Examining the Rights-of-Way Process for Indian Allotment Lands Navajo-Gallup Water Supply Project

Bernadette Benally Fontenelle

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Examining the Rights-of-Way Process for Indian Allotment Lands
Navajo-Gallup Water Supply Project

Bernadette Benally Fontenelle

A Professional Water Supply Project Submitted in Partial Fulfillment of the Requirements
For the Degree of
Master of Water Resources
Policy and Management Concentration

Water Resources
The University of New Mexico
Albuquerque, New Mexico

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Acknowledgements

Many thanks to my committee. I am thankful for the advisement, guidance and support of Dr. John Leeper (AMEC Earth & Infrastructure), Dr. Robert Berrens (University of New Mexico, Water Resources), Dr. Laura Harjo (University of New Mexico, Community and Regional Planning), and Darcy Bushnell (University of New Mexico, School of Law, Utton Center). Thank you.

This research would not have been possible without the support of the U.S. Bureau of Reclamation, Four Corners Construction Office (FCCO), in Farmington, New Mexico. This office selected me as their environmental stewardship intern, in collaboration with AmeriCorps and Southwest Conservation Corporation. The stewardship was a rewarding opportunity to explore the Rights-of-Way issues for Navajo allotment lands. Thank you, Reclamation FCCO staff for recognizing my unique skills by hiring me as a Native American Liaison Specialist for the Navajo-Gallup Water Supply Project.

Through this internship, my ability to connect with the Navajo allottees was a rewarding learning experience. Thank you to the Navajo language. Thank you to the Navajo allottee families residing on/off the Project alignment, Reaches 12.1, 12.2, and 22. Your concerns were taken seriously.

Many thanks to my family for their generous support of my educational journey, especially my kids, Brandon and Bernalene. This paper is dedicated to my late mother, Verna Clashin Benally. Her family, too, experience Navajo land issues through the Navajo-Hopi Land Dispute.
Abstract

This research examines the Rights-of-Way process for Navajo allotment lands. Today, there are 566 Indian nations. Each nation has its own history relating to Indian allotment lands. In the 1880s, allotment lands were created through federal Indian policy as tribal trust lands were allotted to individual Indian tribal members of various nations. This research examines a real example of the Rights-of-Way process for Navajo allotment lands as it relates to the Navajo-Gallup Water Supply Project. Land access for allotment lands is questionable. Water access for the Water Supply Project secured and supplied through the recent Navajo Nation San Juan River Water Rights Settlement. The water pipeline alignment will cross six types of land. Each type has its own Rights-of-Way process. This research will examine the current Rights-of-Way process for Navajo allotment lands. This research applied three methods to identify the current Rights-of-Way process for allotment lands. A document review for existing federal and tribal policy for allotment lands finds that the Navajo Nation does not have authority over allotment lands. The U.S. Bureau of Indian Affairs has authority over allotment lands. For Navajo allotment lands, the Rights-of-Way process is initiated by the U.S. Bureau of Reclamation for the Water Supply Project. The Bureau of Indian Affairs will approve or disapprove Rights-of-Way easement. The results show the current Rights-of-Way process for Navajo allotment land is quite general. After examination, the research identifies areas of improvement for the current the Rights-of-Way process. This research provides recommendations to improve and update the current Rights-of-Way process starting with a better framework to understand the Rights-of-Way process for Navajo allotment lands.
Introduction

“Rights of way laws, as they relate to Indian lands, can be confusing. As tribes and individuals face either renewing an existing Rights of way or considering a proposal for a new one, they should know how the laws governing Rights of way came to be and to understand the Rights of individual landowners and tribes” (Indian Land Tenure Foundation, 2012). The purpose of this research is to examine the Rights-of-Way (ROW) process for allotment lands crossed by the water pipeline alignment of the Navajo-Gallup Water Supply Project (Water Supply Project). This research looks at the current ROW process for the Navajo Nation allotment lands. The Nation’s historical background to land and water reflects on the current ROW process for allotment lands. The background of the Navajo people and their land is significant to understanding that the extensive Indian allotment history and its policies impact today’s economic development in Navajo country.

The U.S. Bureau of Reclamation (Reclamation) is building a water pipeline for the Eastern Navajo Nation in New Mexico. The pipeline is projected to be completed in the year 2024. This is ten years from today. The project area of construction is the first water pipeline to be built in this area of the Navajo Nation. The Reclamation has identified some project challenges. One challenge is acquisition of ROW permissions. The Water Supply Project identified six types of land status. Each type has its own ROW Process. Out of the six types of land status, Indian allotment is the most problematic because of the current ROW process for allotment lands is not clear. Even though the current ROW process for allotment lands is not clear for water projects, prior ROW applications have been approved by the U.S. Bureau of Indian Affairs (BIA) for other types of utilities.
This research applies four methods to identify the current administrative regulations for the ROW process for Navajo allotment lands. A document review for existing federal and tribal policy for allotment lands finds that the Navajo Nation does not have authority over allotment lands. The BIA has authority over allotment lands. The results show that the current ROW process for Navajo allotment land is quite general. The research provides a better understanding of the Water Supply Project pipeline alignment crossing Navajo allotment land and the current ROW process for those lands. A recommendation is to use the conceptual framework created in this research as a way to implement a 6 step ROW process.

Background

The background describes what a Rights-of-Way (ROW) process is about and how it pertains to the Navajo-Gallup Water Supply Project, the Navajo allotment lands, and the Navajo water settlement. Any type of water project poses questions about the land to be crossed which requires ROW easement approval. For this Water Supply Project, in order to cross allotment lands and build the water pipeline, Reclamation FCCO must obtain a ROW easement approval from the BIA. The BIA has a ROW process for allotment lands that needs clarification. The water pipeline alignment will cross six different types of land. Each type of land has its own ROW process. The water for the Water Supply Project is stored at the Navajo Dam Reservoir and that water is released into the San Juan River. Recently, the Navajo Nation agreed to the San Juan River Water Rights Settlement.

What is a Rights-of-Way?
A ROW is a set of permissions (e.g., for land acquisition and construction) needed for land development. Examples of where ROWs are necessary include public and private roads, railroads, electric lines, gas lines, and pipe lines. A ROW permits a developer (in this research, Reclamation is the developer and the ROW applicant) to access the property (allotment) for construction. For construction purposes, there are both a temporary ROW and a permanent ROW. Both are measured in feet and are stated in the legal description of the ROW application.

What is a Rights-of-Way process?

A ROW process is part of an application that is used to determine if a ROW easement should be granted for a ROW applicant. It is a set of administrative regulations that must be followed by developers when applying for the application. The application is reviewed by BIA. The application includes legal descriptions, survey maps, archaeological survey and clearance, environmental assessment, fees, and landowners’ ROW consent. For this Water Supply Project, the research examines this ROW process that is enforced by BIA.

What is the current Rights-of-Way process for allotment land?

The current ROW process for Navajo allotment lands is unclear, especially for the two federal sister agencies involved in the Water Supply Project. The current ROW process recognizes that contacting land owners is one of the important steps in the ROW process. This step is not clearly understood by the ROW applicants and Navajo allottees. This important step is defined in a guideline outside the current ROW process documentation. Land owners must give their ROW consent before construction may begin, but how to do that needs to be clarified.
In February 2013, the BIA Crownpoint Office, also known as the Eastern Navajo Agency (ENA) conducted a workshop about the ROW process at the San Juan Community College in Farmington, New Mexico. This workshop was for ROW applicants. The workshop’s main objective was for BIA to educate applicants and answer questions about the ROW process. According to the workshop, applicants must comply with the federal administrative regulations known as the Code of Federal Regulations (CFR). BIA follows the 25 CFR Part 169, Title 25—Indians, Part 169—Rights-of-Way Over Indian Lands for ROWs. This federal regulation does not specifically state a step-by-step ROW process for allotment lands, and instead describes the general ROW rules and regulations. This is the research problem. For allotment lands only, the ROW process is too general for not only the two federal sister agencies, but also for past applicants and the Navajo allottees. There is no written step-by-step ROW process for allotment lands.

Federal Agencies

Two sister federal agencies within the Department of the Interior—Bureau of Reclamation and Bureau of Indian Affairs—have key responsibilities with regard to the ROW process for allotment lands. Reclamation is the lead federal agency constructing the Water Supply Project. It must submit a ROW application for allotment lands to BIA. The BIA will review and approve the final application.

