

RIGHT-OF-WAY OVERVIEW

The Bureau's responsibility for the granting of Right-of-Way (hereafter ROW) is derived from the government's fiduciary responsibility as trustee for restricted Native land. Your responsibility is to assure that the granting of the right-of-way is in the best interest of the landowners, i.e., the maximum benefit is obtained. In Alaska the term *right-of-way* and *easement* are used interchangeably to describe the right of one party to use a specific part of the land of another for the purpose of building, using or maintaining a road, driveway, utility line, etc.

The procedures and regulatory requirements should be thoroughly discussed and explained to the Right-of-Way Applicant and to the landowners (please note that "applicant" in this part refers to the party wanting to obtain an easement across a Native Allotment or Townsite Lot). The investigator must be certain that an understanding is reached with the landowners. In particular, the following items must be discussed:

1. *Rights-of-Ways are for a specific purpose.* This could be for a driveway, road, highway, electrical, telephone, water and sewer, television cable, or a combination of these as long as the purpose is clearly stated and compensation is paid. Once the easement is granted the purpose can be changed only by mutual agreement and with BIA approval.
2. *Rights-of-ways are for a specific length of time.* You need to consider what length of time is really in the landowner's best interest and what is acceptable to the ROW applicant; for many purposes, a 20-year period is sufficient. An easement may be perpetual (i.e., forever); but, make sure it is necessary.
3. *Compensation is due in advance in a one time payment.* Make sure the landowner understands this, it is not like a lease. Also, the damage deposit is not for the landowner's use, it must be placed in an escrow account and can only be used if there is actual damage to the land or terms of the Right-of-Way application

are not complied with.

4. *A Right-of-Way* is a non-possessory interest in the land of another which allows the owner of the easement to use that land for a particular purpose. A "non-possessory interest" is a right to use (or restrict the use) of the property for a particular purpose, such as a road or electric line easement. Title remains in the owner of the land, but the land is subject to the easement.
5. *ALL Easements must be granted by the Superintendent (of the Fairbanks or Anchorage Agency) or the Area Director.*¹ A ROW is the only land transaction where the Bureau actually conveys an interest in the land with the landowner's consent. For all other transactions, the Bureau is the approval authority.
6. *No right-of-way shall be approved or granted at less than the fair market value* except when waived in writing by the landowners or their authorized representative and approved by the Secretary (25 CFR 169.12). Therefore, a request for appraisal of fair market value will be made, including with the request, the terms of the proposed easement. The fair market value established by an appraisal will serve as the absolute minimum compensation, but negotiation should produce the maximum benefits possible.
7. *Permits.* There are a number of regulatory permits which must be secured prior to the granting of an easement.
 - a. A timber request will be prepared by you and forwarded to the Tribal or BIA Forestry department if there are trees with a diameter of 4" or more, at breast height, which will be cut to make room for the right-of-way.

The ROW applicant should be required to obtain any and all permits for their action, including but not limited to:

¹ Most of the forms in this manual use the Superintendent's Delegation of Authority. If the Area Director signs your document, you must use his authority.

b. The 1970 amendment of the National Environmental Policy Act of 1969 (NEPA) provides that prior to granting of an easement, the Secretary shall first satisfy himself that adequate consideration has been given to the effect on the environment of the uses to which the land will be subject. Unless the easement falls within a categorical exclusion, an Environmental Assessment and FONSI must be prepared. The Exception Review Checklist can be used to determine if an EA or EIS will be required (see part I for NEPA compliance).

c. A permit from the Corps of Engineers pursuant to Section 404 of the Clean Water Act is required if any wetlands are to be disturbed. The objective of the Clean Water Act of 1972 is to restore and maintain the chemical, physical and biological integrity of the nation's waters. Section 404 prohibits the discharge of concrete, rubble, soil, fill, riprap, site grading material, backfill dredged material, road beds or surfaces, or other such material into lakes, streams, rivers, ponds, wetlands, and other waters. Such action requires a permit. The status and future of wetlands and the 404 permit process and BIA's involvement, if any, remain unclear at the present time. Contact the Environmental Protection Officer at the Area Office for assistance if the project will involve wetlands.

d. Any local permits required under zoning ordinances.

8. A Service Line Agreement is an agreement between the landowner (or authorized occupant) and a utility company for the utility to be brought from the main line onto the landowner's property for the **exclusive use of that landowner**. If the utility line serves another property, an easement is required.