of title to any new owners?

- **FOR ALL NEW DOCUMENTS - Reserve tribal sovereign rights in easements!** *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (2000) Is an easement “non-Indian land”? :

- Reserve rights to exercise dominion and control over lands within rights of way. Right to tax, regulate, license, exercise civil conduct over activities and conducts in right of way. Specify that the property remains Indian land.
- See 25 CFR 169.10

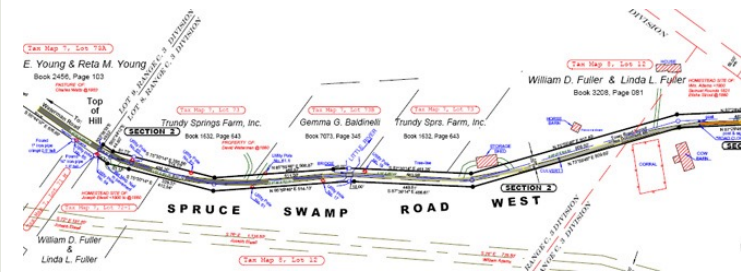
- **Limit rights granted** : term and what happens on termination, voltages, pipeline sizes, right to hang or add other wires, facilities, towers, access, maintenance, tree cutting and other encroachments...

- **Describe rights retained** : existing and future uses of property

Know the land ownerships along the Infrastructure route; Tribal coordination with Allottees

Use Tribal GIS if available to map the facilities

Coordinate tribal strategy with allottees; generally, it's helpful for the tribe to complete negotiations to set the price and terms before the utility acquires interests from allottees for the same infrastructure. Consider also coordinating with any fee landowners on the route.



Develop or Refine Relevant Tribal Laws

- Create Tribal rules on interpretation of documents.

- Local laws are often used to interpret easements.
- Sovereignty protection.

- Establish tribal code provisions:

- Real vs. Personal property rights
- Easement acquisition procedures
- Valuation procedures
- Trespass rules and penalties including removal of facilities
- Rules of interpretation of documents
- Condemnation
- Forms
- Documentation requirements
- Taxation and/or Franchise Document requirements (25 CFR 169.11)
 - Note- A franchise fee may be passed along to all customers within the reservation. See *Willman v. Washington Utilities & Transp. Com'n*, 93 P.3d 909 (2004).

- Tribes can regulate utilities and their facilities on reservations!
- Assure that the tribe exercises jurisdiction over any easements and facilities!
- Get your laws in place before you begin negotiations for facilities

Negotiating (or Renewing) ROWs



Federal Law Applicable to ROW Negotiations

- ❖ Treaties

- ❖ Specific Statutory Authority in Various Infrastructure Laws

- ❖ General Federal Authority – Rights-of-way for all purposes across any Indian Lands (1948) 25 USC 323-328



Infrastructure Laws Impacting Land Acquisitions and ROW Negotiations- Example – Reclamation Law

- Section 7 of the Reclamation Act of 1902 provides: (32 Stat. 389; 43 U.S.C. §421) Sec. 7. [Authority to acquire property-Attorney General to institute condemnation proceedings.] —Where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.
- Section 2 of Flood Control Act of 1938
- Section 14 of the Reclamation Project Act of 1939
(includes right to exchange)

Treaties Impacting ROW Negotiations- Examples

- *US v. 2,005.32 Acres, 160 F. Supp. 193 (USDC SD) 1958*: Even though the Pick Sloan Project Acts allowed the condemnation of lands for federal dams, under the Fort Laramie Treaties of 1851 [11 Stat. 749] and April 1868 [15 Stat. 635], **the Army Corps of Engineers did not have the authority to condemn tribal lands subject to the treaties without specific Congressional approval**
- On the other hand, in *US v 5,677.94 Acres of Land, 162 F. Supp 108 (USDC MT) 1958*, the Montana District Court found that **there was specific authority to condemn Indian lands on the Crow Reservation under the Flood Control Act by the Bureau of Reclamation**. The Court distinguished the South Dakota District Court's ruling by stating that the Bureau of Reclamation also used its authorities under the Reclamation Act of 1902 and subsequent laws.

