October 2, 2014

Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
U.S. Department of the Interior
1849 C Street, NW
MS 4141
Washington, DC 20240


Dear Ms. Appel:

The American Gas Association (AGA) appreciates the opportunity to comment on the Bureau of Indian Affairs’ (BIA) proposed rules concerning rights-of-way on Indian land (the “Proposed Rules”).

The American Gas Association, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 71 million residential, commercial, and industrial natural gas customers in the U.S., of which 94 percent—over 68 million customers—receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and industry associates. Today, natural gas meets more than one-fourth of the United States’ energy needs.

Many AGA member companies hold rights-of-way on Indian lands administered by the BIA. Rights-of-way across Indian lands are, and will continue to be, necessary for AGA members to both expand service to new customers and improve service to existing customers—including customers who are tribal members on tribal lands. These lands play a crucial role in helping to meet America’s energy needs. While AGA appreciates the BIA’s desire to clarify and streamline the process for obtaining and administering rights-of-way on Indian lands, AGA has several concerns about the current Proposed Rules. In our comments, we highlight aspects of the BIA’s Proposed Rules that merit revision. AGA believes that our suggested revisions will promote the BIA’s goal of
streamlining and clarifying the process of obtaining rights-of-way on Indian lands, to the mutual benefit of Indian landowners, energy producers, and energy consumers.

**The Proposed Rules Do Not Incorporate Specific Purpose Rights-of-Way Statutes**


AGA believes that this decision is both ill-advised and contrary to federal law. Before passing the 1948 Act codifying general right-of-way authority, Congress enacted specific purpose rights-of-way statutes. Congress did not explicitly or implicitly repeal these earlier acts, but merely provided that the 1948 Act would not repeal "any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands." 25 U.S.C. § 326. Courts that have addressed whether the 1948 Act was meant to repeal the earlier statutes have found that the 1948 Act was not meant to repeal earlier provisions, and instead held that the previous specific purpose right-of-way statutes "can be read as coexisting" with the 1948 Act. *Blackfeet Indian Tribe v. Montana Power Co.*, 838 F.2d 1055, 1058-59 (9th Cir. 1988).

The BIA’s Proposed Rules directly conflict with both the text of 25 U.S.C. § 326 and Congressional intent by effectively repealing all previous existing statutory authority empowering the Secretary to grant rights-of-way over Indian land. AGA believes that this is contrary to federal law, and the BIA must revise the Proposed Rules consistent with Congressional statute and intent.

**Section 169.006: The Effect on Preexisting Rights-of-Way is Unclear**

As drafted, the Proposed Rule is unclear as to how the new regulations will apply to preexisting rights-of-way. Subsections 169.006 (a) and (b)(2) seem to indicate that the Proposed Rule will apply only to future administrative actions affecting rights-of-way grants issued or submitted for approval under prior regulations, to the extent those future actions do not conflict with any provision(s) of the grandfathered rights-of-way. AGA requests additional agency clarification as to whether this understanding is correct.

Additionally, AGA believes that section 169.006 should clarify that rights-of-way approved or submitted for approval before the effective date of the new rule will not be subject to any review by BIA to determine whether they are consistent with the provisions of the new rule.

AGA believes that the Proposed Rules’ section on appeals, section 169.011, and the relevant definitions, found in section 169.002, should be revised to clarify which party(ies) may bring an appeal. While the language of the Proposed Rule indicates that a party can appeal from BIA decisions, section 169.011 adds that “[The BIA’s] decision to disapprove a right-of-way may be appealed only by an Indian landowner.” This language appears to grant only the Indian landowner the right to appeal a BIA decision disapproving a right-of-way application, denying the same right to applicants and therefore forcing them to bring challenges in federal district court.

