DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Parts 2800, 2810, 2880, 2920, 9230, and 9260

[WO 350 05 1430 PN]

RIN 1004–AC74

Rights-of-Way, Principles and Procedures; Rights-of-Way Under the Federal Land Policy and Management Act and the Mineral Leasing Act

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

The Bureau of Land Management (BLM) is amending its regulations governing rights-of-way issued under both the Federal Land Policy and Management Act (FLPMA) and the Mineral Leasing Act (MLA). This final rule revises BLM cost recovery (processing and monitoring fee) policies and procedures for issuing right-of-way grants and adjusts cost recovery fees to take into account cost increases since the previous regulations became effective in August 1987. The rule also eliminates automatic exemptions from cost recovery fees for Federal agencies, except for those agencies and projects exempted by law. It establishes policies related to paying rent in advance and adds a financial penalty for paying rents late and allows for automatic adjustment to cost recovery fees based on an economic indicator. This final rule also clarifies how BLM applies the rent schedules for communication site rights-of-way and reorganizes the regulations in a manner similar to the sequence in which BLM takes action on applications and monitors issued grants.

DATES: *Effective Date:* This final rule is effective June 21, 2005.

FOR FURTHER INFORMATION CONTACT: Bil Weigand at (208) 373–3862, or Ian Senio at (202) 452–5049, or write to Director (630), Bureau of Land Management, Eastern States Office, 7450 Boston Boulevard, Springfield, Virginia 22153, Attention: RIN 1004–AC 74.

Persons who use a telecommunications device for the deaf may contact these persons through the Federal Information Relay Service at 1–800–877–8339 24 hours a day, seven days a week.

SUPPLEMENTARY INFORMATION:

I. Background

BLM published the proposed rule in the **Federal Register** on June 15, 1999 (see 64 FR 32106) for a 120-day comment period ending on October 13, 1999. As a result of public requests for extensions of the comment period, on October 13, 1999, we extended the public comment period for 30 days ending on November 12, 1999. We received 63 comment letters on the proposed rule. We address public comments in the section-by-section discussion of this preamble.

In these regulations we use the terms ''previous regulations'' and ''final regulations.'' ''Previous regulations'' refers to the regulations in effect prior to June 21, 2005. ''Final regulations'' means the regulations in this final rule. This final rule will replace the regulations in parts 2800 and 2880 of the October 2004 edition of Title 43 of the Code of Federal Regulations.

General Information About BLM Right-of-Way Grants Basis and Purpose of These Regulations

Each year, thousands of individuals and companies apply to BLM to obtain a right-of-way grant on public lands. A right-of-way grant is an authorization to use a specific piece of public land for a certain project, such as roads, pipelines, transmission lines, and communication sites. The grant authorizes a specific use of the land for a specific period of time. The term ''grant'' is defined in the definitions sections in both parts of this rule. The definition of ''grant'' in part 2800 applies to grants authorized by Title V of FLPMA, 43 U.S.C. 1761, and the definition in part 2880 applies to grants authorized by the MLA at 30 U.S.C. 185. Generally, BLM issues a right-of-way grant for a term commensurate with the life of the project. Typically, BLM issues grants with 30-year terms, and most can be renewed. This final rule covers FLPMA grants for rights-of-way that cross public lands and MLA grants for rights-of-way that cross Federal lands. We cover general provisions for right-of-way grants in subparts 2801 and 2881 of this final rule.

BLM places a high priority on working with applicants on proposed rights-of-way to provide for the protection of resource values and to process applications timely. Careful advance planning with BLM personnel is strongly encouraged. If we know about your plans early, we can work with you to tailor your project to avoid many problems and costly delays later in the process.

If you are not familiar with our right-of-way application process or local BLM jurisdictions, the best place to start is by contacting a BLM State Office listed in our regulations at 43 CFR 1821.10. Please note that each state office oversees a number of field offices. Depending on your project, you may be working primarily with personnel at a BLM field office.

As a general rule, you need a right-of-way grant whenever you plan to build a right-of-way facility on public lands. Some examples of land uses which require a right-of-way grant include: transmission lines, communication sites, roads, highways, trails, telephone lines, canals, flumes, pipelines, and reservoirs.

You do not need a right-of-way grant for ''casual use'' activities. Examples of casual use include driving vehicles over existing roads, sampling, surveying, marking routes, collecting data to prepare an application for a right-of-way, and performing certain activities that ordinarily result in no, or negligible, disturbance of the public lands or resources. ''Casual use'' is defined in sections 2801.5 and 2881.5 and is addressed in sections 2804.29 and 2884.25 of this final rule. We encourage you to contact BLM and discuss your planned activity before assuming your use is casual. BLM can then make a judgment based on your particular activity.

Steps In Applying for a Right-of-Way

(A) Contact the BLM office having management responsibility for the land where you need the right-of-way.

(B) Arrange a preapplication meeting with the field office manager or appropriate staff. During this meeting, participants will jointly review the application requirements and Standard Form (SF) 299, Application for Transportation and Utility Systems and Facilities on Federal Lands, to determine what information BLM needs. If you contact us ahead of time to set up the meeting, we can often arrange to hold the meeting at the site of your proposed use.

(C) When you have all the information, bring or mail the application, along with the nonrefundable application processing fee, to the appropriate BLM office.

This final rule covers the application process for FLPMA right-of-way grants in subparts 2803 and 2804, and the application process for MLA grants in subparts 2883 and 2884.

Preapplication Meeting

The preapplication meeting is an important part of the process for both

you and BLM. The meeting provides the opportunity for you to fully discuss and describe your proposal in detail and provides an opportunity for BLM to fully explain processing requirements. The preapplication meeting may also cover fees, safety, work schedules, and other items. This meeting has the potential to save both you and BLM time and expense. For example, in FLPMA, Congress directed that ''rights-of-way in common'' (common use of a right-of-way area by multiple grant holders) be required, to the extent practical, in order to minimize adverse environmental impacts and the proliferation of separate rights-of-way. This is accomplished through a system of designated right-of-way corridors and co-locating communication uses on existing towers and within multi-occupancy buildings when feasible. During the preapplication meeting, BLM staff may examine the proposed right-of-way use to see if it would fit in an existing corridor or in an existing communication facility. Sections 2804.10 and 2884.10 of this final rule address preapplication meetings.

Application forms are available at every BLM office and on the Internet at *www.blm.gov/nhp/what/lands/realty/forms/299/index.html.* BLM wants to make the application process as easy as possible. Accordingly, the application form (SF–299) requests a minimum amount of information. Even so, incomplete information is often the reason BLM cannot process your application quickly.

To avoid problems, you should review the form prior to your preapplication meeting and, if possible, complete it before or during the preapplication meeting with BLM. Be sure to bring any information that you believe BLM would find useful during this session. For example, item 8 requests a map of the project area. You may already have a survey or other adequate map that will satisfy this requirement.

You should arrange for your preapplication meeting well in advance of when you would like to start work on the project. Processing time for an average grant is 60 to 90 days. However, grants for complex projects can take much longer to process. Try to contact BLM as soon as possible. The field office manager and staff are ready to provide information, advice, and assistance to help you prepare your application.

Costs

Both FLPMA (43 U.S.C. 1764(g)) and the Mineral Leasing Act (30 U.S.C. 185(l)) authorize BLM to charge processing fees, monitoring fees, and rent.

Processing Fees. This cost recovery charge reimburses the United States in advance for the expected administrative and other costs we incur in processing the application. You must pay processing fees when you submit the written application. BLM will use the information presented during the preapplication meeting to estimate the application processing fee. Subparts 2804 and 2884 of this final rule address processing fees.

Monitoring Fees. This cost recovery charge is a nonrefundable fee to reimburse the United States for the cost of monitoring compliance with the terms and conditions of the right-of-way grant, including your obligation to protect and rehabilitate the lands covered by the right-of-way. BLM will monitor your construction, operation, and maintenance of the right-of-way and, when the time comes, the shutdown of your activities and the termination of the right-of-way grant. Subparts 2805 and 2885 of this final rule address monitoring fees.

Rents. This is a charge for locating your right-of-way facility on public or Federal lands. It is payable (for a specified term) before we issue the grant and is based on the fair market value of the rights we authorize. We usually establish the rental for linear and communication sites on public lands via two separate administrative schedules. Based roughly on land values in the project area, these schedules are adjusted annually using an economic index. In some cases, the rental is established by an appraisal. Subparts 2806 and 2885 of this final rule address these schedules and other rent issues.

Exemptions, waivers, or reductions in the processing, monitoring, or rental fees may apply to your application and BLM officials can explain these during the preapplication meeting. Subparts 2804, 2806, 2884, and 2885 of this final rule cover these issues.

Temporary Use Permits and Short Term Grants

All activities associated with the construction, operation, maintenance, and termination of your right-of-way grant must be within the specified limits of the authorization. Item 7 on the right-of-way application form is where you would identify your need for the use of additional land during, for example, the construction phase of your project. This additional land may be necessary for construction, stockpiling of excess materials, equipment parking, and the like. If you require additional land for your MLA grant, you will need to apply for a temporary use permit (TUP). The MLA specifically authorizes BLM to issue temporary use permits associated with MLA grants (see 30 U.S.C. 185(e)). BLM can grant TUPs for up to three years. If you require additional land for your FLPMA grant, you will need to apply for a short term grant for the additional lands. FLPMA specifically authorizes temporary use of additional lands for FLPMA grants (see 43 U.S.C. 1764(a)). You should discuss TUP and short term right-of-way grant needs with BLM during the preapplication meeting.

You can apply for a TUP or a short term grant at the same time you apply for a right-of-way by describing the dimension and location of the additional lands, and the term you need in item 7 of the standard right-of-way application (SF–299), or by describing this information in your Plan of Development, as part of your application. You may also apply for a TUP or short term grant after BLM grants your right-of-way. In this case, you must use a separate SF–299 form, and pay additional processing and monitoring fees for BLM to process the TUP or short term grant. This might require a separate environmental clearance and take additional processing time. If there is a possibility that you may need extra width or space, it is best to identify this in your original right-of-way application. Part 2800 of this final rule addresses short term grants and part 2880 of this final rule addresses TUPs.

Processing a Right-of-Way Application

Once you file an application with BLM, we will review it to make sure you have included all necessary information. We will then review and evaluate the application contents and determine the probable impact of the activity on the social, cultural, economic, and physical environment. BLM will also check to see if the proposed right-of-way is consistent with the existing land use plan, and will check to see what valid existing rights currently exist on the lands in question. BLM may deny a right-of-way application for any number of reasons. A preapplication meeting will reduce the possibility of BLM denying your application. Sections 2804.26 and 2804.27 and sections 2884.23 and 2884.24 of this final rule address denials of grant or TUP applications.

Appeals

If BLM denies your application, the official written decision will give the reasons for the denial and information on how to file an appeal. You also have appeal rights at many other decision

points in this final rule. In general, if you are an applicant who is adversely affected by a BLM written decision, you may appeal that decision. Sections 2801.10 and 2881.10 of these regulations address appeals.

Liability

As holder of a right-of-way grant you are responsible for damage or injury to the United States and to third parties in connection with the right-of-way use. You, as the holder, must also indemnify or hold the United States harmless for third party liability, damages, or claims it incurs. Sections 2807.12, 2807.13, 2886.13, and 2886.14 of this final rule address liability issues.

Amendments to Your Grant

If you want to substantially change, improve, or add to a project once you have a right-of-way grant, you must file an application with BLM to amend your right-of-way grant. You must have BLM's prior written approval before you make any substantial change in location or use during construction, operation, or maintenance of the right-of-way. You must contact the field office manager to determine if your proposed changes require you to file an amendment. Sections 2807.20 and 2887.10 of this final rule cover grant amendments.

Monitoring Your Grant

BLM may inspect your project for compliance with the terms and conditions of the grant and these regulations. In addition, under the terms of the grant, BLM reserves the right of access onto the lands covered by the right-of-way grant and, with reasonable notice to the holder, the right of access and entry to any facility constructed in connection with the project (see sections 2805.15 and 2885.13). Subparts 2805 and 2885 of this final rule address grant monitoring.

Grant Suspension and Termination

A right-of-way holder may use the right-of-way for only those purposes permitted in the grant. BLM may suspend or terminate a right-of-way if the holder does not comply with the applicable laws, regulations, terms, or conditions. BLM may require an immediate temporary suspension of activities within a right-of-way to protect the public health or safety or the environment. Sections 2807.16 through 2807.19 and sections 2886.16 through 2886.19 of this final rule address suspensions and terminations.

Assignments

With BLM approval, you may transfer your right-of-way grant to another person. A transfer of your grant is called an assignment. You must submit to BLM, in writing, an application for the proposed assignment, along with a nonrefundable payment. BLM will not recognize an assignment to the new owner until we approve it in writing. BLM will approve the assignment if doing so is in the public interest. Sections 2807.21 and 2887.11 of this final rule address assignments.

Trespass

If you use, occupy, or develop the public lands or their resources without a required authorization or in a way that is beyond the scope and terms and conditions of your authorization, you are considered to be in trespass and you may be penalized. Subparts 2808 and 2888 of this final rule address trespass.

Comparison Between FLPMA and MLA Grants

There are many similarities and differences between FLPMA and MLA grants. The following chart describes FLPMA and MLA right-of-way grants, but is not meant to be a complete description of all of the nuances, similarities, and differences between FLPMA and MLA grants.

	Part 2800 Regulations FLPMA Grants	Part 2880 Regulations MLA Grants
Agency Jurisdiction	BLM issues grants on public lands only (43 U.S.C. 1761(a)).	BLM issues grants on all Federal lands if the lands are administered by two or more Federal agencies. BLM also issues grants on public lands (30 U.S.C. 185(c)).
Term	A reasonable term. This can range from a term of one day to a term in perpetuity. (43 U.S.C. 1764(b)).	A reasonable term not to exceed 30 years (30 U.S.C. 185(n)).
Rental	Fair market rental value required from holders, but exceptions apply. (43 U.S.C. 1764(g)).	Fair market rental value required from all holders (30 U.S.C. 185(l)).
Cost Reimbursement	Collect reasonable costs of processing the application and monitoring except from certain government agencies and cooperative cost share program participants (43 U.S.C. 1764(g)).	Collect actual costs of processing the application and monitoring except from certain government agencies (43 CFR 2884.13).
Renewal	Renewable if it is provided for in the grant and satisfactory operation and maintenance exists (43 U.S.C. 1764(b)).	Renewable if the grant is still being used for commercial operations and satisfactory operation and maintenance exists (30 U.S.C. 185(n).
Citizenship	Individual applicant not required to be U.S. citizen (43 U.S.C. 1761(b)).	Individual applicant required to be U.S. citizen (30 U.S.C. 181, 185).
Width	Variable, depending on purpose of the authorization (43 U.S.C. 1764(a)).	Maximum 50-foot permanent width, plus the ground occupied by the pipeline; exceptions are possible (30 U.S.C. 185(d)).
Assignments	Assignable with BLM's approval (43 U.S.C. 1764(c) and (g)).	Assignable with BLM's approval (30 U.S.C. 185(r)).
Temporary Use	Authorize temporary work areas as part of a right-of-way grant or with a separate short-term right-of-way grant (43 U.S.C. 1764(a)).	Authorize temporary work areas with a Temporary Use Permit (30 U.S.C. 185(e)).
Common Carrier Provision	Does not apply to FLPMA grants	Applies to all pipeline grants (30 U.S.C. 185(r)).
Application form	BLM Standard Form 299 or APD or Sundry Notice for off-lease oil and gas access roads.	BLM Standard Form 299 or APD or Sundry Notice for all off-lease portions of oil and gas pipelines.

II. Final Rule as Adopted and Response to Comment

Part 2800—Rights-of-Way Under FLPMA

We received many comments on the proposed rule that addressed issues common to both the part 2800 and part 2880 regulations. So as not to be redundant, we address the comments only in the section they pertain to in the part 2800 regulations. Comments that specifically address the part 2880 regulations are discussed in that section of the preamble.

Subpart 2801—General Information

This subpart contains material that pertains to all of part 2800 and several sections of part 2880. Part 2800 contains policies and procedures related to right-of-way grants BLM issues under the Federal Land Policy and Management Act and part 2880 to right-of-way grants and temporary use permits BLM issues under the Mineral Leasing Act. More specifically, subpart 2801 contains:

(A) An explanation of the objective of BLM's right-of-way program;

(B) Acronyms and definitions used in the regulations; and

(C) Information about which grants the regulations affect and which they do not.

General Comments

Several commenters said that there is no up-to-date data to support the need for increases in existing right-of-way fees or the creation of new ones, and that BLM should prepare a baseline report and annual reports thereafter to document the needed increases. They also said that there have been significant technology increases, as well as staff reorganizations, that have improved efficiencies that should reduce costs. For a discussion of the justification for increasing cost recovery fees, please see the proposed rule at 64 FR 32107 through 32111.

In 1995, BLM program experts analyzed a cross section of right-of-way cases. This analysis showed that the cost of processing right-of-way cases, including labor costs, had increased since 1986 at approximately the same rate as the Implicit Price Deflator-Gross Domestic Product (IPD–GDP). Therefore, the final rule adjusts costs upward based on the IPD–GDP and allows for automatic adjustments based on this indicator. Technological improvements and staff reorganizations that have taken place recently may have yielded improved right-of-way processes in many BLM offices. Since the processing categories in this final rule are based on the time (hours) required to process an application, this final rule takes into account increases in efficiencies. We note, however, that the number of processing hours may be increased by the increasingly complex resource issues BLM encounters when processing grant applications which add to the amount of coordination required to process applications. Increased public involvement in the National Environmental Policy Act (NEPA) process adds extra levels of analysis and review. Comments relating to BLM creating new fees are misdirected since BLM is not proposing any new fees in this rule (see previous subparts 2808 and 2883 and previous sections 2803.1–2 and 2883.1–2).

We suggest that commenters who requested reports justifying the fee increases refer to the preamble discussion in the proposed rule (64 FR 32107 and 32108). A 1995 audit of BLM's cost recovery efforts by the Office of Inspector General (OIG) for the Department of the Interior found BLM was not recovering all the costs of processing applications and recommended that BLM revise its regulations to recover all applicable costs. The audit estimated that BLM incurred about $640,000 in additional expense in excess of the fees collected in 1993. (This shortfall comes to $213 per application, or $800,000 and $336 respectively when adjusted for the change in IPD–GDP.) BLM is following the OIG's suggestions by increasing the costs for processing and monitoring right-of-way applications and providing for future adjustments to the costs based on economic indicators to reflect the costs of inflation. BLM also prepares yearly reports, some to meet requirements imposed by Congress in the Mineral Leasing Act, that discuss the relative numbers and types of cases that we process each year. BLM publishes this data annually in a statistical report that you can find on the Internet at *http://www.blm.gov/nhp/browse.htm#annual_reports.* While these reports alone do not justify increasing cost recovery fees, they show that the number of right-of-way authorizations BLM grants and administers continues to increase. As such, the monetary losses projected by the OIG in 1995 continue to increase each year. We did not amend the final rule as a result of these comments.

Several commenters from the oil and gas industry suggested that BLM should not increase processing fees because the bonuses, rents, and royalties industry already pays to the government should cover BLM's right-of-way processing costs. We address this comment here because it could apply to grants issued under either FLPMA or the MLA, as some oil and gas lessees do hold FLPMA rights-of-way to assist in transporting product off-lease.

Congress authorized BLM to recover processing costs, and did so fully aware that BLM was already collecting bonuses, rents, and royalties. Congress is presumed to understand the state of the existing law when it legislates. *Bowen* v. *Massachusetts,* 487 U.S. 879, 896 (1988).

In the MLA, Congress specified how mineral royalties and bonuses are distributed to states and to the Treasury (30 U.S.C. 191), and this distribution does not return funds to BLM to cover the costs of processing right-of-way applications. However, as discussed in the preamble to the proposed rule at 64 FR 32107, section 504(g) of FLPMA and section 28(l) of the MLA authorize BLM also to collect the costs to process right-of-way applications. Section 504(g) of FLPMA further provides that the deposit of reimbursements for reasonable costs be placed into a Treasury account to be appropriated to BLM for processing applications.

Also, BLM charges processing fees to everyone who files an application, except those specifically exempted by law or regulation, pursuant to its authorities under the Independent Offices Appropriations Act, as amended, 31 U.S.C. 9701 (IOAA); section 304(a) of FLPMA; Office of Management and Budget Circular A–25; the Department of the Interior Manual 346 DM 1.2 A; and case law (also see the preamble to the proposed rule at 64 FR 32107 and Solicitor's Opinion M–36987 (December 5, 1996)). Congress clearly intended for agencies to recover processing costs in addition to bonuses, rents, and royalties.

The IOAA states that Federal agencies should be ''self-sustaining to the extent possible,'' and authorizes agency heads to ''prescribe regulations establishing the charge for a service or thing of value provided by the agency.'' Section 304(a) of FLPMA specifically authorizes the Secretary of the Interior to ''establish reasonable filing and service fees and reasonable charges and commissions with respect to applications and other documents relating to the public lands.'' IOAA and FLPMA give BLM authority to charge fees for processing applications, which we interpret to include amendments and assignments.

OMB Circular A–25 sets forth a general policy that a user charge will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public. Departmental Manual 346 DM 1.2A

requires (unless otherwise prohibited) that a charge, which recovers the bureau's costs, be imposed for services which provide special benefits or privileges above and beyond those which accrue to the public at large.

A particularly relevant court ruling is *Mississippi Power & Light Co.* v. *United States Nuclear Regulatory Commission,* 601 F.2d 223 (5th Cir. 1979), *cert. denied,* 444 U.S. 102 (1980). The court upheld a Nuclear Regulatory Commission (NRC) licensing fee schedule. The court rejected the petitioners' argument that the work of the NRC benefitted the general public solely and that the conferral of a license or permit does not bestow upon the petitioners any special benefit whatsoever. The court concluded: ''A license from the NRC is an absolute prerequisite to operating a nuclear facility, and as such, is a benefit 'not shared by other members of society.' '' Likewise, a right-of-way grant is a benefit not shared by other members of society. Therefore, BLM charges applicants for processing their applications for grants because they are seeking a benefit not shared by other members of society.

The commenters' contention that BLM should not charge right-of-way processing fees to the oil and gas industry because the industry already pays bonuses, rentals, and royalties misses the point about processing fees. Congress intends for agencies to be reimbursed for processing costs when the agency action benefits an identifiable party. BLM's processing of right-of-way applications benefits the applicant, who will use the right-of-way to aid its operation. Bonuses, rentals, and royalties are related to the use of the resource and are unrelated to agency processing costs. Congress has provided for agencies to collect both for the use of the resource and for the processing of applications and other documents.

Some of these commenters further suggested that any regulations pertaining to rights-of-way should be combined with existing oil and gas regulations, onshore orders, and notices to lessees and that a separate rulemaking is duplicative. We have decided not to combine this rule with other oil and gas rules. We believe that since both the FLPMA and MLA right-of-way programs are administered under BLM's lands and realty program and because of the many similarities between the various lands and realty regulations, both as a matter of policy and a matter of process, BLM's right-of-way regulations should not be located in the same part in 43 Code of Federal Regulations as BLM's oil and gas regulations.

One commenter suggested that BLM should consider the benefits the public receives from industry upgrading access roads and performing special studies that benefit the public. Previous regulations allowed BLM to reduce cost recovery fees to reflect both public benefits from studies connected with processing an application and special services to the public or a program of the Secretary provided by a project (see previous sections 2808.5(b)(5) and (6). Like previous regulations, the final rule contains provisions for FLPMA right-of-way applicants to pay cost recovery fees that reflect the public service or public benefit derived from a right-of-way grant or its processing (see final sections 2804.20 and 2804.21).

Several commenters said that the proposed automatic fee adjustments appear to be a disincentive for future BLM process improvements. We disagree with the commenters. The automatic fee adjustment provisions in this final rule will not act as a disincentive to continuing our process improvement efforts. Even after this rule becomes final, BLM will continue to examine ways to improve processes. The automatic fee adjustments are intended to increase fees based on an economic indicator that reflects yearly increases in the cost of doing business. We have included automatic fee adjustments because the cost to BLM of going through rulemaking each time fees needed to be adjusted would be prohibitive and inefficient. If during periodic review of the fee structure we determine that the fees or fee structure need to be revised, apart from applying the IPD–GDP, we will propose new rulemaking.

Some commenters said that the fee increases were not legal since they were really special use taxes that must be ''approved by Congress and signed by the President.'' BLM does not agree with the commenter. Clearly, both FLPMA and MLA give BLM authority to collect the reasonable or actual costs of processing right-of-way applications (see 43 U.S.C. 1764(g) and 30 U.S.C. 185(l)). Neither statute imposes a limitation on fee increases. Moreover, the Supreme Court has made clear that agencies may charge for special benefits to identifiable recipients, which is what BLM is doing in this rule. See *National Cable Television Association* v. *U.S.,* 415 U.S. 336, 341 (1973), and *Federal Power Commission* v. *New England Power,* 415 U.S. 345, 349 (1973).

One commenter agreed with the proposal to automatically adjust fees to keep pace with inflation. This provision remains in the final rule.

Some commenters thought that the IPD–GDP was not the appropriate indicator for automatic increases in fees. They thought that the Consumer Price Index would be a better economic indicator to use since, due to streamlining, labor costs have decreased since 1987. We disagree. As we stated in the proposed rule's preamble (see 64 FR 32109), we believe that the IPD–GDP is the correct economic indicator on which to base these fee adjustments since the IPD–GDP more closely reflects the relationship of labor to other costs than do other economic indicators and most of BLM's processing and monitoring costs are related to labor costs.

One commenter stated that BLM was attempting to recover costs in excess of the shortfalls in cost recovery identified by the OIG in 1995, and that the new fees would be indexed annually to guarantee additional income. Further, commenters said that BLM was only allowed to recover reasonable or actual costs. We agree that BLM can only charge reasonable or actual costs for processing right-of-way applications. Final section 2804.14 of the FLPMA regulations requires that you pay the United States the reasonable costs of processing your application, and final section 2884.12 of the MLA regulations requires that you pay the United States the actual costs of processing your application.

We believe the commenter who stated that BLM was attempting to recover more that its shortfall misunderstood the explanation in the proposed rule. In 1995, the OIG sampled 75 of the approximately 3,000 right-of-way cases BLM processed in fiscal year 1993 and determined that there was a shortfall in collected processing fees of $16,000 for those 75 cases. The total estimated shortfall for the 3,000 cases processed was thus at least $640,000 for that one year. The proposed rule stated that the maximum fees that possibly could be generated by the proposed regulations over and above fees already being collected, was approximately $2.7 million annually (see 64 FR 32123). We calculated that figure to show that even under the most extreme circumstances this rule would not be considered economically ''significant'' under Executive Order 12866 (which defines ''significant'' as having an annual economic impact of $100 million or more). The $2.7 million figure does not represent anticipated revenue, but indicates the outside limit of the economic impact of the proposed rule, over and above the fees already being

collected, if every right-of-way application, including those that were exempted or reduced under previous regulations, were placed at the highest fee category available. Therefore, the difference between $640,000 and $2.7 million does not represent costs in excess of what BLM needs to process grant applications. BLM anticipates that this rule will, on an annual basis, generate additional revenue from processing fees approximately equivalent to the $640,000 shortfall identified by the OIG, corrected for inflation by application of the IPD–GDP.

One commenter said that BLM and the U.S. Forest Service (FS) should adopt the same rules, procedures, and regulations to reduce application costs and review times. We agree. BLM and the FS are working together on parallel regulations to establish procedures that are consistent to the extent possible for the collection of right-of-way processing and monitoring fees (see 64 FR 66341 for the FS proposed rule).

A few commenters said that the difference between FLPMA and MLA rights-of-way should be pointed out in the final rule since it is confusing to the public and BLM. The basic processing steps, fee determination process, and conditions for approval involved in both types of applications are nearly identical. However, there are some differences between the two types of applications and the two parts of the rule, most of which result from distinctions in the statutory authority for the two types of grants. The major differences between the part 2800 and part 2880 regulations are explained in the table and general discussion above.

A few commenters said that instead of the cost recovery fee in the proposed rule, BLM should use a ''minimal impact flat fee'' similar to that proposed by the FS for flowlines, roads and electric lines being installed in a developing field. The FS proposed a ''minimum impact category'' in their rule that would cover one-time authorizations for the use of forest system lands for events such as recreation events, weddings, or bike races or uses where more than 75 people participate (see 64 FR 66341, 66344, and 66350). The BLM requested comments on the need for such a category. Both agencies decided not to establish a ''minimal impact category'' in their final rules. Instead, in this final rule BLM establishes a new processing and monitoring category for all ROW actions where we spend more than one hour but less than eight hours processing the application or monitoring the grant. The FS also plans to issue a similar final rule.

R.S. 2477

Many commenters were concerned that the regulations would impact rights associated with R.S. 2477 roads. One commenter said that before the rule can be finalized, a Federal court must decide which roads are available for rights-of-way as some may be owned by the county under R.S. 2477. Similarly, another commenter said that BLM needs to make sure we own the road before issuing a right-of-way grant. These final regulations do not change the current policy of the Department of the Interior for handling R.S. 2477 issues and apply only to public lands (Part 2800) and Federal lands (Part 2880). Final section 2801.6 makes clear that these regulations do not apply to valid claims under R.S. 2477.

Temporary Use Permits

Several commenters supported the continued use of temporary use permits (TUPs). Some commenters from the oil and gas industry said that we should not eliminate TUPs for FLPMA rights-of-way since the industry needs them for testing and emergency situations. Other commenters said that BLM only needs to be able to authorize the additional use of public land outside a permanent right-of-way, no matter what you call the authorization. We agree with the basic point of the last comment and have so provided in this rule. Moreover, BLM believes there is little difference between approving the use of public land using short term right-of-way grants and approving the use of Federal land with TUPs. Both authorizations require:

(A) The same application procedure;

(B) Compliance with NEPA and land use plans;

(C) Preparation of a decision; and

(D) Execution of an authorizing document.

BLM can authorize all associated uses with a FLPMA grant, whether they are short or long term, and therefore TUPs are not needed. This is consistent with the proposed rule (see 64 FR 32118).

One commenter said that BLM should authorize in a right-of-way grant access roads, temporary landing sites, and lay down areas rather than in a special use permit since these activities are an integral part of the construction operations. We agree and the final rule is consistent with this comment. The same commenter said that short-term incidental activities, such as those short term construction activities that would temporarily require additional width for a right-of-way, or a temporary access road should be permitted for a term and with stipulations, as a right-of-way, not as a special use, because they are tied to a longer term use. We agree with the commenter. Under this final rule, we will issue right-of-way grants under FLPMA with an appropriate term and stipulations for all authorized uses associated with a right-of-way, including short term construction and access needs.

Section 2801.2 What Is the Objective of BLM's Right-of-Way Program?

This section is new to the final rule and explains it is BLM's objective to grant rights-of-way to qualified individuals and business or government entities, and to direct and control the use of rights-of-way on public lands in a manner that:

(A) Protects the natural resources;

(B) Prevents unnecessary or undue degradation to public lands;

(C) Promotes the use of rights-of-way in common; and

(D) Coordinates, to the fullest extent possible, all BLM actions under the regulations with state and local governments, interested individuals, and appropriate quasi-public entities.

We inadvertently left the objectives section out of the proposed rule, but this final section is consistent with previous section 2800.0–2. We added a similar provision to the part 2880 regulations discussed later in this preamble.

Section 2801.5 What Acronyms and Terms Are Used in These Regulations?

This section contains the acronyms and defines the terms that are used in these regulations. Paragraph (a) is new to the final rule and contains acronyms that are frequently used in the final rule. We also amended the definitions section in the final rule by adding several terms, by deleting unnecessary terms, and by amending the definitions of the terms we proposed.

Two terms not defined in the proposed or final regulations are ''suspension'' and ''termination.'' We discuss those terms here because the public and BLM staff often inappropriately use the terms interchangeably. The two terms have very different meanings. Suspensions involve immediately curtailing activities and privileges authorized under a grant for a specified period of time. Suspensions may be ordered to protect public health, safety, or the environment. Terminations, on the other hand, involve ending the term of a grant because the grant has expired or is required by law to terminate, the holder requests and BLM consents to the termination, or the holder has not complied with laws, regulations, or any

terms and conditions of the grant, including abandonment.

Many comments related to redefining terms used in the proposed rule or adding new terms to make the rule easier to understand.

In the final rule we added a definition of ''actual costs'' to mean the financial measure of resources BLM expends in processing and monitoring right-of-way grants including direct and indirect costs, exclusive of management overhead. We added this definition because ''actual costs'' is one of the criteria spelled out in FLPMA that BLM uses to assess whether costs are reasonable. The term is defined similarly to previous section 2800.0–5(o).

One commenter asked that the final regulation define ''administrative costs of processing,'' as the phrase was vague and subject to interpretation. In the final rule we do not use the phrase ''administrative cost of processing'' and therefore there is no need to define the term.

The Forest Service recommended revising the definition of ''base rent'' to read, in part, as follows:

> Base rent means the initial dollar amount required of a facility owner or a facility manager based on the highest value use in their facility, as determined by the communications rent schedule and the population of the community served. If the facility manager rental rate or the facility owner's type of use rental rate is equal to or greater than other assigned rental rates in that facility, then * * *.

In the final rule we moved the definition of ''base rent'' from proposed section 2806.5 to this section. We also modified the final definition to make it easier to understand that when a communication site facility manager's or facility owner's scheduled rent is equal to the rent for the highest use from the communication use rent schedule, the facility manager or facility owner's use determines the base rent. When the value of any other use in the communication site facility exceeds that of the facility manager or facility owner's use, that other use determines the base rent. Although we did not copy the FS proposed language exactly, we followed the suggested meaning of the FS comment in the final definition.

In the final rule we amended the definition of ''casual use'' to mean ''activities ordinarily resulting in no or negligible disturbance of the public lands, resources, or improvements.'' We also replaced the example proposed with ''Surveying, marking routes, and collecting data to use to prepare grant applications.'' We believe the final rule's definition of ''casual use'' is a more accurate and useful description because it recognizes that casual use may cause no disturbance and because it gives examples that are more useful than that provided in the proposed rule.

In the final rule we moved the definition of ''commercial purpose or activity'' from proposed section 2806.5 to this section and modified it to make it easier to understand. In the final rule, we use the term to describe the situation where a holder attempts to produce a profit by allowing the use of its facilities by an additional user. Under these circumstances BLM may assess an appropriate rent for such commercial activities. The holder's use may not otherwise be subject to rent charges under BLM's rental provisions.

In the final rule we moved the definition of ''communication use rent schedule'' from proposed section 2806.5 to this section and modified it to make it easier to determine where a use will fit into the schedule. The final rule also clearly states that the type of use identified on an FCC license does not supersede either the definition found in this subpart or the procedures for calculating rent in subpart 2806. The definitions in this rule are different from those in FCC's rules because our reason for defining them is so we can determine the correct rent for the use of a right-of-way, whereas the FCC regulations define them for entirely different reasons, such as licensing requirements. Therefore, our definitions continue to focus on determining the type of use. However, there may be circumstances where BLM cannot accurately determine the type of communication use and therefore cannot determine the proper category in the rent schedule for the use. Should this occur, BLM may consult with the FCC to help us determine the use, based on our definitions, and therefore determine where the use would fit into the communication use rent schedule.

Several commenters said BLM should change its definition of ''commercial mobile radio service'' (CMRS) (contained in ''communication use rent schedule) because it differs significantly from the regulatory classifications established by Congress and the FCC. They said BLM's definition of CMRS did not identify cellular, personal communication service, or enhanced specialized mobile radio services as specific types of commercial mobile radio services, but instead focused on communication services to individual customers and ancillary communication equipment for operating, maintaining, or monitoring use. One of the commenters suggested that we use the FCC's definition of CMRS. Another commenter said that the definition contravened section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, which mandated that similar mobile services be subject to consistent regulatory definition and urged BLM to adopt FCC definitions in its final rule. We disagree with the commenters. BLM and the FCC have different definitions for the terms because we use the terms for different purposes. The FCC issues licenses for different classifications of primary uses. BLM defines different types of communication uses for rental calculation purposes only.

In the final rule we moved all communication site related definitions from proposed section 2806.5 to this section. For example, we moved the definition of ''customer'' from proposed section 2806.5 to this section. We also modified the definition to make it clear that:

> (A) BLM includes private or internal communication uses located in a holder's facility as customer uses; and
>
> (B) Customer uses are not included in the amount of rent owed by a facility owner, facility manager, or tenant unless the facility owner or facility manager is operating the facility for a commercial purpose. This more accurately describes how we charge for customer uses than the proposal and is consistent with existing policy and practice.

Several commenters thought the definition of ''designated right-of-way corridor'' should be deleted because it is not compatible with oil and gas field operational practices. We address this comment here because right-of-way corridors, even those for oil and gas operations, are designated under FLPMA. The commenters said that the spider web of flowlines, gathering lines and roads on specific leases cannot be predicted and would not be conducive to corridors. We retained the definition in the final rule because of the advantages to locating major utility rights-of-way in corridors on public land and because section 503 of FLPMA requires that we use rights-of-way in common to the extent practical. Further, the final rule does not require that rights-of-way for all oil and gas field operations be located in a designated right-of-way corridor. Designation of a right-of-way corridor is a land use planning decision that BLM makes only after fully considering the impacts on other existing and planned land uses, including oil and gas development.

We made minor wording changes to the definition of ''facility'' in the final rule to make it easier to understand. The definition makes it clear that ''facility'' includes the improvements or structures on a right-of-way owned or controlled by the grant or lease holder.

In the final rule we moved the definition of ''facility manager'' from proposed section 2806.5 to this section. The final definition makes clear that a communication site facility manager does not own or operate its own equipment, but leases space to tenants and customers in a communication facility. We also moved the ''facility owner'' definition from proposed section 2806.5 to this section and reworded it to be clear that a ''facility owner'' owns and operates its own communication equipment in a facility and may or may not lease space to other users in the communication facility. Both definitions are consistent with current policy and practice.

Several commenters said that the definition of ''field examination'' should make it clear that the BLM staff person making a field trip should look at as many rights-of-way and Applications for Permits to Drill as possible in one trip to make the trip as efficient as possible. We agree. Combining several field examinations or other inspections into one field trip is BLM's routine practice. However, we deleted the proposed definition of ''field examination'' from the final rule because we no longer use the term and it is not part of the criteria for determining a cost recovery category in this final rule. For further information, please see the preamble discussion of final section 2804.14.

Several commenters asked what ''reasonable costs'' are and said that BLM should be responsible for paying for NEPA and other studies since it is our responsibility under the law. We use the phrase ''reasonable costs'' in sections 2804.14, 2804.20, and 2805.16. The final rule defines this phrase in section 2801.5, and final section 2804.20 lists the factors from FLPMA that BLM will use in its determination of the reasonable costs for Processing Category 6 or Monitoring Category 6.