Reclamation’s previous experience is primarily in building dams and irrigation systems. Reclamation finds itself in unfamiliar territory with Navajo allotment lands and the ROW process. Reclamation is finding that the ROW process is not specific enough for allotment lands. The Department of Interior mandated the FCCO in Farmington, New Mexico to build this Water Supply Project. The FCCO is a part of Reclamation’s Upper Colorado Region.
The BIA serves as the trustee for most Indian reservations and allotment lands (Taylor, American Indian Policy, 1983, p. 76). The largest BIA region is the Navajo Nation (Fixico, 2013). Within the Nation, the BIA has four area offices: 1) the Navajo Region, Gallup, New Mexico, 2) the Fort Defiance Agency, Fort Defiance, Arizona; 3) the Northern Agency, Shiprock, New Mexico, and 4) the ENA, Crownpoint, New Mexico. Today, BIA oversees Navajo allotment lands through the federal authoritative figure, the Secretary of the Department of the Interior. BIA plays a major role in land access. BIA has power to grant any interest in land, except to sell it, with the consent of the Tribe, including ROW, easements, and leases of all kinds (Land Term Definition, 2013).

Reclamation submits the ROW application for allotment lands to the appropriate BIA office. The appropriate office depends on where the allotments are located. For the Water Supply Project, Reclamation will send the ROW application for these allotments to the BIA Real Estate Service Office (ENA) in Crownpoint. The office will either make further recommendations about the ROW application, or approve, or disapprove it.

One major problem for the current ROW process is retrieving ROW consent from the allotment land owners, also known as Navajo allottees. The ROW consent requirement is not clearly stated in the current ROW process. Instead BIA has a separate reference document, *Guideline for Acquiring Owner Consent on Navajo Indian Allotments*.

**WATER**

Quantification of Navajo Nation San Juan River Basin Water Rights

Bernadette Benally Fontenelle  Professional Project  10
The Water Supply Project is bringing treated water to the Eastern Navajo Nation in New Mexico, under a recent Indian water settlement of the San Juan River. The 2009 Navajo Nation San Juan River Water Rights (Settlement) in New Mexico resolved some of the Navajo Nation claims to the San Juan River Basin (Order Granting the Settlement Motion For Entry of Partial Decrees Describing the Water Rights of the Navajo Nation, 2013). This Settlement authorizes construction of the Water Supply Project.

On March 30, 2009, U.S. President Obama signed Public Law 111-11 that authorizes the U.S. Federal Government to enter into the settlement with the Navajo Nation and the State of New Mexico. On December 17, 2010, the Secretary of the Interior signed the Navajo Settlement Agreement and, then U.S. Federal Government became a settling party. Today the water rights of the Navajo Nation in the San Juan River of New Mexico have been resolved and settled between the U.S. Federal Government, the State of New Mexico, and the Navajo Nation.

The Settlement was designed to bring drinking water to the Navajo people who reside in the eastern part of the reservation. For this river basin, it is through the Water Supply Project that the Navajo Nation water rights1 will be exercised. The Water Supply Project will deplete industrial use. Based on expected populations in the year 2040, Reclamation estimates that Water Supply

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1 The Navajo Nation water rights priority date is based upon the year the reservation was created in the Treaty of 1868. The legal standard that was used to quantify the water rights is Homeland Standard.
approximately 35,893\(^2\) acre-feet of water per year from San Juan River for municipal and Project would serve approximately 203,000 people in the 43 Navajo chapters\(^3\) (list provided in Appendix A) in the Eastern Navajo Nation (U.S Department of the Interior Bureau of Reclamation, 2009).

However, the Settlement did not recognize allottees’ water rights and instead, designated the Navajo Nation as having the water supply (Partial Final Judgement and Decree of the Water Rights of the Navajo Nation, 2013). The Decree, Section 11 titled “Allottees” says: “such water rights for allotted land shall be fulfilled or serviced by rights of the Navajo Nation quantified in this Decree, or the depletions of flow of the San Juan River resulting from the use of water under such rights for allotted lands shall be fully offset by a forbearance of use of rights of the Navajo Nation quantified in this Decree. Nothing in the paragraph shall create a right of any Allottee to delivery of water by the Navajo Nation.”

In the past years, many Navajos have hauled water to their homes from border towns outside of the reservation, such as Farmington or Gallup, New Mexico. Access to water for Navajo allottee homes involves a) another application process handled by Indian Health Service (IHS), b) Navajo chapter houses, and c) the Navajo Tribal Utility Authority. This is known as the Navajo


\(^3\) A Navajo chapter is the community hub where the elected tribal chapter officials and their staff hear and address the concerns of their constituents.
Connection Plan. This plan is being implemented by the Navajo Nation Department of Water Resources, Water Management Branch.

Navajo-Gallup Water Supply Project

The Water Supply Project is the cornerstone of the 2009 Navajo Nation Water Settlement (Reclamation, Brochure for the Navajo Gallup Water Supply Project, 2013). The Water Supply Project consists of two main transmission water pipelines: the San Juan and Cutter Laterals. Allotment lands are located along both laterals. The water pipeline is 280 miles long. It must be built by the year 2024. The total cost of this Water Supply Project will be more than 1 billion dollars. The Water Supply Project participants are: Bureau of Reclamation, Bureau of Indian Affairs, Navajo Nation, Jicarilla Apache, City of Gallup, Indian Health Service, and Navajo Tribal Utility Authority. Together, they designed the entire Water Supply Project which has 27 construction reaches. Out of the 27 reaches, the pipeline alignment crosses three reaches with allotment lands. According to J. Gibson, these Reaches are 12.1, 12.2, and 22 (personal communication, June 16, 2014).

The map below shows the current Water Supply Project alignment shown in red, green, and yellow lines. The San Juan Lateral (red line) runs from Shiprock to Gallup, New Mexico along U.S. Highway 491. There is a sub-lateral which runs to Window Rock, Arizona, capital of the Navajo Nation. Some of the allotment lands (Reaches 12.1 and 12.2) are found on this sub-lateral. The Cutter Lateral (yellow and green line) runs from the Cutter Reservoir to the Jicarilla Apache Nation and to Ojo Encino, along U.S. Highway 550. There are also allotments (Reach 22) along this

---

4 Reaches are the construction phases for the entire Water Supply Project.
lateral. The additional features are a water treatment plant and multiple pumping plants built on each lateral.

Figure 1- Map of Navajo-Gallup Water Supply Project

Courtesy of Reclamation, (U.S. Bureau of Reclamation, 2014)
LAND

Development and History of Navajo Nation Reservation

The Navajo Reservation spans three states: Arizona, New Mexico, and Utah. A piece of theNavajo Reservation is located in the San Juan River Basin in New Mexico. The Navajo Reservation homeland now extends over 17 million acres (27,000 square miles) (Walden, Handout- Navajo Government History: 1846 to 2013, 2013). The Navajo Reservation was created through the Treaty of 1868 (Treaty of the Navaho, 1868) (Treaties, 1904) (Dehiya, 1972). Since that time, more land has been added through Executive Orders issued between the years 1880 to 1934. Allotment lands were created through these executive orders in an effort to Americanize tribal members so that they would become taxpaying state citizens. This federal Indian policy was expressed in 1887, in the General Allotment Act.

Figure 2 below is a map that shows the development of the Navajo Reservation (Walden, Navajo-Gallup Water Supply Project Cultural Awareness Training, 2013). The 1868 block incorporates the land acquired through the Treaty of 1868. After 1868, executive orders were issued by various Presidents of the United States to add land to the Reservation. On the map, the 1880 backward letter ‘L’ shape represents land containing the first allotments. The map below shows the development of the Reservation and additions by years (Walden, Navajo-Gallup Water Supply Project Cultural Awareness Training, 2013). For example, the year 1868 represents the original Navajo Reservation lands set aside for the Nation by the Treaty of 1868. The blocks of color show additions of land to the original 1868 Reservation. The land additions were made in the following years: 1878, 1880, 1882, 1884, 1896, 1900, 1901, 1905, 1907, 1913, 1918, 1930, and 1934.

---

5 After 1871, no more treaties were signed between the Federal Government and Indians.
orange block, for the year 1880, corresponds with the Water Supply Project map showing the alignment of Reaches 12.1, 12.2, and 22. Reaches 12.1 and 12.2 are located in the area of Rocksprings, Twin Lakes, and Yahtahey, New Mexico. Reach 22 is located in Blanco Canyon, Huerfano, and Nageezi, New Mexico.