Subsection (a)(2) of the Proposed Rules, however, states that a decision to disapprove “any other right-of-way document” may be appealed by both an Indian landowner and an applicant. Section 169.002 defines “right-of-way document” as a right-of-way grant, renewal, amendment, assignment, or mortgage of a right-of-way. The BIA offers no justification for allowing applicants to appeal a decision disapproving a right-of-way amendment, assignment, or mortgage, while denying them the same right to appeal a decision disapproving a right-of-way application. Additionally, because administrative review is often the most cost-effective method for correcting errors by the BIA, denying applicants access to administrative review will lead to more costly, inefficient, and time consuming federal court litigation. In the interests of efficiency, cost-effectiveness, and fairness, all parties with legitimate interests, including Indian landowners, right-of-way applicants, other surface lessees, mineral owners, etc., should have the right to an administrative appeal.

Restricting appeal to only the Indian landowner under proposed section 169.011(a)(1) is inconsistent with existing regulations. The existing regulations allow an applicant to appeal a disapproval of a right-of-way application, and AGA sees no reason to depart from such a policy. Furthermore, AGA believes that it is not the BIA’s intent to depart from that policy. As such, the BIA should edit proposed section 169.011(a)(1) to make it clear that an applicant can appeal a disapproval of a right-of-way application. As providers of essential public services whose customers are directly affected by a disapproval of a right-of-way application, applicants, not just Indian landowners, should be allowed to appeal any disapproval of a right-of-way application.

Section 169.106: The Proposed Rules Improperly Extend a Consent Requirement to All Tribes

In addition to allowing for payment of other than “just compensation” as mandated by Congress, the Proposed Rules improperly require tribal consent in all cases - regardless of tribal organizational status. § 169.106. As the BIA is aware, Congress first imposed a limited consent requirement for rights-of-way when it passed the 1948 Act. See 25 U.S.C. § 324. Section 324 provides that “[n]o grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 [Indian Reorganization Act (“IRA”)] . . . shall be made without the consent of the proper tribal officials.” Id.
Despite section 324’s requirement that consent is only required of IRA-organized tribes, the BIA has improperly applied the consent requirement to all tribes, contrary to the Congressional limitation. This gives all tribes leverage to extract unjust compensation or to block needed infrastructure projects.

In addition, there are specific statutes which govern specific uses which do not require consent of the tribes (see, e.g., no consent required for pipelines at 25 U.S.C. § 321) because those uses have been determined to be so instrumental to the public interest that decisions regarding them are left to the Secretary of the Interior. Similarly, these statutes do not provide for consent of the tribes when only a renewal is taking place, as opposed to the initial grant of a right-of-way.

The BIA’s extension of the consent requirement to all tribes in all circumstances is an incorrect interpretation of sections 321 and 324. AGA urges the BIA to revise the Proposed Rules consistent with Congressional statutes so that the final rule only requires consent from tribes organized under the Indian Reorganization Act and not for specific uses such as pipelines, or renewals of rights-of-way involving these uses, where Congress vested the Secretary of the Interior solely with authority to make the decision whether to issue the right-of-way across U.S. land based on the public importance of these functions to the surrounding communities. Providing tribes with unfettered authority whether to consent in these circumstances, and/or to demand any price, or to eliminate an existing right-of-way, is contrary to both the statutes enacted by Congress and appropriate policies protecting the national interest and other U.S. citizens.

Section 169.109: The New Compensation Requirements Give Too Much Discretion to Individual Tribes

AGA believes that the Proposed Rules’ section on Compensation Requirements, section 169.109, gives too much discretion and unfettered, lopsided bargaining power to individual tribes and is contrary to federal law. Under Proposed Rules' section 169.109(a), a right-of-way “may allow for any payment amount negotiated by the tribe,” and the BIA will subsequently “defer to the tribe” regarding compensation. Additionally, under subsection (b), the BIA will “provid[e] the tribe with the market value” at the tribe’s request and then “defer to the tribe’s decision to allow for any compensation.”

