



[4337-15-P]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 169

[190A2100DD/AAKC001030/A0A501010.999900 253G]

RIN 1076-AF20; 1076-AF37

Rights-of-Way on Indian Land; Bond Exemption

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: This final rule exempts Federal, State, Tribal, and local governments from the requirement to obtain a bond, insurance, or alternative form of security for a right-of-way across Indian land and Bureau of Indian Affairs (BIA) land where such governments are prohibited by law from obtaining security.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Elizabeth Appel, Director, Office of Regulatory Affairs & Collaborative Action, (202) 273-4680; elizabeth.appel@bia.gov.

SUPPLEMENTARY INFORMATION: On November 19, 2015, the Bureau of Indian Affairs (BIA) finalized revisions to the regulations governing rights-of-way on Indian land and BIA land at 25 CFR part 169. *See* 80 FR 72492. The regulations became effective on April 21, 2016 under Regulation Identifier Number (RIN) 1076-AF20. 81 FR 14976. The final regulations established new requirements for bonding, insurance, or alternative form of security to cover the annual rental, estimated damages, operation and maintenance charges, and restoration. *See* 25 CFR 169.103(a). The regulations allow for waiver of this requirement on a case-by-case basis. *See* 25 CFR 169.103(f).

Currently, a governmental entity applying for a right-of-way across Indian land or BIA land must seek a waiver (and landowner consent for the waiver) from the requirement to provide bonding, insurance, or alternate security in those cases in which the entity is prohibited by law from obtaining such bonding, insurance, or alternate security. On July 23, 2018, the BIA published a proposed rule to eliminate the need for governmental entities to seek a waiver for each instance by exempting governmental entities from the requirement to obtain bonding, insurance, or alternative form of security if they are prohibited by law from doing so. *See* 83 FR 34802. The proposed rule would require governmental entities to: (1) provide a certification with their application, with citation to applicable law, that they are prohibited by law from providing security; and (2) notify landowners that they are prohibited by law from providing security when they notify the Indian landowners of their application under 25 CFR 169.107.

Comments and Responses on Proposed Rule

The public comment period on the proposed rule ended on September 21, 2018. During that time, the Department received one comment that was relevant to the rulemaking. (To view all comments, search by Docket Number “BIA-2018-0003-0001” in <https://www.regulations.gov>.) That comment asked for further explanation on the reason for the rule change, expressed concern with whether governmental entities could contaminate the land, and asked whether the rule change gives governments an unfair advantage. The following discussion addresses each of these items.

Reason for Rule Change

The current version of part 169 requires applicants for a right-of-way across Indian or BIA land to obtain bonding, insurance or alternative form of security. Governmental entities sometimes need to apply for rights-of-way across Indian or BIA land, but are unique in that applicable laws often prohibit governmental entities from obtaining bonding, insurance, or other security. The rule change effectively streamlines a step in the process of obtaining a right-of-way by eliminating the need for the governmental entity to seek a waiver as long as the governmental entity provides a certification and citation to applicable law stating they are prohibited from providing security. The governmental entity must notify landowners as part of the application that they are prohibited from providing security, so that landowners may consider this as part of determining whether to consent to the right-of-way. Providing this exemption in lieu of requiring governmental entity applicants for rights-of-way to seek individual waivers in each instance streamlines the process and provides transparency for landowners, who may review the exemption as part of the application in determining whether to consent to the right-of-way.

Environmental Contamination by Governmental Entities

The commenter pointed out that, in finalizing part 169, BIA stated that the potential for environmental contamination was a reason for imposing the bonding, insurance, or alternate security. Bonding, insurance, or alternate security are some of several tools BIA has at its disposal if a right-of-way grantee contaminates Indian or BIA land. For grantees who are governmental entities that are prohibited by law from providing bonding, insurance, or other security, the BIA may pursue recourse through a variety of means ranging from negotiation to legal action, as appropriate according to the circumstances.