We reworded the definition of ''grant'' to state that a grant is any authorization or instrument (*e.g.*, easements, leases, licenses, or permits) issued under Title V of FLPMA, and that ''grant'' includes those authorizations and instruments BLM and its predecessors issued for like purposes prior to the passage of FLPMA under now expired authorities. Therefore, the term ''grant'' includes communications use leases. We use the term ''lease'' for communication site purposes because of the nature of the rights we authorize to the holder of the authorization. Communication use leases allow holders to sublease space to tenants and customers without first obtaining BLM approval. A typical BLM right-of-way grant does not allow holders to sublease.

We received many comments related to the definition of ''hazardous material.'' Many commenters said that the Environmental Protection Agency (EPA) has an established definition of ''hazardous substance'' and that EPA regulates hazardous substances and BLM therefore need not. Some commenters said the definition was overly broad, inconsistent with other regulatory authorities and should be deleted. Several commenters said that the definitions ''hazardous material,'' ''discharge,'' and ''release'' should all be deleted from the rule and that the rule is expanding BLM's jurisdiction beyond what is required by law. Some commenters said the rule changes statutory requirements and regulations on hazardous materials. The commenters said the rule should not weaken or dilute the Resource Conservation and Recovery Act (RCRA) or the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or eliminate the exemptions provided the oil and gas industry in those statutes. We have not changed these definitions as a result of these comments. The final rule includes these definitions to make clear the regulations addressing use and management of hazardous materials on Federal and public lands. As noted in the proposed rule's preamble (see 64 FR 32118), right-of-way holders use, store, and transport various hazardous materials on and across public lands. BLM seeks to ensure that those using BLM lands are responsible for damage to health, property, and the environment incurred while using and occupying a right-of-way and that they understand which materials we consider to be hazardous.

The terms ''discharge'' and ''release'' take their meanings from the Clean Water Act (33 U.S.C. 1321(a)(2)) and CERCLA (42 U.S.C. 9601(22)), respectively. The terms broadly address the range of circumstances under which, during the use of a right-of-way, a chemical substance may enter the environment.

The term ''hazardous material'' is also intentionally broad and includes, among others:

(A) Hazardous substances as defined by CERCLA (see 42 U.S.C. 9601(14);

(B) Regulated substances managed in tanks as defined by the Resource Conservation and Recovery Act (RCRA) (see 42 U.S.C. 6991 *et seq.*);

(C) Oil, as defined by the Oil Pollution Act (see 33 U.S.C. 2701(23)), and the Clean Water Act (see 33 U.S.C. 1321(a)); and

(D) Other substances defined and regulated as ''hazardous'' under applicable Federal, state, tribal, or local law.

We defined ''hazardous material'' by cross-referencing other laws to ensure that all pollutants, contaminants, and hazardous substances, including oil and petroleum products, fall within the definition. Although some commenters stated that BLM should specify hazardous substances of concern, and should not incorporate into its rule definitions taken from other laws, such an approach would be impracticable in light of the large number and types of hazardous substances that can cause harm to health, property, or the environment. In addition, numerous laws, including CERCLA, define ''hazardous substance'' by incorporating definitions found in other laws. (See section 101(14) of CERCLA, 42 U.S.C. 9601(14), and section 1001(23) of the Oil Pollution Act, 33 U.S.C. 2701(23).) Because numerous jurisdictions have adopted definitions of hazardous substances that, in many respects, differ from those in CERCLA, RCRA, the Oil Pollution Act, and the Clean Water Act, BLM included within its definition a catch-all for substances defined as hazardous under Federal, state, tribal, or local law. Rather than cause confusion and inconsistency, as claimed by some commenters, BLM believes the definition fosters consistency in the meaning and application of key terms and provides clear guidance to users of their obligations and liability under these regulations.

BLM disagrees that, by incorporating definitions of environmental terms taken from other laws, we are attempting to expand our authority into areas administered by EPA and state regulatory authorities under environmental laws. BLM is not seeking to supplant EPA and state authorities to regulate environmental laws on Federal and public lands. To the extent that EPA and the state have such authority, nothing in this rule affects it. These definitions apply only to BLM's right-of-way regulations, which seek to ensure that if someone using and occupying a right-of-way issued under these regulations causes harm to health, property, or the environment, the cost of remedying such harm falls on the grant holder, rather than on the public.

Several commenters stated that BLM should delete the term ''hazardous material'' and replace it with ''hazardous substance'' as defined in CERCLA, because using the term ''hazardous material'' could weaken or dilute the exemption granted to the oil and gas industry in CERCLA and RCRA. The commenters misunderstand the purpose of the rule. Nothing in the rule

affects the exclusion of petroleum from the definition of ''hazardous substance'' under section 101(14) of CERCLA (42 U.S.C. 9601(14)). BLM is not seeking through this rule to enforce CERCLA on Federal or public lands or to regulate users' management of waste under RCRA. Rather, BLM is issuing these regulations to ensure that, as a manager of public lands, it places the risk of harm on the grant holder and not on the public. In this context, the definitions are used in these regulations only as a way to identify which materials we consider to be hazardous and which, therefore, may impact Federal or public lands.

One commenter said that the final rule should define ''holder'' as it is defined in the law, to exclude Federal agencies. The commenter is correct that FLPMA does not include Federal agencies in its definition of holders. However, section 507 of FLPMA clearly provides for rights-of-way for the use of any department or agency of the United States. Title V of FLPMA also applies to any Federal agency that would apply to construct an oil or gas pipeline on public lands. Therefore, we believe it necessary to include Federal agencies in the definition of holders.

In the final rule we added a definition of ''management overhead costs'' to mean the costs associated with the BLM directorate, including all BLM State Directors and the entire Washington Office staff, except where a State Director or Washington Office staff member is required to perform work on a specific right-of-way case. We added the definition because we use the phrase in the definition of actual costs and in final section 2804.20.

In the final rule we also added a definition of ''monetary value of the rights and privileges you seek'' to mean the objective value of what the right-of-way grant is worth in financial terms to the applicant. We added this definition because ''monetary value'' is one of the criteria spelled out in FLPMA that BLM uses to assess whether costs are reasonable and we use the term in final section 2804.20. The meaning of the term is the same as the definition in previous section 2800.0–5(p).

Several commenters said the final rule should define ''monitoring'' in terms of requirements and time frames and that monitoring should not be considered an annual or recurring cost. Another commenter asked if the determination of compliance was part of the ''administrative costs of (renewal) compliance,'' or part of day-to-day monitoring activities. The second comment appears to be asking if compliance inspections prior to renewal of a grant are part of day-to-day monitoring or part of the cost of processing a renewal. In the final rule we added a definition of monitoring, which includes those actions BLM performs to ensure compliance with the terms, conditions, and stipulations of the grant.

Monitoring occurs primarily during the construction and rehabilitation phases of a project. During grant application processing, BLM will estimate the hours we will need to monitor the construction and rehabilitation of a Monitoring Category 1 through 4 application, and we will collect the applicable fees when the applicant accepts the terms, conditions, and stipulations of a grant. For a Category 1 through 4 application, compliance inspections for a renewal are part of the cost of processing the renewal. Monitoring Category 1 through 4 fees are one-time fees. Monitoring for Category 5 Master Agreements and Category 6 projects are in accordance with the terms of the agreement and may include monitoring during the life of the grant through the termination phase of the project.

In the final rule we deleted the definition of ''project'' because there is a common understanding of the term as it is used in this rule.

We also replaced the proposed rule's definition of ''public land'' with a definition more closely following section 103(e) of FLPMA.

In the proposed rule we omitted the definition of ''reasonable costs.'' In the final rule we added the definition of the term, citing the definition in section 304(b) of FLPMA, which is consistent with existing policy and practice.

In the final rule we moved the definition of ''site'' from proposed section 2806.5 to this section.

One commenter supported using the term ''site,'' but recommended a broader definition that would include a geographic area that can accommodate multiple communication facilities under the control of one or more facility managers supporting a combination of recognized communications uses. BLM did not change the definition in response to this comment because we believe the commenter's suggestion is actually more restrictive than the proposed definition. A site is not limited to communication facilities and may contain several other types of right-of-way facilities and uses besides communications facilities.

One commenter said that the definition of ''substantial deviation'' absorbs rights that a Federal agency may already have in an existing grant. As an example, the commenter said that in utility rights-of-way it is common practice for the grant to include terms that allow the holder to construct, modify, and maintain the facilities. The commenter said that if Federal agencies want to do something that is beyond the scope of the grant, they should contact BLM. In the proposed rule BLM provided an explanation of ''substantial deviation'' that was not spelled out in previous regulations (see proposed section 2807.11). We moved the description of substantial deviation from proposed section 2807.11 to final section 2801.5. BLM agrees with the commenter that when an activity is beyond the scope of what is authorized in a grant, the holder should contact BLM before engaging in the activity. We reworded the definition of ''substantial deviation'' to make clear that the notification requirement of proposed section 2807.11(b) applies only in circumstances where the use is outside the scope of an existing grant or outside the boundaries of an existing authorized right-of-way. The requirement does not apply to uses that are in an existing grant. BLM considers adding facilities that are not specifically authorized in the original grant to be a substantial deviation that requires supplemental authorization in the form of a grant amendment.

Several commenters said that as it pertains to the definition of ''temporary use permit,'' public safety is an ''OSHA function,'' not a BLM function. They also said that there should be a definition of ''natural environment'' in the final rule and that under a temporary use permit, there may not be any ''natural environment'' to protect.

In the final rule we deleted the definition of ''temporary use'' from part 2800. Under the final rule, for any use or activity requiring a FLPMA grant for a short duration, BLM will issue a short term right-of-way grant instead of a temporary use permit. When an applicant identifies a short term use during application processing, such as the need for additional work space outside the right-of-way boundary, BLM will approve that use, as appropriate, within the right-of-way grant. When the short term use is identified after a right-of-way grant for a project has been executed, BLM will approve the additional short term use, as appropriate, in a separate short term grant or an amendment to the grant. There is no specified term or duration for a short term grant and BLM will determine the term on a case by case basis.

Under the final rule for part 2880, we will continue to issue TUPs for uses associated with MLA right-of-way

grants. We disagree with commenters' suggestion that the definition of TUPs should not address public safety. The MLA specifically states that BLM may issue TUPS to ''protect the natural environment or public safety'' (see 30 U.S.C. 185(e)). We also disagree with the commenters that said under a TUP there may not be any natural environment to protect. The ''natural environment'' is the land for which BLM issues the original grant and any attendant TUP, which holders must protect.

In the final rule we moved the definition of ''tenant'' from proposed section 2806.5 to this section. The final rule's definition is similar, but more specific, than the previous rule's definition (see previous section 2800.0–5(bb)), and is also consistent with the proposed rule.

We use the term ''third party'' in the proposed and final rules. We did not define it in the proposal, but do define it in the final rule to make clear that BLM considers a third party to be any party aside from the applicant, holder, or BLM.

In the final rule we added a definition of ''tramway'' to eliminate confusion over the meaning of the term. One of the right-of-way uses FLPMA specifically mentions is tramways (see 43 U.S.C. 1761(a)(6)). BLM administers a large amount of timber property in western Oregon and on other public lands where the term is commonly used to describe systems for transporting and hauling timber from the forest. Previous regulations did not define the term and there has been ongoing confusion over what type of transportation system qualifies as a tramway. Therefore, in the final rule we added a definition of tramway that is consistent with common usage of the word and existing policy.

One commenter said that we should add a definition of ''trespass'' to the final rule, while other commenters said that the proposed definition of ''trespass'' was too open ended and gave BLM too much discretion. In the proposed rule we defined the term ''trespass'' in the body of the regulatory text in section 2808.10, as we do in the final rule. We disagree with the commenter that the definition of the term is too open ended and gives BLM too much discretion. The final definition is consistent with previous regulations (see previous sections 2800.0–5(u), (v), and (w)) and does not give BLM any more discretion than do previous rules.

Several commenters said that the definition of ''unnecessary and undue degradation'' should be changed to ''unnecessary and undue damage'' and should not include ''non-willful'' acts. Other commenters said that ''degradation'' can mean almost anything and does not provide guidance to industry on what to avoid. The term ''unnecessary or undue degradation'' is statutory in origin and for that reason we decline to change ''degradation'' to ''damage.'' The term appears in section 302(b) of FLPMA (43 U.S.C. 1732(b) which states that ''In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.''

In our 1999 proposed rule, we defined the term ''unnecessary and undue degradation'' to mean ''surface disturbance that is greater than that which would occur when the same or a similar activity is being done by a prudent person in a usual, customary, and proficient manner that considers the effects of the activity on other resources and land uses outside the area of the activity. The disturbance may be either willful or nonwillful.'' We have decided to delete this proposed definition (and the existing definition at 43 CFR 2800.0–5(x)) because we find it to be unnecessary. Issuing a right-of-way grant is a highly discretionary act on BLM's part. In final section 2804.26(a), BLM has established standards for exercising this discretion. For instance, as final section 2804.26 makes clear, an application may be denied if the proposed use is not in the public interest or is inconsistent with the purpose for which we manage the public lands.

''Unnecessary or undue degradation'' sets a standard far less stringent that those in section 2804.26. The Secretary, through BLM, will continue to observe the ''unnecessary or undue degradation'' standard in addressing a right-of-way application and in assessing and administering the terms and conditions and conditions of a grant, but will allow the facts posed by a particular situation give meaning to this phrase.

In the final rule we moved the definition of ''zone'' from proposed section 2806.5 to this section. We amended the definition in the final rule to more accurately describe a zone as ''one of eight geographic groupings necessary for linear right-of-way rent assessment purposes, covering all lands in the contiguous United States.''

Section 2801.6 Scope

This section explains what these final regulations apply to and what the final regulations do not apply to. In this final rule we combined proposed sections 2801.7 and 2801.8 into this section. We also amended this section by adding new paragraphs (b)(5), (6), and (7).

We added new paragraph (b)(5) to alleviate the concerns of some commenters that this rule would have a negative effect on rights under R.S. 2477.

We added new paragraph (b)(6) to clarify that the right-of-way regulations do not apply to existing rights for private reservoirs, ditches, and canals established prior to FLPMA under the Mining Act of July 26, 1866. We think this clarification will be helpful in eliminating any confusion associated with the previous regulatory language found in former section 2801.4.

In the 1866 Act, Congress granted Federal protection for vested state law-based water rights and rights-of-way for ditches, canals and other structures necessary for the use of water. Under the Act, a private party could acquire a right-of-way across Federal lands without any action by the government—no application or filing with the government was necessary, and no governmental approval was required. The right-of-way vested once a ditch or canal was constructed and a water right acquired. Once the right-of-way was created, it existed in perpetuity and included the right to operate and maintain the ditch, canal or conduit within the right-of-way. *See, e.g., Utah Power & Light* v. *United States,* 243 U.S. 389, 405 (1917); *Gorrie* v. *Weiser Irr. Dist.,* 153 P. 561, 562 (Id. 1915); *Perry* v. *Reynolds,* 122 P.2d 508, 511 (Id. 1942); *United States* v. *Big Horn Land & Cattle Co.,* 17 F.2d 357, 366 (8th Cir. 1927).

Other statutes enacted after the 1866 Act also allowed private parties to acquire rights-of-way across Federal lands. Unlike 1866 Act rights-of-way, however, these other statutes required government action before rights-of-way vested. For example, the Act of March 3, 1891 required an applicant to file and get government approval of a map before the right-of-way vested. The 1891 Act differed from the 1866 Act in several other ways, too. Unlike the 1866 Act, the 1891 Act defined the physical extent of the right-of-way. In addition, the 1891 Act allowed for establishment of rights-of-way for irrigation purposes on reserved lands; the 1866 Act did not apply to reserved lands.

When FLPMA was enacted in 1976, it repealed the existing laws governing rights-of-way and replaced them with a single mechanism for establishing a right-of-way over the public lands. Section 501(a) of FLPMA provides the Secretary of the Interior with authority to ''grant, issue, or renew rights-of-way over, upon, under, or through'' the

public lands. 43 U.S.C. 1761. In addition, FLPMA provides the Secretary with authority to impose terms and conditions on these rights-of-way that, among other things, ''minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.'' Section 505(a); 43 U.S.C. 1765.

But FLPMA did not terminate rights-of-way established under the prior statutes. Instead, FLPMA expressly preserved and protected such pre-existing private rights-of-way. Section 701(a) of FLPMA provides that FLPMA does not terminate ''any valid lease, permit, patent, right-of-way, or other land use right or authorization'' existing at the time of FLPMA's enactment. 43 U.S.C. 1701, note 1. In addition, section 701(h) of FLPMA provides that all actions taken by the Secretary in the exercise of her authority under FLPMA are ''subject to valid existing rights.'' 43 U.S.C. 1701, note 1. Together, these provisions of FLPMA ensure that pre-FLPMA rights-of-way are protected and preserved.

This final rule therefore reflects long-standing law and BLM's historical practice by clarifying that 1866 Act rights-of-way are not subject to regulation so long as a right-of-way is being operated and maintained in accordance with the scope of the original rights granted. Because rights-of-way under the 1866 Act are perpetual and do not require renewal, no authorization under FLPMA exists or is required in the future. Therefore, unless a right-of-way holder undertakes activities that will result in a substantial deviation in the location of the ditch or canal, or a substantial deviation in the authorized use, no opportunity exists for BLM to step in and regulate a right-of-way by imposing terms and conditions on the right-of-way's operation and maintenance. Simply stated, there is no current BLM authorization to which such terms and conditions could be attached. Therefore, Title V of FLPMA and BLM's right-of-way regulations do not apply to these rights-of-way.

This does not mean, however, that BLM cannot take action to protect the public lands when a holder of an 1866 Act right-of-way undertakes activities that are inconsistent with the original right-of-way. In such a situation, if the right-of-way holder does not approach BLM for a FLPMA permit authorizing such activities, FLPMA and BLM's trespass regulations provide BLM with the discretion to take an enforcement action against the right-of-way holder.

Title III of FLPMA provides the Secretary of the Interior with broad law enforcement authority. Section 302(b) provides that the Secretary ''shall * * * take any action necessary to prevent unnecessary or undue degradation of the lands.'' 43 U.S.C. 1732(b). In addition, section 303(g) provides: ''The use, occupancy, or development of any portion of the public lands contrary to any regulation of the Secretary or other responsible authority, or contrary to any order issued pursuant to any such regulation, is unlawful and prohibited.'' 43 U.S.C. 1733(g). BLM's trespass regulations, at 43 CFR part 9230, specify that, among other things, the ''extraction, severance, injury, or removal of timber or other vegetative resources or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass.'' 43 CFR 9239.0–7. Trespassers are liable to the United States in a civil action for damages and may be prosecuted under criminal law. Therefore, with respect to 1866 Act rights-of-way, Section 302(b) of FLPMA and the trespass regulations provide BLM with the authority to take an enforcement action against a right-of-way holder undertaking activities inconsistent with the original grant.

We added new paragraph (b)(7) to address statutory changes to the Federal Power Act (FPA) and FLPMA. These changes incorporate existing policy and implement FPA and FLPMA amendments.

One commenter stated that the final rule should state if there are any rights-of-way outside the scope of the rule and should address rights-of-way in wilderness areas or ''short term rights-of-way on wilderness lands.'' We did not amend the final rule as a result of these comments. However, the final rule explains what the final regulations do not apply to and includes language in paragraph (b)(3) that states that the regulations do not apply to ''Lands within designated wilderness areas, although BLM may authorize some uses under parts 2920 and 6300 of this chapter.''

Section 2801.7 Information Collection Matters

We deleted this section from the final rule because it is not necessary to publish this information in the text of the regulations.

These regulations contain information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), we submitted a copy of the proposed information collection requirements to the Office of Management and Budget (OMB) for review. OMB approved the information collection requirements under Control Number 1004–0189, which expires October 31, 2005.

Section 2801.8 Severability

This section explains that if any court holds provisions of these regulations invalid, the remainder of the rules are not affected. This principle has always applied to BLM regulations, but it is stated here for clarity. This section was proposed as section 2801.10. We made editorial changes to the section, but its effect is the same as the proposed rule.

Section 2801.9 When Do I Need a Grant?

This section is a combination of proposed sections 2801.7 and 2801.8. It explains that you must have a grant when you plan to use public lands for certain systems or facilities, whether over, under, on, or through public lands. The section lists examples of the types of systems or facilities that require grants. The section also explains additional requirements for rights-of-way for generating, transmitting, or distributing energy. Finally, the section provides a cross-reference to BLM regulations for rights-of-way for transporting oil and gas resources.

Section 2801.10 How Do I Appeal a BLM Decision Issued Under These Regulations?

This is a new section to these regulations. The proposed rule listed the basic contents of this section for each action which allows a right to appeal. This final rule replaces the appeals language in each of those sections with a cross-reference to this section. This eliminates redundancy and brings this rule in line with other BLM regulations that handle appeals sections in a similar manner.

We received several comments on the subject of appeals. One commenter wanted the regulations to state whether or not applicants had the right of appeal if BLM rejected their applications. As a result of this comment, we amended final section 2804.26 and it now states that applicants have the right of appeal to the Interior Board of Land Appeals (IBLA) if BLM denies their applications.

Several commenters wanted the opportunity for State Director review for initial disagreements with BLM before BLM referred the matter to the IBLA. One commenter suggested language to accomplish this administrative review. Although other BLM programs have adopted these reviews, BLM did not add State Director review provisions to this final rule. When you appeal a decision to IBLA, BLM is not prohibited from

reconsidering or discussing the appealed decision with you or other interested parties. If BLM decides to rescind or amend the appealed decision as a result of additional review or discussion with you or other interested parties, we may rescind or amend only after asking IBLA to remand the matter for BLM's further consideration and IBLA's consent to this request. We encourage BLM personnel, grant holders, and applicants to work toward informal resolution of disputes over BLM decisions proposed or made by BLM both before and after appeals are filed. In BLM's right-of-way program these informal reviews and discussions have been and are a useful way to resolve disputes without unnecessarily formal mid-level reviews, such as State Director reviews.

Several commenters said that there is no part 4 in this title. The commenters are mistaken. Part 4 of 43 CFR is in a volume separate from the volume where BLM's regulations are located. Parts 1 through 999, including part 4, are in the first volume of 43 CFR and parts 1000 through 10010, including BLM's regulations, are in the second volume.

Subpart 2802—Lands Available for FLPMA Grants

This subpart describes the lands that are available for rights-of-way and how BLM designates corridors. Generally, BLM designates lands as suitable for right-of-way uses through its land use planning process, as described in FLPMA and existing regulations at 43 CFR 1610. During this process BLM prepares land-use plans, called either ''resource management plans'' or ''plan amendments.'' After going through a process in which the public helps BLM identify issues the plan should address, BLM then:

(A) Identifies resource and information needs;

(B) Formulates alternatives;

(C) Analyzes the effects of the alternatives;

(D) Prepares a draft plan and environmental document for public review and comment; and

(E) Determines what resource and land-use decisions to make in the approved plan. Among these decisions are what land uses are available for right-of-way grants. Land use plans designate lands as:

(1) Open to right-of-way grants;

(2) Right-of-way avoidance areas (where right-of-way grants would not be issued unless there were no other available alternatives); or

(3) Right-of-way exclusion areas where right-of-way grants would not be approved for any reason. Land use plans also designate right-of-way corridors.

Section 2802.10 What Lands Are Available for Grants?

This section explains that BLM grants rights-of-way for lands under its jurisdiction and lists exceptions when we would not issue a right-of-way grant. These exceptions include instances when a statute, regulation, or public land order excluded right-of-way uses, the lands are segregated or withdrawn from right-of-way uses, or when BLM identifies areas as inappropriate in a land use plan or in an analysis of an application. The section explains that BLM may also require common use of rights-of-way and may require location of a right-of-way within an existing corridor. This section states that BLM will designate right-of-way corridors through land use plan decisions. This section also suggests that you contact BLM to determine if the lands you are considering for a right-of-way are available for right-of-way use.

We added new paragraphs (a)(1), (a)(2), and (a)(3) to the final rule to more completely explain the reasons why certain lands under our jurisdiction would not be available for a right-of-way use. These new provisions to the rule are consistent with the proposed rule, our existing regulations at part 2300 (land withdrawals), subpart 2091 (segregation and opening of lands), and part 1600 (planning, programming, and budgeting). We also eliminated the discussion in proposed section 2802.10(b) of notifying the public ''by appropriate means'' of designated corridors because it was vague and because we already require public notification as part of the land use planning process.

Several commenters said that BLM should replace ''may'' with ''will'' where it appears in proposed paragraphs (a) and (b) of this section. We did not make the change to the final rule in either proposed paragraph (a) or (b). Issuing a right-of-way grant remains a highly discretionary act on our part. Section 501(a) of FLPMA authorizes, but does not compel, the Secretary to issue rights-of-way over, upon, under, or through the public lands (see 43 U.S.C. 1761(a)). Section 503 of FLPMA requires common use of a right-of-way but only ''to the extent practical'' (see 43 U.S.C. 1763). There may be circumstances where BLM determines that it is not in the public interest to issue a right-of-way grant or to require common use of a right-of-way area even when the lands are open to the development of right-of-way grants. Therefore, the final rule continues to leave the discretion to issue a grant or require common right-of-way use in BLM's hands.

One commenter said that in paragraph (b) of this section, we should replace ''require'' with ''propose.'' We did not change the final rule as suggested by the commenter. As noted above, Section 503 of FLPMA provides that BLM, to the extent practical, require, not simply propose, common use of a right-of-way. BLM is therefore required to issue rights-of-way in common where it is practical and replacing ''require'' with ''propose'' would be inconsistent with the statute.

One commenter said that BLM must consider the location of existing assets and facilities when determining whether land is available. Another commenter said that BLM should not require common use of a corridor if location in the corridor would render use of existing facilities infeasible or burdensome. We agree with the commenters. When issuing rights-of-way in common, or requiring that a right-of-way be issued in or adjacent to an existing corridor, BLM will consider whether or not the uses are compatible. BLM will also consider the possible impacts a proposed use may place on the future usability of a corridor. In other words, if a proposed right-of-way use would render a corridor unavailable for any future right-of-way uses, BLM could decide that the proposed use should be located in some alternate location.

Several commenters suggested inserting ''or'' between ''regulation'' and ''planning'' in proposed paragraph (a), and deleting the rest of the sentence after ''planning.'' Commenters made this suggestion because they said environmental and other resource conditions should already be addressed in the land management planning process. When BLM completes, updates, or amends a land use plan we undertake an environmental analysis. However, when a project is proposed, BLM will complete a site-specific NEPA analysis. NEPA requires the site-specific environmental analysis and it is designed to identify how the project-specific activities may impact the environment. The planning documents, on the other hand, are more general in nature and generally do not and cannot address site-specific impacts of a given project. Therefore, we made no changes to the final rule as a result of this comment.

The same commenters recommended that we replace ''require'' with ''encourage'' in proposed paragraph (b) since access roads, gathering lines, and flowlines do not always fit neatly into existing corridors. The commenter said

that such a requirement could render an oil and gas project uneconomic. We did not amend this section as suggested by the commenter. As stated above, section 503 of FLPMA says that BLM must require common use of rights-of-way to the extent it is practical. When determining whether it is practical to require a right-of-way to be located in a corridor, BLM will consider whether or not the new use will be compatible with the existing use. If it is not, BLM will informally work with you to determine a right-of-way location that will both protect the public interest and meet your needs. These types of issues are best resolved during the preapplication meeting.

One commenter said that the regulations should make clear that communication site facility managers and facility owners need to allow shared use of a right-of-way for pipelines and communications cables. The commenter said that there should be a minimal process for using existing pipeline rights-of-way for fiber optic cables and the like. The commenter said that this will serve the public and facilitate the installation of facilities with minimal damage to BLM lands. We agree with the commenter and encourage co-location of fiber optic facilities with power line structures and within pipeline rights-of-way. One of the advantages of co-locating uses in one right-of-way is that NEPA work has already been done for the existing use and therefore the amount of additional environmental analysis necessary for any additional use would normally be minimal unless the new use is significantly different or other reasons apply. BLM currently has a categorical exclusion for the granting of rights-of-way wholly within the boundary of compatibly developed rights-of-way. Because exceptions to this categorical exclusion may apply, BLM will determine the amount of analysis and additional work for additional uses on a case-by-case basis. The amount of analysis necessary cannot be determined by a rule of general applicability, and as a result we did not amend the rule to address the comment.

Several commenters said that once BLM designates corridors in land-use plans, it should require common use of the corridor and location of new rights-of-way within the corridor to the extent possible. The commenters said that the proposed regulations give too much discretion. As is stated in the proposed rule's preamble (see 64 FR 32118), BLM designates right-of-way corridors and issues grants within these corridors to the maximum extent possible, but due to resource concerns and conflicts between uses, it is not always possible to restrict uses to designated corridors. We disagree with the commenters that the proposed regulations give BLM too much discretion in issuing grants in right-of-way corridors. BLM must have the flexibility to choose whether or not a use should be located in a right-of-way corridor to make sure uses are compatible and to ensure that the public interest is protected.

Several commenters said that forcing the use of corridors will make lease operations uneconomical and result in a waste of minerals and associated royalties from the public good. BLM agrees that the designation of a corridor in a land use plan can impact, in some cases, the development of mineral resources. The land use planning process described above assures that our analysis considers effects on other resource uses such as impacts to mineral extraction. It is frequently these same mineral extraction interests that need right-of-way corridors to support the transportation of materials to and from their operations. We made no changes to the final rule as a result of this comment.

One commenter said that requiring common use of a right-of-way may be unpractical, for safety considerations, in designing power lines. BLM considers issues of safety when requiring common use of a right-of-way. If BLM determines that common use of a right-of-way is unsafe, BLM will not require it.

Section 2802.11 How Does BLM Designate Corridors?

This section explains that BLM may designate corridors during the land use planning process described in 43 CFR 1610. During this process BLM coordinates with other Federal agencies, state, local, and tribal governments, and the public to identify resource-related issues, concerns, and needs. The process results in a resource management plan or plan amendment, which addresses to what extent you may use public lands and resources for specific purposes. It also explains the factors that BLM considers when determining the locations and boundaries of right-of-way corridors.

Paragraph (a) is new to the final rule and generally explains how we designate corridors in our land use planning process, which is discussed in greater detail in subpart 1610 of existing regulations. This provision provides helpful background to an understanding of paragraph (b). Final paragraph (b) lists the factors BLM considers when designating corridors. Final paragraphs (c) and (d) are new to this final rule and are consistent with section 503 of FLPMA and existing policy.

Several commenters said that this section should identify how corridors are designated. The commenters also said that the process of designation through the land planning process or as provided by section 503 of FLPMA also needs to be briefly described. Proposed and final section 2802.11 identify the factors BLM considers when designating corridors. Therefore, the regulations already address the first part of the comment. As for the second part of the comment, we do not believe these rules should address the land use planning process since BLM's existing regulations at subpart 1610 already address the process and it is not necessary to repeat those regulations here. Final paragraph (a) of this section explains that as part of the planning process under subpart 1610, BLM designates corridors. You can find additional information about the land use planning process in section 202 of FLPMA (see 43 U.S.C. 1712).

Several commenters said that the regulations should emphasize the advantages of reduced NEPA requirements, processing time, and costs that could occur through requiring common use of existing or designated corridors. We agree with the commenters that common use of rights-of-way and proper corridor planning and use can lead to reduced processing times and decreased costs. However, we do not believe it appropriate to discuss motivating factors for using corridors in our implementing regulations. Discussions about cost savings and processing time can occur during the preapplication meetings discussed elsewhere in this final rule.

Subpart 2803—Qualifications for Holding Grants

This subpart describes the qualifications necessary for applicants to receive right-of-way grants. It discusses:

(A) Who may hold a FLPMA grant;

(B) Whether another entity can act on a grant holder's behalf; and

(C) What happens to a grant if the holder dies.

Section 2803.10 Who Can Hold a Grant?

This section explains the qualifications for holding a grant and requires that you are:

(A) An individual, association, corporation, partnership, or similar business entity, or a Federal, state, tribal, or local government;

(B) Technically and financially able to construct, operate, maintain, and terminate the grant; and

(C) Of legal age and authorized to do business in the state where the right-of-way would be located.

This section is essentially the same as that proposed, except that we added a new paragraph (c) stating that you must be of legal age and authorized to do business in the state where the right-of-way is located. Although this provision was not in the proposed rule, it is consistent with previous section 2802.3(a)(5).

One commenter asked if BLM is authorized to issue grants to foreign entities and if so, what the qualifications are. FLPMA is silent on the subject of whether BLM may issue a FLPMA grant to foreign entities. The part 2800 regulations are similarly silent. Regarding MLA requirements, however, 30 U.S.C. 185(a) makes the qualifications provisions of 30 U.S.C. 181 applicable to section 185. The part 2880 regulations reflect these considerations. For example, final section 2883.10 states in part:

> To hold a grant or TUP [temporary use permit] under these regulations, you must be a United States citizen, an association of such citizens, or a corporation * * * organized under the laws of the United States, or of any state therein.

As in previous section 2802.3(a)(5), final section 2803.10 requires all entities seeking a right-of-way grant under FLPMA to be qualified to do business in the state where the right-of-way is located. Thus state law must be examined to determine the eligibility of a right-of-way applicant. Final section 2803.10 is substantially the same as previous regulations.

Section 2803.11 (Proposed) Must I Submit Proof of My Qualifications With My Application?

Due to reorganization, we moved the substance of this proposed section to paragraph (b) of final section 2804.12. Please see that section for a discussion of this matter.

Section 2803.11 (Final) Can Another Person Act on My Behalf?

This section allows another person to act on your behalf if you have authorized the person to do so under the laws of the state where the right-of-way would be or is located. This section is slightly different from what we proposed in that the final rule requires that you follow the laws of the state where the right-of-way would be or is located. We believe this is reasonable, consistent with the intent of the proposed rule, but most importantly, it sets the appropriate legal standard.

Section 2803.12 What Happens to My Grant If I Die?

This section explains that if an applicant or grant holder dies, any inheritable interest in an application or grant will be distributed under state law. In this rule, the term ''inheritable'' is not used in its technical sense. Here, it refers to property passing by will or intestate succession.

If the distributee of a grant is not qualified to hold a grant under section 2803.10, BLM will recognize the distributee as grant holder and allow the distributee to hold its interest in the grant for up to two years. During that period, the distributee must either become qualified or divest itself of the interest. We added this provision to the final rule to make sure we have consistent processes in place for cases where an applicant or a grant holder dies.

Subpart 2804—Applying for FLPMA Grants

This subpart contains information and policies concerning how to apply for right-of-way grants under FLPMA. It discusses:

(A) Where applicants should file their applications;

(B) What information BLM needs to process their applications;

(C) Filing fees for the various categories of applications;

(D) Exemptions from paying filing fees and criteria for establishing reasonable costs; and

(E) How BLM processes applications, including a customer service standard.

Section 2804.10 What Should I Do Before I File My Application?

This section encourages you to schedule a preapplication meeting with BLM to discuss your right-of-way grant application. This section also explains that we may share any information you provide to us at this initial meeting with other agencies to help us to better coordinate the application process. Final section 2804.13 provides that we will keep confidential any information you submit that you identify as such, to the extent allowed by law.

We received no substantive comments on this section and except for editorial changes, it remains as proposed.

Section 2804.11 Where Do I File My Grant Application?

This section explains where you must file your right-of-way grant application.

We received no substantive comments on this section and except for editorial changes, this section remains as proposed.

Section 2804.12 What Information Must I Submit in My Application?

This section explains the information you must include in your application. It requires you to file your application on Standard Form 299 and fill in the required information. This includes a description of the project, a project schedule, the estimated life of the project, and construction and reclamation techniques. You must also include a map of the project, a statement of your financial and technical ability to run the project, and any plans, contracts, and agreements concerning the proposed use(s) on the right-of-way and its effect on competition. We require a complete proposed project description to process the application, to complete an accurate NEPA analysis, and to make a determination whether the proposed use(s) indicate existing or potential competitive interest. BLM requires materials such as plans, contracts, agreements, etc., only if they have a direct bearing on the proposed right-of-way uses. Section 501(b)(1) of FLPMA (and this final rule at section 2804.12(a)(6)) requires a right-of-way applicant to submit and disclose plans, contracts, agreements, or other information reasonably related to the use, or intended use, of a proposed right-of-way, ''including its effect on competition,'' which the Secretary deems necessary. BLM typically relies on application filing activity as the indicator of competitive interest, but may also examine the plans, contracts, and other information supplied by an applicant to make a determination on competitive interest. We usually process applications on a first come-first serve basis, unless:

(A) Application activity indicates there is a competitive interest; or

(B) Planning decisions, applicant plans, contracts, agreements, or other information indicate there is a competitive interest.

This section also requires business entities to submit additional information about their business. Paragraph (b) of this section was proposed as section 2803.11. BLM requires the information in paragraph (b) to verify the legal status of applicants, including verification that the persons representing the applicant are authorized to do so. Under this paragraph a business entity must submit copies of the formal documents creating the entity and evidence that the party signing the grant application has authority to act on the business entity's behalf. To make it clearer, this final rule uses different terminology than the

proposed rule, but the effect of this final rule is the same as that proposed.

This section also informs you that if you are an oil and gas lessee or operator, and you need a right-of-way for access to your production facilities or oil and gas lease, you may include your right-of-way requirements in your Application for Permit to Drill or Sundry Notice. This improves processing and is consistent with existing policy.

One change from proposed section 2804.12 is our deletion of ''On the form, give your name and address and the name and address of any authorized agent * * *'' from the second sentence of proposed paragraph (a). We did this because the form itself requires you to submit this information and therefore these words are redundant. In final paragraph (a)(2), we added ''operating'' and ''terminating'' the project to the list of things you need to address in your application to ensure that you describe a proposed project completely. As a result of these changes, final paragraph (a)(2) now includes all phases of a proposed project.

In final paragraph (a)(4), the term ''facilities'' replaces the term ''improvements.'' We made this change to make this section consistent with the rest of the rule and because the definition of ''facility'' includes structures and improvements.

In final paragraph (b)(4), we added text concerning identification of the number and percentage of any class of voting shares of the entity which certain shareholder(s) are authorized to vote. This makes final paragraph (b)(4) consistent with business entity qualification requirements in section 501(b)(2)(B) of FLPMA and previous section 2882.2–1(b)(2). We made the same type of change in final paragraphs (b)(6) and (b)(7) by adding ''directly or indirectly,'' to be consistent with business entity requirements in section 501(b)(2)(C) of FLPMA and previous section 2882.2–1(b)(3) and final section 2883.12 of this rule. Also, in final paragraph (d) of this section we corrected the citation to BLM's oil and gas operating regulations.