AGA believes that this Proposed Rule is contrary to Congressional statute and intent. The 1948 Act requires that the Secretary of Interior determine just compensation for any grant of a right-of-way. In contrast, the Proposed Rules effectively allow tribes to determine the compensation amount unilaterally. It could never have been Congress’ intent to create a statutory scheme allowing tribes to demand compensation other than “just compensation” as determined by federal appraisal methodology. This Proposed Rule, therefore, is contrary to federal law, and the BIA must revise it consistent with Congressional statutory mandates and intent.

---

1 25 U.S.C. § 325. “No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of Interior shall determine to be just.”
As written, the Proposed Rule allows “for any payment amount negotiated by the tribe,” even after a tribe has requested that BIA determine market value. Granting tribes such absolute discretion in determining compensation could lead to increased costs to those AGA members relying on such rights-of-way to serve new and existing customers. If tribes are not held to market value or the Secretary’s determination of just compensation, distribution companies could be forced to pay an exorbitant amount for a necessary right-of-way, leading to increased costs for existing customers (including those within tribal communities) while impairing access for new customers.

There may also be instances where the tribe and the applicant mutually agree to a compensation amount other than the amount determined by the federal appraisal method. If such discretion is intended by the Proposed Rules, it should be clarified to provide that the BIA will accept a mutually agreed-upon, negotiated compensation amount. This discretion would be consistent with the 1948 Act in that the Secretary could determine the mutually agreed-upon, negotiated amount to be “just compensation.”

Likewise, section 169.109(b) should be modified such that the applicant (and not just the tribe) has the right to request BIA determination of appropriate value for the right-of-way.

Section 169.111: The Proposed Rules Grant the BIA Too Much Discretion in Determining Fair Market Value, Without Offering Applicants an Opportunity to Challenge

The Proposed Rules are unclear regarding how the BIA will determine fair market value. While section 169.111(a) specifically lists both a market analysis and appraisal, it also allows the BIA to determine market value by “other appropriate valuation.” This Proposed Rule appears to grant the BIA substantial discretion to determine other appropriate methodologies. Although section (c) provides some limits, it also allows the BIA to approve a market valuation prepared by another Federal agency as “appropriate.”

Furthermore, AGA members have expressed concerns with the absence of options available to applicants after the BIA has made its fair market value determination. There is no indication that there is an arbitration hearing or other administrative appeal process allowing applicants to challenge the BIA’s determination. AGA believes that there should be an opportunity for applicants to challenge the BIA’s fair market value determination through an arbitration hearing or similar procedure.

Section 169.201: The Term Limits Provided for Gas Pipelines Are Insufficient

AGA believes that the proposed term limit guidelines for gas pipelines on individually owned Indian land, section 169.201, are insufficient and should be increased from twenty to fifty years, which is the suggested term for electric power projects. Because the facility life for electric generation is similar to that of natural gas distribution and transmission pipelines (as distinguished from oil or gas well-head gathering system pipelines), the suggested term length for these uses should be the same.

To renew under current regulations, a right-of-way holder may submit an application for renewal of the grant on or before its expiration date. The Proposed Rules, however, appear to add the requirement that the original right-of-way grant must specifically allow for renewal and specify any related compensation. Such a requirement could prove problematic where, for example, a natural gas utility distribution line (used to provide direct service to customers), which has a perpetual term, obtains its natural gas supply from a backbone transmission pipeline system with a lesser term. If the grant for the backbone system does not contain the renewal language required by the Proposed Rule and thus cannot be renewed, the utility would be unable to fulfill its service obligations to distribution customers.

Accordingly, AGA believes that this language should be removed from the Proposed Rules, and that the BIA should maintain the current practice of allowing renewal even without such a provision in the original grant if the parties agree. If the language is not removed, the section should make clear that a right-of-way approved before the effective date of the final rule may be renewed with the written consent of the parties, even if the original right-of-way grant did not specifically provide a mechanism for renewal.