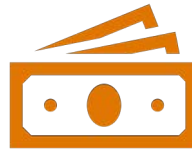
Understand the **proposal**, its **legal basis** and the **infrastructure**, whether new or existing

- Know what they intend to put on the ground, the construction and ongoing maintenance needs, the schedule, regulatory steps before easement can be in effect, purpose of the infrastructure, need for the infrastructure, etc.
- Know the legal basis for the facility (federal, state or local). Especially if the infrastructure is federal, sometimes treaties require *specific* federal authorization for condemnation of lands subject to treaties.

Contract with experts



Infrastructure
Subject Matter
Experts



Valuation Experts



Attorneys

Identify negotiating team

Tribal leadership
representative(s)

Tribal lands office

Tribal subject matter
experts as may be
impacted by the facility
(water department, utility
department, fish and
wildlife, tribal farm, etc.)

Tax or revenue
department (as needed
to enforce franchise or
payments)

Allottee representatives (if
desired)

Tribal attorney and/or
outside attorneys

Assure that the team members have approved the team leader for
coordinating and speaking for the group – Establish confidentiality obligations.

Request tribal application fees to cover your costs;
Determine if a Temporary Use Permit is needed during negotiations

- Upon receiving a request from a company to acquire or extend the term of an existing ROW, the tribe should apply its law related to acquisition procedures.
- Even if no law is in place, the tribe can present an agreement for the company's payment of tribal negotiation costs and due diligence.
- This can be coupled with a Temporary Use Permit (a permit is not a land right so does not need BIA approval) if a trespass is imminent or likely to occur before a final agreement is completed and BIA approved.

Allottee Best Practices

- Goal is for the tribe to negotiate excellent terms and conditions which are then applied to all allotments on the ROW.
- Include a process for allottee negotiations in tribal code ROW code.
- When a tribe gets a ROW proposal, send a letter to the applicant stating that they should not seek consents from allottees on the route until tribal negotiations are complete. Sometimes the allottees are offered a signing bonus, which gets early consents in the door prior to the completion of tribal negotiations.
- Obtain a list of all known allottees on the ROW route for communications.
- Make a decision about whether the tribal ROW negotiations will include the allottees or not. If not, assure that when an offer is made to the allottees, that offer is consistent with the tribal terms.
- Communicate with the allottees and with BIA related to the allottees over the course of negotiations.

Appraisals – Ways to value

- Build-around (highest likely land value achievable)
- Share of Operating Income
- Standard Appraisal – USPAP
 - Highest and best use
 - “Comparable Sales” of generally non-Indian lands to determine land value
 - Percentage – partial taking
- OR
 - Before and after methodology
- Trust Land Comparable “sales”
 - Comparable tribal land transactions
 - Term of easement considered
 - Achieve a base annual land value
 - Adjust for inflation (either consumer price index or escalation rate ~2.5%)
- Paid annually or in a lump sum discounted for value of money

Valuation of Rights of Ways

- Industry is used to appraisal methodology (“comparable” properties)
- No established tribally approved valuation methodology- different tribes have different approaches
- Consider legal purpose of lands – look to treaties, etc.
- Customary purposes of lands negotiating tactics – to be considered with care
 - Value to go around
 - Profitability of easement facilities
 - Leverage for other issues
 - Tribal need for infrastructure
 - Tribal participation in ownership of rights?



Negotiate ongoing communications opportunities

- Allow ROW negotiations to open the doors to relationships with entities on your reservation.
- Require annual meetings of officials.
- Establish protocols for emergencies, then test them.
- Share GIS and other information.