One commenter said that proposed section 2804.12(a)(6) is vague. The commenter also said that we should define ''competition'' in the final rule. Section 501(b)(1) of FLPMA requires a right-of-way applicant to submit and disclose those plans, contracts, agreements, and other information reasonably related to the use, or intended use, of the right-of-way, ''including its effect on competition.'' As discussed above, BLM typically relies on application filing activity to determine whether competition exits, but we may also ask an applicant for additional information concerning the proposed right-of-way to verify whether competitive conditions exist. We believe that adding a definition of competition to this regulation would not add any new or useful information to the common understanding of the word, and therefore did not add a definition of the term.

Several commenters said the final rule should provide for applicant-prepared Environmental Assessments and third-party prepared Environmental Impact Statements. The commenters said this practice is authorized by Council on Environmental Quality (CEQ) regulations at 40 CFR 1506.5. Environmental documentation (resource surveys and reports, environmental assessments, and environmental impact statements) prepared by third parties or provided by right-of-way applicants is a well-established and common practice under existing BLM NEPA guidance in H–1790–1. Chapter V–B.1.h, states contracting may be used for preparation of an environmental impact statement (EIS) or for certain analyses to support preparation of an EIS and that either standard Federal contracting procedures or third-party contracting approaches may be followed. H–1790–1, Appendix 7.B. further clarifies that a third-party contract is an option when BLM cannot prepare a required NEPA analysis due to time, budget, or other limitations or when either the BLM or the applicant requests that a contractor be hired to prepare the EA or EIS. Therefore, adding this guidance to the final rule would be repetitive and unnecessary.

We also agree with the commenters that under CEQ rules the practice is acceptable. Although this practice is not specifically restated in the final rule under section 2804.12, this option remains available to applicants. BLM will consider environmental documentation offered by or agreed to by an applicant in determining the appropriate cost recovery category under section 2804.14. The environmental documentation, however, must meet BLM standards, and any conclusions drawn from the documentation remain BLM's jurisdiction. This final rule contains no provision to either discourage or prohibit applicants from providing environmental documentation for BLM to use to determine appropriate cost recovery categories and process applications more efficiently and timely.

Several commenters said that the final rule should make clear that the additional information allowed under paragraph (c) of this section should be limited to requests for ''relevant'' information or all ''pertinent'' information, and any requirements in the regulations to ask for more information is ''too broad and open-ended,'' and could result in limitless requests for additional information. Final section 2804.12(c) states that BLM can require an applicant to provide additional information at any time while processing an application. The comment implies that BLM could require information not relevant to evaluating an application. We disagree. BLM will implement this provision in a common sense manner, limiting requests to only that additional information that is both relevant and necessary for BLM to properly evaluate a right-of-way proposal and to process an application in an efficient and timely manner.

Examples of the type of information we may require are provided by a reference to final section 2884.11(c).

Several commenters objected to the requirement to give BLM a plan of development and stated that it is overly burdensome, expensive, and unnecessary. Final section 2804.25(b) does not require submission of a plan of development as a universal requirement for all applicants. BLM would require a plan of development only where detailed information about a proposed right-of-way development and use is both relevant and necessary for BLM to properly analyze a proposal and render a decision. This is consistent with proposed sections 2804.20(b).

A few commenters said that BLM should require an applicant to provide an ''initial environmental assessment'' as part of the application since that would enable BLM, other Federal agencies, and state governments to better assess impacts on endangered species, cultural resources, and the like. BLM disagrees with the commenter and we did not amend the final rule as a result of this comment. Because we receive a wide range of applications in terms of scope and impact, we believe that a universal requirement that all applicants be required to submit environmental studies would be inappropriate. However, under this final rule, applicants may continue to volunteer such information to facilitate the processing of an application. Under final sections 2804.12(c) and 2804.25(b), BLM may require an applicant to provide this type of information if we determine it is necessary to process an application.

Section 2804.13 Will BLM Keep My Information Confidential?

This section makes it clear that BLM will keep confidential any information in your application that you mark as ''confidential'' or ''proprietary'' to the extent allowed by law.

We amended this section slightly by replacing ''to the extent allowed under the Freedom of Information Act (5 U.S.C. 552)'' with ''to the extent allowed by law'' to be consistent with other BLM regulations. We received no substantive comments on this section.

Section 2804.14 What Is the Processing Fee for a Grant Application?

This section requires you to submit a processing fee for a right-of-way grant application before BLM incurs the costs to process your application.

This final rule changes the terminology describing this fee. In the proposed rule we used the phrase ''filing fee'' to describe the fee. The final rule uses the phrase ''processing fee'' because that term more accurately describes the fee.

We added a new provision to paragraph (b) of this section which explains that there is no fee if BLM takes one hour or less to process your application. We believe that the minimal costs involved to process an application requiring one hour or less of work does not justify charging a fee.

We added a provision at final section 2804.14(f) that we inadvertently omitted from the proposed rule. This provision allows applicants to pay full actual costs for processing applications and monitoring grants. Although FLPMA requires the Secretary to consider the factors at section 304(b) of FLPMA in determining reasonable fees, and these regulations provide for that, BLM has found that some applicants prefer to pay actual processing and monitoring costs to assist us in processing their applications in a more timely manner. This rule is consistent with previous section 2808.3–1(f) and section 307(c) of FLPMA (43 U.S.C. 1737(c)). Section 307(c) allows the Secretary of the Interior to ''accept contributions or donations of money, services, and property, real, personal, or mixed, for the management, protection, development, acquisition and conveying of the public lands * * *.''

BLM has not increased processing fees since publication of its final rule in July 1987. Since January 1986, the Consumer Price Index for All Urban Consumers (CPI–U) has risen by an average annual rate of about 3.83 percent or a total of about 73 percent. The Implicit Price Deflator, Gross Domestic Product (IPD–GDP), has risen by an average annual rate of about 2.88 percent or a total of about 55 percent.

A 1995 audit of BLM's cost recovery efforts by the OIG found BLM was not recovering all the costs of processing applications and recommended that BLM revise its regulations to recover all applicable costs and to provide for adjusting processing costs on an annual basis to reflect changes in economic conditions. The audit estimated that BLM incurred about $640,000 in additional expense in excess of the fees collected in 1993. (This shortfall comes to $213 per application, or $800,000 and $336 respectively when adjusted for changes in the IPD–GDP.) Since section 504(g) of FLPMA requires that BLM set these costs by regulation and the current regulations contain fixed charges, BLM must revise the regulations to revise the processing fees. The final rule will establish a mechanism to adjust the processing fees on an annual basis to reflect changes in economic conditions.

The preamble to the proposed rule at 64 FR 32107 states that BLM conducted field studies in 1982 and 1983 which measured the costs of processing right-of-way applications and monitoring grants. Between November 12, 1982, and July 25, 1986, BLM field offices kept and reported actual time and cost on some 500 right-of-way projects in non-major categories (see 51 FR 26840 (July 25, 1986)). In 1986, the agency conducted an extensive field study of processing and monitoring costs, which generally verified the processing costs developed from the earlier studies (see 64 FR 32108).

When we set the MLA processing fees in 1985 (50 FR 1308, Jan. 10, 1985) and in the proposed rule, we set fixed MLA processing and monitoring fees at our estimated actual cost, as required by section 28 of the MLA. The preamble to the rule proposing MLA cost recovery fees in 1983 makes plain that the fees were developed by a BLM task force consisting of employees with expertise in the processing and monitoring of right-of-way cases, budgeting, and cost accounting. The task force analyzed data from a representative sample of actual right-of-way cases and examined several demographic variables which might influence cost, including location and area of the right-of-way or temporary use area. Fees were based on the estimated work effort required to accomplish the processing actions, including personnel costs, fringe benefits, vehicle usage, and indirect costs (see 48 FR 48478, 48479 (Oct. 19, 1983) and 64 FR 32108 (June 15, 1999)).

In 1995, BLM program experts analyzed a cross section of our right-of-way cases. This analysis showed that the cost of processing right-of-way cases, including labor costs, had increased since 1986 at approximately the same rate as the IPD–GDP. Therefore, the final rule adjusts costs upward based on the IPD–GDP and allows for automatic adjustments based on this indicator. However, in the final rule we also made several other adjustments in the proposed rule fee schedule, in response to comments, which affect the final amounts and number of categories for both the processing and monitoring schedules.

The proposed rule requested public comment (see 64 FR 32108) on whether BLM should adopt a ''Minimum Impact'' category similar to the one proposed by the U.S. Forest Service. We received several comments suggesting BLM establish a minimum impact processing fee category or a category for any action which might take from 1 to 8 hours to process, such as most assignments and many renewals. We agree that some right-of-way actions can be accomplished in less than eight hours, but saw no benefit in referring to the category as the ''minimal impact category,'' or restricting the category to only work on assignment and/or renewal applications. Therefore, in the final rule, BLM establishes a new processing and monitoring category (Category 1) for all right-of-way actions where we spend more than one hour, but less than or equal to eight hours, processing the application or monitoring the grant, but we did not use the ''minimal impact category'' title.

In the final rule we increased the number of processing categories to six from four, adding a Category 1 for processing routine applications that require greater than one hour and less than or equal to 8 hours to process, as just discussed, and another category for processing Master Agreements. Under the final rule no fee is assessed for any action that takes 1 hour or less to process. We then adjusted new Category 2 to include actions that are estimated to take a maximum of 24 hours but greater than eight hours. New Categories 3 (>24 hours ≤ 36 hours) and 4 (>36 hours ≤ 50 hours) are the same as proposed Categories II and III. Category 5 in the final rule is for Master Agreements only. The proposed regulations did not contain a specifically numbered category for Master Agreements, and in this final rule BLM gave these agreements their own category number. Category 6 in the final rule (Category IV in the proposed rule) is for processing applications where the estimated work hours are greater than 50.

For Processing Categories 1 through 4, labor costs are by far the largest percentage of processing costs. Costs associated with environmental analysis and other application processing steps for these categories are predominantly labor costs. The costs of supplies, printing, fuel, and lodging are relatively small. For Processing Category 5 and 6 applications, the extent of the required environmental analysis is usually an important factor in determining processing costs, particularly if the application requires an EIS. Processing costs for Category 5 and 6 applications are, however, worked out in advance between BLM and the applicant either through a Master Agreement or a detailed accounting of work hours spent on processing an application.

In the proposed rule we used the term ''field examination'' in the category definitions and defined it in section 2801.5 of this part. In the final rule we eliminated this term and instead based the categories on the number of Federal work hours needed to process the document or request. We made this change for Categories 1 through 4 because the non-labor costs are relatively insignificant compared to labor costs, and for Categories 5 and 6 because the non-labor costs are considered as part of a Master Agreement or are otherwise negotiated. As used in the proposed rule, field examinations conducted during the processing of applications included the time and travel costs for BLM personnel. Because, as explained, labor costs constitute nearly all costs associated with field examinations, we decided to measure costs by work hours.

For processing and monitoring fees that we collect under FLPMA, we are required to consider the ''reasonableness'' factors at section 304(b) of FLPMA. These factors are:

(1) BLM's actual costs to process an application, including monitoring construction, operation, maintenance, and termination of a facility authorized by a right-of-way grant. Actual costs do not include management overhead, which means costs of BLM State Directors and Washington office staff, except when a member of this group works on a specific right-of-way application or grant. Actual cost includes both direct and indirect costs and other costs such as money spent on special studies, environmental impact statements and other analysis, and monitoring activities. We estimated actual cost figures for each category using data from the studies described previously. Where an appraisal is necessary to calculate rent for a right-of-way, such costs may be included in actual costs;

(2) The monetary value, or objective worth, of the right-of-way or what the right-of-way grant is worth in financial terms to the applicant. The preamble to the proposed rule at 51 FR 26837 (July 25, 1986) sets forth a number of ways to estimate monetary value, such as computing residual return or the residual profit of the project. Monetary value can be an enhancing factor when that value is greater than BLM's processing costs. This enhancing factor may offset a diminution caused by another of the ''reasonableness'' factors, such as public service provided. In considering and applying this factor since 1987, we have noted that the monetary value of the right or privilege sought has been much greater than the processing cost;

(3) The efficiency with which BLM processes an application. This factor refers to BLM's ability to process an application with a minimum of waste by carefully managing agency expenses and time. An explanation of this factor is set forth at 51 FR 26838 (July 25, 1986). Among the considerations there is the establishment of a cost recovery process that does not cost more to operate than would be collected under the process. Charging fixed fees based on the number of Federal work hours necessary to process an application benefits applicants by informing them in advance what the fee will be, and eliminates the enormous time and expense that would be required to track the processing of each document on a case-by-case basis. The use of current average costs to set a fee schedule is a commonly accepted practice in both the private and public sectors (see 50 FR 1309 (Jan. 10, 1985) (preamble to the final rule setting fees for MLA rights-of-way). Our application processing and grant administration procedures, which are based on standard steps in internal BLM Manuals and Handbooks, are reasonably efficient;

(4) Costs incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant. Under this factor, we examine whether any of the costs for such things as studies and data collection have value to the Federal Government or the general public apart from processing the application. Courts have held that processing which an agency is required to perform in connection with a specific request (for example, before approving a permit or grant) provides a special benefit to an applicant, even if it also provides some benefit to the public. (See, e.g., *Mississippi Power & Light Co.* v. *United States Nuclear Regulatory Comm'n,* 601 F.2d 223 (5th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980)). In our preamble to proposed rules at 51 FR 26840 (July 25, 1986), we stated that for non-major projects, there is little opportunity for public benefits or public services because of the local nature of such projects. We find, in practice, that any small benefit to the public provided by the processing of fixed-fee right-of-way applications is speculative and outweighed by the monetary value to the applicant of the right or privilege sought. Major categories 5 and 6 present more opportunities for public benefits;

(5) Any tangible improvements, such as roads, trails, recreation facilities, or other direct services to the public, which provide significant public service and are expected in connection with constructing and operating the project. This is referred to in section 304(b) of FLPMA as ''public service.'' A negative factor, such as an adverse impact on wildlife or surface drainage, may prevent an improvement from being a public service. Data collection that we need to monitor an activity is not a public service. As mentioned above, for non-major projects such as those falling in categories 1 through 4, there is little opportunity for public service in such projects. If a project provides a small public service, it will usually be outweighed by the monetary value to the applicant of the right or privilege; and

(6) Other relevant factors (see section 2804.21 of the final rule). This factor allows BLM State Directors to reduce actual processing costs based on a wide range of special circumstances, including unique instances of public benefits or services. These reductions generally fall under the broad category of ''hardship,'' that is, paying full actual costs would create an undue hardship on the applicant. There are an insignificant number of applications (less than 1 percent of the total processed) where ''other relevant factors'' can be applied.

In our proposed rule at 64 FR 32110, we acknowledged that ''[f]or all but complex projects * * * the reasonability factors have little or no effect on actual costs.'' The final rule reflects this conclusion. Thus, for categories 1 through 4, processing and monitoring fees under FLPMA are identical to the analogous category under the MLA. (As noted above, MLA fees are based on actual costs.) For example, a category 2 processing fee under FLPMA is identical to a category 2 processing fee under the MLA. A category 3 monitoring fee under FLPMA

is identical to a category 3 monitoring fee under the MLA.

We were aided in this analysis by a 1996 Solicitor's Opinion on cost recovery (M–36987), entitled ''BLM's Authority to Recover Costs of Minerals Document Processing.'' That opinion clarified that ''[a] factor such as 'the monetary value of the rights or privileges sought by the applicant' could, when that value is greater than BLM's processing costs, be weighed as an enhancing factor, offsetting a diminution due to another factor such as 'the public service provided' '' (see M–36987 at 36). Major categories 5 and 6 are more likely to reflect differences in FLPMA and MLA fees.

In the final rule, we define each processing and monitoring category by the estimated number of Federal work hours necessary to process or monitor the application/grant rather than a combination of criteria (number of hours, availability of data, number of field examinations, and need for land use plan amendment) which in the proposed rule were used to define all the categories (except the Master Agreement category). In doing so, it was necessary to determine a ''mean hour'' or average number of hours for processing or monitoring for each category, and then apply the appropriate cost figure to the mean hour in each FLPMA or MLA category. This ensures that each category is cost-weighted the same. For example, the mean hour for Category 1 is 4.5; for Category 2 the mean hour is 16; for Category 3 the mean hour is 30; and for Category 4 the mean hour is 43.

The next step in arriving at the cost recovery fees in the final rule was to determine the ''mean per hour rate or cost figure'' for FLPMA and MLA processing and monitoring categories. In this final rule Category 4 (which in the proposed rule was Processing Category III) was used as the basis for determining the mean per hour rate for all categories. We determined that a mean per hour rate of $21.46 was appropriate. Multiplying the mean hour for each category by the mean per hour rate gives the fee for each category.

The following brief analysis verifies the appropriateness of the above fees:

The $21.46 mean per hour rate for processing and monitoring fees would approximately equal the hourly wage in 2005 for an employee at the GS 9, Step 3 level.

These rates compare favorably with the 1987 processing fees which, if adjusted to a mean per hour rate, would average $11 per mean hour or an hourly wage earned by an employee in 1987 (when the existing rule was published) at the GS 9, Step 2 level (according to the 1987 General Schedule).

Most right-of-way actions are processed and monitored by employees who are at the GS 9 to GS 11 levels and who will earn between $20.02 (GS 9/1) and $31.48 (GS 11/10) per hour in 2005.

Several commenters pointed out that reasonable costs criteria only apply to FLPMA rights-of-way and that the MLA requires BLM to collect actual costs. A few commenters said that we should amend the final regulations to make it clear that the applicant and BLM must agree on what are reasonable costs and that the applicant must have the ability to monitor BLM to make sure it is following the agreement. We received similar comments on the MLA right-of-way regulations.

Sections 304(b) and 504(g) of FLPMA require that right-of-way cost recovery fees represent reasonable costs. BLM's process to identify reasonable cost recovery fees has been in place since 1987 (see previous subpart 2808). This final rule continues to identify reasonable costs using cost recovery categories for a right-of-way grant under FLPMA. BLM must apply the factors at section 304(b) of FLPMA unless the applicant chooses to pay the actual costs. Likewise, the MLA requires that we collect ''administrative and other costs'' incurred for processing applications under that statute (30 U.S.C. 185(l)). Under the previous rule, and this final rule, BLM determines in a processing fee schedule the cost recovery fees for Categories 1 through 4. We will determine cost recovery fees in the new Category 5 (Master Agreement) through a negotiated agreement between the applicant and BLM, as the comment suggests. All parties have generally accepted the process of identifying set fees in Categories 1 through 4 (and their corresponding categories in the previous regulation) as reflecting average reasonable costs for processing applications in those categories. The same applies for the MLA right-of-way regulations at section 2884.12 of this final rule. Although BLM determines whether an application falls into Category 6, the decision typically reflects an agreement between an applicant and BLM based on communication and cooperation. We also added a definition of ''actual costs'' to section 2801.5 to help explain the difference between actual and reasonable costs.

The previous regulations contained no provision for applicants to monitor BLM in its determination of cost recovery fees, whether by decision or agreement, and such a provision is unnecessary in this final rule. BLM's internal management reviews and periodic Inspector General and Government Accounting Office audits ensure that BLM is following proper procedures based on law, our regulations, and internal guidance. The final rule contains provisions for appeals in the case of disagreement with a BLM cost recovery decision (section 2804.14(d)), and for consideration of hardship and other factors under section 2804.21(a).

Several commenters said that BLM should make cost adjustments based on the reasonable or actual processing costs from the previous year rather than basing it on the IPD–GDP or any other economic index. Previous section 2808.3–1, which established cost recovery fees in 1987, had no provision to make annual adjustments in its Categories I through IV. The preamble to the proposed rule explained BLM's determination that periodic adjustment of the fees was reasonable, and included consideration of various ways to accomplish it. This final rule uses the IPD–GDP as the basis for making annual adjustments in the new Categories 1 through 4.

We evaluated the question of annual indexing while preparing the 1987 final rule and have used the IDP–GDP since August 1987 to make annual adjustment to right-of-way rent schedules under previous section 2803.1–2(c)(1)(ii). Following consideration of various alternatives, and consultation with the Department of Commerce, BLM determined that applying this known and generally accepted economic indicator is the most efficient method of ensuring that processing category fees adjust with changes in economic conditions. Conducting annual reviews and analyses of the prior year processing costs would be a time and labor intensive effort, which, considering the widely accepted use of economic indicators to make these kind of adjustments, we have determined is unnecessary. BLM continues to believe that the IPD–GDP is the appropriate method for annual indexing of processing fees because it reflects a heavily labor-based activity (see 64 FR 32109 and 32110) and we retained it in the final rule.

One commenter said that BLM should make it clear that we may enter into a Master Agreement at the applicant's option, but that BLM has approval authority over the final agreement. The commenter said the proposed rule suggests that entering into a Master Agreement could be done entirely at the option of the applicant. We made the rule clearer by defining a Master Agreement as a written agreement

negotiated between BLM and an applicant to document cost recovery and other aspects of how application(s) are to be processed. Master Agreements are, under the right conditions, available to applicants, but it requires agreement between BLM and the applicant, and is not at the sole option of either party. Final section 2804.18(b) makes it clear that BLM will not enter into a Master Agreement if it is not in the public interest.

Several commenters said that in determining the processing costs, BLM should consider reducing fees in cases where the applicant does a considerable amount of work that benefits the public, such as archaeological collection and mitigation. We agree with the commenter that BLM may consider beneficial work performed by an applicant, such as archaeological collection above and beyond what is required, in determining whether fees might be reduced. BLM can consider such factors under final section 2804.21(a)(7), which allows consideration of appropriate management of public lands and the applicant's equitable interest. We do not agree that BLM should consider reducing fees due to mitigation the applicant undertakes. Mitigation addresses the consequences of the project; it is not equivalent to, for example, a public service provided by a project.

Several commenters suggested that the final rule should require automatic yearly processing fee adjustments for inflation and that BLM should review the categories every ten years. We agree with the commenters. Final section 2804.14(c) uses the IPD–GDP to make annual adjustments and a new section 2804.15 provides that BLM will reevaluate the processing fees for each category, and the categories themselves, five years after the effective date of this final rule, and then every 10 years after that.

Many commenters supported adding a minimal impact cost recovery category. As discussed above, this rule does not add a category specifically called a ''minimal impact cost recovery'' category. However, this final rule establishes a new cost recovery Category 1 for any right-of-way action requiring more than one hour, but less than or equal to eight hours to process. The Forest Service plans to adopt a similar category to replace the ''minimal impact category'' found in its proposed rule.

One industry group thought we should include a minimum impact category in the processing fee regulations to take into consideration activities such as emergency access for repair of facilities damaged by a storm or other disaster. We did not revise the rule in response to this comment, because activities necessary to ensure safe and reliable right-of-way use are normally provided for by the grant, and would be considered within the scope of the authorized use. If maintenance or emergency activities are not within the scope of an existing grant, the proposed use would require a separate application. Under section 2804.21(a)(4) of this final rule, if you include relevant information in your application, the BLM State Director will consider, in determining your processing fee, whether you need a right-of-way grant to mitigate certain damages or hazards. We encourage applicants to include provisions for emergency use or maintenance in the original grant so as to avoid having to apply for the use separately.

One commenter said that there is no reason to charge a fee for less than eight hours of work. We disagree. Section 504(g) of FLPMA requires that the United States be reimbursed for reasonable costs associated with processing right-of-way applications. FLPMA does not provide for fee reduction or elimination based on the number of hours an application takes to process. As explained earlier, we determined that for actions taking less than one hour to process, the minimal costs involved to process an application does not justify charging a fee. For all other actions, unless you are exempt, as provided in final section 2804.16, you must reimburse BLM for the reasonable cost of processing a right-of-way application. We did not amend the rule as a result of this comment. A similar rationale applies to actual costs under the Mineral Leasing Act.

Several commenters said that there should be criteria for measuring ''full reasonable costs.'' We believe that the final rule provides these. Section 304(b) of FLPMA identifies criteria for determining reasonable costs, as did proposed section 2804.18. These ''FLPMA factors'' appear in this final rule at sections 2804.20 and 2804.21. BLM considered these factors when developing the schedules for this rule and previous rules.

The fixed fees in FLPMA Categories 1 through 4 all reflect consideration of the FLPMA factors and represent reasonable costs, as FLPMA requires. As explained earlier, the fixed category fees originate from field studies conducted in 1982 and 1983, and supplemented with additional studies in 1986 and 1995. These studies gathered detailed information on processing nearly 3,000 FLPMA and MLA right-of-way applications.

We also apply the FLPMA factors to fees that are determined on a case-by-case basis (Category 6) or by agreement (Category 5). For those fees, BLM would give the applicant an estimate of the proposed fee after estimating the actual cost of processing the application and considering the other FLPMA factors. If the fee is set at less than our actual costs because of one of the FLPMA factors, processing could not proceed until funding for the shortfall became available through the BLM budget, contributions by the applicant, or other means.

For additional information on how BLM applies the FLPMA factors in determining processing fees, and other elements affecting processing costs, please refer to 64 FR 32107 to 32111 (June 15, 1999) and 51 FR 26836 to 26841 (July 25, 1986).

One commenter said that the premise that BLM should determine category fees by the number of hours spent in processing the application is false, but that there is not enough data to evaluate alternatives. Another commenter said that the bulk of an agency's processing and monitoring costs is most accurately measured by the total number of person hours devoted to processing and monitoring activity, not whether the activity involves one or more ''field examinations'' and one or more vehicles. BLM has determined that using the number of hours spent in processing an application is an appropriate measure to identify cost recovery categories. We base this determination on previous studies and sampling efforts completed in 1982–83, 1986, and 1995, and a review of known economic indicators. BLM also believes that it is reasonable to equate application processing costs to hours of staff time required. We agree with the commenter that the number of field examinations should not be the determining factor for processing categories and have deleted that requirement from the final rule. In the final rule, field examinations are considered only to the extent that they add to the number of hours necessary to process and monitor a right-of-way use or grant.

Several commenters asked that we provide a schedule of costs in the regulations so that the public will know what the costs are before starting a project. We agree with the commenter. Final section 2804.14(b) identifies the set processing fees for Categories 1 through 4.

Several commenters were concerned that BLM will use proposed Category IV

(final Category 6) costs to pay for new NEPA and field studies. There is no provision in section 504(g) of FLPMA or in this or previous regulations that permits BLM to collect fees from a right-of-way applicant for purposes of conducting any work beyond that necessary to process an application. Moreover, section 304(b) of FLPMA expressly identifies ''environmental impact statements'' and ''special studies'' as among the reasonable costs for which an agency may be reimbursed. In *Nevada Power Co.* v. *Watt,* 711 F. 2d. 913, 933 (10th Cir. 1983), the Court of Appeals held that ''[r]easonable costs of processing include the reasonable costs of EIS preparation, as determined using the section 304(b) factors.''

Several commenters asked if BLM does routine Category I (in the proposed rule, Category 2 in the final rule) applications in blocks and stages in which BLM handles several applications at a time, will companies be charged the full amount for each right-of-way. Where efficiencies can be gained by handling the processing of similar or related applications in combination, BLM will do so. If we process several applications in a combined effort, BLM will identify that portion of the effort, in hours, attributable to each application and determine the appropriate cost recovery categories based on those hours. Such efficiencies will most likely occur in Categories 1 through 4, and in the context of a Master Agreement (Category 5).

Several commenters asked that BLM provide clear-cut examples of specific types of activities that fall into each category. Because hours are the measure BLM uses to determine the processing costs category, and since there may be several proposed right-of-way uses in a given category, there is no such thing as a typical application. Therefore, we have not provided specific examples for each category in the final rule. However, we expect that most assignment and renewal applications will require fewer than eight hours to process and will, therefore, fall into Category 1. Beyond that, the hours BLM requires to process the application, including those for assignments and renewals, and not the type of proposed use itself, determines the cost recovery category.

Many commenters said that fees for processing assignments are too high. They also said that if the amount of time necessary to process the application is less than the category designation, the fee should be lower. We changed the final rule to lower processing fees for any right-of-way action requiring eight hours or less to process, as suggested in these comments. The new Processing Category 1 will apply to all applications requiring eight or fewer hours to process. The processing fee for Category 1 applications is now $97, a significant reduction from the proposed rule's Category I fee of $230. If you believe that BLM has incorrectly designated an application's fee category, you may appeal our determination to the IBLA.

Several commenters stated that the oil and gas industry pays its own way through bonuses and royalties and therefore should not pay any fees for rights-of-way to develop and produce mineral resources. They stated that BLM should reduce or eliminate fees for the oil and gas industry since:

(A) The revenue stream to the public good resulting from mineral extraction is significant and roadways constructed for oil and gas operations are used by the public and other governmental agencies;

(B) BLM's operating budget is less than the revenues received from the oil and gas industry;

(C) Oil and gas rights-of-way are the infrastructure (roads and pipelines) that allows the treasury to realize the revenues being developed;

(D) BLM should recognize the tangible and valuable benefits that right-of-way grants provide, such as archaeological and threatened and endangered species surveys, road upgrades, and maintenance that benefits recreational users; and

(E) There must be a distinction between those entities that simply use the land and those that pay bonuses and develop minerals and pay royalties.

Please see the discussion in the General Comments section at the beginning of this preamble for a discussion of why we disagree with the commenters. We note that any benefits to the public provided by BLM's processing or any public service provided by the applicant through tangible improvements are factored into the fees BLM charges. See final section 2804.20 and the discussions in the preamble to the proposed rule at 64 FR 32110–32111.

Many commenters said that BLM should not increase fees. They said that if we do so, fees should only be adjusted to the 1986/1987 levels, based on the study. Commenters said that the public should not suffer a 30-percent increase because BLM did not make proper administrative decisions in the past. BLM does not agree with these comments. First, we note that the fees are charged to right-of-way applicants, not the public. Second, any increase reflects an adjustment in the proposed rule, based on the increase in the IPD-GDP since the 1986 studies and comments. BLM has not increased these fees since 1987. As stated in the proposed rule, the IPD-GDP is a reasonable measure to adjust fees that are heavily dependent on labor costs. This final rule contains a periodic review requirement to reevaluate these fees. The adjusted fee categories in this final rule represent BLM's determination of current, reasonable costs as required by section 504(g) of FLPMA.

A few commenters said the rule should make clear that fee increases will not be applied retroactively. The processing fees in section 2804.14(b) for new Category 1 through 4 applications and the Monitoring Categories in section 2805.16(a) Category 1 through 4 grants apply only on and after the effective date of this final rule. Applications pending on the effective date of this final rule will be charged processing fees under subpart 2808 of the previous rule. However, the holder of a new grant authorized after the effective date of these regulations will be subject to the new monitoring fees.

One commenter said that BLM must continue to be responsible for NEPA costs and that if industry chooses to pay NEPA costs because of BLM delays from staffing issues, industry should be able to offset the costs against processing and monitoring fees. We do not agree with the comment. FLPMA is clear that the agency may charge fees for NEPA work, and any application-related NEPA costs will be charged to the applicant in Category 5 or 6. If BLM agrees to allow an applicant to supply NEPA or other documentation, that may reduce the time BLM requires to process the application (depending on factors such as completeness and technical adequacy), which may reduce the fee BLM charges. This could also hold true for set fees (Categories 1 through 4) if the number of BLM processing hours is reduced enough that the application falls into a lower processing fee category. We note, however, that regardless of whether BLM or the applicant supplies the documentation, the applicant is responsible for the costs.

A few commenters said BLM needed to make clear what the fees are targeted toward recovering. We believe the rule does that. Section 504(g) of FLPMA and these regulations provide for the reimbursement of all reasonable administrative and other costs BLM incurs to process a right-of-way application and to inspect and monitor the construction, operation, and termination of a facility authorized by a grant. A variety of tasks are involved as

BLM processes an application, including an analysis of environmental impacts, as set forth at section 304(b) of FLPMA. In this final rule, the range of tasks that BLM performs during application processing is measured by the hours necessary to perform them.

Another comment stated that BLM should recognize that fees could be reduced if economic indices go down. We agree with the commenter. As provided in final section 2804.14(c), BLM will use the IPD-GDP as the basis to make an annual adjustment in fees. The annual adjustment in fees will follow any annual second quarter to second quarter change of this index, either up or down. Under final section 2804.15, fee adjustments, either up or down, may also occur after BLM completes a periodic review of the fees and categories.

Two non-profit cooperatives opposed the fee increases because they stated that they would have to pass the costs along to their customers and that, instead of increasing the fees, BLM should streamline its operations to become more efficient and cost effective. Although non-profit applicants are not exempt from paying processing fees, final section 2804.21 provides a mechanism for BLM to consider the non-profit's status in determining reasonable processing fees. One of the factors BLM may consider is whether the studies undertaken in connection with processing the application of a non-profit have a public benefit. If during the periodic review of processing fees and categories BLM determines that revising the fees and fee structure is warranted, we will make an adjustment as set forth in section 2804.15. If you believe that BLM's category determination for your application is incorrect, you may appeal the decision to IBLA.

Section 2804.15 When Does BLM Reevaluate the Processing and Monitoring Fees?

This is a new section to the final rule that explains that BLM reevaluates processing and monitoring fees for each category, and the categories themselves, within five years after they go into effect and at 10-year intervals after that. This section also lists some examples of the types of factors BLM considers when reevaluating these fees.

Several comments suggested a periodic review and evaluation of the processing and monitoring fees and categories, and this section is in response to those concerns. Previous rules established fixed processing and monitoring fees with no provision for reviewing them. BLM added this provision in this final rule to ensure that the fees and categories are systematically reviewed. Any adjustment that BLM makes to the fees or fee structure as a result of a review under this section, apart from applying the IPD-GDP, would require a separate rulemaking.

Section 2804.16 Who Is Exempt From Paying Processing and Monitoring Fees?

This section explains that under certain conditions, state and local governments or their agencies are exempt from paying processing and monitoring fees. It also explains that if a grant application is associated with a cost-share road or a reciprocal right-of-way agreement, the applicant is exempt from processing and monitoring fees. Section 502 of FLPMA and existing regulations at 43 CFR subpart 2812 provide for the issuance of cost share and reciprocal rights-of-way. A reciprocal right-of-way is the grant to the United States of an access right or easement across private lands as a condition of receiving a right-of-way authorization from the United States. A cost share road authorization is created where the United States and a private party participate, through agreement, to share costs of road construction and maintenance.

This section was proposed as section 2804.15 and except for minor editorial changes, it remains as proposed.

Several commenters said that BLM should not exempt Federal Power Marketing Agencies and other non-profit energy providers from processing fees and rent payments because that would give them an unfair competitive advantage in an open power market. Other commenters said that Federal Power Marketing Agencies and other non-profit energy providers should be exempt from processing fees. Under section 504(g) of FLPMA, BLM may, by regulation, require an applicant to reimburse the United States for all reasonable costs incurred in processing a right-of-way application. The previous rule at section 2808.1(b) identified ''automatic'' exemptions from payment of processing costs only for Federal agencies; for state and local governments and their instrumentalities where the right-of-way use is for governmental purposes benefitting the general public; and for cost share roads or reciprocal right-of-way agreements. The only substantive change we made from previous regulations is that Federal agency applicants are no longer automatically exempt. Any applicant, including a Federal Power Marketing Agency, that does not meet the new exemption requirements must pay reasonable processing costs. Final sections 2804.20 and 2804.21 identify factors that BLM will take into account for purposes of determining these costs.

Several commenters said that the rule should not eliminate the Federal agency exemption for processing fees. Other commenters said we should establish a threshold over which we would begin charging an agency processing fees. Another commenter said that the rules should exempt Federal agencies from having to pay rent, but not from paying processing fees. Although previous section 2808.1(b) provided for a Federal agency exemption, common practice has been that many Federal agency right-of-way applicants do provide funds, usually through a negotiated agreement, to reimburse BLM for processing costs. To recognize this common practice, and to provide consistency and efficiency in fund transactions, we eliminated the automatic Federal agency processing costs exemption in this final rule.

Several commenters said that BLM does not have the authority to remove the exemption for Federal agencies or those agencies whose facilities are eligible for financing under the Rural Electrification Act (REA). The commenters said that this regulatory change would require an amendment to FLPMA section 504(g) (43 U.S.C. 1764(g)). We disagree. Section 504(g) of FLPMA does not require BLM to exempt Federal agencies. It does allow us to require a right-of-way applicant to reimburse the United States for reasonable processing costs. Although the previous rule provided for an automatic exemption to Federal agencies, that rule may be changed by subsequent rulemaking. Section 504(g) gives BLM discretion to require, by promulgation of regulations, right-of-way applicants, including Federal agencies, to pay reasonable processing costs. Regarding facilities eligible for REA financing, section 504(g) of FLPMA exempts from rent rights-of-way for electric or telephone facilities eligible for financing under the REA, but specifically reinforces the authority for requiring reimbursement of reasonable processing costs from such applicants. The final proviso of section 504(g) addresses this point.

One commenter said that BLM needs to have the flexibility to determine when to waive processing and monitoring payments for Federal agencies. Under final sections 2804.20 and 2804.21, BLM will examine a number of factors, e.g., public benefits or public services, in determining the reasonable costs to be charged an applicant, including Federal agencies.

One commenter said that a weak argument could be made that the Western Power Administration is exempt from paying processing fees because it is in the business of supplying electrical power to rural electric associations. As explained earlier, section 504(g) of FLPMA addresses facilities eligible for REA financing and exempts from rent rights-of-way containing these facilities. It does not exempt such holders from reimbursement of reasonable application processing costs. Therefore, the Western Power Administration is not exempt from payment of reasonable processing costs.

One commenter was concerned that under these regulations, a non-commercial private individual would pay agency costs for processing a grant, but a commercial user may not. The commenter may be referring to the fact that an applicant for a right-of-way involving a cost-share road or reciprocal right-of-way agreement is exempt from paying processing and monitoring fees under section 2804.16. Section 504(g) of FLPMA provides that BLM may require reimbursement of the reasonable costs associated with processing right-of-way applications. This section further provides that BLM need not secure reimbursement in any situation where there is in existence a cooperative cost-share right-of-way program.

Section 2804.17 What Is a Master Agreement (Processing Category 5) and What Information Must I Provide to BLM When I Request One?

This section explains that a Master Agreement is a negotiated agreement between you and BLM covering processing and monitoring fees for multiple applications and grants within a defined geographic area. This section also explains how to apply for a Master Agreement.

In the final rule we split proposed section 2804.17 into this section and the following section, which covers the provisions and limitations of a Master Agreement. This revised section provides a clearer description of what a Master Agreement is. The proposed rule identified it as a ''cost recovery'' Master Agreement, whereas this final rule identifies it simply as a Master Agreement. We made this change to make clear that a Master Agreement is not strictly limited to negotiation of processing and monitoring fees. A Master Agreement may contain negotiated agreements between BLM and an applicant concerning other aspects of application processing and monitoring as indicated in final section 2804.18. Revised section 2804.17 and new section 2804.18 also provide a clearer distinction between the information BLM requires when you request a Master Agreement, and the required content of a final negotiated agreement.

