

RIGHT-OF-WAY NEGOTIATION STRATEGIES

11th Tribal Land Staff National
Conference
Mystic Lake Center
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INTRODUCTION AND WELCOME



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Director, AVSO

- Previously Chief Appraiser for the Department
- Started Federal Career with BLM in the Colorado State Office (2000)
- Regional Appraiser with USDA Forest Service from 2003-2009 in Rocky Mountain Region
- BLM Client Services Manager for OVS from 2010-2014
- B.S. in Wildlife Conservation and Management (University of Wyoming)
- Master of Public Administration and Graduate Minor in Environment and Natural Resources (University of Wyoming)
- Recently completed term as Chair of The Appraisal Foundation Advisory Council (TAFAC)
- As Chief Appraiser completed implementation of 2015 ROW Regulation changes for Indian Trust Lands.

WHAT WE WILL COVER TODAY



AVSO
Overview



Refresher on
25 CFR 169
Terminology



Key
differences in
approach by
parties



Questions to
Ask and
Critical
Information



Negotiation
Checklist
Items



Question
and
Answer
Time

Please hold questions until the allotted Q&A time

DISCLAIMER



- I am presenting today in my official capacity as the Director of the Appraisal and Valuation Services Office of the Department of the Interior, however the opinions presented are mine and do not represent the Department of the Interior
- I am not an attorney, and these strategies are presented from a valuation perspective to assist with negotiation and awareness of right-of-way specific issues and should not be taken as legal advice
- If you have specific questions related to the legal nature of the right-of-way being sought, I recommend that you talk to an attorney with knowledge of right-of-way negotiations and familiarity with the unique situation of rights-of-way across Indian lands.

THREE KEY AREAS OF CONCERN

- How will the proposed ROW impact your property?
 - Short term and long-term effects
 - Can they be reduced through negotiation?
- Income – How much compensation is just for the impact identified above?
- Eminent Domain – Does the company possess the potential power of eminent domain, and is the company willing to pursue eminent domain?

Many of the topics we will discuss today go back to these three areas



AVSO BACKGROUND AND FUNCTION

Fox Bay, Lake Iliamna, Alaska

AVSO BACKGROUND AND FUNCTION

AVSO is the consolidated appraisal and mineral valuation office for the Department

- Created by Secretarial Order 3363 in March of 2018.
- Separate appraisal function in the Department resulted from critical audits by DOI-OIG and GAO in the late 90s and early 2000s.
- Ensures independence in valuations from program and political pressure within the bureaus.
- Unique across government – no other departments have similar structures to ensure appraiser independence.

1990s and 2000s – audits found appraisal independence compromised by appraisers' placement within the bureaus.

2002 – Sec. Order 3240 moved appraisers from BIA to OST.

2003 – Sec. Order 3251 removed all appraisers from bureaus and reassigned to the Appraisal Services Directorate.

2010 – Federal land appraisal function moved from National Business Center to Office of the Secretary.

2018 – Sec. Order 3363 consolidated all appraisal functions within DOI into AVSO as required by ITARA*.

*Indian Trust Asset Reform Act (P.L. 114-178) requires that all appraisals and valuations on Indian Trust property are conducted by a single entity within the Department of the Interior

AVSO ACCOMPLISHMENTS FY2021

Federal Lands



391 Cases

146K Acres
\$380 million
BLM, FWS, NPS, USBR

Indian Lands*



10k Cases

961K acres
\$1.1 billion
96 Tribal Nations

Minerals Evaluation*



278

4 million acres
30 Tribal Nations
29 States

* Includes Land Buy Back Program for Tribal Nations



RIGHT OF WAY REFRESHER

Santa Rosa Wilderness, Riverside County, California

DOI.GOV/VALUATIONSERVICES

RIGHT-OF-WAY REFRESHER

Terminology from 25 CFR 169

- *Compensation* means something bargained for that is fair and reasonable under the circumstances of the agreement.
- *Easement* means an interest, consisting of the right to use or control, for a specific limited purpose, land owned by another person, or an area above or below it, while title remains vested in the landowner.
- *Fair market value* means the amount of compensation that a right-of-way would most probably command in an open and competitive market.
- *Grant* means the formal transfer of a right-of-way interest by the Secretary's approval or the document evidencing the formal transfer, including any changes made by a right-of-way document.
- *Right-of-way* means an easement or a legal right to go over or across tribal land, individually owned Indian land, or BIA land for a specific purpose, including but not limited to building and operating a line or road.

KEY VALUATION POINT 2015 ROW RULE

Includes definition of Fair Market Value for the first time:

Fair market value means the amount of compensation that a right-of-way would most probably command in an open and competitive market.

This is dramatic departure from how FMV was determined in the past.

- Decouples compensation from land value
- Allows for inclusion of other items unrelated to the land

Was recommended by DOI-OIG in 2012 audit of ROWs for all federal agencies within DOI

COMPENSATION

Terminology from 25 CFR 169

Compensation means something bargained for that is fair and reasonable under the circumstances of the agreement.

