

IX. Preliminary Engineering - Right-of-Way (ROW) & Utilities

A. Overview. Preliminary Engineering for a project includes completion of the NEPA document, environmental review, and environmental permits (see [Chapter VII - Preliminary Engineering - NEPA and Other Environmental Requirements](#)), development of the Plans, Specifications, and Estimates (PS&E) (see [Chapter VIII - Preliminary Engineering – Project Package](#)), acquisition of right-of-way, utility relocations, and advertisement and procurement of the project’s construction contract (see [Chapter X - Procurement, Construction Bid Advertisement and Award](#)).

B. Acquisition of Right-of-Way (ROW) for projects. “Right-of-way” means real property, and rights therein, that is used for the construction, operation, or maintenance of a transportation or related facility. The public right-of-way must be wide enough and in the proper location for the proposed transportation project. Acquisition of new right-of-way may be necessary.

Right-of-way acquisition can occur only after the project’s NEPA document is completed and approved.

Right-of-way must be obtained and certified before construction of a project can begin. The Tribe must include a copy of the Certification of right-of-way clearances as part of the project package submitted by the Tribe, according to 25 CFR §§ 170.460(c). The Tribe must submit this project package to the TC before solicitation of the project construction contract or the issuance of a notice to proceed.

Routine maintenance activities like blading and plowing snow do not require certification of ROW.

Tribes are responsible for acquiring ROW, including cost appraisals and negotiations with landowners, except when a Tribe/Consortium has transferred this responsibility to BIA through a Direct Services MOU, to the BIA through an RSA, or to an agency through a Project Agreement. Also, on projects occurring on transportation facilities owned by the state, county, borough or local agency, the facility owner may be responsible for acquiring right-of-way and utility relocation needed for the project. This will depend on memorandum of understandings or other agreements between the Tribe and the facility owner.

Right-of-way must be obtained and certified before construction of a project can begin. The Tribe must provide a copy of the Certification of right-of-way clearances to the TC (depending on which agency the Tribe is working with) before construction of the project can begin. The TC shall file the copy of the Certification of right-of-way into the Tribe’s folder in the agency’s TTP database

It is recommended that the Tribe perform the right-of-way research, mapping and acquisition early in the project design phase to allow the project development and construction to proceed efficiently. .

Acquisition of right-of-way or easements may be needed for a proposed project. The need for acquiring permanent right-of-way, as well as temporary or specialized easements for driveway approaches, runoff ditches, utility relocations, etc., typically depends on:

- The width and location of the existing public right-of-way.
- The width and location of the proposed right-of-way needed for the project.
- The types of land ownership that will be affected by acquisition of the proposed project right-of-way.
- Temporary or specialized encroachments that will be needed onto land outside the proposed right-of way.

If right-of-way or easements need to be acquired for the project, then it will be necessary for the Tribe to accomplish the following: plat (map) onto plan sheets the existing and proposed right-of-way and easement limits, perform a cost appraisal of the land or rights to be acquired, negotiate the acquisition

cost and conditions of use with the landowners, and finally acquire the new right-of-way and easements from the landowners.

C. Cost Appraisal Requirement Waiver. Pursuant to 25 CFR § 1, Section 1.2, the Secretary (of the Interior) has the authority to waive or make exceptions to the regulations contained in 25 CFR § 169.12, where the waiver or exception is permitted by law and in the best interest of Indians. The Statutory authority underlying 25 CFR § 169.12 is 25 USC § 325, which provided the “No grant of right of way shall be made without the payment of such compensation as the Secretary (of the Interior) shall determine to be just.” The statutory authority permits the Secretary (of the Interior) to exercise his discretion to determine what compensation is just.

- 1. Cost Appraisal Requirement Waiver on Trust lands.** A Tribe has a right to waive the consideration of compensation at the fair market value. The Tribe’s request for waiver of the consideration must be in the form of a tribal resolution.
- 2. Cost Appraisal Requirement Waiver on Allotted Trust lands.** The BIA Solicitor's Office opinion on cost appraisal requirement waivers on Allotted Trust lands is needed on a case-by-case basis.