We amended paragraph (a) in the final section 2804.17 to be more descriptive of what Master Agreements are and amended paragraph (b)(2) of this section by making clear what a preliminary work plan is. Final paragraph (b)(3) is also different from the proposal in that the final rule requires you to submit a timetable along with the preliminary cost estimate. We added this requirement so BLM knows when you expect BLM to complete processing your application. The customer service standard in final section 2804.25(c) for Processing Category 5 applications is ''As specified in the Master Agreement.'' Your expectation of processing times is critical information for BLM to know in order to proceed and reach a final agreement.

We also made other changes to this section. We simplified proposed paragraph (b)(4) and moved it to final section 2804.18(a)(1). Proposed paragraph (b)(5) now appears as section 2804.18(a)(3).

One commenter said that the rule should require BLM and the applicant to meet to determine the scope of the data needed to process the application to limit the amount of additional information that BLM may request under this section. The same commenter asked who in BLM has the authority to sign the agreement. Since this final rule defines a Master Agreement as an agreement negotiated between BLM and an applicant, communications are by implication necessary to reach such agreement. Therefore, a regulatory requirement to compel a meeting is unnecessary. Signature levels for right-of-way grants are identified in the BLM delegation of authority Manual at section 1203. For most rights-of-way, the delegated authority is at the field manager level, and therefore, we will usually authorize Master Agreements at that level. Master Agreements would not apply to those major rights-of-way not delegated below the BLM State Director signature level, as these are usually single or related one-time actions which are handled in Processing Category 6.

Two commenters said that BLM must commit to making the private party an integral party in agreeing on the level of work necessary to adequately monitor and administer plans for lands affected by Master Agreements. Several commenters asked that the final rule provide for an appeals process for Master Agreements to resolve disagreements over Master Agreements. Inherent in the concept of a Master Agreement is a cooperative relationship between BLM and an applicant. BLM is committed to working with any applicant wishing to pursue a Master Agreement. Under the proposed rule and final section 2804.14(d), an applicant's signature on a Master Agreement constitutes an agreement with the processing category decision. More specifically, an applicant's signature on a Master Agreement constitutes agreement with all of its provisions, including the negotiated application processing costs. A signed Master Agreement documents BLM's decision on the processing category and the applicant's agreement with it. Therefore, we believe that an appeal of a negotiated agreement would be rare. If there are disagreements during the Master Agreement negotiation process that cannot be resolved, negotiations would not culminate in an approved Master Agreement. At that point, if the applicant still wished to pursue applying for a right-of-way grant, BLM would make a processing category decision outside the context of the Master Agreement process, and that decision would be subject to administrative appeal.

Section 2804.18 What Provisions Do Master Agreements Contain and What Are Their Limitations?

This is a new section that incorporates some new provisions and some from proposed section 2804.17. This section describes the provisions in a Master Agreement and explains that BLM will not enter into any agreement that is not in the public interest. It also explains that if you enter into a Master Agreement, you waive your right to request a reduction of processing and monitoring fees. We added paragraphs (a)(1), (a)(2), (a)(4), and (b) to more clearly describe the content of a Master Agreement and added language concerning compliance with all applicable laws and regulations, assignment of tasks and responsibilities of BLM and an applicant, and the public interest standard that will guide BLM's decision to enter into a Master Agreement.

A few commenters recommended that Master Agreements be for a term of twenty years or longer. The term of a Master Agreement is negotiated and agreed to by an applicant and BLM. A 20-year or longer term may be appropriate in some circumstances and not in others, and therefore should not be a regulatory standard. Also, a Master Agreement may or may not specify a fixed term. A Master Agreement may

provide that it stays in effect until or unless specific conditions or circumstances occur. Whether or not a term is specified, every Master Agreement must contain provisions for termination under final section 2804.18(a)(7).

Many commenters asked for an explanation of the ''other information'' in proposed section 2804.17(b)(9). Others said the application form should contain all of the information necessary for BLM to process an application. Final section 2804.12(c) allows BLM to require you to submit additional information to BLM ''at any time while processing your application.'' Similarly, final section 2804.17(b)(5) states that the application must contain ''any other relevant information that BLM needs to process the application.'' We believe that these sections make clear that any additional information we request will be relevant to the application, and necessary for us to process it. Examples of the type of additional information we may request include plans of development, cultural resource surveys, and inventories for threatened and endangered species (see sections 2804.25(b) and 2804.12(c) of these regulations). Due to the wide variety and types of right-of-way applications and uses involved in BLM's right-of-way program, we must have some flexibility to determine the type of additional information we may require to process and approve an application. Therefore, we did not amend this section.

Section 2804.19 How Will BLM Process My Processing Category 6 Application?

This section describes how BLM will process a Category 6 application. In processing your application BLM will:

(A) Determine the issues subject to analysis under NEPA;

(B) Prepare a preliminary work plan that identifies data needs, studies, survey and other reporting requirements, and level of NEPA documentation and outline consultation and coordination requirements, public involvement needs, and a proposed schedule to complete application processing;

(C) Develop a preliminary financial plan that estimates the costs of processing your application and monitoring the project;

(D) Discuss with you the preliminary plans addressed above; and

(E) Work with you to develop final work and financial plans which reflect any work you have agreed to do. As part of this process BLM will complete our final estimate of the costs you must pay BLM for processing the application and monitoring the project.

BLM may allow you to prepare environmental documents and conduct any studies related to your application. However, if BLM agrees to allow you to perform this work, you must do it to BLM standards. Previous section 2808.3–1(d) encouraged applicants to do all or part of any study or analysis, including completing a NEPA document, required in connection with processing the application. The practice of applicant-provided information and NEPA documents is well established and is successful in increasing efficiency and reducing BLM costs. Under final section 2804.19, dealing with Processing Category 6, we continue to encourage this successful practice. BLM will continue to allow applicants to provide us additional information to assist us in processing their application. As with previous regulations, this final rule requires that all environmental information an applicant provides meets BLM standards.

Finally, this section states that BLM will set out timeframes for periodic estimates of processing costs for a specific work period. You must pay the amount due before we will continue to process your application. BLM will refund excess payments or adjust the next payment amount to reflect any overpayment.

Previous section 2808.3–1(f) provided for payment of up to one percent of actual construction costs as an alternative method for an applicant to pay reasonable processing costs. One commenter said that the 1 percent fee would not be used because companies do not want to divulge the cost of their projects. Several other commenters supported eliminating the 1 percent fee. As mentioned in the preamble to the proposed rule (see 64 FR 32110), this provision has only been used once by an applicant. This final rule eliminates this provision.

Section 2804.20 How Does BLM Determine Reasonable Costs for Processing Category 6 or Monitoring Category 6 Applications?

This section explains that for Processing Category 6 or Monitoring Category 6 applications BLM will consider the factors in this section to determine reasonable costs for processing your application, unless you agree in writing to waive consideration of reasonable costs and elect to pay full actual costs. These factors are set forth in section 304(b) of FLPMA and are referred to as FLPMA factors in paragraph (a). With your application you should provide an analysis that shows how your application meets each of the FLPMA factors. After considering your analysis, BLM will notify you in writing of what you owe. You may appeal this determination under section 2801.10 of this part.

The provisions in this section and final sections 2804.21 and 2804.22 were all proposed in section 2804.18. We divided that proposed section into these sections and modified the content of the rule because we believe the proposed rule did not accurately reflect policy. We also replaced the proposed rule's use of the term ''reasonability criteria'' with ''FLPMA Factors'' because the latter promotes greater clarity owing to its statutory basis. BLM policy is to apply the FLPMA Factors when determining processing fees for Category 6 applications. BLM has previously used these FLPMA Factors in setting the processing fees in Categories 1 through 4.

In the final rule, we added a definition of ''cost incurred for the benefit of the general public interest (public benefit)'' to this section to describe that portion of the funds spent in connection with processing an application on collecting data or performing studies that are determined to have value to the Federal Government or the general public aside from being needed to process the application. The term's definition is substantially similar to that in previous regulations at section 2800.0–5(q). Adding it makes the rule clearer.

One commenter said that since the word ''actual'' does not appear in the cited portion of the MLA, there is no need for the regulations to distinguish between the treatment of fees under parts 2800 and 2880. The commenter said that the regulations should apply a ''reasonableness standard'' to both parts. Section 28 of the Mineral Leasing Act (30 U.S.C. 185(l)) authorizes the Secretary of the Interior to recover administrative and other costs of processing an application, while sections 304(b) and 504(g) of FLPMA provide for the recovery of reasonable administrative and other costs. Because the standards for cost recovery differ between the MLA and FLPMA, so must the regulations.

One commenter said that the regulations sometimes use the term ''waive'' and sometimes say ''reduce to zero'' when referring to fees. The commenter said the regulations should be consistent. We agree. Previous section 2808.5 used the terms ''reduction'' and ''waiver.'' The preamble to proposed section 2804.18 used the term ''reduction'' to include a potential reduction to zero dollars (see 64 FR 32119). In this final rule we are

consistent in our use of the terms ''reduction'' and ''waiver.''

Section 2804.21 What Other Factors Will BLM Consider in Determining Processing and Monitoring Fees?

This section sets out the factors the BLM State Director will consider in determining your processing or monitoring fee in any category, if you include this information in your application. If the factors do apply to your application, you need to include an analysis of how each of the factors applies. BLM will notify you in writing of the BLM State Director's fee determination. You may appeal this decision under section 2801.10 of this part. This is consistent with existing policy and previous regulations.

One commenter suggested eliminating ''financial hardship'' as a criterion for waiving or reducing cost recovery fees. The commenter said that if a cost recovery fee creates a financial hardship to an applicant, BLM should evaluate whether the applicant has the financial capability to conduct the proposed use according to the terms and conditions of the grant. Financial hardship for waiving or reducing cost recovery fees has existed since previous section 2808.5 became effective on August 7, 1987. The ''other factors'' mentioned in section 304(b) of FLPMA is the basis for using financial hardship as a criterion for lower cost recovery fees. This provision is rarely utilized for the reasons stated by the commenter. Yet, in a very few instances, an applicant may show technical and financial capability to hold (construct, operate, maintain, and terminate) a right-of-way grant, but the additional expense of paying a processing fee may be just enough of an additional burden that its payment would create undue financial hardship. This final rule continues to allow for consideration of an applicant's financial hardship. Section 504(j) of FLPMA makes clear that all grant holders must be technically and financially able to construct the project for which the right-of-way grant is requested. As required by final section 2804.12(a)(5), each applicant must provide a statement of financial and technical capability.

One commenter said that the regulations should give BLM the ability to waive or recover costs and charge other agencies for its services depending on the benefits to the public. As proposed, and as carried through in this final rule, BLM has the authority to recover fees from other agencies. Final section 2804.16 retains exemptions for state or local governments or an agency of such government if a right-of-way grant is for governmental purposes benefitting the general public. This final rule eliminates the previous automatic exemption for Federal agencies.

One commenter said that small, non-profit associations, such as domestic water associations, should be exempt from paying any processing fees ''in view of the public benefits derived from our services.'' Previous section 2808.1(b) provided no automatic exemption for non-profit associations, and we did not propose a change in this policy. The final rule makes no provision for an automatic exemption for non-profit associations, but does provide that BLM will consider, in setting a reasonable processing fee, whether an applicant is a non-profit organization and the studies undertaken in connection with processing its application have a public benefit or the facility or project will have a benefit or special service to the general public or a program of the Secretary.

Section 2804.22 How Will the Availability of Funds Affect the Timing of BLM's Processing?

This section explains that if BLM has no funds to process your application, we will not process it until funds become available or you elect to pay full actual costs under section 2804.14(f) of this part. If reasonable costs to be charged to an applicant are significantly less than BLM's actual processing costs, the customer service standards at section 2804.25(c) may not apply, since the resources necessary to process these applications will be subject to the availability of appropriated funds. This is consistent with existing policy and previous section 2808.5.

Section 2804.23 What If There Are Two or More Competing Applications for the Same Facility or System?

This section was proposed as section 2804.19. It explains that if there are two or more competing applications for the same facility or system and your application is in:

(A) Processing Category 1 through 4, you must reimburse BLM for processing costs as if the other application or applications had not been filed; or

(B) Processing Category 6, you are responsible for processing costs identified in your application. Cost sharing agreements by applicants are possible. You must pay the processing fee in advance. Consistent with existing policy, BLM will not process your application without the advance payment.

This section also explains that BLM determines whether applications are compatible in a single right-of-way system, or are competing applications for the same system. We added new paragraphs (b) and (c) to this section to make it clear that BLM determines whether competition exists and the procedures for a bid announcement if we determine that competition does exist. Section 501(b)(1) of FLPMA and final section 2804.12(a)(6) require a right-of-way applicant to submit and disclose plans, contracts, agreements, or other information related to the use, or intended use, of a proposed right-of-way, and ''its effect on competition.'' You should not construe this filing requirement as requiring you to make a determination on whether competition exists or is likely. This new paragraph reinforces the fact that BLM determines, based on information provided in an application, whether competition exists.

Several commenters said that the current process of BLM's beginning to process applications when they are received should remain and that BLM should provide the applicant an estimate of processing costs before the right-of-way is granted. The majority of right-of-way applications BLM processes are on a noncompetitive basis, and we expect this to continue. However, if we determine that competition exists, we will follow these regulations and FLPMA. Under the previous rule and as provided in this final rule and section 2804.25, we will inform the applicant in writing of the processing fee and will collect the fee before we process a right-of-way application.

Section 2804.24 Do I Always Have To Submit an Application for a Grant Using Standard Form 299?

This section explains that if BLM determines that competition exists under section 2804.23 of this subpart, you are not required to submit an application using Standard Form 299, because there will be a competitive bid process for the lands you propose to use. Section 2804.23 notes that BLM will describe the procedures in a notice published in a newspaper in the area of the lands involved and in the **Federal Register**.

You are also not required to submit an application if you are an oil and gas operator and have need for a FLPMA right-of-way. You may submit your right-of-way requirements in your Application for Permit to Drill or Sundry Notice. This section is consistent with existing policy and except for editorial changes, remains as proposed.

Section 2804.25 How Will BLM Process My Application?

This section explains that BLM will notify you in writing when we receive your application and will identify your processing fee. BLM may require you to submit additional information to complete your application. If we need additional information to process your application, we will send you a written deficiency notice. BLM will also notify you of any other applications for rights-of-way which involve lands in your application.

This section also lays out estimated processing times for the different categories of applications based on the complexity of the application and the amount of analysis that we must perform. The final rule uses a chart in place of the description of the processing times that was in the proposed rule. We also replaced the term ''working days'' with ''calendar days'' to be consistent with the rest of the rule, other BLM regulations, and the Forest Service right-of-way cost recovery regulations.

BLM's current policy for right-of-way approvals, set forth at BLM manual section 2801.35.B.2.(1), provides that most ''low impact'' right-of-way applications needing a categorical exclusion or EA should be processed in 30 days, and requires BLM to notify an applicant in writing if processing would take more than 60 days. Proposed section 2804.20(c) identified very similar customer service standards for application processing times. However, the current standard has caused confusion for some of our applicants, as well as BLM employees, because the notification deadline is twice as long as the processing deadline. A more logical standard would have the notification deadline prior to the processing deadline, if the processing deadline can not be met. This final rule sets the customer service standard for processing a completed Category 1 through 4 application at 60 calendar days. However, if BLM knows beforehand that this standard can not be met, then BLM will notify an applicant (prior to the 30th calendar day) if we expect the processing time to take longer than 60 days. The 60 calendar day processing standard for Categories 1 through 4 does not mean that BLM intends to take that long to process all applications in these categories. Actual processing times will vary among categories. For example, we will generally process Category 1 actions in significantly less time than 60 days.

This section also explains that before BLM will issue a grant, we will:

(A) Complete a NEPA analysis for the application or approve a NEPA analysis previously completed for the application. We amended this paragraph in the final rule by adding specific citations to the Council on Environmental Quality regulations and by making it clear that the NEPA analysis may be approved or completed for the specific application;

(B) Determine whether or not your proposed use complies with applicable Federal and state laws;

(C) If your application is for a road, determine whether it is in the public interest to require you to grant the United States an equivalent authorization across lands that you own. In the final rule we made this paragraph clearer by pointing out that situations requiring a holder to grant equivalent rights to BLM always involve access needs. BLM requires no equivalent rights involving other proposed right-of-way uses;

(D) Consult, as necessary, with other governmental entities;

(E) Hold public meetings if sufficient public interest exists to warrant their time and expense; and

(F) Take any other action necessary to fully evaluate and decide whether to approve or deny your application.

This final rule moves BLM's notification responsibilities from proposed section 2804.20(c) to the ''Conditions'' column in the chart in final section 2804.25(c). We also moved proposed section 2804.20(e) to final section 2805.10 because these provisions are part of BLM's decision concerning the content and terms and conditions in a grant.

A few commenters suggested that the regulations require the applicant to provide the location and extent of designated or existing corridors that are proposed for use. This information may be important in determining the NEPA classification for the proposal and subsequently the processing and monitoring costs for the project. The commenters said that they understood that if they use an existing corridor or right-of-way they would not be required to perform an EIS, but only an EA. Under section 503 of FLPMA, BLM identifies existing corridors and designates new corridors. We do this through cooperation with industry and other interested parties. Final sections 2802.10(b) and 2802.11 contain information on right-of-way corridors. It is not incumbent on an applicant to identify or otherwise supply corridor information in a right-of-way application. The preapplication meeting identified in final section 2804.10(a) provides the opportunity to discuss corridor designations. Given this process, BLM believes requiring applicants to provide corridor information is not necessary.

A few commenters said that requiring an inventory for threatened or endangered species is another extravagant cost for applicants to bear and they opposed it. They also said that it was ''redundant, inefficient and costly to our customers'' for them to prepare reports and then be charged for BLM staff to go out to the field to confirm that they are accurate. Final section 2804.25(b) (proposed section 2804.20(b)) states that BLM may require an applicant to submit additional information ''necessary to process the application.'' This same standard applies to BLM review and verification of applicant-supplied information. If information is not necessary to process an application, BLM will not request it.

Several commenters objected to the provision in proposed section 2804.20(e)(1) allowing BLM to modify the area applied for and said that changing the route or location of facilities may render a project uneconomic. Proposed section 2804.20(e)(1) provided that in deciding to issue a right-of-way grant, BLM may modify a proposed use or change the route or location. This provision is in previous section 2802.4(f) and is consistent with section 504(c) of FLPMA and the discretionary nature of a right-of-way grant. Final section 2805.10(a)(1) contains a provision giving BLM discretion to modify a proposed right-of-way use or change its route or location. NEPA and implementing regulations at 40 CFR 1500–1508 require an evaluation of alternatives to proposed actions. These alternatives must be reasonable and capable of meeting the purpose and need of the proposed project. We will follow that standard when processing applications that may need modifications to the proposed use, route, or location.

Several commenters objected to the requirement in proposed section 2804.20(e)(2) for a plan of development. The commenters said the plan would serve no purpose other than to ''create another document that is only for the Federal government.'' Several commenters said that requiring plans of development is new to oil and gas and is not cost effective. The commenters said that they only fill a file in a BLM office and that independents do not have the staff to create a document whose only purpose is to fill a file for BLM. Proposed section 2804.20(b) provided that BLM may require an applicant to submit additional

information, including a plan of development, ''necessary to review the application.'' The final rule at section 2804.25(b) does not change this provision. Section 501(b)(1) of FLPMA is the authority for BLM to require information necessary to determine whether BLM should issue a grant and the terms and conditions which BLM should include. Section 504(d) of FLPMA requires a plan of construction, operation, and rehabilitation for proposed rights-of-way uses that may have a significant impact on the environment. It is important to note that a plan of development is not a universal requirement. We will require one when necessary to fully describe the proposed use.

Several commenters said that there should be mandatory approval times for each category. They also said that we should amend the proposed rule to require that if BLM does not approve a grant within an agreed upon time, then the grant is automatically approved at the expiration of that time, whether or not BLM has finished processing the application. Several commenters also said that the final rule should establish an agreed upon mandatory approval time for Category IV applications. The previous rule contained no standards for application processing times.

As stated above, it has been BLM's policy to process ''low impact'' right-of-way applications needing a categorical exclusion or EA in 30 days, and to notify an applicant in writing if processing would take more than 60 days. Proposed section 2804.20(c) identified very similar customer service standards for application processing times. Paragraph (c) of final section 2804.25 contains changed customer service standards for application processing times. BLM made these customer service standards flexible because there are a variety of factors that can influence processing time. Requiring that BLM approve an application within a regulatory timeframe or it would be approved by default would remove BLM's discretion in granting a right-of-way and would be inconsistent with the provisions in FLPMA for management of the public lands. Therefore, we did not change the rule.

One commenter suggested that as costs rise, the services BLM provides with the accompanying fee increases should get better. Final section 2804.25 establishes a customer service standard which states that BLM will attempt to process your completed application within 60 calendar days of receiving it. If processing is expected to take longer than 60 calendar days, then prior to the 30th calendar day after filing a complete application BLM will notify you in writing of this fact including an estimate of when we will complete processing your application.

One commenter said that the final regulations should require the potential grantee to submit an initial assessment of the environmental conditions of the land being proposed for use as a right-of-way. The commenter said that such assessment was necessary to evaluate the impact of the activity on the land and to allow BLM to complete its obligations under NEPA, 42 U.S.C. 4321 *et seq.*, and that this assessment will also allow the Fish and Wildlife Service, and public and private applicants, to comply with the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, and the Migratory Bird Treaty Act, 16 U.S.C. 701 *et seq.* The commenter also said that BLM should require the potential grantee to provide an environmental assessment as part of the right-of-way application and make such assessment available for public comment. We did not amend this section as the commenter requested.

NEPA and its implementing regulations require assessments of environmental conditions and impacts. BLM's obligations under the authorities the commenters cited are already covered in other parts of BLM's regulations. Repeating these existing requirements in this right-of-way rule is unnecessary. A universal requirement that all applicants provide an initial environmental assessment or other environmental documentation was not a part of the previous regulation, was not proposed, and does not appear in this final rule. Due to the wide range and scope of proposed right-of-way uses, from very minor actions to major projects, such a requirement is not practical. However, applicants may continue to volunteer such information to facilitate the processing of an application. Or, under final sections 2804.12(c) and 2804.25(b), BLM may require an applicant to provide this type of information if BLM determines it is necessary to process an application. We disagree with the commenter that an applicant should be required to provide such preliminary assessment. Neither CEQ regulations, NEPA, nor the other statutes cited contain such requirements.

One commenter recommended that BLM should clearly state that the agency retains the authority to conduct the environmental analysis that is associated with processing a right-of-way grant application, at the applicant's expense, in those rare circumstances when BLM determines that it may be in the public interest to do so (as opposed to the applicant, or its contractor, conducting that activity). We agree with the commenter that BLM retains the authority to prepare NEPA-related documents. We note too BLM's authority to approve any NEPA-related documents prepared by the applicant or a third party. In final section 2804.19(c) we clearly state that BLM retains the option to prepare any environmental document related to a Category 6 application and that if BLM allows the applicant to prepare these documents, they must be prepared to BLM standards. BLM will make the final determinations and conclusions arising from this work. In final section 2804.25(d), we state that before issuing a grant, BLM will complete a NEPA analysis for the application or approve a NEPA analysis previously completed for the application, as required by 40 CFR parts 1500 through 1508.

Several commenters asked that BLM provide mandatory approval times for each category, including proposed Category IV (final Category 6). BLM sees the customer service standards in final section 2804.25(c) as reasonable goals, and expects to meet them in most cases. However, in some cases, other agency consultations or other actions may result in extended processing times beyond the standards BLM has identified. Therefore, we believe that mandatory processing and approval times set by regulation are not appropriate. We did not include them in the final rule.

One commenter said that stating a 30 working day processing time for applications may be unrealistic because of cuts in personnel and other resources. Final section 2804.25(c) establishes a customer service standard of 60 calendar days for Processing Category 1 through 4 applications. Proposed section 2804.20(c) included a 30 working day processing period. Because a 60 calendar day processing period is much more realistic and is consistent with the Forest Service's customer service standard the final rule sets a customer service standard of 60 days. If we require more than 60 calendar days to process your Category 1 through 4 application, we will provide you written notice prior to the 30th calendar day.

Several commenters said that in proposed section 2804.20, BLM should change the ''60 working day'' response time to ''30 calendar days.'' The proposed rule identified a 30 working day processing time for the ''minor'' categories, but included a provision for notification to an applicant if the processing time were to take more than 60 working days. In this final section

2804.25(c) we set the processing time customer service standard as 60 calendar days for Categories 1 through 4, a change consistent with the provision to notify an applicant if the processing time will be more than 60 days in those categories. We did not make the change the commenter suggested since 30 calendar days is not enough time to thoroughly review and process Category 1 through 4 applications. In the final rule we lengthened the processing time from the proposed rule's 30 working days to the final rule's 60 calendar days to reflect a more realistic time for processing MLA grant applications.

Several commenters said that public hearings are not necessary for right-of-way applications affiliated with oil and gas field operations and that hearings would cause interminable delays. The previous rule at section 2802.4(e), proposed section 2804.20(d)(5), and final section 2804.25(d)(5) all make it clear that BLM will hold public meetings in connection with a right-of-way application only if sufficient public interest exists to warrant their time and expense. Depending on how applications affiliated with oil and gas field development are handled, public meetings may or may not be necessary. For example, there may be in place a programmatic NEPA document that includes field development activities, and appropriate levels of public review have already been conducted. In such a case, public meetings may not be necessary.

Section 2804.26 Under What Circumstances May BLM Deny My Application?

This section explains that BLM may deny your application if:

(A) The proposed use is inconsistent with the purpose for which BLM manages the lands;

(B) The proposed use would not be in the public interest;

(C) You are not qualified to hold a grant;

(D) Issuing the grant would be inconsistent with the Act, other laws, or these or other regulations;

(E) You do not have or cannot demonstrate the technical or financial capability to construct the project or operate facilities within the right-of-way; or

(F) You do not adequately comply with a deficiency notice or with any BLM requests for additional information needed to process the application.

You may appeal BLM's decision to deny your application under section 2801.10 of this part. With the exception of minor editorial changes, this section is the same as proposed section 2804.21.

Several commenters said that the regulations should state whether applicants have the right of appeal if BLM denies their applications and should require BLM to indicate in writing reasons for denying an application. We agree. Under final section 2804.26(b) you may appeal a BLM decision denying an application. As a matter of policy, BLM always provides written justification for denying right-of-way applications.

Section 2804.27 What Fees Do I Owe if BLM Denies My application or if I Withdraw My Application?

This section explains that if BLM denies your application or if you withdraw your application you owe the processing fee, unless you have a Category 5 or 6 application. If you have a Category 5 or 6 application that:

(A) BLM denied, you are liable for all reasonable costs the United States incurred processing it. Consistent with existing policy and previous regulations (see previous section 2808.3–3), the money you have not paid is due within 30 calendar days after you receive a notice of payment; or

(B) You have withdrawn before BLM issues your grant, you are liable for all reasonable processing costs the United States has incurred up to the time you withdraw the application and for the reasonable costs of terminating your application. Any money you paid that is not used to cover costs the United States incurred as a result of your application will be refunded to you.

In the final rule we replaced ''BLM'' with ''the United States,'' where we talk about the government incurring costs. This is because BLM may not be the only Federal agency that incurs costs in processing your application. This is consistent with existing policy and section 504(g) of FLPMA. We also added a sentence explaining that any money you paid that is not used to cover costs the United States incurred as a result of your application will be refunded to you. We added this sentence to explain existing policy. With the exception of this change and editorial changes, the substance of this section is the same as the proposed section 2804.22.

Section 2804.28 What Processing Fees Must I Pay for a BLM Grant Application Associated With Federal Energy Regulatory Commission (FERC) Licenses or Relicense Applications To Which Part I of the Federal Power Act (FPA) Applies?

This section requires that you pay BLM the costs the United States incurs in processing your application associated with a FERC licensing or relicensing project, other than those described in section 2801.6(b)(7) of this part. BLM also requires reimbursement for processing a right-of-way grant application associated with a FERC project licensed before October 24, 1992, that involves the use of additional public lands outside the original area reserved under section 24 of the FPA. In determining what you owe, BLM will use the processing categories in section 2804.14 of this part. FERC will address other costs it incurs in processing your license or relicense.

This section is different from proposed section 2804.24. Section 2401 of the Energy Policy Act of 1992 (Pub. L. 102–486) amended portions of section 501 of FLPMA regarding Federal rights-of-way associated with hydropower projects licensed by FERC. The 1992 Act amended section 501(a) to authorize the Secretary to issue rights-of-way with respect to the public lands, including ''public lands, as defined in section 103(e) of [FLPMA], which are reserved from entry pursuant to section 24 of the Federal Power Act (16 U.S.C. 818).'' BLM issues rights-of-way under Title V of FLPMA for public lands withdrawn and reserved under the Federal Power Act. The Energy Policy Act also amended section 501 of FLPMA by adding a new paragraph (d), which provides that no right-of-way authorization is required for continued operation on FPA-reserved lands of a project that did not receive a BLM right-of-way prior to October 24, 1992. We inadvertently omitted regulations to implement these provisions from proposed section 2804.24. Therefore, we revised final section 2804.28 to be consistent with the statutory changes.

Section 2804.29 What Activities May I Conduct on the Lands Covered by the Proposed Right-of-Way While BLM Is Processing My Application?

This section explains that you, or any member of the public, may conduct casual use activities on the BLM lands covered by your application. For activities that are not casual use, you must get prior BLM approval. ''Casual use'' is defined in section 2801.5 of this final rule. With the exception of editorial changes, the substance of this section is the same as proposed section 2804.25.

Subpart 2805—Terms and Conditions of Grants

This subpart contains information and policies about:

(A) The terms and conditions of grants;

(B) When a grant is effective;

(C) The rights that grants convey and that the United States retains; and

(D) Information about monitoring costs.

Section 2805.10 How Will I Know Whether BLM Has Approved or Denied My Application?

This section contains some new information and explains that BLM will send you a written response to your application. If we do not deny your application, we will include an unsigned right-of-way grant for you to review, sign, and return that:

(A) Will include any terms, conditions, and stipulations that BLM determines to be in the public interest. This includes modifying your proposed use or changing the route or location of the facilities;

(B) May prevent your use of the right-of-way until you have an approved Plan of Development and BLM has issued a Notice to Proceed; and

(C) Will impose a specific term for the grant and may include provisions for periodic review of the grant and its terms and conditions.

These provisions were part of previous regulations.

Under this section, if you agree with the terms and conditions of the unsigned grant, you should sign and return it to BLM with any monitoring fee payment that may still be due for the application. If the regulations in this part, including section 2804.26, remain satisfied, BLM will then sign the grant and return it to you with a decision letter.

If you do not agree with any of the terms and conditions contained in the grant, you may appeal BLM's decision to IBLA under section 2801.10 of this part.

If BLM denies your application, we will send you a written decision:

(A) Stating the reasons for the denial;

(B) Identifying any processing costs you must pay; and

(C) Notifying you of your right to appeal the decision.

These provisions are consistent with existing policy and previous regulations (see previous section 2808.3–3). The substance of this section is the same as proposed section 2804.19(e).

Several commenters said that the language allowing BLM to include in a grant any terms or conditions that BLM determines are in the public interest is ''gratuitous.'' We disagree. Section 505(b) of FLPMA provides that a right-of-way grant contain such terms and conditions as the Secretary deems necessary to, among other things, ''otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.'' The regulatory language implementing that provision of FLPMA was in the proposed rule at section 2804.20(e)(1), and is in final section 2805.10(a)(1).

Section 2805.11 What Does a Grant Contain?

The grant states what your rights are on the lands subject to the grant and describes what lands you may use or occupy. These lands may or may not correspond to the lands in your application. This section lists the factors BLM considers when determining which lands to include in the grant. This section contains the same four provisions as those in proposed section 2805.10(a) and explains that your grant will state the length of time that you are authorized to use the right-of-way and lists the factors BLM will consider in establishing the term of the grant.

In the final rule we added a provision stating that BLM will limit the grant to those lands on which we determine operations will not result in unnecessary or undue degradation. We added this provision because FLPMA directs BLM, in managing the public lands, to take any action necessary to prevent unnecessary or undue degradation of the lands (see 43 U.S.C. 1732(b)). We believe that in order to comply with FLPMA's mandate, it is necessary to take into consideration the unnecessary or undue degradation standard when determining which lands to include in a right-of-way grant. Section 504(a)(4) of FLPMA sets forth similar, though not identical, language (see 43 U.S.C. 1764(a)(4)).

We added a provision to this section stating that the time necessary to accomplish the purpose of the grant is a relevant factor in fixing the duration of the grant. We inadvertently omitted this provision from the proposed rule. This provision, which was in previous section 2801.1–1(h), is consistent with section 504(b) of FLPMA and is necessary for us in determining the appropriate length of the term of a grant.

In the final rule we also added a provision to this section stating that all grants, except those issued for a term of less than one year and those issued in perpetuity, will expire on December 31 of the final year of the grant. The reason we added this provision is so that the expiration date of a grant will coincide with the calendar year rental term.

Several commenters stated that granting an ''easement'' on lands that do not correspond to those in the application is unacceptable, since doing so may make the grant ''unsatisfactory to accomplish the desired project.'' In processing your application, BLM will examine your proposed action, and consider all reasonable alternatives to accomplish your purpose, including the no action alternative. We develop alternatives in consultation with the applicant and potentially affected parties. If BLM were to select an alternative that did not satisfy you or one that contained conditions or stipulations that were unsatisfactory to you, you may challenge those conditions by appealing BLM's decision to the IBLA under section 2801.10 of this part.

Section 2805.12 What Terms and Conditions Must I Comply With?

This section explains that by accepting a grant, you agree to comply with and be bound by the terms and conditions set forth in this section. This section requires that during construction, operation, maintenance, and termination of the project you must:

(A) To the extent practicable, comply with all existing and subsequently enacted, issued, or amended Federal laws and regulations and state laws and regulations applicable to the authorized use. We made minor changes to this paragraph and added the phrase ''To the extent practicable,'' which was inadvertently omitted from proposed section 2805.10. The phrase has been in the Department's regulations since 1980 and is set forth here to qualify a holder's compliance with Federal and state laws and regulations applicable to the authorized use. Practicability is important because a right-of-way may cross through multiple jurisdictions, and strict compliance with the laws and regulations of each may be impractical and inefficient. The phrase will be interpreted as in years past. This section also makes clear that a holder must comply with any changes to applicable law or regulation that occur during the term of the right-of-way grant. This is consistent with long-standing BLM policy and previous section 2801.2;

(B) Rebuild and repair roads, fences, and established trails destroyed or damaged by the project;

(C) Build and maintain suitable crossings for existing roads and significant trails that intersect the project;

(D) Do everything reasonable to prevent and suppress fires on or in the immediate vicinity of the right-of-way area;

(E) Not discriminate against any employee or applicant for employment during any phase of the project because of race, creed, color, sex, or national origin. You must also require subcontractors to not discriminate;

(F) Pay monitoring fees and rent described in section 2805.16 of this subpart and subpart 2806 of this part;

(G) If BLM requires, obtain, and/or certify that you have obtained, a surety bond or other acceptable security to cover liabilities and obligations listed in the regulations. BLM may require a bond, an increase or decrease in the value of an existing bond, or other acceptable security at any time during the term of the grant;

(H) Assume full liability if third parties are injured or damages occur to property on or near the right-of-way (see section 2807.12);

(I) Comply with project-specific terms, conditions, and stipulations, including those listed in the section. This paragraph contains editorial changes to make it easier to understand. BLM added the term ''and stipulations'' to the first sentence of paragraph (i) to make it clear that a grant may contain standard terms and conditions, and also stipulations that address site-specific conditions. The final rule lists seven types of requirements that BLM typically adds to grants in the form of site-specific terms, conditions, or stipulations. Paragraph (i) is not new to our regulations (see previous section 2801.2(b)). Paragraph (i)(4) of this section uses different terminology than that in the proposed rule. In the final rule we replaced the term ''subsistence purposes'' with the term ''subsistence uses'' since that is the term used in the appropriate statute (see 16 U.S.C. 3111 *et seq.*). We also added a new paragraph (i)(6) to this section requiring you to comply with state standards for public health and safety, environmental protection, and siting, constructing, operating, and maintaining any facilities and improvements on the right-of-way when state standards are more stringent than Federal standards. This provision is authorized by section 505(a) of FLPMA and is in previous regulations at section 2801.2(b)(6). We inadvertently omitted it from the proposed rule;

(J) Immediately notify all Federal, state, tribal, and local agencies of any release or discharge of hazardous material reportable to such entity under applicable law. You must also notify BLM at the same time, and send BLM a copy of any written notification you prepared. The proposed rule did not include ''tribal'' in the list of jurisdictions that you must notify in case of a hazardous material spill. BLM added the term ''tribal'' because Federal lands are frequently intermingled with tribal lands for many large linear right-of-way projects and tribes should be notified of any hazardous material spill that may occur as a result of operations on a FLPMA right-of-way;

(K) Not dispose of or store hazardous materials on your right-of-way, except as provided by the terms, conditions, and stipulations of your grant. Any storage of hazardous waste on site must be in compliance with applicable Federal and state law;

(L) Certify your compliance with all requirements of the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. 11001 *et seq.* (EPCRA), when you receive, assign, renew, amend, or terminate your grant. Unless provided otherwise, your signature on an application is certification that you have complied with these requirements. This provision is consistent with proposed section 2805.10(c)(11). We added ''amend'' to the list of events when you must certify that you are complying with EPCRA. We added it to address situations where a change in your use would require a grant amendment. We deleted the requirements of annual certification due to commenter's concerns. Please see the discussion of comments that follows for an explanation of why we eliminated the annual certification;

(M) Control and remove any release or discharge of hazardous materials on or near the right-of-way arising in connection with your use and occupancy of the right-of-way, whether or not the grant authorizes release or discharge. You must also remediate and restore lands and resources affected by the release or discharge to BLM's satisfaction and to the satisfaction of any other Federal, state, tribal, or local agency having jurisdiction over the land, resource, or hazardous material. We added ''tribal'' to this paragraph because a tribe could have jurisdiction over land near the right-of-way;

(N) Comply with all liability and indemnification provisions and stipulations in the grant;

(O) As BLM directs, provide diagrams or maps showing the location of any constructed facility. This paragraph is new to the final rule. This provision allows BLM to require you to file an as-built survey or diagram of the right-of-way facility. Frequently, during the construction of a project, BLM approves or even requires changes from the original design. These changes may not be incorporated into the design drawings or surveys. BLM added this requirement so that if there are changes to a right-of-way facility during construction, we will have the most up-to-date design drawings and surveys for our records. This ongoing policy is consistent with previous section 2802.3; and

(P) Comply with all other stipulations that BLM may require.