Figure 2- Development of Navajo Nation Reservation

(Walden, Navajo-Gallup Water Supply Project Cultural Awareness Training, 2013)

Six Types of Land

The Water Supply Project alignment will cross six types of land: 1) allotment lands, 2) checkerboard lands, 3) private lands, 4) state lands, 5) tribal fee (restricted) lands, and 6) tribal trust lands. Reclamation created a Water Supply Project land status map (Figure 3) to demonstrate the six types of land status. Each type has its own Rights-of-Way process.
Figure 3- Checkerboard pattern of eastern Navajo Nation in New Mexico

Courtesy copy from Navajo Nation Land Department
First Type- Individual Indian Allotment Land

BIA defines Individual Indian Allotment land as, land with “legal title in the U.S. held in trust for an Individual Indian.” These lands were created in an effort to destroy tribal trust land and eventually make an Indian land owners taxpaying state citizens. The BIA has pervasive power over this kind of lands; tribes have no consent privilege. The BIA and landowner can lease to non-Indians or sell to the Tribe with the consent of the Individual Indian (Department of the Interior, 2006). Allotment land owners are known as allottees. “These allotted lands were given to the head of each Indian household a 160 acre of reservation land, and then to add the land left over to the public domain” (Kelley, 1986). These lands were held in trust for a period of twenty-five years. After the 25 year period ended, allottees were allowed to lease land to whomever but not to sell without BIA’s approval.

As of 2005, there are 762,749 acres of Navajo Nation allotment land (Type of Navajo Nation Lands and Leases- Section/ONLA, 2005). The table below summarizes the Navajo Nation allotment lands by state. In the State of Arizona, there are 81,964 acres of Navajo allotment lands. In the State of New Mexico, there are 671,044 acres of Navajo allotment lands. In the State of Utah, there are 9,742 acres of Navajo allotment lands. Another source shows there are 633,354 acres of Navajo allotment land (Land Term Definition, 2013).
Table 1- Summary of Navajo Nation Allotment Lands in AZ, NM, UT

<table>
<thead>
<tr>
<th></th>
<th>Arizona (acres)</th>
<th>New Mexico (acres)</th>
<th>Utah (acres)</th>
<th>Total</th>
</tr>
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<tr>
<td>Navajo Allotment</td>
<td>81,964</td>
<td>671,044</td>
<td>9,742</td>
<td>762,749</td>
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<tr>
<td>Lands(^6)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Individual Indian</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Allotment(^7)</td>
<td></td>
<td></td>
<td></td>
<td>633,354</td>
</tr>
</tbody>
</table>

Allotted lands were not identified as a significant issue during the initial planning stages of the Water Supply Project. The U.S. Congress gave approval for immediate construction based on appraisal-level study. This failure to fully consider ROW easements for allotment lands would not have occurred if the Water Supply Project had performed a feasibility study. Reclamation believes that the lack of a feasibility study is the main reason why allotment lands became a problem (Sandra Anderson, 2012).

Table 2- Summary of Allotment Lands Crossing the Water Supply Project

<table>
<thead>
<tr>
<th>Reach</th>
<th>Number of Allotments Impacted</th>
<th>Number of Allottees (Share Interest Holders)</th>
</tr>
</thead>
<tbody>
<tr>
<td>12.1</td>
<td>8</td>
<td>200</td>
</tr>
<tr>
<td>12.2</td>
<td>4</td>
<td>50</td>
</tr>
<tr>
<td>22</td>
<td>13</td>
<td>400</td>
</tr>
<tr>
<td>TOTAL</td>
<td>25</td>
<td>650</td>
</tr>
</tbody>
</table>

\(^6\) Data retrieved from: (Type of Navajo Nation Lands and Leases- Section/ONLA, 2005).

\(^7\) Data retrieved from: (Land Term Definition, 2013).
The table above describes the project reach under which each the allotment falls, the number of allotment lands involved in the Water Supply Project, and the number of allottees per allotment. For the Navajo Supply Project, 25 allotment lands will be impacted. The number of Navajo allottees impacted is 650. There are three reaches of the Water Supply Project pipeline alignment that will cross 25 allotments. The allotment impacted, the number of allottees per allotment varies. The ROW process becomes more complicated because a ROW consent must be obtained from each allottee for each allotment. For example, Reach 22 has one allotment that has 165 allottees. Each of the 165 allottees must be contacted for ROW consent because each allottee owns a shared percentage interest in the land.

Today, the allotment legacy impacts many Indian reservations. The legacy began when the General Allotment Act was passed in the year 1887. The Indian Reorganization Act of 1934 ended the allotment of tribal lands. (Discussed later). This Act among other things stopped the allotment of tribal lands to individual Indians. Other than these two Acts, no other congressional acts, have been passed or presidential executive orders entered, which directly relate to the governance of allotment lands. Mostly because of the General Allotment Act, this policy has haunted individual tribes and individual Indian tribal members (Colby, 1993). The Navajo Nation does not oversee their allotment lands. According to J. Gibson, most of the Navajo allotments are held in trust, and are known as “allotment in trust” (personal communication, June 16, 2014). Allotment lands are part of the Navajo Nation checkerboard land.

Second Type- Checkerboard Land

Some Indian reservations contain mixed land status within their tribal boundaries. These are known as checkerboard lands. Checkerboard lands are found mostly in the eastern part of the
Navajo Nation. Checkerboard lands have a variety of ownership—tribal group, individual Indian, non-Indian, as well as a mix of trust and fee lands (Land Indian Tenure Foundation, 2012). The pattern of mixed ownership resembles a checkerboard on any map.

Third Type- Private Land

During an allottee outreach at the St. Michaels Chapter House, B. Longwell pointed out one main difference in private land and allotment land is that private land owners pay taxes for their lands while the allotments are held in trust and the allottees do not pay taxes (personal communication, August 10, 2012). Private lands belong to individuals, Indians or non-Indians, who own their land outright and pay state and county taxes on these lands. The individual land owner has complete power over the lands, as granted for any private property right for private lands. The ROW consent is negotiated with the landowner. For this Water Supply Project, the ROW process is set by McKinley and San Juan Counties and regulated through those two county governments. An example of a private land owner involved in the Water Supply Project is the Sagebrush Liquor Bar. The bar is found on Reach 12.1 along Highway 264. The Reclamation FCCO will comply with McKinley County government requirements to get the ROW.

Fourth Type- State Land

State lands are lands held by the State of New Mexico. These lands were given to each state by acts of Congress when it entered the Union. In 1912, the proclamation to admit the State of New Mexico as the 47th state was signed (Garcia, 2006, p. 15). The state government has exclusive power over these lands. The ROW process is controlled by the New Mexico State Land Office, or sometimes the New Mexico Bureau of Land Management.
Fifth Type - Tribal Fee (Restricted) Land

Tribal fee lands are also known as “restricted lands.” These lands are owned by the Navajo Nation and administered by the Navajo Nation. These lands are taxable (Department of the Interior, 2006). Tribal fee lands are not trust lands and not administered by BIA. According to meeting notes between BIA and Reclamation, dated June 29, 2012, these lands are recorded with the county for the purposes of paying the local and state taxes. The Navajo Nation has complete power over this kind of land (Land Term Definition, 2013). For Navajo fee lands, the ROW process is administered by the Navajo Nation Land Department with BIA oversight. The Navajo Nation Council gives the final approval for a ROW.

Sixth Type - Tribal Trust Lands

The last type of land status includes the Tribal Trust lands. The U.S. holds the legal titles to these lands. It holds them in trust for the tribe; that is the Federal Government has a trust responsibility to manage the lands for the tribe. In the U.S., there are approximately 52 million acres of Indian land in trust (Taylor, The Bureau of Indian Affairs, 1984, p. 76). These lands are given to tribes through Indian treaties, executive orders, and congressional acts. Trust land is held by the Federal Government for the benefit of a tribe or of an individual tribal citizen. (Native Lands, 2008) Trust lands cannot be sold or used as collateral for loans without approval of the Secretary of the U.S. Department of the Interior. For the Water Supply Project, the ROW process is regulated through the Navajo Nation Council with BIA oversight.

Objectives
This research takes a closer look at the administrative regulation ROW process for allotment lands crossed by the Water Supply Project alignment. There are four objectives:

- The first objective is to inform the general Navajo community and others about the six different types of land status that are crossed by the Water Supply Project alignment.
- The second objective is to identify and to inform others about the current ROW process for Navajo allotment lands.
- The third objective is to examine all the regulations, congressional acts, the Navajo Treaty, legislation, and the Indian settlement pertaining to the current Water Supply Project. This will be accomplished by conducting a document review. There is Navajo history to consider because there are documents that impact the current ROW process for allotment lands. The document review illustrates that the current ROW process is being enforced through the regulations, congressional acts, the Treaty, and current legislation. BIA complies with federal regulations that do not fit the problems found in the ROW process.
- The fourth objective is to make recommendations for improving the ROW process on Navajo allotment lands.