Coordinate with other authorities

- In addition to BIA Realty!
- State siting bodies
- Local (tribal and non-tribal) governments, non-profits, homeowner or other groups interested in the infrastructure
- Federal agencies
- Environmental Protection Agency (air quality issues)



Paraphrased:

General Federal Laws for Rights of Ways on Indian Lands

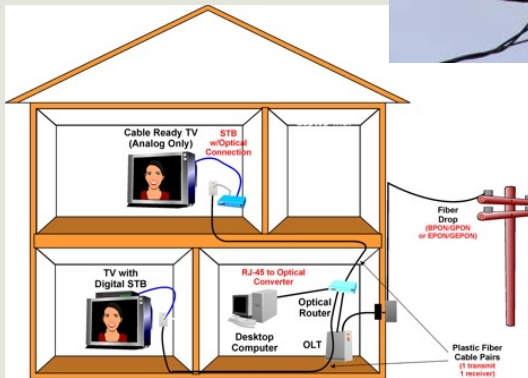
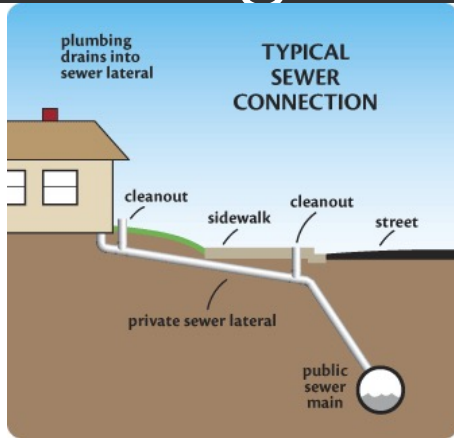
- **25 USC 323** The Secretary of the Interior is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.
- **25 USC 324**
 - No grant of a right-of-way over and across any lands belonging to a tribe... shall be made without the consent of the proper tribal officials.
 - Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if 1) Majority consent, 2) owners unknown and majority of the known consent 3) devisees not determined and BIA determines the grant will cause no substantial injury 4) numerous owners and BIA determines the grant will cause no substantial injury to the land or any owner.
- **25 USC 325** No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just.
- **25 USC 326** Certain laws unaffected.
- **25 USC 327** Rights-of-way for the use of the United States may be granted hereunder.
- **25 USC 328** The Secretary of the Interior is authorized to prescribe any necessary regulations