Except for the changes listed above, and minor editorial changes, this section contains provisions substantially the same as those in proposed section 2805.10(c).

Several commenters said that the final rule should make it clear that under proposed section 2805.10(c)(1) (final section 2805.12(a)), BLM should not require applicants to comply with state requirements concerning radio frequency (RF) emissions. They said that would contravene section 704(a)(7)(B)(4) of the Telecommunications Act of 1996 which prohibits state and local governments from regulating directly or indirectly ''the placement, construction, and modification of personal wireless facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission regulations concerning such emissions.'' This is not the forum to decide the merits of the commenters' statement. The final rule makes clear that a holder must comply to the extent practicable with applicable Federal and state law and regulations. Statutes and case law addressing the issue of pre-emption will determine the question posed by the commenters.

Several commenters said that proposed section 2805.10(c)(3) (final section 2805.12(d)) makes it sound like every right-of-way holder must have a fire department. They also said that the requirement is new and could be very costly. BLM disagrees. This provision is in previous regulations at section 2801.2(a)(4) and has been BLM policy for many years. BLM has, on rare occasions, enforced this provision when, for example, during construction activities, the holder's or holder's contractor's equipment was used for immediate fire suppression activities on a fire caused by actions of the holder. More importantly, this condition requires holders to maintain their rights-of-way so as not to create a fire hazard. BLM expects holders to do only what is reasonable to prevent and suppress fires in the immediate vicinity of a right-of-way. As a practical matter, BLM will not allow unauthorized equipment or untrained personnel to work on any wildland fire.

Several commenters said that it is inappropriate to include provisions relating to discrimination in these regulations as there are already laws relating to discrimination and including it here is duplicative. BLM disagrees. This provision is in previous regulations

at section 2801.2(a)(2) and is carried forward into the final rule.

BLM received many comments regarding bonding. Several commenters said that we should allow for bonding coverage to include statewide or nationwide oil and gas bonds. We disagree. Statewide and nationwide oil and gas bonds are not an acceptable security for MLA or FLPMA right-of-way grants. Oil and gas leases and right-of-way grants are separate instruments, with different terms, conditions, and liabilities, and authorize different activities in different locations. An oil and gas lease bond covers only those activities on the lease; a right-of-way bond covers those activities off the leased lands and on the grant. Generally speaking, a lessee would not need a right-of-way to conduct activities or to construct or to maintain lease-related structures, including roads, on an oil and gas lease. Lessees would need right-of-way grants for those activities and structures off the lease, such as roads connecting drill pads when the roads go off the lease or to connect leases. For these reasons, BLM separately bonds oil and gas leases and right-of-way grants.

Another commenter asked BLM to limit the amount of the bond. We assume the commenter means we should only require the minimum amount in a bond to recover any losses or damages resulting from construction or operation of a right-of-way. BLM calculates what is needed to recover possible losses, damages, or injuries associated with a right-of-way on a case-by-case basis. Bonding continues to be part of BLM standard operating procedures. Previous section 2803.1–4 also required bonding.

Proposed section 2805.10(c)(6) and final section 2805.12(g) add to our existing regulations by specifically requiring that bonding cover releases or discharges of hazardous materials and by allowing BLM to adjust bonding limits over the life of the grant to meet changing conditions. Previous section 2803.1–4 allowed BLM to require a bond to secure the obligations imposed by the grant and applicable laws and regulations. We consider the release or discharge of hazardous materials to be an appropriate consideration when setting a right-of-way bond. This regulation makes explicit what has up to now been implicit in our regulations. BLM continues to believe that bonding of right-of-way grants is an effective way to protect the Federal Government from liabilities associated with right-of-way operations, including any liability associated with the use of hazardous materials.

Another commenter believed that there was no justification for automatic increases in a bond. Under this final rule there is no automatic increase in the bond amount. The final rule allows BLM to increase or decrease the amount of an existing bond at any time during the term of a grant if changing conditions warrant it. BLM's experience in monitoring grants indicates that there are occasions when conditions on a grant change sufficiently to require an increase or decrease in the face amount of the bond. For example, if during construction, BLM discovers conditions such as unstable slopes or highly erosive conditions that we did not identify during application processing, BLM could increase the bond amount during the reclamation and restoration phase to take into consideration the potential additional liability that these conditions may cause. Likewise, BLM may reduce bond amounts when you satisfactorily complete components of a project or there are other changes in conditions that lower the potential liability of right-of-way operations.

Several commenters objected to the requirement in proposed section 2805.10(c)(9) that a grant holder notify authorities of any actual or threatened release or discharge of hazardous materials. Several commenters suggested that we replace the phrase ''actual or threatened'' with ''reportable.'' In response to this comment, we reworded the final rule at section 2805.12(j) by removing the phrase ''actual or threatened'' and limiting notification requirements to releases or discharges reportable to the named authorities under applicable law.

Several commenters said that proposed section 2805.10(c)(9) is too broad since it requires reporting of releases, no matter how small, whereas CERCLA requires notice of only reportable quantities of hazardous substances. EPA regulations at 40 CFR 302.4 establish a specific threshold amount for each substance, commenters noted. We reworded the final rule to make clear that the section only applies to reportable releases or discharges of hazardous materials. The final rule makes clear that if reporting is required under applicable law, the grant holder must notify BLM at the same time that it notifies appropriate authorities. Under the final rule, the holder must provide BLM a copy of any written notification required under applicable law at the same time that the holder sends it to the appropriate regulatory authority. We believe this notification is reasonable in light of FLPMA's mandate that BLM protect public lands and resources.

A few commenters objected to proposed section 2805.10(c)(10), which prohibits a grant holder from storing hazardous materials on the grant for more than 90 days, less if required by law. These commenters stated that crude oil would be stored on a lease for the life of a producing oil well, and other chemicals may be stored for longer than 90 days. The commenters said BLM's proposed rule goes beyond the agency's jurisdiction and duplicates other requirements. BLM deleted from this final rule the prohibition for on-site storage of hazardous materials beyond 90 days. Final section 2805.12(k) prohibits any storage or disposal of hazardous materials that is not provided for by the terms, conditions, or stipulations of the grant. This means that you may store or dispose of hazardous materials on the right-of-way, only if the grant specifically authorizes that storage or disposal. In approving a grant, BLM may place restrictions on the amount of hazardous materials stored or disposed of, the length of the time during which such material may be stored or disposed of, and the manner in which such storage or disposal may take place, among other conditions. Any storage of hazardous waste on site must be in compliance with applicable Federal and state law.

Several commenters said that there is no rationale for requiring an annual report for each grant on EPCRA and said that proposed section 2805.10(c)(11) defeats the purpose of streamlining and creates even more burden on industry and applicants. Commenters also said that right-of-way grantees must already file this under title III of the Superfund Amendments and Reauthorization Act. In the final rule we removed the requirement for an annual statement from each holder, but we expect grant holders to notify BLM, as appropriate, should reporting conditions change on their right-of-way, even if there is not an assignment, renewal, amendment, or termination action. The purpose of this provision is to ensure that BLM has current information about a holder's use of certain substances on a right-of-way by requiring certifications stating that a holder has complied with EPCRA, including emergency reporting, timely submission of inventory forms, preparation of emergency response plans, and reporting of toxic chemical releases.

Several commenters suggested that proposed paragraph 2805.10(c)(12) be amended to read ''to a condition as near as possible (or practical) to the area's original condition'' rather than to the satisfaction of the BLM. We did not change the final rule as a result of this

comment. In enforcing this final rule at section 2805.12(m), BLM expects, in general, to require remediation and restoration to pre-release conditions. However, BLM is responsible for administration of the public lands and is ultimately responsible for determining what is acceptable reclamation. BLM cannot rely solely on cleanup standards and requirements imposed by other regulatory agencies, because those standards and requirements vary widely among jurisdictions, and frequently only require that significant public health risks be abated. BLM has obligations under FLPMA and other laws to protect public lands and resources from degradation and must make the final determination as to the adequacy of any remediation or restoration.

A number of commenters objected to the requirement in proposed section 2805.10(c)(12) that a holder control and remove any release or discharge of hazardous materials that occurs on or near the right-of-way. One commenter said that a grantee's duties should be limited to those releases and discharges for which a grantee is personally responsible because a grantee cannot always restrict access to the right-of-way. The commenter said that to control any release on or near the right-of-way is an impossible standard. For example, a hunter might change the oil in his car while waiting for the birds to come in, or an unknown person might dump a load of old batteries and oil filters on a right-of-way. The commenter asked how an operator can be held responsible for an occurrence near his right-of-way that he has no control over. We amended the proposed rule because of these concerns. The final rule at section 2805.12(m) imposes an obligation on the holder to control and remove any release or discharge of hazardous materials arising in connection with the holder's use and occupancy of the right-of-way. That is, the grant holder is responsible for controlling any release or discharge of such material on or near the right-of-way, and attributable to the holder's operations. For example, the holder will be responsible for remediating any such releases or discharges, whether on the right-of-way or nearby areas, caused or contributed to by its construction, use, operation, or maintenance activities.

BLM does not agree, however, that a holder's obligation to control and remove releases or discharges of hazardous materials should be limited to those releases or discharges caused by the holder. Final section 2807.12(b)(2) and its predecessor 43 CFR 2803.1–5(b) impose strict liability upon a holder for costs incurred by the United States to control or abate conditions, such as fire or oil spills, which threaten life, property, or the environment. Consistent with this strict liability, holders have a corresponding duty to control and remove any release or discharge of hazardous materials, notwithstanding the conduct of a third party causing such release or discharge. Thus, if a third party enters onto a right-of-way and causes a release or discharge of hazardous materials resulting from activities or facilities associated with the right-of-way area, even if the release or discharge is unauthorized by the grant holder, the grant holder must control and remove the hazardous materials. The grant holder can, as provided under applicable state or Federal law, seek contribution or reimbursement from any otherwise liable third party. Subrogation provisions appear at final section 2807.12(b)(5) and previous section 2803.1–5(c).

In providing in final section 2805.12(m) that a holder's remediation and restoration obligations go beyond the boundaries of the right-of-way, BLM intends that holders fully address releases and discharges of hazardous materials attributable to the holder's operations. Thus a holder's duty extends to any such release or discharge on the right-of-way itself and on any nearby lands to which the release or discharge has migrated. This duty to address a release or discharge of hazardous materials off Federal lands does not enlarge the geographic scope of a holder's duty. Previous 43 CFR 2803.1–5(b) and final section 2807.12(b) extend a holder's strict liability to costs incurred by the United States to control or abate conditions, such as fire and oil spills, which threaten lives, property, or the environment, regardless of whether the threat occurs on areas that are under Federal jurisdiction.

Section 2805.13 When Is a Grant Effective?

This section explains that a grant is effective after you and BLM sign it and that you must accept its terms and conditions in writing and pay any necessary rent and monitoring fees. In general, the process involves BLM sending you an unsigned right-of-way grant and you returning the signed grant for BLM's signature. The package we send you will include a:

(A) Grant, containing terms, conditions, and site specific stipulations;

(B) Determination of the estimated rental, if appropriate; and

(C) Monitoring fee determination, if that determination was not previously made.

You must accept the provisions of the grant and signify that by signing the grant and sending it back to BLM with any required rental payment and monitoring fee payment. When BLM receives the grant and all fees and signs the grant, it is effective. You may also ask BLM for the process to occur face-to-face, so that you may avoid delays caused by mailings. This section was proposed as section 2805.11.

Section 2805.14 What Rights Does a Grant Convey?

This section explains that the grant conveys only those rights it expressly contains and that BLM issues the grant subject to valid existing rights of others, including the United States. The grant conveys to you the right to:

(A) Use the lands described in the grant for authorized purposes;

(B) Allow other parties to use, and charge for the use of, your facilities on the grant for authorized purposes. You may do this only if the grant specifically authorizes it or BLM authorizes or requires it in writing;

(C) Allow others to use your right-of-way as your agent;

(D) Do minor trimming, pruning, and removing of vegetation to maintain the right-of-way or facility;

(E) Use common varieties of stone and soil which are necessarily removed when constructing part of the project, without additional BLM authorization or payment, in constructing other parts of the project within the authorized right-of-way; and

(F) Assign the grant to another, provided that you obtain BLM's prior written approval.

With the exception of editorial changes, this final section contains the same requirements as proposed section 2805.12.

One commenter said that the second sentence of proposed paragraph (b) should be rewritten to read: ''Otherwise, you may not let anyone else use your facility unless BLM authorizes it.'' The commenter said that the phrase ''or requires it in writing'' should be stricken. BLM disagrees. Paragraph (b) says that you may not allow other parties to use your facility unless your grant specifically authorizes it or BLM authorizes it or requires it in writing. This means that when a third party wants to use your facility and your grant does not specifically allow you to sublease your facility or approve the third party use, the third party must request and receive a separate right-of-way grant from BLM for the use.

If the added third party use is a change of use on your right-of-way, you must request an amendment to your grant so BLM can recognize the change in use of the facility beyond what was originally granted. An example of this is a proposal for a third party phone cable to be installed on an existing electric power distribution line right-of-way. If the power line grant did not provide for the phone cable, we would require a new right-of-way grant for the phone company use and an amendment to the power line right-of-way grant to recognize the change in use of the original grant. Experience has shown that there are circumstances where BLM will require joint use of an authorized facility. For example, we may condition access road grants with requirements that you share maintenance responsibilities with other authorized road users. This is consistent with final section 2805.15(b), which allows BLM to require common use of your right-of-way for compatible uses.

The same commenter opposed BLM requiring grant holders to allow joint-use on power poles without full consent, a joint-use agreement with the second party, and full compliance with the National Electrical Safety Code. Paragraph (b) does not give BLM authority to authorize a third party to use a grant holder's facility without the holder's permission, unless that grant specifically stated that the holder would provide space for additional users. The paragraph limits the holder's ability to lease or sublease its facility to another party without first obtaining BLM approval.

Several commenters said that the final rule should make clear whether BLM intends to preclude electric utilities from charging the ''just and reasonable rates'' utilities are required to charge telecommunications entities who attach facilities to existing utility structures under the authority of the Pole Attachments Act (47 U.S.C. 224). BLM believes the comments are outside the scope of these regulations. There is nothing in the final rule that affects the rights of a holder to charge a reasonable rate to a telecommunications utility that wants to attach facilities to existing structures.

One commenter wanted a more thorough explanation of the minor trimming, pruning, and vegetation removal allowed to maintain a right-of-way facility because of the importance to insure safety and reliability on electric utility rights-of-way. The commenter suggested that we amend paragraph (d) by adding ''for the prevention of fire, and promotion of public health and safety, using appropriate industry standards, and in accordance with an integrated vegetation management plan if one is warranted and has been developed as part of the terms of the grant'' to the end of the sentence. The commenter said that the practice of charging timber cost for the removal of trees that jeopardize facilities in an authorized right-of-way is inconsistent with the partnership established between BLM and the grant holder at the time of the grant regarding safety and fire prevention. Further, the commenter said that the regulations should be clarified to exempt the cost of removing timber or other vegetation immediately adjacent to a grant. The commenter said that holders should not be charged for removing trees that may fall into transmission wires and result in fires, outages, or injuries to personnel maintaining the right-of-way.

BLM did not amend the final rule as a result of these comments. However, we will describe our trimming, pruning, and removal practices in the terms and conditions of the grant, and they will be part of the grant's plan of development, as necessary. We recognize the need for utility companies to perform maintenance pruning, trimming, and clearing under aboveground electric distribution and transmission lines for safety purposes. Minor pruning, trimming, and clearing refers only to maintenance activities after the right-of-way is constructed, not to removal of vegetation during initial construction.

Any time a holder plans to remove vegetation that is not authorized by the terms of the grant or that falls outside the boundary of the right-of-way, the holder must submit to BLM a request for approval to perform those activities prior to commencing the activity (see section 504(f) of FLPMA). Although not specifically mentioned in the proposal or this rule, the Materials Act of July 31, 1947, as amended (30 U.S.C. 601, 602), requiring you to pay for the removal of merchantable timber or common varieties of stone, applies to rights-of-way issued under these regulations (see 43 CFR parts 3600 and 5400). Once you construct on the right-of-way, you may perform minor trimming, pruning, and clearing of lands covered by the grant to maintain safety of right-of-way operations. If you need to perform additional work outside the boundary of the right-of-way, BLM would require an amended grant or new approval. We recommend that you plan and request this well in advance of the anticipated work schedule.

Many utility companies are now cooperating with Federal agencies in preparing vegetative treatment plans on a landscape basis to reduce the threat of catastrophic fires. These plans address vegetation treatment projects near large transmission facilities to help prevent catastrophic fires from damaging transmission facilities.

Oil and gas industry commenters recommended that the following language should be incorporated as terms and conditions in lieu of BLM's language:

> Lessees and operators have the responsibility to see that their exploration, development, production, and construction operations are conducted in a manner that conforms with:
> (a) Applicable Federal laws and regulations;
> (b) State and local laws and regulations;
> (c) Terms and conditions of permits and other approvals;
> (d) Notices to Lessees; and
> (e) Written orders or other BLM instructions.

BLM did not change the final rule as a result of this comment. The language suggested by the commenters is too broad to be useful for terms and conditions in FLPMA and MLA right-of-way grants. We believe the terms and conditions in this final rule are more appropriate for both FLPMA and MLA right-of-way grants than those listed by the commenters.

Section 2805.15 What Rights Does the United States Retain?

This section describes the rights that the United States retains when it issues a right-of-way grant. The United States retains any rights the grant does not expressly convey to you, including the right to:

(A) Access the lands covered by the grant at any time and enter any facility you construct on the right-of-way. BLM will give you reasonable notice before it enters any facility on the right-of-way;

(B) Require common use of your right-of-way, including subsurface and air space, and authorize use of the right-of-way for compatible uses. You may not charge for the use of the lands made subject to such additional right-of-way grants. Proposed section 2805.13(b) stated BLM could require common use of the land in your right-of-way. BLM has reworded the paragraph and added the phrase ''including subsurface and air space'' to the final rule to make it clear that BLM would also consider the subsurface and associated air space, including air waves, to be areas open to common use. The interest granted in a FLPMA (or MLA) right-of-way is, and always has been, a non-exclusive right (see section 503 of FLPMA). It does not convey to the holder any right to use the land for purposes other than those stated in the grant;

(C) Retain ownership of the resources of the land. You have no right to use

these resources, except as noted in section 2805.14 of this subpart;

(D) Determine whether or not your grant is renewable; and

(E) Change the terms and conditions of your grant through changes in legislation or regulation or as otherwise necessary to protect public health or safety or the environment.

Except for the changes noted above, and minor editorial changes, the requirements of this section are the same as proposed section 2805.13.

Several commenters said that BLM should not be allowed access to right-of-way grant areas until its employees can demonstrate adequate safety training commensurate with the facility. BLM did not amend the final rule to address this comment, but agrees with the comment's emphasis on safety. Should activities on the lands in a right-of-way grant pose any kind of threat to any visitors of a site, whether during construction or operation of the facility, the holder should provide adequate safety training to all such visitors. This is not limited to BLM personnel, but to anyone visiting the site. It is the holder's responsibility to identify unsafe conditions and provide suitable training. Where appropriate, this will be a term and condition of a grant. Likewise, if any required safety equipment is necessary to visit a right-of-way area, the holder should identify those needs and provide the appropriate equipment. This is consistent with existing policy.

A few commenters said that BLM should notify grant holders when others request a grant using the same corridor and should allow the current grant holder to make recommendations to maintain the integrity of its facilities in the corridor. BLM agrees with the comment but did not amend the final rule. It is our continued policy to notify all affected interests of new right-of-way proposals, especially existing right-of-way holders, in situations where we require common use of a right-of-way area.

Several commenters said that it must be clear that both parties, BLM and the holder, are bound by grant terms and conditions and BLM cannot later change or add conditions. BLM believes it necessary to include provisions in the final rule that allow BLM to amend the terms and conditions of right-of-way grants. Over the life of a grant, many things change that affect management of public lands. New laws are passed and new regulations are enacted that holders must comply with. Thus, if conditions warrant, BLM must be able to change, add, or delete terms and conditions of a grant to comply with these changing conditions on affected lands and to protect the public interest. Section 2805.12(a) of this final rule is consistent with this position.

Our position is in harmony with FLPMA. Section 504(e) of FLPMA gives the Secretary the authority to ''issue regulations with respect to the terms and conditions that will be included in rights-of-way pursuant to section 505 of this title,'' and makes revised regulations applicable to ''every right-of-way granted or issued pursuant to this title and to any subsequent renewal thereof * * *'' In addition, protection of public health or safety or the environment is set forth at section 506 of FLPMA as a basis for the Secretary to abate and temporarily suspend a holder's activities on the right-of-way, even prior to an administrative hearing. These two statutory provisions set reasonable limits on our ability to change terms and conditions. If BLM should add terms and conditions adversely affecting a holder, a right of appeal to IBLA would lie under 43 CFR Part 4.

Section 2805.16 If I Hold a Grant, What Monitoring Fees Must I Pay?

The provisions in this section were proposed in section 2805.14. In the final rule we renumbered the monitoring categories and modeled them (and the category fees) after the final numbering and associated fees of the processing categories in final section 2804.14. We did this to make the final rule easier to understand, and to be able to recover the necessary costs associated with monitoring a right-of-way grant.

Under this section you must pay to BLM a fee for the reasonable costs the Federal Government incurs in monitoring the following six activities: project construction, operation, maintenance, termination, and protection and rehabilitation of the public lands the grant covers. Category 1 through 4 monitoring fees are one-time fees and are not refundable. BLM categorizes the monitoring fees based on the estimated number of work hours necessary to monitor your grant.

In the proposed regulations at section 2805.14(a), we said that BLM would use the same category for monitoring as it did in establishing the processing fee category. Alternatively, we requested public comment on whether to separate processing fees from monitoring fees (see 64 FR 32109). One commenter thought that processing and monitoring fees should remain linked. Another commenter agreed that it is generally appropriate to associate monitoring costs with the size of the project, and to set a rate schedule accordingly. BLM's alternative proposal would establish monitoring fees based on the number of work hours required to monitor grants. We have determined that there are enough instances where the processing times and monitoring times for a given application would not fall into the same category that separating the processing and monitoring categories is warranted.

One commenter stated that BLM should continue to determine both the processing and the monitoring category fees as one process because it would be more efficient. We disagree with the commenter. BLM will determine the processing categories and monitoring categories separately, based on hours, as described in the ''revised category definitions'' section of the preamble of the proposed rule (64 FR 32109). Determining processing and monitoring costs separately provides a more accurate calculation of reasonable costs. The hours to monitor a grant may vary significantly from the hours BLM needs to process the application. If there is any increase in staff time to make the determinations separately, we expect it to be minimal.

The final rule uses the total number of hours necessary to ensure compliance with the terms, conditions, and stipulations of a grant to determine the category. Our rationale for eliminating the proposed criteria for setting the monitoring fee is the same as we discussed at section 2804.14 of this preamble for eliminating the proposed criteria for processing fees.

For Categories 1 through 4, holders pay monitoring fees in accordance with the chart, which will be adjusted annually. For Categories 5 and 6, holders pay monitoring fees in accordance with signed agreements for those categories (see section 2805.17(b) and (c)).

BLM annually updates Category 1 through 4 monitoring fees in the manner described at section 2804.14(c) of this part. BLM updates Category 5 monitoring fees as specified in the Master Agreement. The monitoring cost schedule is available from any BLM office or on BLM's National Home Page on the Internet at *http://www.blm.gov* and is published for calendar year 2005 in the final rule in a chart format.

In the final rule we added a chart showing monitoring fee amounts for each category, similar to the processing fee chart in section 2804.14(b). The chart clearly describes the divisions between monitoring fee categories. We made this chart consistent with the anticipated Forest Service rule for cost recovery to minimize confusion for those right-of-way customers that do business with both agencies.

The Forest Service recommended that we revise the first sentence of proposed section 2805.14(b) to read: ''For Categories I through IV, there is a one-time payment for all monitoring fees based on a fee schedule available from any BLM office.'' BLM agrees that we should clarify this. In the final rule we added a sentence to section 2805.16 to make it clear that Category 1 through 4 monitoring fees are one-time fees and are not refundable.

One commenter thought that categories for monitoring fees based on the number of hours it takes to monitor a grant was not an appropriate measure because each case and each EA could require different monitoring based on the mitigation required for that case. BLM believes that by eliminating the link between processing and monitoring fees that existed in previous regulations, we will be able to more accurately estimate the hours necessary to monitor the grant. When we issue a grant, we will have completed an EA or EIS that will set out the required mitigation. Therefore, there should be enough information to support our estimate of the time required to monitor the project.

One commenter thought that BLM should not charge for monitoring because:

(A) The costs of monitoring right-of-way grants are paid for out of taxpayers' money; and

(B) Monitoring is a fairly simple, straightforward process.

BLM disagrees with the comment and did not amend the final rule as a result of it. While monitoring can be a fairly straightforward process, we believe the costs to perform compliance inspections should not be paid for with taxpayers' money. Were it not for the existence of the right-of-way, there would not be the need to monitor. The holder of the grant should be responsible for these costs. Statutory authority supports our position. Section 504(g) of FLPMA gives BLM the authority to require right-of-way grant holders to reimburse the United States for inspection and monitoring of construction, operation, and termination of right-of-way grants. Section 28 of the MLA, 30 U.S.C. 185(l), provides similar authority.

One commenter thought that monitoring should be a one time event to ensure compliance and not an annual or continuing function. We amended the final rule by making it clear in the definition of monitoring (see section 2801.5), that we monitor Categories 1 through 4 from the time of construction and until the holder completes rehabilitation activities and BLM approves them. For Categories 5 and 6, monitoring will occur as defined in the agreement for those categories, which may include long-term monitoring throughout the life of the project.

Several commenters thought that taking multiple trips to a right-of-way was an integral part of the duties of land stewardship and should not be charged as part of monitoring fees. They were concerned that BLM was proposing to require industry to pay for functions BLM currently covers. Under this final rule and previous regulations it is the grant holder's responsibility to reimburse the Federal Government for monitoring grants. As stated above, section 504(g) of FLPMA makes it clear that inspections and monitoring of construction, operation, and termination of a facility are costs that the United States can require an applicant or holder to reimburse. Most monitoring costs are incurred during construction and rehabilitation activities. In order to ensure a grant holder is complying with the terms and conditions of the grant, it is likely that BLM will make multiple trips to a right-of-way area during the construction and rehabilitation phase of the project for most types of right-of-way projects that we would not make if there were no authorization in place.

One commenter thought BLM should prorate monitoring fees when the costs incurred by the agency are spread over two or more permit holders as would be the case with communication sites. The commenter thought there should be a fixed schedule in cases where the monitoring activity involves a number of different facilities managers/permit holders at the same site. They said that BLM's actual monitoring costs per permit holder are likely to be lower because monitoring expenses are spread over a larger number of permit holders. BLM disagrees and did not amend the final rule as a result of this comment. As previously stated, most monitoring costs are incurred during construction and rehabilitation activities. Even in the case of communication sites where a number of facilities are located together, it is unlikely that initial construction or other phases of the project would take place for multiple holders at the same time. Therefore, prorating monitoring fees among various holders, even on a communication site lease, is not practical or appropriate.

Several commenters said that costs associated with BLM's review of monitoring data collected by industry should be included in the base charge and rental for rights-of-way. We disagree. Section 504(g) of FLPMA makes a distinction between rent and those ''reasonable administrative and other costs incurred in processing an application * * * and in inspection and monitoring.'' Two separate charges are authorized, and BLM is careful to avoid mixing the two. BLM typically only requests monitoring data for Category 6 applications. In these cases, BLM will include the costs of reviewing monitoring data supplied by the applicant in our determination of monitoring costs.

Section 2805.17 When Do I Pay Monitoring Fees?

This section explains that for:

(A) Monitoring Categories 1 through 4, unless BLM otherwise directs, you must pay monitoring fees when you submit to BLM your written acceptance of the terms and conditions of the grant;

(B) Monitoring Category 5, you must pay the monitoring fees as specified in the Master Agreement. BLM will not issue your grant until it receives the required payment;

(C) Monitoring Category 6, you must pay the monitoring fee as specified in the financial plan of your cost recovery agreement. If BLM has underestimated the monitoring costs, we will notify you of the shortfall. In addition, BLM may periodically estimate the costs of monitoring your use of the grant; and

(D) Monitoring Categories 1–4 and 6, if you disagree with the category BLM has determined for your grant, you may appeal the decision under section 2801.10 of this part.

Subpart 2806—Rents

The final subpart is organized differently from the proposed rule in that it is divided into several sections as follows:

(A) General provisions, applicable to all grants;

(B) Linear rights-of-way, applicable to linear grants only;

(C) Communication site rights-of-way, applicable to grants containing telecommunications facilities; and

(D) Other rights-of-way, applicable to miscellaneous grants, such as those for wind energy facilities.

We also divided the final rule into the several different areas by subject matter so that it is easier to read and follow.

General Provisions

Section 2806.5 (Proposed) What Definitions Do I Need To Know To Understand These Regulations?

We moved most of the definitions proposed in this section to the general definitions section of this rule (see section 2801.5) and deleted others from the rule. As a result, we deleted this section from the final rule. Please refer to the discussion of section 2801.5 for responses to any comments and

explanations of any changes to the definitions proposed in this section.

We deleted the definitions of ''Reselling'' and ''Zone value'' from the final rule. We deleted the definition of ''Reselling'' because the term is not used in the final rule. We deleted the definition of ''Zone value'' because it is only used in the Per Acre Rent Schedule (see final section 2806.20). However, the rule continues to define the term ''Zone'' (see final section 2801.5) and the schedule makes it clear that rent is based on the zone where the linear right-of-way is located and that rental values change in each zone.

Section 2806.10 What Rent Must I Pay for My Grant?

Paragraph (a) of this section explains that before you receive a right-of-way grant you must pay in advance a rent that BLM established based on sound business management principles and as far as practical and feasible, using comparable commercial practices. This section makes clear that rent does not include processing or monitoring fees, but is in addition to those fees. Also, BLM may exempt, waive, or reduce rent as provided in sections 2806.14 and 2806.15 of this final rule.

Paragraph (b) of this section explains that if your grant was issued before FLPMA, you may request an informal hearing with BLM before we increase your rent as, for example, a result of initially placing your grant on the rent schedule at section 2806.20.

We amended the final rule to make clear that rent is separate from and in addition to processing or monitoring fees to eliminate possible confusion for applicants concerning fees that are associated with obtaining a right-of-way grant. This section was proposed as the opening paragraph of proposed section 2806.10 and with the exception of the changes mentioned above and editorial changes, it remains as proposed.

Some commenters asked that the final rule define the term ''sound business management principles.'' This term has appeared in BLM's rental regulations for over 15 years. When first introduced in 1987, BLM described at length the standards and assumptions that inform this term (see 52 FR 25811–25818 (July 8, 1987). We did not define ''sound business management principles'' in the final rule. We believe it is sound business management to determine rent through a system of rent schedules. Using rent schedules eliminates the need to prepare an individual appraisal report for each of the estimated 3,500 grants and leases BLM issues each year. It is not feasible or cost effective to prepare, review, and approve individual appraisal reports for each right-of-way because of the time and expense required to prepare and review appraisal reports. The phrase is in previous section 2803.1–2(a) and it is only used once in these regulations in section 2806.10.

Several commenters asked how BLM establishes fair market value and how fair market value compares to the appraised value. Several commenters asked if the method for determining fair market value established in this section was an accurate method. Another commenter said that BLM should establish in the regulations the process for determining fair market value.

As previously explained, BLM uses rent schedules to determine fair market value rent for some types of right-of-way grants. The rents in the schedules are based on a comparative market analysis of rents for rights-of-way in the private sector. Please see the preamble discussion in BLM's 1987 rule at 52 FR 25811 for more information. We started using a schedule system (in 1987 for the linear schedule and in 1997 for the communication site schedule) in response to multiple appeals and legal challenges to our linear and communication site appraisals that we used at the time to determine rent. We believe that if BLM reverted to using individual appraisals to determine rent, rentals may be higher than under the current schedule system, but the cost to the agency to prepare individual appraisals would be more than the amount of rent we could collect and therefore would not be justified. BLM believes the schedules are customer friendly, efficient to implement and use, and reflect fair market value for the use of the land.

This final rule does not change our existing policy, reflected in BLM regulations since 1987 (52 FR 25818, July 8, 1987; 52 FR 36576, Sept. 30, 1987, as amended at 60 FR 57070, Nov. 13, 1995) for rent schedules for linear rent and since 1995 for communication site rents. We developed both the linear rent schedule and the communication site rent schedule based on analysis of market data and a great deal of public comment and involvement.

We do not agree with the comment that the process to determine fair market value should be established in the rule. BLM is required to follow recognized standards in determining fair market value. In determining fair market value we rely on the standards in the ''Uniform Appraisal Standards for Federal Land Acquisition'' published by the Appraisal Institute in cooperation with the Department of Justice and the ''Uniform Standards of Professional Appraisal Practice'' published by the Appraisal Standards Board.

Several commenters said that the final regulations should make clear what costs the rents are targeted toward recovering and what value or rights the payment of rents conveys. The rule does not authorize BLM to recover costs through rent collection. With one exception, rental payments go directly into the U.S. Treasury and are not allocated to BLM. The one circumstance where BLM is allowed to keep rental payments is for communication site rights-of-way. In 1996 Congress passed the 1996 Interior and Related Agencies Appropriation Act, which allowed BLM to keep the first $2 million in annual communication site rent collections. BLM uses this money to manage communication site rights-of-way. We did not change the final rule to address this comment.

The same commenters said that it was unclear to what extent improvements on rights-of-way, including the co-location of fiber optic transmission facilities, results in additional occupation of Federal lands. The commenters said that it seemed reasonable to charge rent for the extent to which right-of-way activities foreclose other activities, but that it seemed unreasonable to charge grantees additional rent for improvements on a line, such as adding telecommunication facilities, that have no additional material impact on public lands. We disagree with the comment that it is not reasonable to charge rent for co-located facilities on a right-of-way. BLM establishes rent using schedules that reflect what many right-of-way holders pay for comparable right-of-way uses on non-public lands.

BLM issues a non-exclusive grant for right-of-way uses. The terms and conditions in BLM grants do not allow additional uses or users beyond what the grant specifies. Any co-location of additional facilities by third parties requires the party to obtain its own separate grant (except in the case of a communication site lease which allows third parties to act as customers and tenants without a grant from BLM). The third party must pay rent unless the use qualifies for a rental reduction or is exempted from paying rent. A proposal by a grant holder to co-locate new facilities in an existing right-of-way facility requires a grant amendment if there is a substantial deviation or change in use from the original grant. Amendments, therefore, usually result in added rental for the holder, even when the new use may not physically impact public lands. We interpret section 504(g) of FLPMA to require the holder to pay the fair market value

(FMV) of the use of the land, not simply for impacts to the land, as the commenter suggests (see 43 U.S.C. 1701(a)(9)). An example of this occurs when additional communication facilities are added to an existing communication site building with no changes to the structure. In many cases, right-of-way grants acquired in the private market do not allow the holder to add more facilities without first acquiring additional rights from the private landowner at additional cost. BLM believes it is reasonable for the Federal Government to require rental payments when holders acquire additional rights from BLM to co-locate facilities.

A few commenters said that rents are far too low. They said that the public will never receive FMV for rights-of-way unless BLM increases rents. This final rule does not change our current policies regarding payment of rent except that final section 2806.12 makes adjustments to the cycle BLM will use to send out rental notices. We believe that existing policy and these regulations provide payment of FMV for the use of public lands in accordance with section 504(g) of FLPMA (see the preamble to the 1987 rule at 52 FR 25811).

Section 2806.11 How Will BLM Charge Me Rent?

Paragraph (a) of this section explains that BLM will charge you rent beginning on the first day of the month following the effective date of the grant through the last day of the month when the grant terminates. It also provides an example. This provision will make it simpler for field offices to uniformly calculate rents.

Paragraph (b) of this section explains that BLM will set or adjust payment periods to coincide with the calendar year by prorating rents based on 12 months.

We moved the substance of proposed section 2806.10(c) to final section 2806.23. Please see the discussion of that section for changes to the rule.

Under final paragraph (c) of this section, if you disagree with the rent BLM charges, you may appeal the decision to the IBLA.

With the exception of editorial changes and the changes noted above, this section is the same as proposed sections 2806.10(a), (b), and (e).

Section 2806.12 When Do I Pay Rent?

This section explains that you must pay the rent for the initial rental period before BLM issues you a grant. You must make all other rental payments for linear rights-of-way according to section 2806.23 of this subpart.

This section also explains that after the first rental payment, all rent is due on January 1 of the first year of the succeeding rental period. We amended the proposed provision of this section to make it more administratively efficient to pay and collect rent. This section is consistent with previous section 2803.1–2. Prior to the 1987 regulations, BLM sent rental notices to many right-of-way holders prior to the grant's anniversary date and payment was due each year on the anniversary date of the grant. This was an ongoing administrative burden on BLM personnel because they had to send rental notices to holders throughout the entire year on the anniversary date of each grant. In a BLM field office that administers thousands of right-of-way grants, it made tracking payments and sending rental notices a labor intensive task each month. In 1987, BLM modified our right-of-way regulations and required that all grants be converted to a calendar year billing cycle with rent due January 1 of each year (see 52 FR 25814). We also started sending consolidated rental notices to the holders of multiple grants, instead of multiple notices. This process reduces the number of rental notices, and simplifies notifying holders of multiple right-of-way grants. A rental notice is provided as a courtesy by BLM. Since all of BLM's rental notification workload is completed at one time of the year, we find fewer past due rental accounts. For these reasons, the final rule carries forward these procedures.

Section 2806.13 What Happens If I Pay the Rent Late?

This section explains that if BLM does not receive your rent payment within 15 calendar days after the rent is due (January 15), BLM will charge you a late payment fee of $25.00 or 10 percent of the rent you owe, whichever is greater, not to exceed $500 per authorization. In the proposed rule we asked for your comments on late payment assessments and cited 43 CFR 2920.8(a)(3) and 43 CFR 4130.8–1(f) as examples. This final provision is similar to existing regulations at 43 CFR 4130.8–1(f) except that it sets the cap on late payment assessments at $500, double the amount in 43 CFR 4130.8–1(f). Under this rule, the assessment is for each authorization so that a holder with multiple right-of-way grants would be assessed the late payment fee for each right-of-way grant. BLM's rental notice is provided as a courtesy. Failure to receive a courtesy notice will not excuse late payment of rent.

Under this section, if BLM does not receive your rent payment and late payment fee within 30 calendar days after rent is due, BLM may collect other administrative fees provided in BLM's National Business Center Manual, Collections Reference Guide, 1998, including fees chargeable under the Debt Collection Improvement Act, 31 U.S.C. 3701, and other statutes. This rule does not change already established procedures under the Debt Collection Improvement Act which we follow regarding all monetary debts owed.