D. Types of land ownership. It is important for the Tribe to determine the type of all land ownership when attempting to acquire right-of-way from those lands. The type of land ownership determines the roles and responsibilities of the parties involved, and the Federal and State laws and regulations that apply. Although there are many classifications of Tribal and non-Tribal land, the following are the most common:

- **Trust lands** - The Federal government holds legal title, has ultimate control over the land, and holds the land in trust for the use of a Tribe. The Tribe holds the “beneficial use”, which is the right to benefit from (live on, use, profit from) a parcel of land, the legal title to which is held by the trustee, in this case the Federal government. Tribal Trust lands are held communally by the Tribe, are managed by the tribal government, and Tribal members share in the enjoyment of the entire property without laying claim to individual parcels. The Tribe may not convey or sell Trust lands without the consent of the Federal government. Tribes may acquire additional land and have it placed in trust, so that it becomes “Trust lands”, with the approval of the Federal government.

“**Allotted Trust lands**” are Trust lands that are held in trust for the use of individual Tribal people (or their heirs). As with Trust lands, the Federal government holds the title, and the individual (or heirs) holds the beneficial interest.

All ROW actions involving Trust Lands are required to comply with 25 CFR § 169.

- **Off-Reservation Trust lands** – Land that is protected by the federal government for Indian use. After reservations were created, some Tribes and individual Indians were given land to use outside of the reservation boundaries. For example, these pieces of land could be religious sites or pieces of land allotted to individual Indians.
- **“Fee-to-Trust Conversion” lands** –These are lands that were originally, historically allotted as Tribal Trust lands, but were transferred to fee simple status in the past. Tribes or individual Indians can convert fee lands they own or acquire back to Trust lands status by initiating the “Fee-to-Trust Conversion” process.
- **Fee (or “Fee Simple”) lands** - Fee lands are held by any owner, whether Tribal or non-Tribal. The owner may make decisions about land use or sell the land without Government permission, except when the land is inside the boundaries of an Indian Reservation.

- **Fee lands purchased by Tribes** - The Tribe acquires legal title under specific statutory authority. Fee lands owned by a Tribe outside the boundaries of an Indian Reservation are not subject to legal restrictions against alienation or encumbrance, absent any special circumstances.
- **“Fee Restricted” lands** – This is a type of fee lands that a Tribe holds legal title to, but there are specific Government-imposed restrictions on use and/or disposition of the land.
- **Native Allotments and “Townsite” lots** – These exist only in Alaska. Generally, Native Allotments have been acquired by Alaska Natives under the 1906 Native Allotment Act, and townsite lots acquired by Alaska Natives under the 1926 Townsite Act. These are the Acts that specifically include Alaska Natives who were not included in earlier legislation. The Alaska Native Claims Settlement Act (ANCSA) repealed the 1906 Native Allotment Act. Only those Alaska Natives who had applied for their Native Allotment before December 18, 1971, would be considered for receiving Native Allotment land. Many people with Native allotments and/or townsite lots are uncertain what their ownership really means and what limitations and restrictions come as part of that ownership. Natives who acquire allotment land or restricted townsite lots from the government have “restricted” land. Owners of these restricted lands cannot sell, lease, or otherwise convey their land, or inherited interest in the restricted land, without the approval of BIA. Right-of-way acquisition on native allotment lands and restricted townsite lots lands requires processing and approval by BIA.

E. Statutory/Regulatory Requirements.

- Rights of way over Indian lands: 25 CFR § 169 at http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title25/25cfr169_main_02.tpl
- Rights of way over fee lands: 42 U.S.C. § 4601 - Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (the “Uniform Act”) at http://www.fhwa.dot.gov/real_estate/practitioners/uniform_act/
- Right-of-way clearance must be included in the project package: 25 CFR § 170.460(c).
- 25 CFR § 1 at <http://www.bia.gov/cs/groups/mywcsp/documents/document/idc-018737.pdf>

F. Compliance with the Uniform Act (42 U.S.C. § 4601). Any right-of-way work involving land acquisition and/or relocation of businesses or people for development of transportation projects must conform to the Uniform Act. Requirements of the Uniform Act provide for fair market value to be paid for real estate, and reimbursements paid for relocating homeowners/tenants and business owners. When acquiring right-of-way, the Uniform Act requires the coordination of any relocation of businesses and families required to build the project. In addition, the management and disposition of residue parcels and surplus right of way should be tracked and coordinated.

Right-of-way work needed to develop a TTP project may also include Federal land transfers, control of outdoor advertising, acquisition of encroachment permits and temporary construction easements, and junkyard control.