Methodology

The methods applied are a) comparing two conceptual frameworks; b) creating a matrix that addresses four questions with applicants’ responses about the current ROW process; c) summarizing statements by the Navajo allottees contacted during Reclamation’s experience with retrieving ROW consent signatures; and d) a document review. The first method examines who has the authority to make decisions about the allotment lands and the ROW process by using a framework. The second method uses a matrix exercise. The third method includes summarizing...
statements of allottees about the current ROW process. The fourth method involves a document review. The document review reveals the certain policies that contribute to the construction of this Water Supply Project. The secondary data\(^8\) from prior community interactions was gathered for these exercises in compliance of the Department of Interior requirements for Integrity of Scientific and Scholarly Activities. Reclamation FCCO provided this information for the research methods.

METHOD 1- Comparing frameworks that demonstrates the current ROW process

This method examines and compares two frameworks. The first framework is Framework A for BIA’s current ROW process. In 2013, Reclamation FCCO attended a workshop\(^9\), facilitated by the BIA, about the ROW process on Indian lands. Framework A is shown in Figure 4. At the workshop, BIA provided attendees with a folder of ROW information. In this folder there was no framework of any kind to demonstrate a step-by-step ROW process. Later at a meeting between BIA and Reclamation FCCO, BIA shared Framework A with Reclamation FCCO and referred to it as the current ROW process for allotment lands. Framework A was not part of the workshop because BIA realized this is the first time a sister agency, Reclamation FCCO, has submitted a

\(^8\) Pat Page, Project Engineer for Four Corners Construction Office, supervised an internship, whose main task was to assist the Realty Specialist for land acquisition for Navajo allotment lands. The internship started June 2012 and completed October 2014. Careful educational use of secondary data has been approved by supervisor.

\(^9\) The date of workshop February 7, 2013 at 10:00 a.m., San Juan College, 4601 College Boulevard Room #9012, Farmington, New Mexico. The title of workshop was “Rights-of-Way Requirement”.

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ROW application to their office. The framework is confusing because it does not show the procedure for all six types of land status.
Figure 4- Framework A- Bureau of Indian Affairs’ Current ROW Process

Indian Land Tenure Foundation

The Foundation is a community-based organization focused on issues about Indian nation lands. The Foundation encourages Indian tribes to adopt a ROW process similar to the Foundation’s ROW process (Indian Land Tenure Foundation, 2012). The Foundation’s ROW process consists of five steps: 1) Application, 2) Notification, 3) Appraisal, 4) Negotiation, and 5) Closing. This framework is known as Framework B.

Figure 5- Framework B- The Foundation ROW Five-Step Process
METHOD 2- Matrix Exercise

The second methodology uses a matrix method\textsuperscript{10} to summarize secondary data on the ROW process collected from Reclamation meetings with past ROW applicants. Table 5 shows the matrix results. The matrix includes four questions that are relevant to the primary research question, “What is the current ROW process for Navajo allotment lands and how can it be improved?” Reclamation FCCO contacted past ROW applicants and asked them questions about the ROW process for allotment lands. The matrix uses information from questioning the following past ROW applicants: Continental Electric Company, Indian Health Service; and ROW agents hired by the Navajo Nation and City of Gallup. For the Water Supply Project, new ROW agents were hired by project participants.

The matrix compares each past ROW agent’s response to the research questions. The top row of the matrix refers to Q1, Q2, Q3, and Q4 which are:

Q1. What is the current ROW process for allotment lands?
Q2. What are the impacts for the Water Supply Project pertaining to the ROW process?
Q3. What other problems are found in the current ROW process for allotment lands?
Q4. How can the current ROW process be improved for allotment lands?

The matrix results compare other ROW applicants’ experience with the current ROW process for allotment lands. The same matrix questions were asked of the BIA Crownpoint Office, and

\textsuperscript{10} The matrix approach idea came from reading about community participatory methods (Lab, 2012).
Reclamation FCCO, and the responses are recorded in the matrix. The last row of the matrix is a comparative analysis about the overall matrix results to the matrix questions. The purpose of the matrix was for ROW applicants to: a) identify the current ROW process for allotment lands, b) point out the impacts for Water Supply Project pertaining to the ROW process, c) identify the problems found in the current ROW process, and d) identify improvements for the current ROW process.

Each of these responses allows comparison among ROW applicants. The matrix points out two things about the current ROW process: 1) Any ROW applicant doing any kind of development on the allotment lands needs to examine the types of land status involved. In the case of the Water Supply Project, it was not until allotment lands were identified, that developers asked, “what is the ROW process for allotment lands?” and 2) most applicants consider 25 CFR Part 169 as the current ROW process, however, that process is too general and is not a step-by-step process. Most applicants identified the ROW consent as problematic because of “fractionated allotments.” Fractionated allotments are defined as allotments of tribal lands that are passed down through generations which at each new generation gains more and more individual land owners. Although the land itself is not physically divided, children and spouses of the landowners get ownership of part of the same original allotment.

METHOD 3- Proposed Intergenerational Exercise and Alternative Synthesis of Allottee View from Reports of Water Supply Project
<table>
<thead>
<tr>
<th>ROW Applicants</th>
<th>Q1- What is the current ROW process for allotment lands?</th>
<th>Q2- What are the impacts for Water Supply Project pertaining to the ROW process?</th>
<th>Q3- What other problems are found in the current ROW process?</th>
<th>Q4- How can the current ROW process be improved?</th>
</tr>
</thead>
<tbody>
<tr>
<td>BIA ENA Real Estate Division, Crownpoint, NM</td>
<td>25 CFR Part 169</td>
<td>Fractionated allotment and allottee consent</td>
<td>Fractionated Allotment</td>
<td>Amending federal regulations</td>
</tr>
<tr>
<td>Reclamation, FCCO, Realty Specialist</td>
<td>25 CFR Part 169</td>
<td>Delay of Water Supply Project</td>
<td>No clear ROW process for Navajo allotment lands</td>
<td>Acknowledging the ROW process for allotment lands in future projects</td>
</tr>
<tr>
<td>Continental Divide Electric Company</td>
<td>25 CFR Part 169 plus ROW consent</td>
<td>Delay of project construction</td>
<td>Numerous heirs, part of fractionated allotment problem</td>
<td>Streamline the current ROW process</td>
</tr>
<tr>
<td>City of Gallup-DePauli Engineering</td>
<td>25 CFR Part 169 two processes</td>
<td>ROW consent by Navajo allottees</td>
<td>Better procedures for ROW process that all can use</td>
<td>Set clear ROW procedures and re-submittals</td>
</tr>
<tr>
<td>Indian Health Service</td>
<td>25 CFR Part 169 plus ROW consent</td>
<td>ROW consent by Navajo allottees</td>
<td>Gathering allottee ROW consent</td>
<td>Better collaboration with BIA and allottees for ROW consent</td>
</tr>
<tr>
<td>Indian Land Tenure Foundation</td>
<td>5 step ROW process (See Figure 6)</td>
<td>No ROW process for Navajo allotment</td>
<td>ROW process for Indian allotments are unclear</td>
<td>Tribes to follow their existing ROW process</td>
</tr>
<tr>
<td>Researcher’s Comparative Analysis</td>
<td>Federal rules and regulations is the current ROW process</td>
<td>No step-by-step ROW process for Navajo allotment land</td>
<td>Separate application to complete: 1) PTS 2) ROW</td>
<td>Better collaboration between Navajo Nation and BIA; update ROW process</td>
</tr>
</tbody>
</table>
Method 3 was to include an intergenerational exercise (Pain, 2005) with the Navajo allottees, Reclamation and BIA. If this exercise had taken place, the intention was to collect information from different age group allottees about the current ROW process. These age groups include the elders, the middle-age adults, and the minors. The proposed exercise was intended to find out the different age groups views about the ROW process. However, BIA declined\(^\text{11}\) to participate in the intergenerational exercise at this time.