If BLM does not receive the rent, late payment fee, and any administrative fees within 90 calendar days after the rent is due, BLM may terminate your grant under final section 2807.17. If BLM terminates your grant for this reason, you may not remove any structures, buildings, or equipment without BLM's written permission. Any rent due, late payment fees, and administrative fees remain a debt that you owe to the United States. Of course, holders may take corrective measures within this 90-day period so the grant is not terminated. Proposed section 2806.13 stated that BLM may terminate your grant when rent payment is delinquent for 30 days after BLM sends you a payment notice.

If you pay the rent, late payment, and any administrative fees after BLM terminated the grant, the grant is not automatically reinstated. You must file a new application with BLM. BLM will consider the history of your failure to timely pay rent in deciding whether to issue you a new grant.

BLM does not send bills for rent due on a right-of-way grant. Instead, BLM sends grant holders a courtesy notice on December 1 for any rent that is due on the following January 1. This notice is currently generated by our automated lease management system. The system consolidates all amounts due for one holder and generates an itemized statement for multiple grants. After the first rental payment, rent is always due on January 1 of the first year of each succeeding rental period for the term of the grant, even if a courtesy notice does not reach the holder.

In addition to the rent, late payment, and administrative fees authorized under these regulations, BLM collects interest on outstanding debts owed the Federal Government (see 31 U.S.C. 3717). BLM currently collects interest for late payment of rental fees and will continue to do so after publication of this final rule.

You may appeal any adverse action BLM takes against your grant to the IBLA under section 2801.10 of this part.

We received several comments on late payment assessments. Several commenters supported this concept, as

it is a standard industry practice to add penalties for late payments. One commenter said that the final rule should allow grant holders to rectify the error within 90 days of a notice. Several commenters said that due to the burden and cost of administering late payment fees, they would recommend against using them. In the final rule we adopted a late payment fee. If you do not pay your rent, this fee is applied automatically 15 calendar days after the due date (*e.g.*, if we do not receive your payment by close of business January 15, you will receive a notice assessing a late payment fee). We do not agree that holders should be given 90 days to rectify errors without assessing the late payment fee and did not change the final rule as a result of this comment. It is common practice in landlord/tenant situations to charge a late payment fee upon default of the payment terms, and we believe it is reasonable for the Federal Government to do so.

One commenter said that it was concerned that under the proposed rule, there are situations where a new company could be assessed a penalty for a permit that was ''not in the original assignment and was found at a later date.'' The commenter said that the cost of the rent should rightly be assessed, but the late penalty should not. We agree with the commenter in part.

BLM must approve all proposed assignments in writing before they are effective. Prior to this approval, BLM must ensure that the holder is in compliance with all terms and conditions of the grant, including any rental obligations. Any past due rent, including late fees and administrative fees, must be paid before BLM will approve the grant assignment to the new entity. The new holder would not be liable for late fees or administrative fees incurred by the previous holder, but could voluntarily pay past rent, late fees, and administrative fees to facilitate completion of the assignment.

Several commenters said they did not object to late payment charges as long as BLM gives the grant holder at least 90 days prior notice that rent is due. The commenters said late fees should not apply if late payments resulted from BLM's late notice or late credit. BLM strives to make sure you receive a courtesy notice of your due rent in a timely manner. However, if you do not pay your rent on time, a late payment fee will be charged, regardless of whether you received a courtesy notice. We do not agree with the comment that holders should be given a 90-day notice of rent being due. In many landlord-tenant relationships, tenants are not given any notice that rent is due. We believe a 30-day courtesy notice is reasonable and provides adequate notice. Also, payment of rent is a term and condition of a grant and this fact provides additional notice at the outset of the grant of a holder's obligation to pay rent.

Several commenters said the existing regulation's requirements for late payment (*i.e.*, grant termination and resubmittal requirements) are deterrent enough for late payments and that if BLM decides that there should be a late payment fee, the right-of-way industry should be involved in setting the guidelines. We disagree with this comment. In a 1995 report, the Department's Inspector General found that it cost one Department of the Interior agency approximately $34 to issue, process, and collect individual bills. In light of this finding, the $25 or 10 percent of the rent owed standard is reasonable, is consistent with other BLM regulations (*e.g.*, 43 CFR 4130.8–1(f)), and will apply to late payment of right-of-way rents as well.

Section 2806.14 Under What Circumstances am I Exempt From Paying Rent?

This section explains that you do not have to pay rent for your use if:

(A) BLM issues the grant under a statute which does not allow BLM to charge rent;

(B) You are a Federal, state, or local government or its agent or instrumentality, unless you are:

(1) Using the facility, system, space, or any part of the right-of-way area for commercial purposes. We added the term ''facility'' and the phrase ''any part of the right-of-way area'' to this section to help explain that BLM would require a Federal, state, or local government to pay rent if any part of the right-of-way area is being used for commercial purposes; or

(2) A municipal utility or cooperative whose principal source of revenue is customer charges;

(C) You have been granted an exemption under a statute providing for such; or

(D) Electric or telephone facilities constructed on the right-of-way were financed in whole or in part, or eligible for financing, under the Rural Electrification Act of 1936, as amended (REA) (7 U.S.C. 901 *et seq.*), or are extensions of such facilities. You do not need to have sought financing from the Rural Utilities Service to qualify for this exemption, but BLM may require you to document the facility's eligibility for REA financing. For communication site facilities, the addition or inclusion of non-eligible facilities as, for example, by tenants or customers, on the right-of-way will subject the holder to rent in accordance with sections 2806.30 through 2806.44 of this subpart.

The proposed rule specified that BLM would charge rents to REA holders if they operated their right-of-way as a commercial communications company, had tenants in their communication site, or provided communication services for commercial purposes. We made the final rule consistent with the statute and specifically address communication site facilities with subleasing provisions.

We modified the proposed rule to be consistent with changes to the statutory provisions dealing with the REA exemptions. In 1996, Congress enacted Public Law 104–333, amending section 504(g) of FLPMA to read: ''Rights-of-way shall be granted, issued, or renewed, without rental fees, for electric or telephone facilities eligible for financing pursuant to the Rural Electrification Act of 1936, as amended, determined without regard to any application requirement under that Act or any extensions from such facilities.'' Congress made this change to exempt from rent those rights-of-way for electric or telephone facilities eligible for REA financing, but not financed through REA. Therefore, it is the eligibility of the facilities, rather than the eligibility of the owner or operator of the facilities, that is the focus of amended section 504(g). If electric or telephone facilities within a right-of-way are financed by REA, *or are eligible for such financing,* the right-of-way qualifies for a rent exemption. Thus, large utilities and rural cooperatives alike are eligible for rent exemptions if the facilities that they build are REA eligible. Previous regulations did not reflect the 1996 changes to the statute and final paragraph (d) of this section implements current statutory authority.

Several commenters said that the proposed rent increase would disproportionately and adversely impact ''about 750 RUS [Rural Utilities System] telephone borrowers that serve sparsely populated high cost rural areas.'' The commenters said that they face uncertainty about maintaining revenue streams, ever increasing regulatory burdens and costs, and ''carrier of last resort'' obligations to serve customers throughout their service areas. The commenters said that the increases frustrate the goals of the REA and the 1996 Telecommunications Act. The commenters also said that there are more than 200 rural telephone systems eligible for financing, but who do not borrow from the Rural Utilities System that administers REA loans, who will also be disadvantaged. We believe the

comments are misplaced because nothing in the proposed or final rule increases the amount of rent BLM collects. As explained earlier, REA eligible facilities do not pay rent, and the final rule conforms to the provisions of section 504(g) of FLPMA.

Several commenters said that eligibility for telephone loans under REA is not determined by corporate structure. They said that section 201 of REA (7 U.S.C. 922) makes loans eligible to all ''persons now providing or who may hereafter provide telephone service in rural areas, to public bodies now providing telephone service in rural areas and to cooperative, nonprofit, limited dividend, or mutual associations.'' One commenter said that the 1996 amendment applied to all not-for-profit rural telephone and electric utilities that may choose to operate without Federal financing, but not to the exclusion of other entities which might be eligible under the amendment. We agree and the final rule is consistent with these comments.

Several commenters said that BLM misinterpreted section 504(g) of FLPMA. The commenters said that the 1996 amendment did not restrict the rent waiver to non-profit telephone and electric cooperatives whose facilities are eligible for REA financing, but expanded the exemption to include eligible facilities, regardless of the owner. BLM agrees with the commenters that the exemption for REA utilities applies to any eligible facility and an entity's non-profit status is not a determining factor in whether the facility is qualified for an exemption. The final rule is clear on this matter.

Several commenters said that proposed section 2806.11(d) should be deleted in its entirety since it has no basis in the statute and is extraneous to it. BLM disagrees. Public Law 104–333 amended FLPMA to clarify the exemptions under the REA, and this provision remains in the final rule at section 2806.14(d). Based upon the comments above, we did, however, replace proposed paragraphs (d)(1), (2), and (3) with a new final paragraph (d) that more accurately implements the REA exemption. We based these changes on the criteria and definitions in the Rural Electrification Act of 1936 and its implementing regulations (see the Rural Utilities Service regulations at 7 CFR) for ''eligible'' facilities, that is, electric or telephone facilities providing service to rural areas. The commenters pointed out that the terms ''telephone service'' and ''rural area'' are defined in sections 203(a) and (b) of the REA, respectively. Under those provisions, telephone service ''shall be deemed to mean any communication service for the transmission or reception of voice, data, sounds, signals, pictures, writing, or signs of all kinds by wire, fiber, radio, light, or other visual or electromagnetic means, and shall include all telephone lines, facilities, or systems used in the rendition of such service; but shall not be deemed to mean message telegram service or community antenna television system services or facilities other than those intended exclusively for educational purposes, or radio broadcasting services or facilities within the meaning of section 3(o) of the Communications Act of 1934, as amended.'' Rural area ''shall be deemed to mean any area of the United States not included within the boundaries of any incorporated or unincorporated city, village, or borough having a population in excess of 5000 inhabitants.''

Final section 2806.14(d) provides rental exemptions to electric or telephone facilities that are financed or are eligible for financing under the REA. This exemption is for electric or telephone facilities that provide service to rural areas. BLM will exempt rent for electric or telephone facilities if the facility is either being financed with loans pursuant to the REA, or is eligible for financing under that statute. BLM may require you to document a facility's eligibility for REA financing. Only electric and telephone facilities that serve rural areas, as those terms are defined by the REA, are eligible for REA loans.

The last sentence of final section 2806.14(d) only applies to communication site authorizations with subleasing provisions. The typical right-of-way grant only authorizes a single use. BLM reserves the right to issue additional right-of-way authorizations for lands on or adjacent to areas described in any previously issued right-of-way. The holder does not have the right to sublease to third parties unless BLM specifically authorizes it in the grant. BLM only grants subleasing rights on a regular basis in authorizations for communication uses and facilities, and we will customarily use the term ''leases'' to apply to those multiple use authorizations. In these leases the holder and BLM have agreed that the holder can lease space in its facility for additional communication uses without additional BLM approval and the holder is liable for rental payments.

The REA exemption for communication facilities is limited by the statute to ''telephone'' facilities that provide telephone service in a rural area. The terms ''telephone service'' and ''rural area'' are defined in section 203(a) and (b) of the REA (see above). Non-telephone uses (TV and radio broadcasting and message telegram service in particular) are not rent-exempt since they are not eligible for financing through the REA.

The last sentence of section 2806.14(d) is intended to provide the holder of a rent-exempt authorization with the same benefits that might be given to other holders of a communication use authorization. Non-telephone uses (and the associated facility for those uses such as radio and TV broadcasting) cannot be financed via the REA, nor are they eligible to be financed via the REA. However, at the request of the holder of the rent-exempt authorization, BLM has and will continue under this final rule, to allow for subleasing of these non-telephone uses. Under these circumstances, BLM will assess rent to the holder under final sections 2806.30 through 2806.44 for the non-telephone uses within the facility. Thus the holder of the otherwise rent-exempt authorization will now pay rent for any facilities not eligible for REA financing. This is a benefit to the holder and to BLM since without this provision, BLM would either:

(A) Not allow non-telephone uses in that facility; or

(B) Issue a separate authorization for the non-telephone uses, and assess rent to that holder for that use.

Several commenters said that the rent waivers for REA-eligible facilities prevent a level playing field for those in the electric utility industry. This comment is outside the scope of this rule. This final rule implements section 504(g) of FLPMA, which requires that we provide the exemption to eligible facilities.

One commenter asked if the rent exemptions are retroactive to the date of the Act. Section 1032(b) of Public Law 104–333 provides that the amendment to section 504(g) (inserting ''eligible for financing'') ''shall apply with respect to rights-of-way leases held on or after the date of enactment of this Act'' (November 12, 1996). The exemption from having to pay rental for REA eligible facilities is established in current policy and practice and is not changed by this rule. BLM is not currently charging rent to any utility with facilities eligible for REA financing unless the utility never told us its facility is eligible or requested the rent exemption. Therefore, there should be no retroactive exemptions to consider. The burden of notifying BLM of eligibility for the rent exemption rests with the right-of-way holder or applicant.

Several commenters said that limiting the REA exemption to cooperative or non-profit entities would only create another disincentive for extending and improving telecommunications service in high-cost-to-serve rural areas. The final rule does not restrict or limit exemptions to non-profit and cooperative entities. The exemption applies to any eligible facility regardless of the holder's organizational status. It is worth noting that BLM can consider the organizational status of non-profit organizations for rental reduction under section 2806.15 of this final rule.

One commenter said that the tax exemption for non-profits in the Federal tax code is section 501(c)(12), not section 501(c)(3). BLM amended the proposed rule to make it clear that it is the eligibility of a facility for REA financing that is important, not whether or not the holder is considered a non-profit organization under the tax code. Therefore, for the purposes of these final regulations the question of whether the appropriate cite to the tax code is section 501(c)(3) or section 501(c)(12) is irrelevant.

Section 2806.15 Under What Circumstances May BLM Waive or Reduce My Rent?

This section explains that BLM may waive or reduce your rent payment, even to zero in appropriate circumstances. BLM may require that you submit information to support your request for waiver or reduction.

To receive a rental waiver or reduction, you must show BLM that:

(A) You are a non-profit organization, corporation, or association which is not controlled by, or is not a subsidiary of, a profit making corporation or business enterprise and the facility or project will provide a benefit or special service to the general public or to a program of the Secretary. We added the phrase ''and the facility or project will provide a benefit or special service to the general public or to a program of the Secretary'' to make it clear we do not believe that a non-profit entity's rent should be reduced unless, for example, the public receives a benefit from the use. Previous regulations only required that a holder be a non-profit corporation or association to qualify for a waiver or reduction. We made this change because many non-profit entities only provide benefits to their members, for example, a right-of-way for a homeowners road association. The association's status as a non-profit entity would not be the sole factor in determining whether to reduce rent. We would consider a rent reduction if the road association provided a public benefit such as maintenance of a road available to the public at large. The BLM State Director could also consider a hardship waiver or reduction under paragraph (c) of this section. Therefore, any non-profit grant holder has multiple opportunities to request waivers or reductions under the final rule;

(B) You provide without charge, or at reduced rates, a valuable benefit to the public at large or to the programs of the Secretary of the Interior. This provision is not intended and should not be used by either BLM or a holder to avoid the payment of rent in exchange for free use of an authorized facility. For example, prior to 1995, it was not uncommon for BLM and the FS to require that an applicant reserve a percent (typically 20 to 25 percent) of the space in a communication facility for use, rent-free, by the agency as a condition of the authorization. (The agency would typically house its internal communication equipment in the facility.) This practice is no longer acceptable;

(C) You hold a valid Federal authorization in connection with your grant and the United States is already receiving compensation for this authorization. We reworded this paragraph in the final rule to make clear that BLM will provide no waiver or rental reduction for a FLPMA right-of-way, such as for a road, that is associated with an oil and gas lease. If you need access under FLPMA to reach an oil and gas lease, then the holder would pay rent for the off lease road. In the final rule we clearly spell out that FLPMA access road grants associated with an oil and gas lease are not subject to a waiver or reduction in rent; and

(D) Your grant involves a cost share road or a reciprocal right-of-way agreement not subject to subpart 2812 of this title. Section 504(g) of FLPMA provides that BLM may waive rentals when a FLPMA right-of-way holder conveys a right-of-way to the United States in connection with a cooperative cost share program between the United States and the holder. In these cases, BLM will determine the rent based on the proportion of use. For example, if BLM granted a two mile long right-of-way across public land and the grant holder gave BLM an equivalent grant across one mile of its property, under this provision, the holder would only pay one-half of the fair market value rent for the FLPMA right-of-way. Previous section 2803.1–2(b)(2)(v) stated that BLM may waive or reduce rent under similar circumstances.

This section also explains that if the BLM State Director determines that paying the full rent will cause you undue hardship and it is in the public interest to waive or reduce your rent, the State Director may waive or reduce your rent. Please note that unlike paragraph (b) of this section, the BLM State Director makes the hardship determination. An undue hardship can be a financial impact on a small business or it could involve situations where there is a need to relocate the facility to comply with public health and safety and environmental protection laws not in effect at the time the original grant issued. These conditions are part of existing policy and practice and are not changed in the final rule.

In the final rule we added language to this section to require applicants to include information in their requests for rental reduction suggesting alternative rental payment plans and time frames when applicants expect to resume paying full rental. In addition, BLM may also ask for specific financial data or other information that corrects or modifies the statement of financial capability required by final section 2804.12(a)(5) of this part. The language in final paragraph (c) has been clarified so that there will be consistency between offices in evaluating requests for hardship rental reductions. BLM should approve a rental reduction for hardship reasons only for a specified time frame and it will be periodically reevaluated. We proposed this section as section 2806.12.

Section 2806.16 When Must I Make Estimated Rent Payments to BLM?

This section explains that to assist us in the processing of your application in a timely manner, BLM may estimate the rental payment and collect that amount before it issues the grant. Section 504(g) of FLPMA requires you to pay rental in advance of grant approval. Section 2806.16 does not apply to rental determined from a schedule, only for rent BLM otherwise determines. If you make an advance estimated payment, BLM will credit any overpayment, and you are liable for any underpayment. This provision is consistent with current practice and policy (see previous section 2803.1–2(e)(2)) and was proposed in section 2806.28(c).

Linear Rights-of-Way

Section 2806.20 What Is the Rent for a Linear Right-of-Way?

This section contains the linear rent schedule for linear rights-of-way. The schedule provides consistency in how we determine rent and eliminates the need to perform individual appraisals on linear right-of-way grants. BLM first implemented the linear rent schedule in

1987 (see 52 FR 25811, 25821, July 8, 1987).

This section explains that BLM may use an alternate means to compute your rent if the rent determined by comparable commercial practices or by an appraisal would be 10 or more times the rent from the schedule.

This section also explains that once you are on a rent schedule, BLM will use the schedule to calculate rent unless the BLM State Director decides to remove you from paying rent under paragraph (d) of this section or you file an application to amend your grant. These provisions are consistent with existing section 2803.1–2(c)(1)(v) and are carried forward in the final rule. Finally, this section explains that you may obtain the current linear right-of-way rent schedule from any BLM office or from BLM's National Home Page on the Internet.

One commenter said it opposed the changes proposed section 2806.14 would make because the rule would allow BLM to recover ''fair market value'' based on land use, rather than land value. BLM disagrees. The linear rent schedule is based on general land values on a county-by-county basis. This section is consistent with existing policy and procedure.

One commenter said that there are no criteria in the rule explaining what level of expected rent would warrant a separate appraisal, or on what this expectation would be based. The commenter said that BLM should not use a higher rental valuation for telecommunication carriers, as opposed to other types of carriers, and that the rent should be based on rent schedules developed through traditional appraisal theories, to value the burden placed on the land. Final paragraph (c) of this section establishes the conditions under which BLM may use alternate means to compute rent. The regulations do not mandate that BLM deviate from the schedule, but only provide us discretion to do so if certain conditions apply. BLM currently has a policy prohibiting us from deviating from the schedule (see WO–IM 2002–172). That guidance states that BLM will use the current schedule to calculate rent for all linear right-of-way uses, including telecommunications (fiber optics lines) uses. The current policy of not deviating from the linear schedule is in response to Congressional direction contained in the appropriations bill for the Department of the Interior for FY 2001. BLM bases the schedules we use to calculate rent on traditional appraisal methods. BLM expects to use schedules to determine rent whenever possible to avoid unnecessary expenditures preparing appraisal reports. In response to the comment that we should not charge telecommunication carriers higher rent than other carriers, these final regulations do not.

Section 2806.21 When and How Does the Linear Rent Schedule Change?

This section explains that BLM updates the rent schedule each calendar year based on the previous year's change in the IPD–GDP, as measured second quarter to second quarter. This provision is similar to previous section 2803.1–2(c)(1)(ii).

We received no substantive comments on this section. This section was proposed as section 2806.15 and, with the exception of editorial changes, is the same as that proposed.

Section 2806.22 How Will BLM Calculate My Rent for Linear Rights-of-Way the Schedule Covers?

This section explains that BLM calculates your rent for a linear right-of-way by multiplying the rent per acre for the appropriate category of use and county zone price from the current schedule by the number of acres in the right-of-way area that fall into those categories and the number of years in the rental period (rent per acre X number of acres X number of years in the rental period = rent for a linear right-of-way). If BLM has not previously used the rent schedule to calculate your rent, we may do so after giving you reasonable written notice. If an existing grant is a pre-FLPMA authorization, BLM will provide you with an opportunity for an informal BLM hearing as described in final section 2806.10(b) of this final rule. With the exception of editorial changes, this section is the same as proposed section 2806.16.

Section 2806.23 How Must I Make Rental Payments for a Linear Grant?

This section explains that you must make either nonrefundable annual rental payments or a nonrefundable payment for more than 1 year, as follows:

(A) You may pay in advance the required rent amount for the entire term of the grant; and

(B) If you choose not to pay the entire amount, you must pay according to one of the following methods:

(1) If your annual rent is less than $100, private individuals must pay at 10-year intervals not to exceed the term of the grant. If your annual rent is greater than $100, individuals have the option to pay annually or at other multi-year intervals that you may choose.

(2) All other right-of-way holders, including corporations, companies, partnerships, and associations, must pay rent at 10-year intervals not to exceed the term of the grant.

These provisions are based on proposed section 2806.10(c), but provide additional detail to more accurately describe the process. Consistent with existing policy and practice, once you make a rent payment, BLM will not refund it. This is because once BLM deposits a payment, it goes into the general fund of the U.S. Treasury and is no longer accessible to BLM.

We added a new paragraph (b) to the final rule to further explain the process of calculating rent. BLM considers the first partial calendar year in the payment period described above to be the first year of the rental payment term. We will prorate the first year rental amount based on the number of months left in the calendar year after the effective date of the grant. For example, the effective date of a grant is June 2 and the annual rental is $49.32 per year. Since the annual rent is less than $100, a 10-year payment method would be appropriate. Rent begins on the first day of the month after the effective date of the grant. BLM would calculate rent beginning in July and would prorate the first year's rent to cover the six months remaining. (*e.g.,* $49.32 × .5 = $24.66 for year one.) Therefore for years 2 through 10, rent is $49.32 × 9 years = $443.88. Total rent is $443.88 + $24.66 = $468.54.

BLM received a variety of comments regarding rental terms. Several commenters thought that due to the administrative costs of processing rent payments, the final rule should bill for rent every five years rather than yearly. Several commenters said that in circumstances where the annual fee would be less than $1,000, the fee should be a lump-sum fee based on a 25-year period. The commenters said that where the annual fees are higher than $1,000, the fee should be paid in lump-sum every 5–10 years. Another commenter said that BLM should require advance payment of rent for lower rent amounts, for which the administrative cost of processing monthly or more frequent rent payments would expend a significant portion of the rent payment. BLM considered several rental terms including one year, five years, ten years, and longer. We determined that ten years is a satisfactory compromise between minimizing the impact a long-term large rent payment might have on a right-of-way holder and the costs to BLM and

industry of tracking numerous payments for relatively low dollar transactions.

One commenter said that small annual rents may generate less revenue than the cost of collecting them. The commenter said that therefore BLM should calculate how much it costs to send, collect, and process a rent bill, and automatically require advance payment for any rent amount below that cost. BLM agrees with the commenter in part and the final rule allows all right-of-way grant holders the option of making a non-refundable lump sum rental payment for the entire term of the grant. For private individuals not electing this one-time payment, you must pay at 10-year intervals if the annual rent is $100 or less or you may pay annually, or at some other annual interval, if the annual rent is more than $100. For all other holders, including corporations, associations, or other entities, you pay either a lump sum for the entire term or at 10-year intervals regardless of the amount of the annual rent. We did not establish a minimum rental requiring an automatic advance payment, as suggested, because we believe most grant holders having very low rental amounts will opt to pay the lump sum in advance so as not to be bothered with multiple future payments.

Several commenters said that the final rule should allow the option of paying all fees in advance and BLM should set grant fee amounts using net present value and the payments should be discounted by the time value of money. BLM agrees with this comment in part and the final rule allows for advance payments for the term of a grant. BLM does not agree with using any formula that would discount a lump sum rental payment to allow for the time value of money because there are many unknown variables used in determining discount rates and future rate increases in the schedule. Holders who pay rent in a lump sum up-front do not pay the rent increases (based on increases in the IPD–GDP) that would occur yearly over the term of the grant. This offsets the need to discount the lump sum payment by the time-value of money. This approach would reduce the already low linear schedule rentals and is not in the public interest.

Under certain limited circumstances BLM issues grants in perpetuity and therefore, BLM needs to establish a consistent process for calculating rent for these grants. Current BLM regulations and guidance do not specify the conditions under which BLM will issue a grant in perpetuity. There are a variety of circumstances under which it would be appropriate for us to issue a perpetual grant. For example, a perpetual grant may be necessary for BLM to protect the rights of grant holders when we dispose of Federal land encumbered by a right-of-way grant. We may also need to issue a perpetual grant in circumstances when holders must comply with local land use ordinances that may require a perpetual right in order to develop private property interests. We frequently issue perpetual grants to governmental entities for permanent facilities such as county roads.

In the preamble to the proposed rule, BLM invited comments concerning how long advance rental periods should be and what amounts should trigger a lump-sum rental payment (64 FR 32112). While we received several comments, none were related to determining lump sum rent for perpetual grants. Nonetheless, BLM believes it is important to establish an advance lump sum rental payment for any grant issued in perpetuity so that if BLM disposes of land, the holders will be protected from future rent increases imposed by a new landowner.

Under the final rule, for linear right-of-way grants issued in perpetuity, you must make a one-time rental payment before BLM will issue the grant, except individuals may make payments as described in (a)(2)(i) of this section. BLM calculates rent for grants issued in perpetuity by multiplying the annual rent by 100 or you may request from BLM a rent determination based on the prevailing price established by general practice in the vicinity of the right-of-way. In order for BLM to determine rent based on the prevailing price, you must prepare an appraisal report that explains how you estimated the rent. The appraisal report must meet all Federal appraisal standards and explain why you believe the rental amount initially calculated by BLM unreasonably exceeds the fair market value of the perpetual grant. You must prepare this report at your expense, and submit it for approval by a review appraiser delegated by BLM or the Department of the Interior. The BLM State Director must concur with the alternative rental payment amount approved by the review appraiser before BLM approves your request. If BLM denies your request, you must pay the amount BLM calculated in paragraph (c)(1) of this section. You may appeal this decision under section 2801.10 of this part.

The provisions in paragraph (c) were not in previous regulations. We added these provisions to provide a consistent approach across BLM for determining rent for perpetual right-of-way grants.

BLM believes it is reasonable and practical to collect rent based on a 100-year rental for a perpetual right-of-way. A common industry practice is to use a 99-year lease to represent near full ownership of a property. The 100-year term extends through 2 to 3 generations, and is considered sufficient ownership by many banks and lending institutions to provide security to justify large loan encumbrances. If a right-of-way holder needs a grant for a perpetual term to protect its rights, such as when BLM is planning to dispose of a parcel of land encumbered by a right-of-way grant, the holder should pay a fair market value rent to acquire the perpetual right-of-way grant.

In its 1995 audit of BLM's right-of-way program (U.S. Department of the Interior, Office of Inspector General Audit Report, Right-of-Way Grants, Bureau of Land Management, Report No. 95–I–747, March 1995) the Inspector General (IG) did a comparison of linear rents between public and private lands using a net present value method (see pages 5–7 and Appendix 4, pg 19 of the report). The IG obtained data on 18 rights-of-way (easements) granted by states and private individuals for various types of facilities across lands in four different states. These 18 rights-of-way were issued in perpetuity for a one-time, up-front, lump-sum payment. This data was converted to a common base to compare what the same rights-of-way would have cost had they been located on public lands. The data indicated that BLM was collecting only about 18 percent (utilizing the linear rent schedule) of the rent that the private and state land owners received in one-time, up-front, lump-sum payments. However, under final section 2806.23(c)(1), BLM will collect nearly 80% of the rent that the private and state land owners received in one-time, up-front, lump-sum payments. The provisions of section 2806.23(c)(1) are administratively simple to apply, and, as the above data indicates, will return a more realistic rental rate when BLM issues grants in perpetuity.

As noted above, in the proposed rule BLM invited suggestions and comments on how long an advance rental payment should cover and what amount should trigger an advance lump sum payment (see 64 FR 32106 and 32112). We received several comments on the subject of advance rental payments. Most industry-related comments supported advance rental payments for a longer term than one year or five years, including payments for the term of the grant, because this approach comes close to normal business practice

for private right-of-way acquisitions. Other commenters thought that advance rental payments for the term of a grant would result in lost revenues to the government on those lands where property values continue to rise. Because of the large number of low dollar rental payments, BLM believes it is a good business practice, administratively efficient, and cost saving to allow a holder to pay rent for the term of a grant. Allowing advance rental payment for the term of a grant eliminates BLM's workload associated with annually preparing notices, tracking payments, and recording deposits in cases where there is a minimal dollar return (see the U.S. Department of the Interior, Office of Inspector General Audit Report, Right-of-Way Grants, Bureau of Land Management, Report No. 95–I–747, March 1995, showing that 7,700 rental notices were for $34 or less). It also reduces paperwork for grant holders because they would not be required to track and pay rent numerous times over the life of the grant.

We disagree that collecting rent for the term of a grant, frequently a 30-year term, will result in lost revenue. If we collect fair market value rent for the term of a grant, the Government has ensured the up-front receipt of rental payments to the Treasury. While the Government may forego future indexed increases to the rent schedule over the term of the grant, this loss is offset by the Government saving administrative costs over the term of the right-of-way grant and by not having to pay the cost of tracking when payments are due and sending notices for those grants. Further, BLM does not reduce the one-time payment by discounting it to the present value of the payment.

Communication Site Rights-of-Way

BLM published a rule on November 13, 1995 (see 60 FR 57073), that provided for a communication use rent schedule and rent collection procedures. The final rule we publish today makes no substantive changes to the policies or procedures in that rule. BLM received a variety of comments about the communication use rent schedule that were previously addressed in the 1995 rule. Where appropriate, this rule cross references the preamble to the 1995 rule to address some of the public comments on the proposed rule that follow.

In the final rule we refer to communication use ''leases'' and communication use ''grants.'' The standard authorization BLM issues for communication site rights-of-way is a Communication Uses Lease, BLM Form 2800–18. This form's standard provisions allow the holder to sublease space in its facility to other users. When BLM determines it is appropriate to issue a right-of-way authorization that does not allow subleasing, such as to other Federal agencies, we use a standard BLM right-of-way grant Form 2800–14. This authorization does not allow the holder to sublease space in its facility without BLM's approval. Because a ''grant'' is defined at section 2801.5 to include a lease, a communication use lease is a form of a right-of-way grant. The terms are frequently used interchangeably, even though the authorizations have different terms and conditions, particularly those relating to subleasing.

Section 2806.30 What Are the Rents for Communication Site Rights-of-Way?

BLM uses the rent schedule for communication uses found in this section to calculate the rent for communication site rights-of-way. You can find a complete discussion of the rationale for using a schedule for determining communication site rent in the proposed rule at 64 FR 32112 through 32114. Please note that we do not use this schedule to calculate rent for telephone line or fiber optic rights-of-way, because they are linear rights-of-way and are covered by the linear rent schedule in section 2806.20. We amended final paragraph (c)(3) of this section to make this clear. Rights-of-way for cellular telephones are covered by the schedule in paragraph (b) of this section.

The communications use schedule is based on nine population strata (the population served), as depicted by the Ranally Metro Area population rankings (RMA), and the type of communication use or uses for which BLM normally grants communication site rights-of-way. You can find a detailed discussion of RMAs in the preamble for the communication site final rule at 60 FR 57062 (November 13, 1995). The uses the schedule covers are listed in the definition of ''communication use rent schedule,'' set out at section 2801.5 of this rule. You may obtain a copy of the communication use rent schedule from any BLM office or on BLM's National Home Page on the Internet.

BLM annually updates the communications use rent schedule based on two sources: the U.S. Department of Labor Consumer Price Index for All Urban Consumers, U.S. City Average (CPI–U), as of July 31 of each year (difference in CPI–U from August 1 of one year to July 31 of the following year); and the RMA population estimates. You can find a discussion of why BLM uses the CPI–U to update the schedule in the preamble to the communication site final rule at 60 FR 57064. The 1995 rule also explains why BLM limits annual adjustments based on the CPI–U to no more than 5 percent. Under this section, at least every 10 years BLM will review the rent schedule to ensure that the schedule reflects a rational fair market value estimate. Both the provision addressing adjustments and the provision addressing the time between reviews of the rent schedule are consistent with previous section 2803.1–2(d)(2)(i). There are several situations to which the communication use rent schedule does not apply, and those are listed in this section as well. This section is a rewording of proposed sections 2806.17(b)(1) through (5) to make them more clear.

We also made several other changes to proposed section 2806.17. We deleted from proposed paragraph (b)(1) (final section 2806.30 (c)(1)) ''Any other communication use, not directly associated with the lease operation, is not excluded'' because the sentence is unnecessary and does not add substance to the rule. We also added ''oil and gas pipeline grant'' to proposed paragraph (b)(2) (final section 2806.30(c)(2)) because it is a more common example than that in the proposed rule. There are far more communication sites ancillary to pipelines than railroad rights-of-way. In proposed paragraph (b)(4) we deleted reference to when rent is determined by appraisals or other reasonable methods and moved it to final section 2806.50 of these regulations. Finally, we reworded proposed paragraph (b)(5) (final section 2806.30(c)(5)), making it clear that the BLM State Director is the only authority that can make the determination that estimated rent would exceed the scheduled rent by five times or that in populations of more than one million, the rent is expected to exceed the scheduled rent by more than $10,000. For new technologies and the conditions listed in final paragraphs (c)(4) and (5), BLM would determine rent according to section 2806.50 of this subpart.

Several commenters addressed various issues related to communication site rights-of-way. The comments principally concerned the rent schedule and the way in which BLM would charge rents for communication sites.

One commenter said that if BLM increases rent payments for communication sites, counties will increase rents also. We believe the commenter was concerned that BLM will begin charging rent to the counties for communication site uses. Under this

final rule, local governments are exempt from paying rent, except when they are using the facility, system, space, or any part of the right-of-way area for commercial purposes (see section 2806.14(b)(1)).

For example, when BLM issues a communication site lease to a local government, *e.g.*, a county, and the local government (facility owner) leases space to other users for commercial purposes, then the local government must pay rent to BLM for the commercial activities being conducted on the right-of-way. In these cases the rent the local government owes would be based upon the tenant uses in the facility, not the local government's uses. In cases where there are only customer uses in a facility owned by a local government, and the local government is profiting from the occupant uses within the facility, then BLM would assess the local government based on the highest value use within the facility pursuant to section 2806.34(d). This is consistent with existing policy and previous section 2803.1–2(b)(1).

One commenter stated that BLM appeared to rely on the misapplied use of comparables from exceptionally high value urban areas. We received similar comments about other sections of this rule. One basis for the rent schedule is the population served, which recognizes a range of populations, from the high value urban areas to rural communities of less than 25,000 people. We believe that basing the rent schedules on the population served is a proper consideration in arriving at the fair market value of a communication site right-of-way. In addition, the population ranges appearing on the schedule fairly represent populations on and around public lands. This final rule does not change the communication uses rent schedule amounts in previous regulations. We continue to believe that the rent schedule amounts established pursuant to that rule are appropriate. Therefore, we did not amend the final rule as a result of the comments.

One commenter asserted that charging rents for telecommunications facilities was tantamount to a toll imposed by BLM on electronic commerce and discouraged co-locating facilities on rights-of-way. We disagree. Communication site right-of-way holders on public land paid rental under FLPMA and even pre-FLPMA authorities prior to the 1995 communication site policy (see 60 FR 57058). As previously stated, section 504(g) of FLPMA requires holders to pay fair market value for the use of public land. This final rule restates existing policy and law and is not imposing a ''toll'' on electronic commerce. We also disagree that this policy discourages co-locating facilities. This rule and the 1995 policy encourage co-location of facilities by allowing a holder to sublease space in its facility to customers and tenants. Prior to 1995, customers and tenants were required to hold separate grants and all users paid full fair market value.

Several commenters objected to the way that BLM proposed to calculate rents for communications sites when the nature of the site is such that BLM would conduct a separate appraisal rather than use the rent schedule for the site. These commenters asserted that individual appraisals would cause undue hardship for many communication site grant holders and would single out telecommunications carriers for higher rents. We disagree with the commenter. One of the objectives of today's rule, consistent with BLM's 1995 communication site rule, is to eliminate the need to perform individual appraisals for communication sites because of the high costs to perform the analysis. Previous regulations at 2803.1–2(c)(1)(i) contained similar provisions. This final regulation allows for individual appraisals in population areas of 1,000,000 or more when the rent is expected to be $10,000 above the scheduled rate, or in situations where estimated rent exceeds the schedule by five times. BLM State Director approval is needed in both of these circumstances. Appraisals may also be necessary to set minimum rents in competitive bid situations and to set rents for uses and technologies not currently on the schedule. We believe that there will be very few situations where an appraisal will be necessary for communication sites.

Several commenters opposed separating the criteria that BLM would use to determine when to conduct a separate appraisal of the rent due on a grant. One stated that conducting individual appraisals would be a disincentive to co-locate facilities and would cause undue hardship for many grant (permit) holders. Another commented that there were no criteria as to what types of use would trigger an alternative valuation or what level of expected rent would warrant a separate appraisal. The final rule is clear on the criteria for not using the schedule. As explained above, individual appraisals would be considered if new technologies are present or the criteria in final paragraphs (c)(4) and (5) are met. We believe that final sections 2806.30(c)(1) through (5) adequately describe the situations when BLM would not use the schedule to calculate a communication use rent.