“may also include additional fees, including but not limited to throughput fees, severance damages, franchise fees, avoidance value, bonuses, or other factors.”
(25 CFR 169.112)

What does this statement mean?

COMPENSATION

The final rule includes the following:

- *“The proposed and final rules clarify that Indian landowners may take into account additional fees when negotiating compensation.”*
- *“The Department does not agree that providing individual Indian landowners with a list of additional fees that may be considered in negotiating compensation, beyond fair market value, will lead to “unwarranted expectations” and ultimately increase the use of eminent domain; rather it helps ensure parity in negotiations between landowners and applicants, providing better information to improve the functioning of the market.”*

These items in the list were never meant to be additive or all encompassing. The intent was that when comparing other ROWs if these things were included, they could also be included in the compensation negotiation and any valuation.

FAIR MARKET VALUE

Terminology from 25 CFR 169

Fair market value means the amount of compensation that a right-of-way would most probably command in an open and competitive market.

- This type of definition is unique to rights of way across Indian lands.
- Separates value of right-of-way from the value of the land.

How is this different from typical definitions of fair market value?

How is it the same?

FAIR MARKET VALUE (CONT.)

Definition from Uniform Standards for Federal Land Acquisitions (UASFLA or Yellow Book)

“*Market value* is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date of value, after a reasonable exposure time on the open and competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property.”

SIDE BY SIDE COMPARISON

25 CFR 169 (Post 2015 rule)

- *Fair market value* means the amount of compensation that a right-of-way would most probably command in an open and competitive market.

UASFLA (Pre 2015 rule)

“*Market value* is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date of value, after a reasonable exposure time on the open and competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property.”

Can you spot the biggest difference between the two?



PARTIES TO THE TRANSACTION

Canyon de Chelly, Arizona

ACQUIRING PARTY

Typical methodology is the before and after appraisal

- Fair market value of the larger parcel “as-is”
- Fair market value of the larger parcel after the easement is hypothetically in place
- Difference is the amount of compensation.

Approach used by state and federal government when acquiring ROWs

Standard methodology used by ROW industry professionals

Compensates landowner for value of land encumbered and some severance damages

Does not value the rights being acquired, only the difference between the before and after appraisals

CONVEYING PARTY

- Has relied on the before and after approach in the past.
- If goes to eminent domain, before and after approach is the most accepted methodology for determination of just compensation.

However...

- State governments granting ROWs across state land are often mandated to get the highest return possible when negotiating ROWs.
- Even the Federal Government is not required to use the before and after methodology when conveying easements or ROWs.
- The Yellow Book allows for consideration of the value of the easement to the acquirer, customary “going rates” or other measures as well as the loss in value to the landowner.

SECRETARY OF THE INTERIOR

Must determine that compensation is just (25 U.S.C. 325)

Defers to negotiated amount

“BIA does not have the legal authority to limit the amount that Indian landowners charge for a right-of-way.”

“The final rule does not establish any ceiling on compensation; to do so would unduly restrict landowners’ ability to get the maximum compensation for their land interest. The Department’s role is to ensure that the compensation is “just” for the Indian landowners.”



ROW SPECIFIC TOPICS AND QUESTIONS TO ASK

**Kasha-Katuwe Tent Rocks National Monument,
west of Santa Fe, New Mexico**

[DOI.GOV/VALUATIONSERVICES](https://doi.gov/valuationservices)

TYPE OF EASEMENT

LEGAL

- Easement in Gross – typically to a party or parties
- Easement Appurtenant – runs with the land

PHYSICAL

- Surface
- Subsurface

USE/TYPE

- Pipeline, Powerline, Road, etc.
- Substances permitted in pipeline: oil and gas, water, sewage, other

LEGAL

- Exclusive
- Nonexclusive

Why are these important?

LEGAL DESCRIPTION

- Must be complete and accurate
- Location on your property
- Detail depends on the situation
 - Official Survey
 - General Sketch
- Should include specific terms, not general terms like “across the landowner’s property.”

What other items might be important when it comes to compensation?

PHYSICAL DESCRIPTION

- Length and width (Rods or acres?)
- If subsurface, how deep? (Special considerations for farm ground)
- If overhead, pole spacing? (May affect uses allowed under powerline)
- Construction rights?
 - May be included in the width of the ROW
 - May require a separate temporary construction easement to install
 - Timeline for installation?
 - What construction standards apply?
 - Will it be installed by a 3rd party?
- Is the ROW limited to only one ROW per agreement?

What other physical items might be important?

DEFAULT PROVISIONS AND TERMINATION

- What happens at the end of the term?
- Who is responsible for what?
- If ROW is terminated, what are the specific requirements for reclamation and restoration?
- If terminated before the end of the term, is the landowner entitled to any payment for the unused term?
 - If entire amount is paid upfront, this may not be an issue.
 - Should specify that if voluntarily early termination, no refund to the holder of the ROW
- Is the ROW renewable? How does that happen? How is compensation determined for renewals?

INSURANCE AND LIABILITY

- Is insurance necessary for the ROW?
- Who pays?
- Can landowner be listed as “additional insured” party by the company?
- Is it Specified in the document?
- Indemnification

If the pipeline blows up or the powerline starts a wildfire, who is responsible?