Instead for Method 3, the quarterly reports of the Reclamation FCCO for the Water Supply Project were used to summarize the views of Navajo allottees’ understanding of the current ROW process. The Reclamation FCCO realty specialist reported that, as of summer 2014, the office contacted 300+ Navajo allottees for ROW consent for the Water Supply Project, in Reaches 12.1, 12.2, and 22 (personal communication, September 24, 2014). The allottees’ views collected during the contacts are summarized as follows:

1. It doesn’t matter if allottees sign the ROW consent because BIA Superintendent makes the ultimate decision to grant a ROW for a project.
2. There is no compensation so allottees refuse to sign ROW consent forms.
3. Why is Reclamation asking for ROW consent when they already have the Permission-to-Survey consent approval by BIA?
4. For years, there have been broken promises by past developers or ROW applicants who promised things but fail to deliver.
5. Some allottees disagreed about who was listed as an allottee.

\(^{11}\) Superintendent for the BIA Crownpoint Office declined to have his staff participate in this exercise because he wanted more information about the research objectives.
6. Where there are deceased allottees, new heirs do not have a say in the allotment land until BIA’s probate process is complete so heirs cannot sign a consent form.

7. The presence of cultural resources impacts all of the pipeline alignment, as well as allotment lands. Is consideration of this a part of the current ROW process or is there a different process?

8. There is no direct communication between BIA and allottees Communication happens only through the U.S. Postal Service.

9. Agency representatives do not speak Navajo\(^\text{12}\) so communication is difficult.

10. Some allottees do not open mail about ROW consent. Mail gets tossed in the trash.

11. There are family disputes about the allotment, therefore family members refuse to talk to anyone about the ROW process.

METHOD 4 - Document Review

The document review was conducted to an understanding of why the current ROW process is structured the way it is. The document review covered the following documents: Navajo Treaty of 1868; the Executive Order of 1880; the General Allotment Act of 1887; the Indian Reorganization Act of 1934; the United States Code Section 323-328; the 25 Code of Federal Regulations, Part

\(^{12}\) The Navajo language played a significant role in the Water Supply Project. The individual who serves as the Native American Liaison Specialist for FCCO was highly valued in the team project.
An additional review was done for the Indian Land Tenure Foundation’s ROW process. These documents show that the current ROW process exists because of the past federal Indian policy impacting allotment lands. All documents reviewed are relevant to the analysis to better understand the current ROW process for Navajo allotment lands ONLY. All the historical documents and applicable law on Indian allotments reviewed have some type of link to the Water Supply Project and deeper links to the current ROW process for Navajo allotment lands.

Historical Documents

Navajo Treaty of 1868

The Treaty of 1868 created the original reservation and was the Navajos’ last treaty with the Federal Government (Seymour, 1941, p. 39). Article 5 of the Treaty states a tract of land was given to heads of family desiring to farm (Treaty of the Navaho, 1868, p. 1017). The Treaty provided the purchase of 15,000 sheep and goats, clothing, an agency building, and other raw materials. (Taylor, The Bureau of Indian Affairs, 1984, p. 16). No allotment lands were created as part of this Treaty.

Executive Order of 1880

The Executive Order of January 6, 1880 created sections of allotment lands out of the Navajo reservation (Dehiya, 1972, pp. 10-11). The Order affected the Navajo homeland in Arizona, New Mexico and Utah. The Order states these lands are identified as “trust patents.” Trust patents are

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13 The Settlement was described earlier in the Background section of this paper but is also listed as a document that was reviewed.
individual title deeds. These trust patents were created for agricultural purposes. At the time, trust patents were recorded in a Federal Government log book. There were no Navajo BIA offices then. No other formal written documents were given to the Indians about their allotment lands.

The General Allotment Act of 1887

The General Allotment Act of 1887 allowed allotment lands to be given to individual Indians or the Indian nation by the Federal Government. The Act (also known as the Dawes Act of 1887) expressed one of the first federal Indian policies. The Act was in effect until the Indian Reorganization Act of 1934 ended issuance of allotment lands (discussed later). The Act aimed to facilitate Indian assimilation into the American society by creating private property out of trust lands and turning Indians into farmers (Greenwald, 2002). Certain Indian tribes accepted allotments under the General Allotment Act and some did not want allotments (Ellis, 1972).

Later this General Allotment Act became known as an act that authorized the division of Indian reservations into individually-owned parcels of land. At the time, President Grant determined which reservations would undergo allotments. Each Indian family head would receive 160 acres; each single person over 18 years old and each orphan would receive 80 acres; and each child under 18 years old would receive 40 acres (Brown, 2011). The allotments would be held in trust for 25 years. Any unallotted land could be purchased by the Federal Government from the tribe and resold to non-Indians (Greenwald, 2002, p. 10).

The Navajo Nation allotments are held by individual Indians and as “allotment-in-trust” by BIA and not the Navajo Nation (Land Term Definition, 2013). Navajo allotment lands and their history
are rooted in the General Allotment Act and are a part of what is referred to as the “Era of Assimilation.” During this era, many Indian nations were forced to become Americanized. This assignment of land to individual Indians initiated a future problem for the ROW process.

As early as the sixteenth century, historical documents revealed the Europeans created the Indian allotment land idea written in Indian treaties. At that time, the U.S. did not exist so those treaties are not recognized by the U.S. Federal Government. The first Indian allotment was discovered by historian J.P. Kinney who found the first published mention of Indian allotments in an order of the Massachusetts Colony dated 1630 (Kinney, 1937, p. 82).

In the eighteenth century, according to U.S. Federal Government documents, original Indian lands were being taken by the U.S. Federal Government. During this time, hundreds of Indian nations were creating treaties with the U.S. Federal Government. The historical document review shows that since the 1850s, the U.S. Federal Government has been introducing allotment land on a small scale through treaties with small tribes (Ellis, 1972). Another document, about the Oneida Nation reservation, revealed that allotments were created in 1891 on their reservation and patents were issued the following year (L.M. Hauptman, L.G. McLester, 2006). By 1885, over 11,000 patents (certification of ownership) had been issued to individual Indians under the authority of various treaties and laws (Taylor, The Bureau of Indian Affairs, 1984, p. 18).

By 1894, seven years after the passage of the General Allotment Act, many Indians had chosen to lease their allotment lands for four reasons: 1) many Indians lacked the money/equipment to farm their lands profitably; 2) some decided not to engage in farming or grazing because they could not
make a decent living in agriculture; 3) some were deterred from farming by the distance of their allotments from family, by water scarcity, or by other features of the reservation; and 4) some were engaged in wage work.\textsuperscript{14} Leasing of allotment land offered Indians a small but reliable source of income (Greenwald, 2002).

Indian Reorganization Act 1934

The Indian Reorganization Act is important in many ways to Indian nations, but for this research, it ended the assignment of further allotments to individual Indians. This act was passed under Roosevelt (FDR’s New Deal) administration. This act also authorized the contemporary Native Nation governance structure.

Indian Allotment Applicable Law Review

United States Code

In an email discussion, S. Pollack and P. Frye stated that the supreme law over Indian allotment lands is found in the United States Code, (USC) section 323-328 (personal communication, July 24, 2014). The applicable allotment law is governed by federal law, not state or tribal law. The USC does not give a ROW process for specific Indian allotment lands. For Navajo allotment lands, the CFRs is source of the applicable law for the ROW process.

Code of Federal Regulations

\textsuperscript{14} An interesting finding is during the period, industrialization was rapidly taking place. The evidence of that is the building of the railroad system. Railroads also required a ROW approval.
The Code of Federal Regulations (CFR), Title 25—Indians, Part 169—Rights-of-Way Over Indian Lands contains the current federal rules and regulation for allotment lands ROW process. It is the source for the administrative regulation authority for allotment lands (Regulations, 1968). The BIA enforces 25 CFR 169 as it applies to Navajo allotment lands. This process is very broad and leaves room for interpretation. No step-by-step process is given. An example of the ROW application that BIA enforces for ROW approvals is listed in Appendix B- 25 CFR Part 169.5

BIA ROW Documents

The BIA’s February 7, 2013 workshop was held in Farmington to inform future ROW applicants about the ROW process. BIA directed ROW applicants to review the 25 CFR Part 169 for an explanation of the current ROW process. Before the workshop began, BIA ENA distributed a blue folder to each attendee filled with ROW information. In the folders were the following BIA ROW documents:

1. Agenda of Workshop
2. Basic ROW Process
3. Land Term Definition
4. Rights-of-Way Across Indian Trust Lands
5. Utility Rights-of-Way Over Indian Lands
7. Presentation PowerPoints handouts, title- ROW across Indian Trust Lands
8. Presentation PowerPoint handouts, title- PTS across Indian Trust Lands
9. Presentation PowerPoint handouts, title- Utility ROW over Indian Lands
10. Application for PTS for ROW
11. Certification Form

12. Statement of Owners of Allotted Indian Lands to Accompany Application for ROW Form

13. U.S. Department of Interior, BIA, ROW Application FORM


These documents provided some, but not enough information to carry out the ROW process on allottee lands.