One commenter suggested that the final rule should more accurately describe how BLM annually indexes the fees, and suggested the following language for the final rule:

> BLM annually updates the schedule based on two sources: the U.S. Department of Labor Consumer Price Index for All Urban Consumers, published in July of each year and the population estimates for the Ranally Metro Areas published annually in the Rand McNally Commercial Atlas and Marketing Guide.

We believe that final paragraph (a)(2) of this section provides adequate guidance on indexing fees and is similar to what the commenter suggested.

Commenters said that for communities of less than 50,000 people, BLM uses the most recent Census Bureau data to determine the size of communities served by communication sites. They recommended that size be more accurately stated, saying that for communities of less than 50,000 people, the agency will use the populations listed in the most current edition of the Rand-McNally Road Atlas as the source for determining the appropriate ''population served'' category in the communications use fee schedule. BLM agrees with the commenters. The preamble to the proposed rule stated that BLM uses the most recent Census Bureau data to determine population size for communities of less than 50,000 people. In the final rule we use the most current edition of the Rand-McNally Road Atlas as the source for these population determinations. The final rule states this clearly (see final section 2806.32(a)(4)).

Section 2806.31 How Will BLM Calculate Rent for a Right-of-Way for Communication Uses in the Schedule?

This section explains that for single-use facilities, BLM applies the rent from the communication use rent schedule for the type of use and the population strata it serves. For multiple-use facilities, whose authorization provides for subleasing, BLM sets the rent of the highest value use in the facility or facilities as the base rent (taken from the rent schedule) and adds to it 25 percent of the rent from the rent schedule for all tenant uses in the facility or facilities, if a tenant use is not used as the base rent (rent = base rent + (25 percent of all rent due to additional uses in the facility or facilities). For example, a single use commercial mobile radio service (CMRS) facility owner would pay the CMRS rate for the population served. If the same CMRS facility owner subleased space in his facility to a cellular

provider, the cellular provider's rent would be the base rent, and 25 percent of the CMRS rate would be added to that to determine the total rent due. You can find additional details on calculations for single-use facilities in final section 2806.33 and for multiple-use facilities in final section 2806.34.

When calculating rent, BLM will exclude customer uses, except as provided for in final sections 2806.34(b)(4) and 2806.42, and those exempted uses described in section 2806.14, and any uses whose rent has been waived or reduced to zero as described in section 2806.15.

By October 15 of each year, you, as a communication site grant or lease holder, must submit to BLM a certified statement listing any tenants and customers in your facility or facilities and the category of use for each tenant or customer as of September 30 of the same year. BLM may require you to submit any additional information needed to calculate your rent, such as private lease agreements with tenants and customers that would provide information on fees the building or facility owner charges for space in its facility. BLM will determine the rent based on the certified statement provided. We require only facility owners or facility managers to hold a grant or lease (unless you are an occupant in a federally-owned facility as described in section 2806.42), and will charge you rent for your grant or lease based on the total number of communication uses within the right-of-way and the type of uses and population strata the facility or site serves. This final rule is slightly different from the proposal. We reworded it to provide additional explanation of the process BLM uses to calculate rent for communication uses. We originally established this process in previous section 2803.1–2(d).

We reworded proposed sections 2806.18(a)(1) and (a)(2) (final sections 2806.31(a)(1) and (a)(2)) to make them clearer and added language in final section (a)(2) to explain that in order to have a multiple use facility, the authorization must allow for subleasing. We added this provision to explain existing policy. We added similar language in final sections 2806.34(a) and 2806.36(a).

Final section 2806.31(b) explains the exclusions that BLM considers in calculating rent and references the sections in the final regulations where those exclusions are described. Exceptions are also noted. Final paragraph (c) of this section makes clear that it is only the holder of a grant or lease, not tenants and customers, that must submit an annual statement of who is in the facility.

Several commenters said that in paragraph (c) we should replace ''tenants'' with ''tenants and customers'' since that is the phrase used in the ''clauses or stipulations in the leases used by BLM and the Forest Service.'' The commenters also said that facility managers and owners may not understand the definition of ''customer or tenant'' and therefore may not report an accurate inventory of all of the uses in each facility. BLM agrees with the comment and added the phrase ''tenants and customers'' in this section rather than only ''tenants.'' Section 2801.5 of these regulations provides definitions for both terms.

Section 2806.32 How Does BLM Determine the Population Strata Served?

This section outlines the processes currently described in BLM policy for determining the population served by a communication facility. This information was in the proposed rule at section 2806.19(b). We made it a separate section in the final rule so that our communication site users clearly understand how we determine the population served. We also eliminated proposed section 2806.19(c), because we do not make case-by-case exceptions to the population guidelines described below.

BLM determines the population served as follows:

(A) If the site or facility is in a designated RMA, BLM will use the population strata of the RMA;

(B) If the site or facility is in a designated RMA, but serves two or more RMAs, BLM will use the population of the RMA having the greatest population;

(C) If the site or facility is outside an RMA, but it serves one or more RMAs, BLM will use the population of the RMA having the greatest population;

(D) If the site or facility is outside an RMA and the site does not serve an RMA, BLM will use the population of the community it serves having the greatest population as identified in the current edition of the Rand McNally Road Atlas. BLM will not add the populations of several communities together to determine the population served; and

(E) If the site or facility is outside an RMA and serves a community of less than 25,000 persons, BLM will use the lowest population strata shown on the rent schedule.

In calculating rent, all uses within the same facility must serve the same RMA or community, and all uses in the same facility or authorized under the same lease must serve the same population strata. In other words, when BLM issues a grant or lease, the holder and all of the tenant and customer uses in the facility are considered to serve the RMA or community with the greatest population. High and low power uses may be located in the same facility and serve different RMAs or communities, but they would all be charged according to the largest RMA or community served by any user within the facility. A site may accommodate a mix of high and low power users, but as long as these users are not located in the same facility or authorized by the same lease, BLM can make a case-by-case determination of the population served by each facility (*e.g.*, the high power facility could serve an RMA and the low power facility could serve a closer community and not reach the RMA). The section also makes clear that BLM will not modify or change the population rankings published in the Rand McNally Commercial Atlas and Marketing Guide or the population of the community served.

Several commenters said that proposed paragraph (b)(2) should make clear that if a site or facility is located in an RMA, but serves two or more RMAs, you should use the population of the largest RMA served in calculating rent. We agree and the final rule is clear on this issue at final section 2806.32(a)(2).

Several commenters said that under the proposed rule, a permit holder could serve a ''*de minimus* percentage of a large RMA'' and still be required to pay rent as if the entire RMA was served. The commenters said that the proposed rule ensures that BLM will charge the highest possible rent regardless of the percentage of the population served in a given area and that may be inequitable. In situations where only a small part of a large RMA is served, under this final rule and under existing policy, we calculate rent for the entire RMA. This is because no accurate means exists to measure and verify percentages of the population served within any given RMA. Even if it were possible to verify that a particular communication use served only 10 percent of the population of an RMA, for example, it would be incorrect to use the population figure represented by the 10 percent as the basis to establish rent. The reason is that RMAs are an indicator of current economic activity that is taking place within that area. Markets in a particular area determine rent, not the area of the market that the use serves. For example, a television station serving the Phoenix market pays significantly more rent for its

communication facility, whether it is located on private or public lands, than does a television station serving the Dillon, Montana market.

The rent or payment for a particular communication use is not dependent on that service reaching 100 percent of the population in an RMA. In fact, most communication uses do not serve the entire population of an RMA, either due to natural physical constraints (frequency shadow area from mountains, for example) or from the user's own business decisions, or because a particular use, such as PCS (mobile telephone use), is limited by its own technology to serve only a portion of a particular area or RMA. For example, one television station may have a 50% market share in an RMA, while another competing television station may only have a 10% market share in the same RMA. A private communication provider would charge each TV station the same rental rate, as should BLM using our communication use rent schedule. Likewise, the programming format of a television or radio station, which inherently limits the population the station might serve, has no bearing on the rent. The programming format of one station may be jazz, while another is country, while another is classical, and another talk. While most programming is in English, some radio stations may broadcast in a different language and intentionally try to reach a very limited market. Each may only serve a narrow percentage of the total RMA, but the rent for each use is calculated based on the population of the entire RMA.

BLM realizes that some users have been subject to significant rent increases when a smaller RMA that their communication use had been serving is combined by Rand McNally with a much larger RMA. The holder's communication use may still be serving the same number of people, but now its service area has been combined and made part of a much larger economic unit. Under these conditions, BLM is still obligated to determine rent based on service to the new, larger RMA. If payment of the new rental amount creates undue financial hardship, the holder can request a reduction in rent under final section 2806.15. The final rule makes clear that BLM will not modify or change the population rankings published in the Rand McNally Commercial Atlas and Marketing Guide or the population of the community served due to the reasons cited above.

Section 2806.33 How Will BLM Calculate the Rent for a Grant or Lease Authorizing a Single Use Communication Facility?

This section explains that BLM calculates the rent for a grant or lease authorizing a single-use communication facility from the communication use rent schedule based on the type of use and the population served.

This section was proposed as section 2806.19(a) and is similar to that provision. The provisions in proposed sections 2806.19(b) and (c) are now in final section 2806.32.

Section 2806.34 How Will BLM Calculate the Rent for a Grant or Lease Authorizing a Multiple-Use Communication Facility?

This section explains that for multiple-use communication facilities:

(A) BLM first determines the population strata the communication facility serves according to section 2806.32 of this subpart; and

(B) Then calculates the rent assessed to facility owners or facility managers for a grant or lease for a communication facility that authorizes subleasing with tenants, customers, or both, using the procedures listed.

Under this section, using the communication use rent schedule, BLM will determine the rent of the highest value use in the facility or facilities as the base rent, and add to it 25 percent of the scheduled rent for each tenant use in the facility or facilities. The highest value use is the use that has the highest dollar value in the communication use rent schedule. This highest value use is central to the definition of base rent. If the highest value use is not the use of the facility owner or facility manager, BLM will consider the owner's or manager's use like any tenant or customer use in calculating the rent. However, if a facility owner is engaged in a PMRS, internal microwave, or ''other'' use, and that use is not the highest value use in the facility, then BLM excludes these uses when calculating the additional 25 percent amount under paragraph (a)(1) (see final section 2806.35(b)). Likewise, BLM excludes the facility manager's use in the 25 percent calculation (see final section 2806.39(a)) when its value does not exceed the highest value in the facility. If a tenant's use is the highest value use, BLM will exclude the rent for that tenant's use when calculating the additional 25 percent amount under paragraph (a)(1) of this section.

If the same grant or lease authorizes a grant holder multiple uses, such as a TV and a FM radio station, BLM will calculate the rent as in paragraph (a)(1) of this section. In this case, the TV rent would be the highest value use and BLM would charge the FM portion according to the rent schedule as if it were a tenant use. The proposed rule at section 2806.20(a)(4) stated we would use ''the sum of each use'' when calculating rent in these situations. We believe that this phrase was misleading. For example, one might have incorrectly determined that the base rent for the example discussed above was the full value of the TV and FM stations added together. Therefore, we deleted the phrase from the final rule.

This section also describes the process to calculate rent for several combinations of holder, tenant, and customer situations. These rental calculation situations were not covered in previous regulations, but are included here so members of the public and BLM staff would better understand when certain special calculation policies apply.

In calculating rents, BLM will exclude a facility owner's or facility manager's exempted uses described in final section 2806.14, or uses whose rent has been waived or reduced to zero in final section 2806.15. Uses of certain non-profit corporations providing benefits to the public would qualify under this latter citation.

BLM will exclude exempted uses, or uses whose rent has been waived or reduced to zero, of a customer or tenant if they choose to hold their own lease or are occupants in a Federal facility.

BLM will charge rent to a facility owner whose own use is either exempted, waived, or reduced to zero, but who has tenants in its facility, in an amount equal to the rent of the highest value tenant use plus 25 percent of the rent from the rent schedule for each of the remaining tenant uses subject to rent. For example, a non-profit facility owner operates an FM radio translator whose rent BLM has waived, and it has two tenants in the facility, one of which operates a CMRS and the other a television translator. Rent for the holder is based on the CMRS use, which is the highest value use, and to this is added 25 percent of the schedule rate for the television translator. Under this example, the holder's not-for-profit FM radio use does not contribute to rent.

This section also explains (at section 2806.34(b)(3)) that BLM will not charge rent to a facility owner, facility manager, or tenant (when it holds a grant or lease) when all of the following occur:

(A) BLM exempts from rent, waives, or reduces to zero the rent for the holder's use;

(B) Rent from all other uses in the facility is exempt, waived, or reduced to zero or BLM considers such uses as customer uses; and

(C) The holder is not operating the facility for commercial purposes with respect to such other uses in the facility.

If a holder whose own use BLM exempts from rent, or whose rent has been waived or reduced to zero, is conducting a commercial activity with customers or tenants whose uses are similarly without rent, BLM will charge rent based on the highest value use within the facility. For example, if an exempt county grant holder subleases space to a private mobile radio customer (PMRS) and charges the customer a fee to locate its equipment in the facility, the county and customer are conducting a commercial activity in the facility. BLM would assess rent to the county at the PMRS rate. Proposed section 2806.20(b)(4) incorrectly stated this rule in providing that the customer or tenant uses were ''not'' exempt from rent. The rule only applies to exempted uses or those uses whose rent has been waived or reduced to zero. This paragraph does not apply to facilities exempt from rent under section 2806.14(d) of this subpart except when the facility also includes non-eligible facilities.

Several commenters said that the final rule should add ''plus 25% of the fee schedule rate for all other exempted tenant uses'' to the end of proposed section 2806.20(b)(4) (final section 2806.34(b)(4)). BLM disagrees. Proposed section 2806.20(b)(4) contained an error that changes the meaning of the rule. The phrase ''customers and tenants that are *not* exempt from rent'' should have been ''customers and tenants that are *also* exempt from rent.'' For example, in situations where all uses in a facility are customer-related uses or exempted tenant uses and the holder of the facility is operating that facility for commercial purposes, BLM will assess a rent for the highest value use in that facility, but does not add 25 percent for the additional exempted uses. This rule recognizes the commercial activity in the facility and allows the United States to collect a rental for the commercial activity. Therefore, we did not add the language suggested by commenters.

Section 2806.35 How Will BLM Calculate Rent for Private Mobile Radio Service (PMRS), Internal Microwave, and ''Other'' Category Uses?

The term ''other'' is defined in section 2801.5 of this rule (see the ''Communication use rent schedule at (9)) and is used in the rent schedule at the far right of the rent schedule chart. This section explains that when an entity engaged in a PMRS, internal microwave, or ''other'' use is:

(A) Using space in a facility owned by either a facility owner or facility manager, BLM will consider the entity to be a customer and not include these uses in the rent calculation for the facility. In the final rule we replaced the phrase ''in someone else's facility'' with ''facility owner or facility manager'' to make the rule more specific and easier to understand; or

(B) The facility owner, BLM will follow the provisions in section 2806.31 of this subpart to calculate rent for a lease involving these uses. However, we include the rent from the rent schedule for a PMRS, internal microwave, or other use in the rental calculation only if the value of that use is equal to or greater than the value of any other use in the facility. BLM excludes these uses in the 25 percent calculation (see final section 2806.31(a)) when their value does not exceed the highest value in the facility. This is because these uses become customer uses and are not subject to rent (see the definition of ''customer''). We reworded proposed section 2806.21 to make the final rule clearer.

One commenter said that BLM should avoid using the term ''exempt'' when describing how BLM considers customer uses when determining communication use rentals. The commenter said the final regulations should read: ''The PMRS, internal microwave, or ''other'' use would not be included in the rental calculation.'' We agree with the commenter. In the final rule we do not use the term ''exempt.'' The uses commenter listed are excluded from the rental calculation.

Section 2806.36 If I Am a Tenant or Customer in a Facility, Must I Have My Own Grant or Lease and, if So, How Will This Affect My Rent?

This section explains that you may have your own authorization (a lease or a grant), but BLM does not require a separate lease for tenants and customers using a facility authorized by a grant or lease that allows subleasing. BLM charges the facility owner or facility manager rent based on the highest value use within the facility (including any tenant or customer use authorized by a separate lease) and 25 percent of scheduled rent for each of the other uses subject to rent (including any tenant or customer use authorized by a separate lease and the facility owner's use if it is not the highest value use). We included ''facility manager'' in the final rule to reflect the fact that a facility manager is generally the right-of-way holder.

We added a new paragraph (b) to this section to make it clear that when someone owns a building, equipment shelter, or tower on public lands for communication purposes, they must have a BLM right-of-way authorization for their improvements, even if they are a tenant or customer in someone else's facility. This provision is consistent with current policy and will eliminate confusion among some right-of-way holders.

This section also explains that BLM will charge tenants and customers who hold their own lease in a facility, as grant or lease holders, the full annual rent for their use based on the BLM communication use rent schedule. Moreover, BLM will include such tenant or customer use in calculating the rent the facility owner or facility manager must pay.

The provisions in this section were proposed in section 2806.22, and except for the changes listed above and minor changes in terminology, this section remains as proposed.

Section 2806.37 How Will BLM Calculate Rent for a Grant or Lease Involving an Entity With a Single Use (Holder or Tenant) Having Equipment or Occupying Space in Multiple BLM-Authorized Facilities To Support That Single Use?

This section explains that for leases involving an entity (holder or tenant) with a single use having equipment or occupying space in multiple BLM authorized facilities to support that single use, BLM will include the single use to calculate rent for *each* grant or lease occupied by that use. A single use occurs, for example, if a television station locates its antenna on a tower authorized by lease ''A'' and locates its related broadcast equipment in a building authorized by lease ''B.'' Under the requirement in final section 2806.31(c) to list tenants and customers in each facility, television use would be included in each facility because each facility is benefitting economically from having the television broadcast equipment located there, even though the combined equipment is supporting only one single end use. The television station use would be included in the rental calculation for both lease ''A'' and lease ''B.'' With the exception of minor editorial changes, this section is substantially equivalent to proposed section 2806.23(a).

Section 2806.38 Can I Combine Multiple Grants or Leases for Facilities Located on One Site Into a Single Grant or Lease?

Under this section, with BLM's approval, if you hold multiple authorizations for two or more facilities on the same site, you can combine all those uses under one grant or lease. The highest value use in all the combined facilities becomes the base rent. BLM then charges each remaining use in the combined facilities at 25 percent of the rent taken from the schedule. These uses include uses we previously calculated as base rents when BLM authorized each of the facilities on an individual basis. This section was proposed as section 2806.23(b).

One commenter said that this final section should state that authorizations will be combined when it is in the public interest and at BLM's discretion. The commenter also said that the final rule should make clear that when facilities are combined under a single authorization, the previous base rents will be included at the 25 percent rate as tenants. BLM agrees with this comment and added language to the final rule to specify that you must have BLM approval to combine multiple leases for facilities on one communication site into one lease. We also added the last sentence to the paragraph to make it clear that once facilities are combined under one authorization, there would be one highest value use determining base rent and all other contributing tenant uses would be at the 25 percent rate.

Section 2806.39 How Will BLM Calculate Rent for a Lease for a Facility Manager's Use?

This section explains that BLM will follow section 2806.31(a) to calculate rent for a lease involving a facility manager's use. However, we include the rent from the rent schedule for a facility manager's use in the rental calculation only if the value of that use is equal to or greater than the value of any other use in the facility. BLM excludes the facility manager's use in the 25 percent calculation in section 2806.31(a) when it does not exceed the highest value use. For example, if a facility manager leased space to a lower valued broadcast translator, the facility manager would be the highest value use setting base rent and the broadcast translator would enter the 25 percent calculation in section 2806.31(a). If the facility manager also leased space to a cellular company, the higher valued cellular company use would determine the base rent, the broadcast translator would enter the 25 percent calculation, and we would not include the facility manager in the rent calculation. This section was proposed as section 2806.24.

If you are a facility owner and you terminate your use within the facility, but want to retain the lease for other purposes, BLM will continue to charge you for your authorized use until BLM amends the lease to change your use to facility manager or to some other communication use. We added this paragraph to the final rule to make it clear that when a holder's use changes, the holder needs to amend its lease to reflect the change in use. If the holder didn't request an amendment, the holder would continue to pay for a use that no longer exists in the facility.

Section 2806.40 How Will BLM Calculate Rent for a Grant or Lease for Ancillary Communication Uses Associated With Communication Uses on the Rent Schedule?

This section explains that if you use ancillary communication equipment, such as a microwave relay, directly related to operating, maintaining, and monitoring the primary use of a grant (see the definition of ''Communication use rent schedule'' in section 2801.5 of this part), BLM will calculate and charge rent only for the primary use. This section was proposed as section 2806.25(a). In the final rule we replaced the phrase ''internal mobile radio and microwave systems'' with ''ancillary communications equipment'' because we no longer use the term ''internal mobile radio'' anywhere in this rule. Also, we replaced the phrase ''give support or connect one another on the same communications facility'' with ''is used solely in direct support of the primary use'' and added a cross-reference to the definition of ''Communication use rent schedule.'' This definition states that ancillary communication equipment is directly related to operating, maintaining, and monitoring the primary use, and more accurately describes what uses we consider to be ancillary. We dropped proposed section 2806.25(b) from the final rule because it did not describe ancillary uses and was therefore unnecessary in this section. We received no substantive comments on this section.

Section 2806.41 How Will BLM Calculate Rent for Communication Facilities Ancillary to a Linear Grant or Other Use Authorization?

When BLM authorizes a communication facility which is ancillary to a linear grant, or some other type of use authorization (*e.g.*, a mineral lease or sundry notice), BLM will determine the rent using the linear rent schedule (see section 2806.20) or rent scheme associated with the other authorization, and not the communication use rent schedule. This section was proposed as section 2806.25(c). We reworded the entire paragraph of the proposed rule making it easier to understand. We deleted the last sentence of the proposed rule because it was not an accurate statement.

Section 2806.42 How Will BLM Calculate Rent for a Grant or Lease Authorizing a Communication Use Within a Federally-Owned Communication Facility?

This section explains that if you are an occupant of a federally-owned communication facility, you must have your own grant or lease and pay the full rent from the rent schedule. If a Federal agency holds a grant or lease and agrees to operate the facility as a facility owner under section 2806.31 of this subpart, occupants do not need a separate BLM grant or lease. In this case, BLM will calculate and charge rent to the Federal facility owner under sections 2806.30 through 2806.44 of this subpart.

This section was proposed as section 2806.26. We reworded the proposed rule to clear up misunderstandings about Federal agency grant holders paying rent. Several commenters were concerned BLM was going to start assessing rent for Federal grant holders (see the discussion of comments in section 2806.14) and this section explains how that may occur in the case of a communication site lease. We reworded the second paragraph of the proposed rule to explain that a Federal agency must be willing to accept a grant or lease and operate the facility as a facility owner before tenants would not need a separate right-of-way grant.

Commenters said that Federal agencies do not fit within the definitions of ''facility manager'' or ''facility owner,'' since subpart 2806, regarding rent, cannot apply to Federal agencies, even those that have commercial ventures and otherwise may fit the descriptions of ''facility manager or owner.'' For the reasons discussed earlier in sections 2801.5 and 2806.14, BLM disagrees with this comment. The final rule allows for a Federal agency to become a facility owner if it so chooses. In practical terms, we realize that few Federal agencies will choose to become a facility manager or owner.

One commenter said that we should rewrite the first sentence of proposed section 2806.27 as follows: ''In the first year of implementation of the rent

schedule, CY 1997, BLM will phase-in over a 5-year period any rent in excess of $1,000 increase from CY 1996 rents.'' The commenter said that the proposed rule could be misinterpreted to mean that BLM would apply the phase-in of rent any time there was an increase in rent of $1,000 or more. We assume that the commenter's mention of CY 1997 refers to the fact that calendar year 1997 was the first year that the communication use rent schedule was effective. The preamble to the proposed rule at 64 FR 32113 (June 15, 1999) notes that 1997 was also the first year of BLM's 5-year phase-in period for the communication use rent schedule. Because more than five years have passed since the communication use rent schedule was effective, all qualifying cases for phase-in rent have been completed. This fact has caused us to delete this section from the final rule.

Section 2806.43 How Does BLM Calculate Rent for Passive Reflectors and Local Exchange Networks?

This section explains that BLM calculates rent for passive reflectors and local exchange networks by using the same rent schedules for passive reflectors and local exchange networks that the Forest Service uses for the region in which the facilities are located. You may obtain the pertinent schedules from any Forest Service or from any BLM state office in the region in question. For passive reflectors and local exchange networks not covered by a Forest Service regional schedule, BLM uses the provisions in section 2806.50 of this subpart to determine rent.

This section also includes definitions of the terms ''passive reflector'' and ''local exchange networks'' that are new to the final rule. We added these terms so that BLM field personnel and grant holders understand the terms and, for example, do not confuse a radio phone local exchange network with a private mobile radio service. We use Forest Service definitions here since we base our rent for these uses on the Forest Service schedule (see Forest Service Handbook 2709.11–2000–1, Chapter 48.12 (e) and (f)). This section was proposed as sections 2806.28(a) and (d). Proposed section 2806.28(b) is covered in final section 2806.50 and proposed section 2806.28(c) is covered in final section 2806.16.

Section 2806.44 How Will BLM Calculate Rent for a Facility Owner or Facility Manager's Grant or Lease Which Authorizes Communication Uses Subject to the Communication Use Rent Schedule and Communication Uses Whose Rent BLM Determines by Other Means?

This section explains how BLM calculates rent for a facility owner or facility manager's lease which includes communication uses subject to the communication use rent schedule *and* communication uses whose rent BLM determines by other means. BLM determines the rent for a use not on the communication use rent schedule under section 2806.50 of this subpart. For those uses on the rent schedule, BLM establishes rent using sections 2806.30 and 2806.31 of this subpart. We determine the facility owner or the facility manager's rent by identifying the highest rent in the facility and adding to it 25 percent of the rent of all other uses subject to rent. We erroneously omitted this section from the proposed rule. Although it rarely occurs, BLM believes it is necessary to make clear how rent should be calculated in these situations.

Other Rights-of-Way

Section 2806.50 How Will BLM Determine Rent for a Grant When Neither the Linear Rent Schedule at Section 2806.20 Nor the Communication Use Rent Schedule at Section 2806.30 Applies?

This section explains that when neither the linear nor the communication use rent schedule is appropriate, BLM determines your rent through a process based on comparable commercial practices, appraisals, competitive bid, or other reasonable methods, such as developing a new schedule. BLM will notify you in writing of the rent determination. If you disagree, you may appeal BLM's final determination under section 2801.10 of this part. This section is based on proposed section 2806.28(b) and the requirements are the same as that proposed rule.

Several commenters were opposed to the alternate rent calculation to recover fair market value. The commenters said that the provision did not contain criteria ''as to what types of use would trigger an alternate valuation or what level of expected rent would warrant a separate appraisal or on what the expectation would be based.'' The commenters also said that BLM should not use a higher rental valuation for telecommunication carriers than we do for other types of carriers. BLM disagrees with the commenters. Final section 2806.30(c)(1) through (5) sets forth the occasions when we would not use the communication use rent schedule to determine rent. Appraisals may be appropriate for new technologies, competitive bidding, and certain conditions described in paragraph (c)(5) of this section. Finally, we do not use a higher valuation for telecommunication carriers than we do for other types of carriers.

Subpart 2807—Grant Administration and Operation

This subpart describes administration and operations activities under grants. It covers topics such as:

(A) When grant holders can start using their right-of-way;

(B) When grant holders must contact BLM;

(C) Liability for different kinds of grant holders;

(D) Policies relating to terminating or suspending grants;

(E) How to amend or assign grants; and

(F) Policies relating to renewing grants.

Section 2807.10 When Can I Start Activities Under My Grant?

This section explains that when you can start activities under your grant depends on the terms of the grant. You can start activities when you receive the grant you and BLM signed, unless the grant includes a requirement for BLM to provide a written Notice to Proceed. If your grant contains a Notice to Proceed requirement, you may not initiate construction, operation, maintenance, or termination until BLM issues you a Notice to Proceed.

We received no comments on this section. With the exception of editorial changes, this section remains as proposed.

Section 2807.11 When Must I Contact BLM During Operations?

This section explains that you must contact BLM:

(A) At the times specified in your grant;

(B) When your use requires a substantial deviation from the grant. You must obtain BLM's approval before you begin any activity that is a substantial deviation;

(C) When there is a change affecting your application or grant, including, but not limited to, changes in:

(1) Mailing address;

(2) Partners;

(3) Financial conditions; or

(4) Business or corporate status;

(D) When you submit a certification of construction, if the terms of your grant

require it. A certification of construction is a document you submit to BLM after you have finished constructing a facility, but before you begin operating it. The certification verifies that you have constructed and tested the facility to ensure that it complies with the terms of the grant and with applicable Federal and state laws and regulations; and

(E) When BLM requests it. You must update information or confirm that information you submitted before is accurate.

We changed paragraph (b) of this section by moving the definition of the term ''substantial deviation'' from this section to the definitions section of subpart 2801. We did this because the term is used more than once in these regulations and it is redundant to define the term the same way in two separate places. We also added language to specify that you must obtain BLM's approval before you begin any activity that substantially deviates from the activity the grant allows. This is a requirement of previous section 2803.2(b) that we inadvertently omitted from the proposed rule.

We amended paragraph (d) of this section by adding a better explanation of a ''certification of construction.''

We also added a new paragraph (e) to this section. This provision is in previous section 2803.2(c). We inadvertently omitted it from the proposed rule.

Several commenters objected to being required to contact BLM every time they have to install a piece of equipment on existing poles on the lands in the grant to correct for hazardous situations or low clearances. Other commenters had the same concerns over small buildings used for storage. Some of the commenters said this type of information is not essential to BLM. The contact requirement of section 2807.11(b) applies only to uses that are not authorized in an existing grant. The National Environmental Policy Act requires BLM to assess the impacts of uses of the public lands before authorizing or allowing such uses and this contact requirement is essential to enable BLM to meet its obligations under this statute.

Section 2807.12 If I Hold a Grant, for What Am I Liable?

This section explains your liabilities as a grant holder. You are liable to the United States for any damage or injury it incurs in connection with your use and occupancy of the right-of-way. Similarly, you are liable to third parties for any damage or injury they incur in connection with your use and occupancy of the right-of-way.

You are also strictly liable for any activity or facility associated with your right-of-way area that BLM determines presents a foreseeable hazard or risk of damage or injury to the United States. BLM will specify in the grant any activity or facility posing such hazard or risk, and the financial limitations on damages commensurate with such hazard or risk. BLM will not impose strict liability for damage or injury resulting primarily from an act of war, an act of God, or the negligence of the United States, except as otherwise provided by law. As used in this section, strict liability extends to costs incurred by the Federal Government to control or abate conditions, such as fire or oil spills, which threaten life, property, or the environment, even if the threat occurs to areas that are not under Federal jurisdiction. This liability is separate and apart from liability under other provisions of law.

This section explains that you are strictly liable to the United States for damage or injury up to $2 million for any one incident. BLM will determine liability for any amount in excess of this strict liability cap through the ordinary rules of negligence under section 504(h)(2) of FLPMA.

The proposed rule would have increased the strict liability cap from $1 million to $5 million. Many comments indicated that the increase was too great. The final rule increases the strict liability cap from the previous $1 million cap to a $2 million cap. We arrived at the $2 million cap by looking at the increases from 1980 (when the cap was instituted) to 2004 in both the IPD–GDP (+ 105%) and the CPI–U (+ 138%). Adjusting the $1 million cap by the change in the IPD–GDP over this period equals $2,050,000. Adjusting the $1 million cap by the change in the CPI–U over this same period equals $2,380,000. Therefore, we believe that increasing the strict liability cap to $2 million is reasonable.

To keep the cap current with changes in economic conditions, the final rule applies an annual adjustment factor based on the change in the CPI–U, as of July of each year (the difference in CPI–U from July of one year to July of the following year). This increase (rounded to the nearest $1,000) will take into account inflation and will provide better protection of Federal lands.

The $2 million cap does not apply to the release or discharge of hazardous substances on or near the grant, or where liability is unrestricted under other laws.

This section explains that the rules of subrogation apply in cases where a third party caused the damage or injury. This means that when a grant holder compensates the United States in strict liability for damage or injury caused by a third party, the grant holder steps into the place of the United States and has the right to pursue compensation from the third party for the damage or injury done to the United States.

If you cannot satisfy claims for injury or damage, all owners of any interests in, and all affiliates or subsidiaries of any holder of, a grant, except for corporate stockholders, are jointly and severally liable to the United States. If BLM issues a grant to more than one person, each is jointly and severally liable. Joint and several liability in a grant means that each person who holds an interest in a grant is responsible for the full amount of liability if the other grant holders cannot satisfy the liability. This provision is in previous regulations at sections 2803.1–5(g) and (i).

This section also explains that by accepting the grant, you agree to fully indemnify or hold the United States harmless for liability, damage, or claims arising in connection with your use and occupancy of the right-of-way areas.

The provisions of this section do not limit or exclude other remedies. This provision is consistent with existing policy and previous section 2803.1–5. We inadvertently omitted it from the proposed rule and therefore added it here.

We reworded and reorganized proposed sections 2807.12(b) and (f) by consolidating the provisions describing the strict liability items that will appear in a grant into final section 2807.12(b) and by making it clear that the financial limitations on damages specified in the grant will be commensurate with the hazard or risk BLM determines. We also added wording to make clear that the strict liability cap applies for any one incident. Previous section 2803.1–5(b) stated that the limitation was for any one event. We inadvertently omitted the wording in the proposed rule and therefore added it to the final rule to be consistent with ongoing policy and previous regulations.

We revised proposed section 2807.12(h) to add tribal governments and to remove the statement that state and local governments may be excepted from the requirements of section 2807.12. This exception language may cause confusion and is not consistent with previous section 2803.1–5(f) or BLM policy. Liabilities of state, tribal, and local governments are discussed in final section 2807.13.

Except for the changes in the increase in the maximum strict liability financial limitation from $1 million to $2 million, and the provision for no maximum

limitation on strict liability resulting from damages or injuries caused by the release or discharge of hazardous substances or as otherwise provided by law, the final rule is substantially equivalent to previous section 2803.1–5.

Several commenters said that final section 2807.12(a) should make clear that the grant holder is only liable to third parties for damage or injury that is a result of the grant holder's intentional negligence. The provision regarding liability to third parties is a requirement of previous section 2803.1–5(d). The proposed rule clarified this section, and the proposal has been carried forward into the final rule intact.

Numerous commenters objected to the strict liability provisions of proposed section 2807.12(b). Several commenters said that the strict liability provisions in this rule are arbitrary and capricious and that a right-of-way grant holder cannot be held responsible for activities on the right-of-way if he does not have the ability to limit access to that right-of-way. Commenters said that if the holder is to be held strictly liable, he must be allowed to secure and control the right-of-way. Several commenters said that the liability provisions should not apply to cases involving negligence by a third party and objected to being held liable for costs arising from damages, injuries, fees, and costs that are beyond their control. One commenter said that any responsibility for liability should be limited to acts of or under the control of the permit holder, or acts of its customers. The commenter said that removing the Federal Government's liability as landowner is unfair and shifts liability to the innocent permit holder. One commenter said that the strict liability standard is unfair and should be replaced with an ordinary negligence standard. The commenter said that just as the right-of-way grantee does not enjoy full ownership of the right-of-way, it should not bear full liability for all damage. The commenter said that the strict liability standard presents a potentially crippling expense to the nation's rural electric cooperatives that may force some of them to choose not to apply for right-of-way grants, and that could result in depriving some rural customers of electricity. The commenter said that under an ordinary negligence standard, grantees would not be liable for damages that could not be prevented by reasonable measures and that standard was fairer to grantees. The same commenter said that an ordinary negligence standard is not inconsistent with FLPMA. Several commenters said that there should be a specific exclusion of liability if the cause of the pollution was principally that of another permit holder or another party. The commenters also said the final rule should make clear how the standard will operate where there are multiple permit holders on a site and the polluter is unable to pay damages. Other commenters said that the normal negligence rules are adequate protection for landowners and for holders of nonfederal rights-of-way in the United States and that the Federal Government should be bound by the same standard.

The strict liability standard in section 2807.12(b) is specifically authorized by section 504(h)(2) of FLPMA (43 U.S.C. 1764(h)(2)), which provides:

> Any regulation or stipulation imposing liability without fault shall include a maximum limitation on damages commensurate with the foreseeable risks or hazards presented. Any liability for damage or injury in excess of this amount shall be determined by ordinary rules of negligence.

BLM regulations addressing strict liability have been in effect since 1980. Previous section 2803.1–5 authorized BLM to impose strict liability on grant holders for any activity or facility within the right-of-way that presented, in the agency's discretion, a foreseeable hazard or risk of damage or injury to the United States. In the preamble to the 1980 rule, BLM addressed and rejected concerns similar to those expressed by the current commenters that a holder's inability to restrict access to the right-of-way precluded the imposition of strict liability. BLM stated at 45 FR 44518, 44524 (July 1, 1980):

> Section 504(h) of the Federal Land Policy and Management Act gave the Secretary of the Interior discretionary authority to impose strict liability in connection with right-of-way grants or temporary use permits under the circumstances described. The decision to exercise the authority was made after careful consideration of all aspects of the issue. The overriding reason for imposing strict liability was the need to provide the Federal Government and the tax paying public with protection from damages resulting from extra hazardous activity on the public lands by those holding a right-of-way grant or temporary use permit and gaining a benefit from such use.

Additional support for imposing strict liability is in the preamble to the 1979 proposed rule at 44 FR 58106, 58113 (October 9, 1979).

BLM continues to believe that strict liability is properly imposed on a holder for certain foreseeable risks and hazards. The fact that a holder may not always be able to control access to the right-of-way does not mean that strict liability may not be applied to specified activities or facilities associated with the right-of-way area. Under the common law, strict liability has been regularly applied to abnormally dangerous activities, irrespective of the liable party's ability to control access to the activity. In fact, it is the inability to control the harm that, in turn, can justify imposing strict liability in the first place. Certain activities undertaken on FLPMA and MLA rights-of-way, such as transmitting electricity, transporting oil and gas, and using and storing hazardous materials, are inherently dangerous. Strict liability for such activities is both necessary and appropriate to ensure that the cost of remediation and restoration falls on the grant holder, rather than the public, and to encourage grant holders to take extraordinary care when conducting inherently dangerous activities on public lands. For these reasons, BLM is retaining the strict liability standard in this final rule and is not adopting a negligence or knowing and willful standard, as suggested by commenters.

In addition, BLM points out that Congress authorized the imposition of strict liability in section 28(x) of the MLA, 30 U.S.C. 185(x), and imposed a policy of strict liability in section 204(a) of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1653(a). Senate Report 94–583, part of the legislative history of FLPMA, notes the similarities (at page 73) between the strict liability provisions of FLPMA and the MLA. In the preamble to the 1979 proposed rule, BLM acknowledged that the strict liability provisions of FLPMA were modeled after the MLA, as amended (see 44 FR 58106, 58113).