G. Roles, Responsibilities and regulations. Tribes/Consortiums are responsible for acquiring ROW, including cost appraisals and negotiations with landowners, and ensuring that utilities are relocated as needed for a project, unless indicated otherwise in the following table, or if a Tribe/Consortium has transferred this responsibility to BIA through a Direct Services MOU, to the BIA through an RSA, or to an agency through a Project Agreement.

The following table outlines the Regulations governing acquisition or ROW on the various land types, and the roles and responsibilities of Federal and State agencies working with the Tribes/Consortiums to accomplish the ROW acquisition.

Land Type / Road Ownership	ROW Acquisition Regulations, and Agency Roles and Responsibilities
Trust Land	<p>All ROW actions involving Trust Lands are required to comply with 25 CFR § 169.</p> <p>FHWA/BIA: When a Tribe with an FHWA TTPA is in the early stages of developing a PS&E for a project needing ROW on Trust lands, the FHWA TC needs to provide a list of the National Tribal Transportation Facility Inventory (NTTFI) routes in the project to the BIA Road Engineer and the BIA Realty Office. The BIA Region will develop the grant of easement and provide a copy of it to the FHWA TC.</p> <p>BIA Regional Office: Process right-of-way: review right-of-way applications and certifications; approve right-of-way documents; process grants and acquisitions of rights-of-way requests for allocated lands; responding to information requests; file Affidavit of Completion Forms; Perform custodial functions related to storing rights-of-way documents; Conduct ROW appraisal and negotiation; provide Title Status Reports (TSRs), Grants of Easement, and filing ROW documents; reviews and approval. If the Tribes decide to conduct an appraisal without utilizing the Office of the Special Trustee Appraisal Department, they must follow Uniform Standards of Professional Appraisal Practice (USPAP).</p>
Restricted Fee Land	<p>All ROW actions involving fee Lands are required to comply with 42 U.S.C. § 4601 - Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (the “Uniform Act”).</p> <p>FHWA/BIA: When a Tribe with an FHWA TTPA is in the early stages of developing a PS&E for a project needing ROW on Restricted Fee lands, the FHWA TC needs to provide a list of the National Tribal Transportation Facility Inventory (NTTFI) routes in the project to the BIA Road Engineer and the BIA Realty Office. The BIA Region will develop the grant of easement and provide a copy of it to the FHWA TC.</p> <p>BIA Regional Office: Process right-of-way: review right-of-way applications and certifications; approve right-of-way documents; process grants and acquisitions of rights-of-way requests for allocated lands; respond to information requests; file Affidavit of Completion Forms; Perform custodial functions related to storing rights-of-way documents; Conduct ROW appraisal and negotiation; providing Title Status Reports (TSRs), Grants of Easement, and file ROW documents; reviews and approval.</p>

Land Type / Road Ownership	ROW Acquisition Regulations, and Agency Roles and Responsibilities (cont'd.)
Fee Land	All ROW actions involving fee Lands are required to comply with 42 U.S.C. § 4601 - Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (the “Uniform Act”).
BIA owned transportation facilities	FHWA/BIA: The BIA Region will develop the grant of easement and provide a copy of it to the TC, who will provide it to the Tribe. When a Tribe with an FHWA TTPA is in the early stages of developing a PS&E for a project that has BIA owned roads, the FHWA TC needs to provide a list of the National Tribal Transportation Facility Inventory (NTTFI) routes in the project to the BIA Regional Road Engineer and the BIA Realty Office.
State Owned transportation facilities	State DOT: The state may be responsible for acquiring right-of-way and utility relocation needed for the project. This will depend on memorandum of understandings or other agreements between the Tribe and the owner of the transportation facility.
County, borough or local agency owned transportation facilities	County, borough or local agency: The County, borough or local agency may be responsible for acquiring right-of-way and utility relocation needed for the project. This will depend on memorandum of understandings or other agreements between the Tribe and the owner of the transportation facility.

H. Resources.

- FHWA right-of-way and real estate website at http://www.fhwa.dot.gov/real_estate/
- FHWA Right-Of-Way Acquisition Guidelines located at http://www.fhwa.dot.gov/real_estate/practitioners/uniform_act/acquisition/real_property.cfm
- WFL Right-Of-Way and Utilities web site <http://www.wfl.fhwa.dot.gov/design/row>
 Chapter 12, Right of Way and Utilities, of the FLH “*Project Development and Design Manual*” (PDDM), at (<http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>)