BIA Procedural Handbook Grants of Easement for ROW on Indian Land

This BIA Procedural Handbook is found online at BIA’s homepage, www.bia.gov. This handbook has more information about the current ROW process utilized by BIA. Yet, the handbook was not referred to at the February 7, 2013 workshop. The handbook directs ROW applicants to review 25 CFR Part 169, and provides a four page ROW checklist and the ROW forms. BIA needs to improve the ROW process for the Navajo Nation allotment lands because there is conflicting ROW process information being circulated. For example, during the workshop, ROW applicants received different ROW information than what is posted online. None of the information circulated by BIA includes a step-by-step ROW process. The information circulated at the BIA workshop in Farmington, the additional information shared by BIA ENA during a meeting with Reclamation FCCO, and the BIA online resources about the ROW process for Navajo allotment lands varies. All the ROW information available was inconsistent.

Analysis

This analysis discusses the four methods that examine the current ROW process for allotment lands. The findings show no standard framework for the ROW process exists for Indian allotment
The methods reveal that there is confusion among both applicants and allottees about the general process under 25 CFR Part 169. Framework A creates more confusion because it only addresses the ROW application and not the Permission to Survey (PTS) application. The two applications require the applicant to get consent twice which is not very successful.

The research questions driving the analysis are based on the following:

Q1 What is the current ROW process for allotment lands?
Q2. What are the impacts for the Water Supply Project pertaining to the ROW process?
Q3. What other problems are found in the current ROW process for allotment lands?
Q4. How can the current ROW process be improved for allotment lands?

Historic Document / Policy discussion

The extensive Indian allotment history impacts today’s federal water projects, such as the Water Supply Project, and the general ROW process. The real-live example used to illustrate the impacts of past federal Indian policy is the ROW issues found in Navajo country. The roots of the ROW issues for Navajo allotment lands and the Water Supply Project evolved from the past federal Indian policy in the General Allotment Act. There are hundreds of Indian nations in the U.S. and each nation has its own story to tell about ROW issues found on their reservation. This policy allowed allotment lands to be given to individual Indians or the Indian nation by the Federal Government. Creating allotment lands back then makes today’s ROW process difficult.

CFR Guidance and Confusion

The current ROW process referred to and described in 25 CFR Part 169 lays out the regulation without providing a step-by-step ROW process. Creating a step-by-step ROW process, similar to
Framework B, for Navajo allotment lands is needed so that the ROW approvals can be given by BIA in a timely matter. An improved ROW process will make retrieving consents from the Navajo allottees by Reclamation FCCO and BIA and avoid confusion. This improvement will help save time and money for projects by avoiding delays.

The most defective part of the current ROW process is that, a ROW applicant must submit two applications for any project development on Navajo allotment lands. Because the two subsections in CFR Part 169, applicants did not realize that there are two separate applications: 1) Permission-to-Survey (PTS) application (CFR Part 169.4) and 2) ROW application (CFR Part 169.5). To support this finding, the research matrix created in Method 2 revealed that past ROW applicants identified that obtaining consent twice, that is, for PTS application and then the ROW application, was problematic because this requirement is not clearly stated in the federal regulation. The finding is also supported by the issue raised by allottees’ views collected summarized in Method 3 where they said they should not have to sign a consent for the ROW because they already had done one for the PTS.

These two subsections are the foundation of the current ROW process. In 25 CFR 169.5–Application for right-of-way states that:

“Anyone desiring to obtain PTS for ROW across individually owned, tribal, or Government owned land must file a written application therefor with the Secretary. The application shall describe the proposed project, including the purpose and general location, and it shall be accompanied by the written consents required by Part 169.3, by satisfactory evidence of the good faith and financial responsibility of the applicant, and by a check or money order of sufficient amount to cover twice the estimated damages which may be sustained as a results of the survey.”
This subsection about the ROW application does not parallel the description found in Framework A (Figure 4). There is no visual representation of this application process in the BIA guidelines. Including a representation could relieve some of the confusion by making clear that one is required.

Framework A- Bureau of Indian Affairs Right-of-Way Process

For the Water Supply Project, the BIA ENA put together Framework A to describe the process for completing a ROW application under 25 CFR 169.5. This process is illustrated in the in the upper right corner of the Framework A.

“The application for Grant of Easement for ROW packages includes the following:
   a. Application for Grant of Easement for Right-of-Way
   b. Landowner Consent:
      - Allotments- Consent Forms with 51% (majority as required by regulation)
      - Whereabouts unknown- BOR must document the search for individuals who are whereabouts unknown.
   c. Survey maps (standards are detailed in 25 CFR 169)
   d. NEPA Compliance Documents (EA, FONSI, Cat Ex etc.)
   e. Cultural Resource Compliance Form/Archeological Inventory Report”

Reclamation is currently using this Framework A and they found several problems with the framework. First, the BIA’s procedural handbook which addresses the current ROW process for applying for the easements does not include Framework A. This makes understanding the proper procedures to follow more difficult. This situation caused Reclamation FCCO realty specialist to research the ROW process for Navajo allotment lands.

Including a visual aid such as Framework A in the handbook would be very helpful. In addition the allottees recommend improving the visual Framework A. This research experience is found in Method 2 where the applicants reported that the current ROW process needs improvements. The allottees impacted by the Water Supply Project also recommend using an improved visual flowchart.
Why the current ROW Process is not effective?

The current ROW process is not effective for getting easements to Navajo allotment land access for building water development projects, such as the Water Supply Project. One of the reasons is that separate two consents must be acquired and this requirement is not clearly set out in the 25 CFR Part 169. Reclamation FCCO recently engaged in the PTS application process and received approval to do study and test Water Supply Project alignment area. A PTS approval gives the applicant access to the land but no construction is allowed. Now, Reclamation is engaging in putting together a second application which involves retrieving a second consent from those same allottees. The requirement for two sets of consents is considered a most critical factor contributing to the ineffectiveness of the ROW process for allotment lands because of the time it takes and the confusion it creates.

Other Problems with the current ROW process for Navajo allotment lands

Problem 1- Many Navajo allottees believe there is a major problem in the current ROW process for allotment lands because there is no enforcement of appraisal or negotiation by the Navajo Nation government. However, the Navajo Nation has no control over allotment lands. BIA has the authority over Navajo allotment lands. The problem is: who represents the Navajo allottees if the Navajo Nation has no control over allotment lands.

Problem 2- A ROW applicant is required to file a request for a Title Status Report (TSR) with BIA. A TSR is a federal document used by the BIA to track Indian allotment land owners. For the Water Supply Project, Reclamation FCCO will use this TSR to find allottees. This TSR is the
only document that is provided to ROW applicants to contact allottees. Reclamation recently discovered there is the difference between certified and uncertified TSRs. A certified TSR allows a ROW applicant to lock in the current land owners listed the day the TSR was requested from BIA. This means if some allottees die and their estates are going through a probate process, the ROW applicant does not have to retrieve ROW consent from the heirs to the allotment. An uncertified TSR does allow ROW applicant to lock in the current land owners at the time the application is submitted to the BIA. If a ROW applicant knows about this difference, it will cause problems for them. If new land owners are discovered at the time the ROW application is submitted, BIA may reject the ROW application because these new land owners were not contacted. BIA ENA recommends calling their office first, before submitting an application to make sure there are no changes to the TSR the ROW applicant is using.

Problem 3- The research also found that the Navajo Nation is listed as an allotment land owner for Reaches 12.1 and 12.2.15 This is problematic because obtaining consent from the Nation will be handled differently than for an individual. The problem arises because it is not clear who signs the consent when the allottee is listed as Navajo Nation. Currently, Reclamation and Navajo Nation are conducting meetings to address this issue. If the Navajo Nation had some authority over Navajo allotment lands, their involvement could solve this problem.