Potential Advantage to Governmental Entities

The commenter expressed concern that eliminating the need for governmental entities applying for a right-of-way across Indian land or BIA land to obtain bonding, insurance, or other security under certain circumstances somehow provides those entities an unfair advantage. Any advantage would be in the entities' legal inability to comply with part 169's security requirement. The rule does not create that legal inability; rather, the rule accounts for the inability by clarifying what information the entities must provide in the alternative to qualify for the exemption. The exemption requires documentation of eligibility for the exemption (proof that the governmental entity cannot legally comply with the security requirement)¹ and landowner consent. Any other grantee may seek an individual waiver from the security requirement and the BIA is open to any other suggestions for categories of grantees that have a sound basis for another exemption.

No changes to the proposed rule have been made as a result of the above comments.

Today's publication references both Regulation Identifier Number (RIN) 1076-AF20 and 1076-

¹ For example, for Federal government entities, sufficient documentation would be a citation to 31 U.S.C. 1301(a) and an explanation that appropriated funds are not available for the purchase of insurance.

AF37 because while the proposed rule was inadvertently listed under RIN 1076-AF20, that RIN was assigned to the final rule for 25 CFR part 169 that effective in 2016. The proposed rule published in 2018 and this final rule are identified as RIN 1076-AF37 on the semi-annual regulatory agenda.

Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

B. Regulatory Flexibility Act

This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule does not change current funding requirements and would not impose any economic effects on small governmental entities.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

- (a) Will not have an annual effect on the economy of \$100 million or more.
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- (c) Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises.

This rule acknowledges that some governmental entities are legally prohibited from complying with the regulatory requirement for providing security and merely establishes a procedure for documenting and notifying that the entities are legally prohibited from complying with the security requirement.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required. This rule does uniquely affect those governmental entities that are prohibited by law from complying with a regulatory requirement to provide security for a right-of-way across Indian or BIA land; however, the purpose of the rule is to account for that legal prohibition. The rule accounts for the legal prohibition in a manner that allows those governmental entities a transparent process for applying for a right-of-way across Indian or BIA land.

E. Takings (E.O. 12630)

This rule does not effect a taking of private property or otherwise have taking implications under E.O. 12630. A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

G. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule: (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation with Indian Tribes (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in E.O. 13175 and have determined there are no substantial direct effects on federally recognized Indian Tribes that will result from this rulemaking because the rule addresses an inconsistency that may have otherwise prevented governments from obtaining rights-of-way on Indian land.

I. Paperwork Reduction Act

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., prohibits a Federal agency from conducting or sponsoring a collection of information that requires OMB approval, unless such approval has been obtained and the collection request displays a currently valid OMB control number. Nor is any person required to respond to an information collection request that has not complied with the PRA. In accordance with 44 U.S.C. 3507(d), the information collections in 25 CFR part 169 are authorized by OMB Control Number 1076–0181, Rights-of-Way on Indian Land, which expires 10/31/2019. The requirements in this rule to provide a legal citation and notice is not expected to have a quantifiable effect on the hour burden estimate for the information collection, but BIA will review whether its current estimates are affected by this change at the next renewal.

A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless the form or regulation requesting the information displays a currently valid OMB Control Number.

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because this is an administrative and procedural regulation. (For further information see 43 CFR 46.210(i)). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

L. E.O. 13771: Reducing Regulation and Controlling Regulatory Costs

This action is not an E.O. 13771 regulatory action because it imposes no more than *de minimis* costs.

List of Subjects in 25 CFR Part 169

Indians-lands, Reporting and recordkeeping requirements, Rights-of-way.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends 25 CFR part 169 as follows:

PART 169-RIGHTS-OF-WAY OVER INDIAN LAND

1. The authority citation for part 169 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 323 - 328; 25 U.S.C. 2201 *et seq.*

2. Amend § 169.103 by adding paragraph (k) to read as follows:

§ 169.103 What bonds, insurance, or other security must accompany the application?

* * * * *

(k) The requirements of this section do not apply to Federal, State, Tribal, or local governments who are prohibited by law from providing a bond, insurance, or other security. Federal, State, Tribal, or local governments seeking this exemption must include with their application a certification, including a citation to applicable law, that they are prohibited by law from providing security. Federal, State, Tribal, or local governments must also notify landowners that they are prohibited by law from providing security when they notify the Indian landowners of their application under § 169.107.

Dated: April 26, 2019.

Tara Sweeney,
Assistant Secretary – Indian Affairs.

Editorial note: This document was received for publication by the Office of the Federal Register on August 14, 2019.

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