Additionally, section 169.202 of the Proposed Rules states that if a proposed renewal involves a change in size, type, location, or duration of the right-of-way, the grantee must reapply for a new right of way, which will be evaluated as an original application. Requiring a new right-of-way application for every change in size, type, location, or duration of a right-of-way grant, regardless of how small, will lead to inefficiencies and detrimentally reduce flexibility for modernizing energy infrastructure. The Proposed Rule should provide the flexibility to allow for minor changes to the size, type, location, or duration of the right-of-way through an amendment, rather than an entirely new application. The Proposed Rule should also allow such amendments to relate back to the date of original installation of the facilities when determining prior rights between multiple holders within a common right-of-way.

Finally, it is unclear how preexisting rights-of-way will be treated for renewal purposes under the Proposed Rules. The Proposed Rules require specific provisions permitting renewal and specifying the compensation amount in the original grant. Section 169.006 details the applicability of the Proposed Rules to preexisting rights-of-way documents. Specifically, the provision indicates that the new rules will apply to all right-of-way documents, but specifies that rights-of-way granted or approved before the effective date of regulations, or submitted before and approved after the effective date of regulations, will be governed by the new rules. Subsections (a) and (b), however, include the qualifying language “if the provisions of the right-of-way document conflict with this part, the provisions of the right-of-way govern.” Even considering both sections 169.006 and 169.202, the Proposed Rules do not give a clear indication of how the regulations will treat rights-of-way without provisions specifically allowing renewal and specifying
AGA Comments on Rights-of-Way on Indian Land
October 2, 2014
Page 7 of 8

compensation. AGA requests clarification regarding whether preexisting rights-of-way without such provisions will need to be submitted as new applications, amendments, or will be exempted from the requirement in section 169.006. Additionally, if the Proposed Rules will not require preexisting rights-of-way grants to add sections governing renewal, it is unclear what would occur if a tribe or the BIA decided to significantly raise the compensation amounts for renewal; especially if no appropriate means of challenging the value determination exist.

AGA supports and incorporates by reference comments by the American Petroleum Institute (API) regarding:

1. Section 169.002—Definitions
2. Section 169.003(a)—Conditioning Grant on Adjacent Right-of-Way
3. Section 169.003(b)—Land Subject to Life Tenancy
4. Section 169.008(b)—Application of Tribal Law
5. Section 169.010—Notice to “Affected” Parties
6. Section 169.001(a)(1)—Right to Appeal
7. Section 169.101—Consent for Survey Access
8. Section 169.103(a)—Performance Bonds
9. Sections 169.103(a)(4), 169.121(b)(2)(iii), (ix), 169.501—“Restoration” of Land
10. Section 169.107(a)—Consent of Individual Indian Landowners
11. Section 169.119(a)—Compensation
12. Section 169.112—When Compensation is Due
13. Section 169.117—Periodic Compensation Review and Adjustment
14. Section 169.118(b)—Damage Fees
15. Section 169.119(b)—Notification of Complete Application
16. Section 169.207(a)—Assignment of the Grant
17. Section 169.210—Mortgage of the Grant
18. Section 169.304(a), (c), (f)—Notice to Compel by “The Parties”
19. Section 169.304(g)—BIA Inaction
20. Sections 169.404—Right of Access for Reclamation
21. Section 169.410—Grace Period for Trespass
Thank you for the opportunity to comment on the Proposed Rules. While AGA appreciates the steps being taken to clarify the process for obtaining and administering rights-of-way on Indian lands, the suggestions offered above will provide necessary clarification while further streamlining the application and review process. The revisions will encourage modern energy infrastructure projects on and across Indian lands, providing economic, environmental, social, and many other benefits to Indian tribes and energy consumers.

If you have any questions, please do not hesitate to contact me.

Respectfully Submitted,

Pamela Lacey
Senior Managing Counsel, Environment
American Gas Association
400 N. Capitol St., NW
Washington, DC 20001
202.824.7340
placey@aga.org