Problems with Getting ROW Consent

15 This is a new issue identified by Reclamation realty specialist and intern.
There are several problems with getting the ROW consent. Another subsection, the 25 CFR Part 169.3 – Consent of landowners to grant of right-of-way, recognizes that land owners’ consent is required but it does not state how to gather consent from Navajo allottees. However, BIA has a separate guideline\(^{16}\) for gathering ROW consent from allottees which does not presently appear as part of the ROW process. This ROW consent is a problem for the ROW applicant, BIA, and the Navajo allottees according to the four research methods findings. The problem includes finding the Navajo allottees who either live on or off the allotment. Then when they are found, the applicant must ask allottees for ROW consent without offering compensation. For the Water Supply Project, there is no compensation because this is a Federal Government project. The no compensation piece is problematic for Reclamation FCCO because most allottees have received some kind of compensation from past other organizations who wanted ROW consent.

Many allottees refused to give ROW consent because of the problems expressed by the allottees are reflected in Method 3. For example, it doesn’t matter if allottees sign the ROW consent because BIA Superintendent makes the ultimate decision to grant a ROW for a project. If things are not worked out with Navajo allottees between the BIA ENA office and Reclamation, the next step is to proceed with a condemnation process. If Reclamation decided to pursue with condemnation, that process is outside the research proposal.

Language barriers also caused problems. The applicant must make quick introduction of who he is and why he is searching for them. Speaking Navajo, helps with this process. The Reclamation

\(^{16}\) The BIA ENA gave this Guideline to Reclamation after the workshop.
FCCO found it necessary for the ROW process to have a Navajo interpreter to explain the Water Supply Project to the Navajo allottees. Most allottees who were located are elders and non-English speakers. During those searches and contacts made with the Navajo allottees, the allottees expressed the problems they see in the current ROW process. These problems include:

Problem 1- The BIA tracks allotment land by share interest. Share interest is obtained by dividing the allotment land among heirs. Share interest does not divide the land itself, only the percentage owned. These shared interests have been reduced and further reduced as more heirs receive a percentage in the original allotment. This situation has caused many allottees to own less than 1 percent of share interest in an allotment as generations went by. It is not clear who started this division, BIA or the allottees. The BIA keeps track of the shared percentages in a database. This causes fractionation of land interests.

All of the Navajo allotments have been fractionated. “Fractionated allotments are tracts or allotments of tribal lands are passed down through generations. Each allotment gains more and more individual land owners. Although the land itself is not physically divided, children and spouses of the land owner become part owners of the same original tract” (Department of Interior, 2014). For example, at the beginning of assignment of allotment, the original land owner (head of household) was assigned 160 acres. When that land owner died, that allotment was divided among children and spouses (heirs). When an heir dies, his/her share of the allotment is further divided. Many Indian allotments now have hundreds and even thousands of individual land owners. Thus, it is difficult to gain approval from all owners for ROW consent (Department of Interior, 2014).
For the Water Supply Project, Reach 22, there is one allotment that has 150+ allottees sharing percentages. Reclamation must contact all 150+ allottees to get the ROW consent. BIA requires Reclamation to contact each and every allottee for each allotment. The proof of contact must be carefully documented and BIA further requires that five attempts must be made. BIA is aware of the problem with getting ROW consent from allottees but is currently in the mix of the Cobell Settlement. This Settlement initiates the Indian Land Buy Back Program which addresses fractionated allotments to reduce the increasing number of allottees for one allotment.

Problem 2- As Reclamation FCCO looked for allottees it had a hard time finding them. Internet searches (Facebook and White Pages) were made to find people. Attempts to reach them were also made by postal service and by collaborating with Navajo chapter houses. Reclamation found some allottees are dead, or some are minors, or some have relocated. In addition, there were errors in allottee names which made it hard to find the correct person.

Problem 3- Many Navajo allottees believe that they do not have claims to water the San Juan River Basin in New Mexico because their claims were not specifically addressed in the Settlement. They question why they should agree to the pipeline crossing their allotment land if their rights are not recognized. The Settlement provides that individual Navajo allottee cannot file a claim for water rights to the San Juan River water. According to law professor, J. Wolfley, if a claim were to be filed, it would have to be filed by the Federal Government for the Navajo allottees (Personal communication, October 25, 2013).
The ROW process for allotment lands could have been addressed if there had been allottee representation in the settlement talks and if allottees’ land and water rights had been recognized. Allottees believe they got the cheap end of the Settlement and the negotiation for their water rights because of the lack of communication between their tribal government and BIA. In the future, the Navajo allottees recommend that the Navajo Nation government collaborate with the land owners of Navajo allotment lands regarding their water rights.

Framework B - Indian Land Tenure Foundation’s Right-of-Way Process

The Indian Land Tenure Foundation’s (Foundation) encourages Indian nations to use a five-step ROW process for tribal lands. This 5-step ROW process is found in Framework B (Figure 5). This process is applied to BIA’s conceptual framework, Framework A and Foundation’s ROW process, Framework B and produced Framework C. Framework C is an updated and improved framework created based on methods applied in the research. The Foundation’s ROW process consists of a 5-step process that may be used to implement a step-by-step ROW process for Navajo allotment lands. Framework B reads:

“The Right of Way Process:

Step 1: Application- The right-of-way application must be in writing and submitted to the Secretary of Interior through the BIA. An initial application must be made in order to survey the land, and a subsequent application is made for the right-of-way itself. Federal regulation dictate the application required contents. Because of its trust responsibility, the BIA must approve all realty transactions involving reservation trust lands.
Step 2: Notification- Landowners will be notified of an entity’s interest in acquiring a ROW. Initial notification will seek a landowner’s permission to enter land for survey and mapping purposes. Disputes regarding title should be taken up with the BIA realty office. If a tribe owns an interest in trust land, either partial or total, that entire parcel of land cannot be subject to eminent domain. Any rights of way must be approved by the tribe.

Step 3: Appraisal- The party who to acquire the ROW pays for the appraisal. The owners is advised to accompany the appraiser during the inspection of the property. All appraisal must be done by a state-licensed or certified appraiser. If the landowner disagree with the appraisal amount, the appraisal can be contested. The landowning individual or tribe can make a counteroffer in negotiation, or if the parties cannot agree to terms, resolves the issues in court.

Step 4: Negotiation- Negotiations can occur at any stage of the process. Landowners should clarify their roles in the negotiation process in relation to BIA officials who are also participating. Landowners should also clearly communicate their bottom line financially and in caring for the land. Tribal governments should clarify policy consideration such as those regarding taxation, environmental and other land regulations and restrictions, and community needs regarding the utility.

Step 5: Closing- At closing, all funds are received and dispersed and all taxes, liens, and mortgage are addressed. Documentation of the transaction will use the common forms
required by law. Whenever possible, tribes or individual landowners should use their own forms and documentation.”

By applying Method 1, Frameworks A and B are integrated to create a better structure and to improve the current ROW process for Navajo allotment lands. Framework C creates a structure of a ROW process that responds to some of the problems identified in this research.

Possible Means of Addressing the Problems with the Current ROW process and Getting ROW Consent

Framework C (Recommended Framework)

One possible means of addressing the problems raised in Methods 2 and 3 about the current ROW process and getting ROW consent, is to consider Framework C for tribal allotment lands. In Framework C, there are 6 steps suggested to improve the current ROW process. This 6 step framework addresses the confusion over applications by clearly identifying that there are two applications. These are listed as Step 4 and 5. The last step, 6, is mainly for closure for the allottees so they know what is happening. Many allottees gets multiple letters from ROW applicants and do not know what was approved or disapproved by BIA. Framework C was created for this research to improve both applicants’ and allottees’ understanding about the ROW process for Navajo allotment lands and to support the recommendations made.

In Method 2, the matrix results show the current ROW process for Navajo allotment lands needs improvement and updating. One observation is that there needs better collaboration efforts among the federal, state, and tribal governments to address the rising ROW issues found in Indian country,
specifically allotment lands, and have answers for those issues. New Mexico could set precedent and lead this collaboration effort. The matrix showed collaboration between BIA and ROW applicants, but no involvement by the state and tribal government.