Summary of Federal Regulations

25 CFR 169

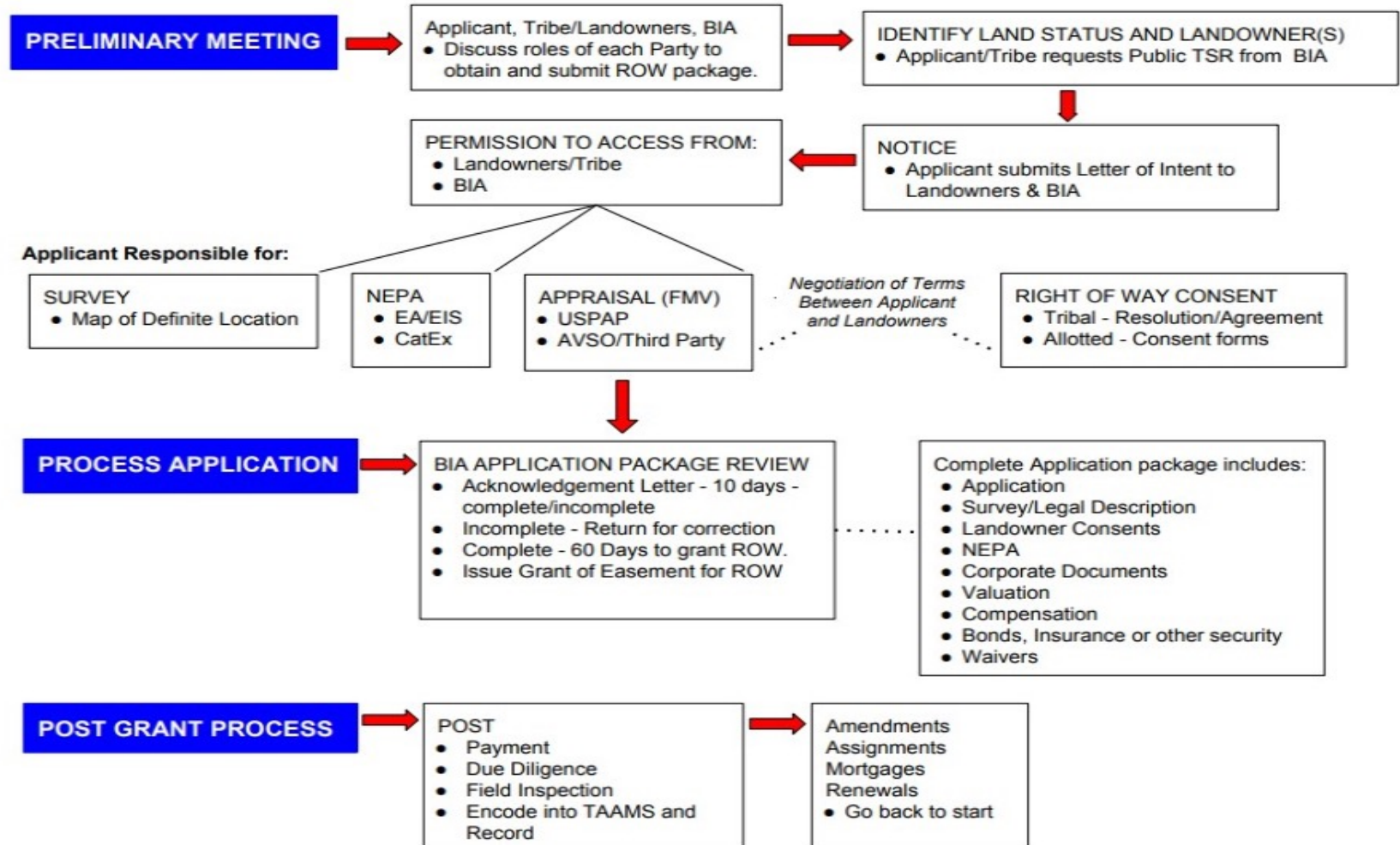
- Subpart A (169.1-169.14) General Provisions
- Subpart B (169.51-56) Service Line Agreements
- Subpart C (169.101-169.130) Obtaining a Right of Way
- Subpart D (169.201-169.212) Duration, Renewals, Amendments, Assignments, Mortgages
- Subpart E (169.301-305) Effectiveness
- Subpart F (169.401-415) Compliance and Enforcement

Subpart B (169.51-56) Service Line Agreements



- Service facilities agreement between utility provider and landowner for access to supply the owner with services
- Requires landowner consent but no valuation
- Filed with BIA

Federal ROW Process (Subpart C) (from BIA website)



Subpart D (169.201-169.212) Duration, Renewals, Amendments, Assignments, Mortgages

- Term
 - Tribal land- defer to tribe's determination on term.
 - Allotted lands- maximum reasonable generally 20 years for oil and gas and 50 years for other purposes.
- Renewals permitted with consent, unless certain circumstances
- Amendments permitted after process
- Assignments permitted as stated in documents and after process
- Mortgage permitted if stated in documents and after process

Subpart F (169.401-415) Compliance and Enforcement

- Compliance can be investigated by BIA or Indian landowner.
- ROW documents can list remedies for breach, including termination- BIA concurs with termination and records.
- Process for violations without remedies listed.
- Late payment remedies can be specified in ROW documents
- Process for cancellation for non-use or abandonment
- BIA may take action to recover possession if trespasses.

Other Federal Resources

- General

- <https://www.bia.gov/bia/ots/rights-of-way-permitting>

- Alaska:

- <https://www.bia.gov/regional-offices/alaska/real-estate-services/contracts-management/right-of-way>

Questions?