TAXES

- Are ROWs taxable in your jurisdiction?
- Can you receive a lowered taxable value because of the ROW?
- Is income received from the ROW taxable?
- In Pennsylvania, payments to the landowner for damages are considered a capital gain and subject to taxation.
- The landowner should ask for and receive an itemized statement from the company that explains the payments to the landowner.

MAINTENANCE

- Which party is responsible for maintenance of the ROW?
 - Roads?
 - Brush removal or other vegetative maintenance?
 - What maintenance is required?

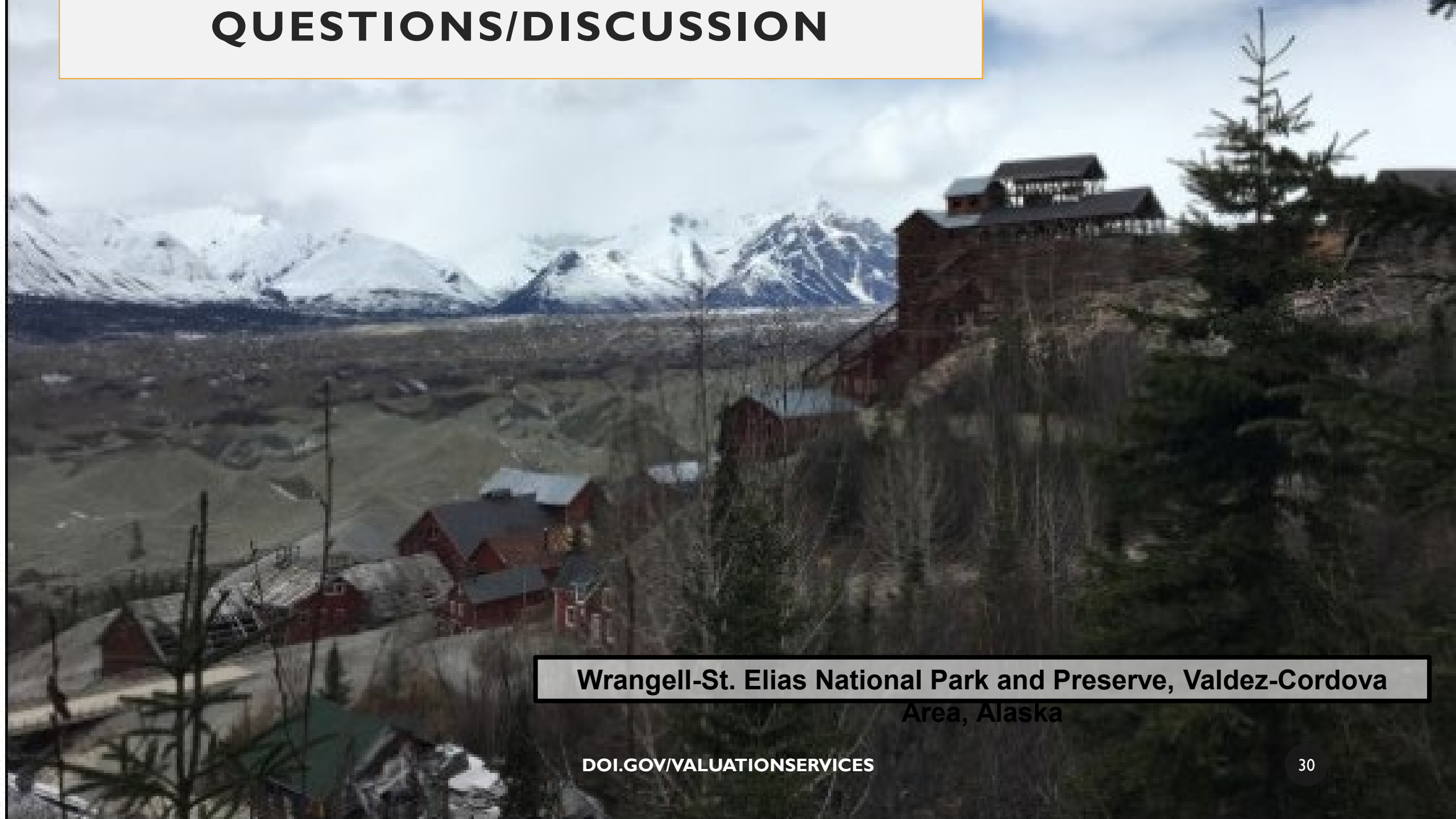
COVENANTS

- Protection of the ROW against the landowner
- Protection of the landowner against the holder

OTHER FACTORS TO CONSIDER

- Timber, Water and Standing Crops
- Access to the ROW and limits to the landowner's use of the property
- Fishing and hunting in the ROW area
- Surface Facilities
- Payment of Negotiation Costs (Legal Fees)
- Dispute Resolution
- Any others?

QUESTIONS/DISCUSSION



Wrangell-St. Elias National Park and Preserve, Valdez-Cordova

Area, Alaska