Other Solutions to the Current ROW process and Getting ROW Consent

Another possible solution to these problems is that for future Navajo projects, the federal, state, and tribal government could better collaborate about the existing ROW process administrative regulations for Indian allotment lands in New Mexico. Navajo Nation could improve, and update the ROW process for its Navajo allotment lands even though the authority lies within BIA. The State of New Mexico could use its government-to-government policy as a framework to initiate this collaboration. The collaboration effort is a good idea because the treatment of Indian allotments is a rising issue in New Mexico. If the State of New Mexico leads this collaboration, it will be using its policy-making powers to address the ROW issues found in biggest area of Indian country. Setting a precedent for structuring an improve ROW process for federal water projects, the State of New Mexico, and Navajo Nation will be a benefit for the future of other Indian water rights settlements.
Figure 6- Framework C- Conceptual Framework

Rights-of-Way Process for Navajo Allotment Lands

Step 1- APPLICATION
Determine Land Status for ROW process

Tribal Trust Lands
Restricted (Fee) Lands
Allotment and Checkerboard Lands
State Lands
Private Lands

Contact Bureau of Indian Affairs for specific ROW process information

Step 2- Notification
Allottee Outreach for ROW consent

Step 3- Dual Appraisals to Avoid Conflict of Interest/Negotiation
Appraiser for ROW applicant & Appraiser Allottees

Step 4- Permission- to-Survey Process

Authority 25 CFR Part 169.4

Permission-to-Survey Application
Allottee (PTS) Consent
Approve OR Disapprove

Step 5- Rights-of-Way Process

Authority 25 CFR Part 169.5

Rights-of-Way Application
Allottee (ROW) Consent
Approve OR Disapprove

Step 6- Closing
Conclusion and Recommendations

The results of this research are intended to help Reclamation and others to better understand the ROW process of Navajo allotment land and to consider alternatives. Reclamation and BIA will benefit from this research if it acknowledges that the treatment of allotment lands and the related ROW process is a significant issue that should be addressed. The absence of a better way to get land access may cause critical and costly delays for the Water Supply Project. As recently written in the Gallup Independent, “The two challenges behind the Water Supply Project is the right of way issues and contaminated soils. Acquiring the right of way required more effort than designing the water line project” (Volkert, 2014).

The research explores the ROW process for Navajo Nation allotment lands. The research illustrates in a matrix what past and current ROW applicants have experienced. These insights were used to form recommendations for the current ROW process for allotment lands. Overall, this professional research examined and analyzed the current ROW process for the allotment lands affected by the Navajo-Gallup Water Supply Project and developed the following recommendations for improvement:

Recommendation 1- The State of New Mexico is known for its Government-to-Government Collaboration Policy Agreement. According to New Models of Cooperation initiatives, in 2004, the State of New Mexico issued an instate policy which allows native nations of New Mexico and the state government to address issues of concern (Native Lands, 2008). The purpose of this collaboration policy is to foster, facilitate and strengthen positive government-to-government relations between the State of New Mexico and New Mexico’s 22 Indian nations, tribes, and
Pueblos by establishing guidelines for State and Tribal communication and collaboration (New Mexico State- Tribal Collaboration Act, 2009). This policy exists to address issues and solutions such as:

- the ROW issues for Navajo allotment lands;
- the impacts for economic development pertaining to the ROW process;
- the problems with the current ROW process for allotment lands.

This is an opportunity for appropriate government organizations to create a mechanism for addressing ROW issues that exist in the State of New Mexico and its 22 native nations, and to further explore the ROW issues such as the ROW process for allotment lands in New Mexico. Collaborations may begin through the Navajo Nation Council and BIA. Either government body could sponsor and initiate a tribal policy that addresses the issues and concerns of the ROW process for Navajo allotment lands by recommending Framework C. The next step is to take research findings to policy-makers to start collaboration efforts. This is an opportunity to illuminate the ineffectiveness of the current ROW process for Navajo allotment lands to the Navajo Nation Council and BIA ENA. If action is not taken, the allotment ROW issues will continue to escalate among the two governments: Navajo Nation and BIA; and the allottees.

Recommendation 2- Since many Navajo allottees have issues and concerns about the current ROW process there should be additional sources of information available besides BIA. One source identified in this research is the Dine Allottee Association (Davis, 2014). Many Navajo allottees believe that the current ROW process for Navajo allotment lands is unjust and unfair. They believe that Navajo allottee are not being well represented. It is recommended that anyone involved in this
Water Supply Project visit the Association’s website.\textsuperscript{17} The Association’s representatives may be willing to assist in improving the ROW process for allotment lands and to explain the process to allottees.

Recommendation 3- There is a disconnection between federal, state, and tribal policy for Navajo allotment lands and the current ROW process. It is recommended that BIA ENA improve its current conceptual framework by using Framework C. This framework implements a 6 step ROW process similar to the Framework B, the Foundations’ ROW process (Figure 5). The 6 steps are:

1. Application
2. Notification
3. Dual Appraisals to Avoid Conflict of Interest/Negotiation
4. PTS Process
5. ROW Process
6. Closing

The first step determines land status so that the appropriate ROW process can be implemented. The second step recommends better allottee outreach for ROW consent, perhaps through annual venue to discuss projects happening on Navajo allotment lands with allottees, ROW applicants and BIA. The third step is to include dual appraisals so that fair market value is shared among the allottees and the ROW applicants. This step avoids conflict of interest that may arise in the current practice of having BIA and ROW applicants conduct an appraisal. The fourth step is conduct the Permission-to-Survey process. This step will clearly identify this is a separate application the ROW process. The fifth step is to conduct the ROW process. The sixth step closes the entire ROW

\textsuperscript{17} Dine Association website address: www.navajoallottee.com
application process among the allottees, the ROW applicants, and BIA by including a closure step. Implementing Framework C or something similar is a step forward for updates and improvements. If updates and improvements are to be made it will involve Reclamation’s sister-agency, BIA, Navajo Nation, and the allottees to make those changes or amendments.
### Appendix A

List of all Navajo Chapters involved in the Water Supply Project

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<td>San Juan</td>
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Appendix B
25 CFR Part 169.5

Application for ROW specifically states:

Written application identifying the specific use requested shall be filed in duplicate with the Secretary. The application shall cite the statutes under which it is filed and the width and length of the desired Rights-of-way, and shall be accompanied by satisfactory evidence of the good faith and financial responsibility of the applicant. An application filed by a corporation must be accompanied by a copy of its charter or articles of incorporation duly certified by the proper State official of the State where the corporation was organized, and a certified copy of the resolution or bylaws of the corporation authorizing the filing of the application. When the land covered by the application is located in a State other than that in which the applicant was incorporated, it must also submit a certificate of the proper State official that the applicant is authorized to do business in the State where the land is located. An application filed by an unincorporated partnership or association must be accompanied by a certified copy of the articles of partnership or association, or if there be none, this fact must be stated over the signature of each member of the partnership or association. If the applicant has previously filed with the Secretary an application accompanied by the evidence required by this section, a reference to the date and place of such filing will be sufficient. Except as otherwise provided in this section, the application shall be accompanied by a duly executed stipulation, in duplicate, expressly agreeing to the following:

(a) To construct and maintain the Rights-of-way in workmanlike manner.
(b) To pay promptly all damages and compensation, in addition to the deposit made pursuant to §169.4, determined by the Secretary to be due the landowners and authorized users and occupants of the land on account of the survey, granting, construction and maintenance of the Rights-of-way.
(c) To indemnify the landowners and authorized users and occupants against any liability for loss of life, personal injury and property damage arising from the construction, maintenance, occupancy or use of the lands by the applicant, his employees, contractors and their employees, or subcontractors and their employees.
(d) To restore the lands as nearly as may be possible to their original condition upon the completion of construction to the extent compatible with the purpose for which the Rights-of-way was granted.
(e) To clear and keep clear the lands within the Rights-of-way to extent compatible with the purpose of the Rights-of-way and to dispose of all vegetative and other material cut, uprooted, or otherwise accumulated during the construction and maintenance of the project.
(f) To take soil and resources conservation and protection measures, including weed control, on the land covered by the Rights-of-way.
(g) To do everything reasonably within its power to present and suppress fires on or near the lands to be occupied under the Rights-of-way.
(h) To build and repair such roads, fences, and trails as may be destroyed or injured by construction work and to build and maintain necessary and suitable crossings for all roads and trails that intersect the works constructed, maintained, or operated under the Rights-of-way.
(i) That upon revocation or termination of the Rights-of-way, the applicant shall, so far as is reasonable possible, restore the land to its original condition.

(j) To at all times keep the Secretary informed of its address, and in case of corporations of the address of its principal place of business and of the names and addresses of its principal officers.

(k) That the applicant will not interfere with the use of the lands by or under the authority of the landowners for any purpose not inconsistent with the primary purpose for which the Rights-of-way is granted.

When the applicant is the U.S. Government or a State Government or an instrumentality thereof and is prohibited by law from executing any of the above stipulations, the Secretary may waive the requirement that the applicant agree to any stipulations so prohibited.
References


Order Granting the Settlement Motion For Entry of Partial Decrees Describing the Water Rights of the Navajo Nation, CV-75-184 (District Court San Juan County New Mexico August 16, 2013).


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