One commenter requested that BLM explain the terms ''primarily'' and ''except as otherwise provided by law'' in proposed section 2807.12(b)(1). As noted above, that paragraph states that BLM will not impose strict liability for damage or injury resulting primarily from an act of God, act of war, or the negligence of the United States, except as otherwise provided by law. BLM intends that the word ''primarily'' have its commonly accepted meaning.

''Primarily'' means principally or chiefly. Accordingly, BLM will not impose strict liability where, for example, the negligence of the United States was the principal cause of the loss or damage. Strict liability would be appropriate, in contrast, where the United States's negligence was a contributory factor, provided that it was not the principal cause. BLM expects that the law of the state where the right-of-way is located will govern the rules regarding fault.

''Except as otherwise provided by law'' means, for example, that if the acts or omissions giving rise to damage or

injury support a claim under a strict liability statute, such as CERCLA, the negligence of the United States will not preclude a strict liability claim.

One commenter remarked that BLM should clarify whether the term ''right-of-way area,'' as used in proposed sections 2807.12(b) and 2807.12(f) (final sections 2807.12(b) and 2807.12 (e)), includes land not specific to the holder's grant. BLM intends that the phrase ''right-of-way area'' in these paragraphs refer to the land specifically included in the holder's grant.

Many commenters objected to the proposed raising of the liability ceiling to $5 million from the current $1 million, and several even objected to the previous regulation's $1 million ceiling. The commenters stated that BLM had given no evidence that there was a need for the increase and that the increase would discourage, if not prevent, oil and gas exploration and small electric cooperatives from serving rural areas. Some of the commenters said the liability cap increase would disproportionately affect small right-of-way holders who may not have access to, or be able to afford, the required commercial insurance. Under this final rule, we would only include a strict liability provision in a grant after analyzing the foreseeable hazard or risk of damage or injury to the United States. It is not common for BLM to issue grants with strict liability provisions. Therefore, this provision will not have a significant effect on a substantial number of small entities. The scarcity of cases challenging BLM's application of the strict liability provisions of section 504 suggests that the agency has applied these provisions in a reasonable manner.

Section 504(h)(2) of FLPMA (43 U.S.C. 1764(h)(2)) requires that any regulation imposing strict liability without fault include a maximum limitation on damages commensurate with the foreseeable risks or hazards presented. The ordinary rules of negligence determine any liability for damage or injury in excess of this amount. In 1980, BLM instituted a $1 million ceiling on strict liability cases. At all times, however, damages could exceed this $1 million limit if determined by ordinary rules of negligence.

The previous regulations, issued in July 1980, established a maximum strict liability limit of $1 million for any one event. This final rule raises the amount to $2 million for any one incident. (We changed the term ''event'' to ''incident'' in the final rule to be more consistent with the terminology in CERCLA and other environmental legislation.) The increase recognizes inflation that has occurred since 1980 and the increasing complexity involved in responding to incidents that damage or threaten life, property, or the environment.

As noted earlier, the proposed rule included an increase in the liability limitation to $5 million. A number of commenters objected to the increase and said that it would disproportionately affect small right-of-way holders who may not have access to commercial insurance. In the final rule, we reduced the increase in the strict liability limitation to $2 million in an effort to reduce adverse impacts to grant holders while still providing the Federal Government and the tax-paying public with reasonable protection from damages resulting from activities and facilities on the public lands. Inflation alone warrants the increase to $2 million. The IPD–GDP has increased 105 percent from 1980 to 2004 and the CPI–U has increased 138 percent during this same period. BLM believes that the CPI–U is a good measure to use in estimating inflation in the costs to control or abate conditions which threaten life, property, or the environment. The $2 million strict liability limit will be updated annually by this index.

A few commenters supported the ''polluter pays'' strict liability standard for hazardous materials. The commenters said that because hazardous materials are intrinsically dangerous to the public, accidents involving them must be prevented at all costs and a strict liability standard gives the proper incentive to prevent such accidents. The commenters said that strict liability eliminates lengthy, expensive litigation which is costly to both the grantee and to BLM. Commenters also said that it is inappropriate to place a cap on strict liability even for non-hazardous materials. The commenters said that if a company seeks the privilege of using the public's land for commercial use, it should be strictly liable for whatever damages occur as a result of such use. As stated earlier, the cap on strict liability is a requirement of section 504(h)(2) of FLPMA. The cap does not apply where another applicable statute (such as CERCLA) provides for unlimited damages, or otherwise pre-empts the damage limits in FLPMA.

Several commenters said that in the final rule we should strike the phrase ''even if the threat occurs on areas that are not under federal jurisdiction'' because the Federal Government has no jurisdiction or right to impose strict liability on any property other than Federal property. One commenter said that it is not clear whether the Federal Government is entitled to recover such costs under the applicable laws and that it would be more logical for the grantee to assume responsibility/liability consistent with ''applicable law.'' The final rule replaces ''on'' with ''to'' in the cited phrase to make clear that strict liability would include costs incurred by the United States for a threat that occurred to non-federal land. Examples might include a fire or landslide that started on the right-of-way and migrated off Federal land, causing damage or injury to non-federal land. A similar policy was set forth in the previous regulations at section 2803.1–5(b). We have not adopted the suggestion that the cited phrase be removed from the final rule.

Several commenters said that we should be consistent in the regulations and use either the term ''hazardous substance'' or ''hazardous materials.'' The commenters said that the term ''hazardous substance'' is not defined in the rule. One commenter said that the ''collective definition'' of hazardous materials is a problem because it is doubtful that all the laws referenced in the definition call for unlimited financial liability. The commenter said that in the proposed rule BLM cites a case decided under CERCLA for the proposition that there are no limits to cost recovery under CERCLA, but then uses this rationale to support the same principle with respect to liability under any of the other statutes in the definition of ''hazardous materials.'' To the extent that these other laws would place a limitation on one's financial exposure, proposed section 2807.12(f) removed that limitation by the collective definition of ''hazardous materials,'' the commenters continued. The commenters said that this is inappropriate. One commenter said that because this section causes uncertainty for the public and BLM, it should be deleted.

In response to those comments, BLM has changed the language of proposed section 2807.12(f) (final section 2807.12(b)(3)) to reference ''hazardous substances,'' as defined by CERCLA and not ''hazardous materials.'' BLM notes, however, that the $2 million cap also may not be applicable to other specified pollutants, contaminants, and substances where controlling law so provides, such as section 1002(a) of the Oil Pollution Act (33 U.S.C. 2702(a)). Where a release would give rise to a claim under Federal or state law that provides for unlimited damages, or otherwise pre-empts the damage limits contained in FLPMA, the limitations of FLPMA will not apply.

Several commenters found the provisions of proposed section 2807.12(g) (final sections 2807.12(b)(3) and (4)) to be confusing. That proposed section stated that a holder is strictly liable for all costs above $5 million (now $2 million in the final rule) that accrue because of negligence regarding hazardous substances. The commenters said that this rule adds a new concept of negligence to this provision which for the most part imposes strict liability. The commenters also said the rule should make clear whose negligence triggers this provision. We agree with the commenters. The purpose of final sections 2807.12(b)(3) and (4) is to implement section 504(h)(2) of FLPMA (43 U.S.C. 1764(h)(2)). The final rule, accordingly, removes the reference to negligence regarding hazardous substances and states that any liability in excess of the $2 million strict liability cap will be determined by the ordinary rules of negligence.

In referring to the strict liability provisions of the proposed rule, several commenters asked if there have been verifiable losses to the U.S. Treasury as a result of rights-of-way crossing Federal land. BLM has not researched case records to determine the extent of unreimbursed costs the United States has incurred stemming from damage or injury associated with rights-of-way crossing Federal land. The intent of the strict liability provisions is to help prevent the public from incurring such unreimbursed costs in the future in those situations where a foreseeable hazard or risk of damage or injury to the United States can be identified at the time a right-of-way grant is authorized.

Several commenters said that the joint and several liability provision of proposed section 2807.12(c) ''* * * ignores corporate separateness, a fundamental principle of corporate law. Each corporation must be held separately liable.'' The provisions of proposed section 2807.12(c) to which the commenters object were first promulgated in 1980 at 43 CFR 2803.1–4(g) and have been effective ever since that time, although the citation changed in 1987 to 43 CFR 2803.1–5(g). This section is necessary to ensure that, where the loss or damage is substantial and potentially exceeds the assets of the grant holder, related entities will also be liable. It also ensures that between grant holders and the public, the grant holder and not the public will pay for rehabilitating damage to the affected lands. Similar liability is imposed at paragraph 28(x) of the MLA, 30 U.S.C. 185(x), and at section 204(c) of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1653(c).

One commenter asked why there is an exception for corporate stockholders being jointly and severally liable to the United States when the holder cannot satisfy claims for injury or damage. The exception for corporate stockholders was first promulgated in 1980 as 43 CFR 2803.1–4(g) and has been effective since that time, although the citation changed in 1987 to 43 CFR 2803.1–5(g). The exception has been carried forward into the final rule. It is a fundamental principle of corporate law that a corporation is a legal entity distinct from its owners. Owners of a corporation are its stockholders. We preserve this distinction in final section 2807.12(c) and accordingly did not amend this rule to make corporate stockholders jointly and severally liable with the corporation.

Several commenters said that proposed section 2807.12(e) (final section 2807.12(d)) should be deleted since multiple holders should be jointly and severally liable only to the extent applicable law would impose such liability. We first published provisions similar to those in this paragraph in our regulations in 1980 at 43 CFR 2803.1–4(i). It has been effective since then, although the citation changed in 1987 to 43 CFR 2803.1–5(i). BLM has retained the provision as final section 2807.12(d) because it has provided clarity that would be lacking if the commenter's view was adopted.

Several commenters said that the final rule should guarantee that the grant holder has sufficient authority to mitigate its liability for fires through appropriate maintenance of vegetation. In processing an application for a grant, BLM will attempt to incorporate terms and conditions relative to the management of vegetation that balance the grant holder's need to minimize its liability exposure for fires with other environmental concerns that might be present in the right-of-way area. Because resource issues and concerns can vary widely among locations, BLM does not believe that it is practical or would protect the public interest to incorporate such a regulation of general applicability in this final rule.

Several commenters said that BLM should amend the rule so that current permit holders would be subject only to current BLM regulations on liability until they renew their permit(s). Alternatively, the commenters said that the environmental liability under the rule should be phased-in over the existing term of a holder's right-of-way permit. They said that this would afford innocent permit holders an opportunity to assess the environmental condition of the site and make reasonable business decisions based on environmental findings, including whether to seek renewal of the permit at the current site location. Under the previous and final rule, existing holders are subject to changes in regulations that occur mid-term. No phase-in is appropriate. Previous section 2801.2 and proposed section 2805.10(c)(1) (final section 2805.12(a)) state that an applicant, by accepting a right-of-way grant, agrees to comply with and be bound by all applicable Federal and state laws, including regulations, that may be issued during the term of the grant. All BLM grants contain the following provision: 'This grant or permit is issued subject to the holder's compliance with all applicable regulations contained in Title 43 Code of Federal Regulations part 2800.'' Although the increase in the strict liability cap will occur mid-term for many grant holders, holders of FLPMA rights-of-way have at all times been liable for amounts in excess of the previous $1 million cap. Liability above that amount would have been based on ordinary rules of negligence.

One commenter said that ''* * * because BLM can apply to federal agencies only those provisions that are applicable to a federal entity, the provisions regarding liability, guarantee bonds, releases of third party environmental damage, and other such provision should not apply to federal agencies. An agency's liability for torts, for example, is covered by the Federal Tort Claims Act.'' BLM agrees generally with the comment. Final section 2809.10 states that ''The regulations in this part apply to Federal agencies to the extent possible * * *.'' To the extent, therefore, that the liability provisions of the rule are not appropriate for Federal agencies, they will not apply.

Section 2807.13 As Grant Holders, What Liabilities Do State, Tribal, and Local Governments Have?

This section explains that state, tribal, or local governments or their agency or instrumentality are liable to the fullest extent the law allows at the time that BLM issues the grant. If a state, tribal, or local government or their agency or instrumentality does not have the legal power to assume full liability, it must repair damages or make restitution to the fullest extent of its powers. Senate Report No. 94–583 notes at 73, in commenting on section 403(g) of S. 507, a predecessor to section 504(h)(1) of FLPMA, that governmental entities may not be legally able to assure protection of the United States because of limitations in state law or State Constitutions.

This section also explains that BLM may require a state, tribal, or local government to provide a bond, insurance, or other acceptable security to:

(A) Protect the liability exposure of the United States to claims by third parties arising out of your use and occupancy of the right-of-way;

(B) Cover any losses, damages, or injury to human health, the environment, and property incurred in connection with your use and occupancy of the right-of-way; and

(C) Cover any damages or injuries resulting from the release or discharge of hazardous materials incurred in connection with your use and occupancy of the right-of-way.

Based on the state, tribal, or local government's record of compliance and changes in risk and conditions, BLM may require it to increase or decrease the amount of its security. The provisions of this section do not limit or exclude other remedies.

Except for minor editorial changes and some reorganizing of proposed paragraphs (b)(1) through (b)(3), this section is the same as in the proposed rule.

Section 2807.14 How Will BLM Notify Me If Someone Else Wants a Right-of-Way Grant for Land Subject to My Grant or Near or Adjacent to It?

This section explains that BLM will notify you in writing when it receives an application for a right-of-way grant for land subject to your grant or near or adjacent to it. BLM will consider your written recommendations as to how the proposed use affects the integrity of, or your ability to operate, your facilities. The notice will contain a time period within which you must respond. The notice may also inform you of additional opportunities to comment.

We added this section to the final rule to provide notice of BLM's long-established policy of informing existing grant holders of new applications for grants that might affect the use of existing rights-of-way. This policy helps BLM to avoid authorizing a new grant that would adversely affect the integrity of existing uses or the ability of existing grant holders to operate their facilities. The recommendations of existing grant holders are desirable to help ensure that this does not happen.

Section 2807.15 How Is Grant Administration Affected If the Land My Right-of-Way Encumbers Is Transferred to Another Federal Agency or Out of Federal Ownership?

This section explains that if there is a proposal to transfer the land your right-of-way encumbers to another Federal agency, BLM may, after reasonable notice to you, transfer administration of your grant for the lands BLM formerly administered to another Federal agency, unless doing so would diminish your rights. If BLM determines your rights would be diminished by such a transfer, BLM can still transfer the land, but retain administration of your grant under existing terms and conditions.

It also explains that if there is a proposal to transfer the land your right-of-way encumbers out of Federal ownership, BLM may, after reasonable notice to you and in conformance with existing policies and procedures, do one of the following three things:

(A) Transfer the land subject to your grant. In this case, administration of your grant for the lands BLM formerly administered is transferred to the new owner of the land;

(B) Transfer the land, but BLM retains administration of your grant; or

(C) Reserve to the United States the land your grant encumbers, and BLM retains administration of your grant.

This section also explains that BLM or, if BLM no longer administers the land, the new land owner may negotiate new grant terms and conditions with you. This may include increasing the term of your grant, should you request it, to a perpetual grant under section 2806.23(c) of this part or providing for an easement. We added the phrase ''for an easement'' to the end of the last paragraph in this section to allow BLM to issue easements in cases where an easement would be a more appropriate instrument than a perpetual grant. Section 103 of FLPMA (43 U.S.C. 1702 (f)) defines ''right-of-way'' to include easements and therefore recognizes that easements are an acceptable BLM authorization.

We proposed this section as section 2807.14 and have renumbered it to account for new section 2807.14, as discussed above. We also reworded paragraphs (a) and (b) and added a new paragraph (c) in response to public comments. Paragraphs (a) and (b) are consistent with previous section 2803.5.

Under paragraph (b), the option BLM chooses for lands transferred out of Federal ownership depends on the circumstances of the proposed transfer and the grant involved. Our choice would be that which would be the least disruptive to the parties involved and that which is in the public interest.

Several commenters said that in the final rule BLM should:

(A) Clarify procedures for maintaining rights-of-way on lands that are exchanged or transferred;

(B) Improve its practice of communicating to grant holders its intent to transfer, exchange, or sell lands; and

(C) Grant easements in perpetuity to existing grantees before transferring or require transferees to grant easements when there is a transfer.

BLM agrees that the description of procedures in the proposed rule at section 2807.14 for maintaining grants on lands that are exchanged or otherwise transferred from BLM could be improved. We rewrote this section and added detail to make it clearer. We added a new sentence at the end of final section 2807.15(a) to describe the existing procedure when BLM's transfer of land to another Federal agency would diminish a grant holder's rights. In this case, BLM could transfer the land, but retain administration of the grant under existing terms and conditions so that there would be no change in administration of the grant.

BLM also agrees that we could improve our practice of communicating to grant holders our intent to transfer, exchange, or sell lands. We added the phrase ''after reasonable notice to you'' to sections 2807.15(a) and (b) to specify that BLM will always provide advance notice to affected grant holders of any proposal to transfer land encumbered by their grants.

We added section 2807.15(c) in response to the third comment above. The new paragraph describes existing practices. Upon the request of a grant holder, BLM will consider extending the term of an existing grant to that of a perpetual grant before transferring the land encumbered by the grant. If an affected grant holder and the proposed new land owner can negotiate a new authorization to replace the existing BLM grant, BLM can arrange the timing of approvals so that termination of the BLM grant and its replacement by the new authorization occur at the same time the transfer of the land is completed.

Section 2807.16 Under What Conditions May BLM Order An Immediate Temporary Suspension of My Activities?

This section explains that if BLM determines that you have violated one or more of the terms, conditions, or stipulations of your grant, we can order an immediate temporary suspension of activities within the right-of-way area to protect public health or safety or the environment. BLM can require you to stop your activities before holding an administrative proceeding on the matter. Existing regulations and section 506 of FLPMA authorize BLM to order

an immediate temporary suspension without an administrative proceeding.

The section also states that BLM may issue an immediate temporary suspension order orally or in writing to you, your contractor or subcontractor, or to any representative, agent, or employee representing you or conducting the activity. When you receive the order, you must stop the activity immediately. BLM will, as soon as practical, confirm an oral order by sending or hand delivering to you or your agent a written suspension order explaining the reasons for it.

You may file a written request for permission to resume activities at any time after BLM issues the order. In the request, state the facts supporting your request and the reasons you believe that BLM should lift the order. BLM must grant or deny your request within 5 business days after receiving it. If BLM does not respond within 5 business days, BLM has denied your request. You may appeal the denial under section 2801.10 of this part.

The immediate temporary suspension order is effective until you receive BLM's written notice to proceed with your activities.

This section was proposed as section 2807.15. In the final rule we replaced the term ''promptly'' in paragraph (b), describing when BLM will follow an oral order with a written one, with the phrase ''as soon as practical.'' This is more consistent than the proposal with previous section 2803.3(b). We also reorganized proposed paragraphs (c), (d), and (e) to make them clearer. We moved proposed paragraph (c) to final paragraph (d) and consolidated proposed paragraph (e) with proposed paragraph (d) because the ''request'' in proposed paragraph (e) is identical to the request in proposed paragraph (d). The result is final paragraph (c). With the exception of minor editorial changes and the reorganization of final paragraphs (c) and (d) explained above, this section of the final rule remains as proposed. The section is consistent with previous section 2803.3.

Several commenters said that the words ''violation of one or more of the terms of the grant'' are too broad and subject to abuse. Commenters also said that safety is the Occupational Safety and Health Administration's (OSHA) responsibility. We disagree. Both the proposed and final rules state that when there is a violation of one or more of the terms, conditions, or stipulations of a grant, BLM may order an immediate temporary suspension of activities ''to protect public health or safety or the environment.'' This provision is not new. It has been in previous section 2803.3 since 1980 and is supported by section 506 of FLPMA (43 U.S.C. 1766). Only violations that cause or threaten damage or injury to public health, safety, or the environment can lead to an immediate temporary suspension of activities. Under the rule, BLM would not have the authority to issue an immediate temporary suspension order for any other type of violation. Although OSHA has responsibility for occupational health and safety in the workplace, it is not charged with responsibility for health and safety in other situations. BLM's authority to suspend a holder's activities to protect public health or safety or the environment is expressly granted in section 506 of FLPMA. This includes the authority to ensure operations on rights-of-way are performed safely and in a manner that protects users of public lands.

Several commenters said that BLM must not be allowed to suspend activities without providing an opportunity for an administrative hearing, unless it determines that the operator has willfully and knowingly created serious permanent damage to the environment or public health and safety following a notice. Commenters also said that the correct standard is that BLM must have ''convincing evidence'' before suspending activities. One commenter said that BLM did not have authority to temporarily suspend activities on a grant to protect public health and safety or the environment without an administrative hearing. We disagree with these comments. Section 506 of FLPMA provides authority for this section of the rule. It states:

> If the Secretary concerned determines that an immediate temporary suspension of activities within a right-of-way for violation of its terms and conditions is necessary to protect public health or safety or the environment, he may abate such activities prior to an administrative proceeding.

Section 506 makes clear that BLM may suspend and abate a holder's activities prior to an administrative hearing. This provision also establishes the standard BLM uses in determining whether to issue an immediate temporary suspension order, namely that such an order is necessary ''to protect public health or safety or the environment.'' Consequently, we have not adopted the alternate standards commenters suggested.

Section 2807.17 Under What Conditions May BLM Suspend or Terminate My Grant?

This section explains that BLM may suspend or terminate your grant if you do not comply with applicable laws and regulations or any terms, conditions, or stipulations of the grant (such as rent payments), or if you abandon the right-of-way.

This section also explains that a grant also terminates when:

(A) The grant contains a term or condition that has been met that requires the grant to terminate;

(B) BLM consents in writing to your request to terminate the grant; or

(C) It is required by law to terminate.

Your failure to use your right-of-way for its authorized purpose for any continuous 5-year period creates a presumption of abandonment. BLM will notify you in writing of this presumption. You may rebut the presumption of abandonment by proving that you used the right-of-way or that your failure to use the right-of-way was due to circumstances beyond your control, such as acts of God, war, or casualties not attributable to you.

You may appeal a decision under this section under section 2801.10 of this part.

This section was proposed as section 2807.16. In addition to minor editorial changes, we made a number of changes and additions to improve the clarity and completeness of the process and to make it more consistent with the previous sections 2803.4(a), (b), and (c).

In this final rule we moved proposed section 2807.16(b) to final section 2807.18, discussed below.

We also modified proposed paragraph (a) by adding the words ''or terminate'' and ''or if you abandon the right-of-way.'' Adding ''or terminate'' consolidates proposed paragraph (c)(3) into paragraph (a) and is more consistent with previous section 2803.4(b). The phrase ''or if you abandon the right-of-way'' is part of previous section 2803.4(b), and refers to a concept which we addressed only indirectly in proposed section 2807.16(d). Our addition of this phrase clarifies the purpose of proposed section 2807.16(d).

We amended proposed paragraph (c)(2) (final paragraph (b)(2)) to provide that BLM's acceptance of your request to terminate a grant must be in writing. It is longstanding BLM policy that such acceptances be in writing.

We consolidated proposed paragraph (c)(3) with paragraph (a) (see discussion above) and added that your grant terminates when it is ''required by law to terminate.'' We added this language to final paragraph (b)(3) to improve the completeness of the section and reflect legal requirements contained in certain pre-FLPMA right-of-way statutes.

Proposed paragraph (d) is now paragraph (c) to account for the transfer

of proposed paragraph (b) to final section 2807.18.

We added a new paragraph (d) to point out that you may appeal a BLM decision issued under this section in accordance with section 2801.10 of this part. Any adverse BLM decision is appealable under the existing 43 CFR part 4. We added this paragraph to give you additional notice of your appeal rights.

We received no substantive comments on this section.

Section 2807.18 How Will I Know That BLM Intends To Suspend or Terminate My Grant?

This section explains that before BLM suspends or terminates your grant under section 2807.17(a) of this part, we will send you a written notice stating that we intend to suspend or terminate your grant. We will give the grounds for such action. The notice will give you a reasonable opportunity to correct any noncompliance or start or resume use of the right-of-way, as appropriate.

Before BLM suspends or terminates a grant issued as an easement, BLM must give you written notice and refer the matter to the Office of Hearings and Appeals for a hearing before an administrative law judge (ALJ) under 5 U.S.C. 554. No hearing is required if the terms of the grant provided for termination on the occurrence of a fixed or agreed-upon condition, event, or time. If the ALJ determines that grounds for suspension or termination exist and such action is justified, BLM will suspend or terminate the grant.

This section was proposed as section 2807.17. In addition to minor editorial changes, we made a number of changes and additions to improve the accuracy and completeness of the process description and to make it more consistent with previous sections 2803.4(d) and (e).

We modified the first sentence of proposed paragraph (a) by adding the reference ''under § 2807.17(a)'' to indicate those suspensions and terminations for which BLM will send a written notice. Previous section 2803.4(d) stated ''Before suspending or terminating a right-of-way grant pursuant to paragraph (b) of this section, the authorized officer shall give the holder written notice that such action is contemplated and the grounds therefor and shall allow the holder a reasonable opportunity to cure such noncompliance.'' We inadvertently omitted the reference from the proposed rule and added it in this rule to be consistent with previous regulations.

We added the phrase ''or start or resume use of the right-of-way'' to the last sentence of paragraph (a) which now reads, ''The notice will give you a reasonable opportunity to correct any noncompliance or start or resume use of the right-of-way'' to make the section consistent with FLPMA. Section 506 of FLPMA states:

> Prior to commencing any proceeding to suspend or terminate a right-of-way the Secretary concerned shall give written notice to the holder of the grounds for such action and shall give the holder a reasonable time to resume use of the right-of-way or to comply with this title, condition, rule, or regulation as the case may be.

We modified the first sentence of paragraph (b) to state that before suspending or terminating a grant ''issued as an easement,'' BLM must refer the matter to the Office of Hearings and Appeals for a hearing. Proposed section 2807.17(b) referred to grants ''issued before October 21, 1976, any subsequent grants issued as an easement, and grants issued under part 2880 of this chapter.'' We moved the provisions for hearings regarding grants issued under part 2880 to final section 2886.18. The proposed rule was in error by including all grants ''issued before October 21, 1976,'' since only those pre-October 21, 1976 grants that were issued as easements are subject to the hearing requirement. Section 506 of FLPMA makes this clear. Previous section 2803.4(e) refers to ''a right-of-way grant that is under its terms an easement.'' Therefore, the final rule is more accurate than the proposal and is more consistent with the previous regulation. We also modified the same sentence by adding that a hearing before an administrative law judge would be conducted under 5 U.S.C. 554. This citation is set forth in section 506 of FLPMA. Previous section 2803.4(e) stated that the hearing would be ''pursuant to 43 CFR part 4'' and the existing regulations at 43 CFR 4.1(a) provide for hearings ''to be conducted pursuant to 5 U.S.C. 554.'' We made the change to make the final regulation more complete than the proposal and more consistent with FLPMA and the previous regulation.

We added a new sentence to paragraph (b), providing that a hearing is not required if the grant contained terms for termination on the occurrence of a fixed or agreed-upon condition, event, or time. We added it to accurately describe the hearing process and to reflect longstanding BLM practice. The final language is consistent with section 506 of FLPMA which states, ''No administrative proceeding shall be required where the right-of-way by its terms provides that it terminates on the occurrence of a fixed or agreed-upon condition, event, or time.''

We received no substantive comments on this section.

Section 2807.19 When My Grant Terminates, What Happens To Any Facilities on It?

This section explains that after your grant terminates, you must remove any facilities within the right-of-way within a reasonable time, as determined by BLM, unless BLM instructs you otherwise in writing, or termination is due to non-payment of rent.

After removing the facilities, you must remediate and restore the right-of-way area to a condition satisfactory to BLM, including the removal and clean up of any hazardous materials.

If you do not remove all facilities within a reasonable period as determined by BLM, we may declare them to be the property of the United States. However, you are still liable for the costs of removing them and for remediating and restoring the right-of-way area.

This section was proposed as section 2807.18. In addition to minor editorial changes, we made a number of changes and additions to make the rule clearer, including dividing the section into three paragraphs. We replaced the terms ''improvements'' and ''structures and improvements'' with the term ''facilities'' to make the rule clearer and consistent with other provisions in the rule and since ''facility'' is defined in section 2801.5 of these regulations.

We added a clause to the last sentence of paragraph (a) providing that you must not remove any facilities or equipment from the right-of-way area if termination of your grant was due to non-payment of rent. This is a requirement of previous section 2803.1–2(h). We added the clause to make the section clearer and to provide a cross-reference to final section 2806.13(c), where similar language also occurs.

We modified paragraph (c) to specify that the reasonable period for the removal of facilities will be ''as determined by BLM.'' This is the same language used in previous section 2803.4–1; we added it to be consistent with that section.

Commenters said that the standard ''any condition satisfactory to BLM'' in paragraph (b) is too broad and subject to abuse. The commenters said that BLM has not presented evidence to justify replacing the current standard of ''restoring the area to a condition as near as possible to the original condition.'' They said that if BLM keeps the change in the rule, it should not also require the former right-of-way holder to pay for

removal. We disagree. The restoration standard in previous section 2803.4–1 is ''to a condition satisfactory to the authorized officer'' and has been in place since 1980. The standard in the proposed and final rule, ''to a condition satisfactory to BLM,'' is essentially unchanged from previous regulations.

Section 2807.20 When Must I Amend My Application, Seek an Amendment of My Grant, or Obtain a New Grant?

This section explains that you must amend your application or seek an amendment to your grant when there is a proposed substantial deviation in location or use. The requirements to amend an application or grant are the same as those for a new application, including paying processing and monitoring fees and rent according to sections 2804.14, 2805.16, and 2806.10 of this rule.

Any activity not authorized by your grant may subject you to prosecution under applicable law and to trespass charges under subpart 2808 of this part.

You must apply for a new grant if BLM issued your grant before October 21, 1976, and there is a proposed substantial deviation in the location or use of the right-of-way or its terms and conditions. If BLM approves your application, BLM will terminate your old grant and you will receive a new grant under 43 U.S.C. 1761 *et seq.* and the regulations in this part. BLM may include the same terms and conditions in the new grant as were in the original grant as to annual rent, duration, and nature of interest if BLM determines, based on current land use plans and other management decisions, that it is in the public interest to do so. Alternatively, BLM may keep the old grant in effect and issue a new grant for the new use or location or terms and conditions.

This section also explains that section 509(b) of FLPMA requires you to apply for a new grant to allow realignment of any railroad and appurtenant communication facilities. FLPMA requires BLM to issue a decision within 6 months after it receives your complete application. BLM may include the same terms and conditions in the new grant as were in the original grant as to annual rent, duration, and nature of interest, if:

(A) These terms are in the public interest;

(B) The lands are of approximately equal value; and

(C) The lands involved are not within an incorporated community.

This section was proposed as section 2807.19. We reworded and reorganized this section in the final rule to make it clear when BLM issues a new grant and when BLM amends an existing grant.

We added the phrase ''or obtain a new grant'' to the title of the section to more accurately reflect the contents of the section.

We modified proposed paragraph (a) by removing the cross reference to section 2808.11(b), which describes the penalties BLM may assess for unauthorized use of public land, and replaced this cross-reference with final paragraph (c). We also modified this paragraph by moving the last sentence to final paragraph (b) and by replacing the phrase ''including cost reimbursement according to § 2804.14'' with the phrase ''including payment of processing and monitoring fees and rent according to sections 2804.14, 2805.16, and 2806.10 of this part.'' Cost reimbursement includes both processing and monitoring fees. In the proposed rule, both fees were in section 2804.14. In the final rule, we moved the provisions for monitoring fees to section 2805.16, making it necessary to add this citation. It is long-standing BLM practice that when an amendment to a grant makes changes in acreage that otherwise affect the determination of rent for that grant, BLM collects any additional rent that may be calculated as part of the amendment process. We added a cross-reference to section 2806.10 to the last sentence of final paragraph (b) to provide more complete notice of the financial impacts that may be involved in an amendment.

We also reorganized proposed paragraph (b) (final paragraph (d)) and modified it in several respects. The proposed rule mirrored previous section 2803.6–1(b) in that it stated that we would issue an amended grant for pre-FLPMA grants whose use or location substantially changed. We believe both the proposed section 2807.19 and previous section 2803.6–1(b) do not accurately reflect FLPMA's intent. Section 509(a) of FLPMA, in referring to grants issued prior to the enactment of FLPMA, says:

> Nothing in this title shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted. However, with the consent of the holder thereof, the Secretary concerned may cancel such a right-of-way or right-of-use and in its stead issue a right-of-way pursuant to the provisions of this title.

To more accurately reflect the intent of section 509(a) of FLPMA, we revised the regulations to clearly state that a pre-FLPMA grant could not be amended, but could rather be replaced with a new FLPMA grant. Our proposed rule at section 2807.19(b) suggested this approach. The cited section of FLPMA provides authority, with the consent of the grant holder, for BLM to cancel the pre-FLPMA grant and in its place issue a new grant under FLPMA authority. We also rewrote the opening paragraph of section (d) to make it clearer as follows:

> If your grant was issued prior to October 21, 1976, and there is a proposed substantial deviation in the location or use or terms and conditions of your right-of-way grant, you must apply for a new grant consistent with the remainder of this section. BLM may respond to your request in one of the following ways.

This changes makes it clear that BLM requires a new grant when you want to change the use, or location, or terms and conditions authorized by a grant issued before October 21, 1976.

We also added a new sentence to final paragraph (d)(1) to specify that when a pre-FLPMA grant is replaced by a new FLPMA grant, BLM may ''include the same terms and conditions in the new grant as were in the original grant as to annual rent, duration, and nature of interest if BLM determines, based on current land use plans and other management decisions, that it is in the public interest to do so.'' This is a provision similar to previous section 2803.6–1(b) that we inadvertently omitted from the proposed rule and we added it to be more consistent with that regulation and existing policy.

We added a new paragraph (d)(2) to make clear that if the pre-FLPMA grant holder does not want to consent to the termination of its pre-FLPMA grant, the holder may apply for a new grant for the new use, location, or terms and conditions. BLM would then process the application in the same manner as any other application filed under this rule. The new grant, as appropriate, would authorize the new location (those lands outside the right-of-way included in the pre-FLPMA grant), the new use (on lands included in the pre-FLPMA grant and/or the new location), or would establish new terms and conditions for the existing use on lands included in the pre-FLPMA grant. BLM would then authorize the holder's operations under two grants (the pre-FLPMA grant and the new FLPMA grant).

We modified proposed section 2807.19(c) (final paragraph 2807.20(e)) to make clear that you must apply for a new grant to allow realignment of any railroad and appurtenant communication facilities. Both previous section 2803.6–2 and the proposed rule do not accurately reflect the intent of FLPMA to the extent that they imply that an existing grant may be amended to allow realignment of a railroad and appurtenant communication facilities.

Section 509(b) of FLPMA states ''When the Secretary concerned issues a right-of-way under this title for a railroad and appurtenant communication facilities in connection with a realinement of a railroad on lands under his jurisdiction by virtue of a right-of-way granted by the United States, he may * * * provide in the new right-of-way * * *.'' This language requires the issuance of a new grant to allow realignment of any railroad and appurtenant communication facilities and we modified the final rule accordingly.

With the exception of editorial changes and those discussed above, the rest of this section is the same as proposed section 2807.19.

Several commenters said that BLM cannot require an amendment to an existing grant that already provides for additional appurtenances (the rights have already been granted). The commenters also said that to the extent that a Federal agency wants to install equipment of any kind that is beyond the scope of the original grant issued under subpart 2809 of these regulations, a Federal agency should seek to amend the grant. BLM agrees with these comments. An amendment is required only when there is a substantial deviation in location or use. This applies whether the applicant or grant holder is a Federal agency or a non-federal entity. The construction, use, or addition of facilities that are already authorized within the scope of an existing grant do not require a grant amendment.

Section 2807.21 May I Assign My Grant?

This section explains that with BLM's approval, you may assign, in whole or in part, any right or interest in a grant. In order to assign a grant, the proposed assignee must file an application and satisfy the same procedures and standards as for a new grant, including paying processing fees.

Assignment applications must also include:

(A) Documentation that the assignor agrees to the assignment; and

(B) A signed statement that the proposed assignee agrees to comply with and be bound by the terms and conditions of the grant that is being assigned and all applicable laws and regulations.

BLM will not recognize an assignment until it approves it in writing. BLM will approve the assignment if doing so is in the public interest. BLM may modify or add bonding and other requirements, including additional terms and conditions, to the grant when approving the assignment. This is consistent with previous section 2803.6–3. BLM may decrease rents if the new holder qualifies for an exemption or waiver or reduction and the previous holder did not. Similarly, BLM may increase rents if the previous holder qualified for an exemption or waiver or reduction and the new holder does not. If BLM approves the assignment, the benefits and liabilities of the grant apply to the new grant holder. The processing times and conditions described at section 2804.25(c) of this part apply to assignment applications.

We added the last clause ''including paying processing fees (see subpart 2804 of this part)'' to paragraph (b) in the final rule to address processing fees in this section and deleted proposed section 2807.21, which also addressed processing fees. We did this because the subject matter of processing fees for assignments should be addressed in the section having to do with assignments.

We modified final paragraph (d) by replacing the last sentence of proposed section 2807.20(d) with ''BLM may decrease rents if the new holder qualifies for an exemption * * * or waiver or reduction * * * and the previous holder did not. Similarly, BLM may increase rents if the previous holder qualified for an exemption or waiver or reduction and the new holder does not.'' We did this to make clear when rents may decrease and when they may increase as the result of an assignment. We also added ''If BLM approves the assignment, the benefits and liabilities of the grant apply to the new grant holder'' to the final paragraph to make clear that any benefits or liabilities of the grant, including any modifications or additional terms and conditions resulting from our approval of the assignment, would apply to the new grant holder.

With the exception of the changes described above, this final section is substantially similar to proposed section 2807.20.

We received many comments on various aspects of assignments. One commenter said that someone could misinterpret the phrase ''in part'' in paragraph (a) of the proposed rule to mean that BLM is granting to someone other than the grant holder the right to construct a project within the boundaries of the original grant. The commenter said that this could result in the first holder being adversely affected by the installation of the second and said that the rule should make clear that BLM will protect the rights of existing facilities. BLM's approval of an assignment, either in part or in full, cannot create any new rights of construction. An assignment can only transfer rights that already exist in a grant. Furthermore, the rule provides that an assignment must include documentation that the assignor agrees to the assignment and without such documentation, BLM will not approve an assignment.

Several commenters believed that the proposed processing fee was too high. One commenter said that all assignments should be designated Category I since the grant being assigned would have already been processed and all information necessary to process the assignment is already in the file. BLM agrees that we can process most routine assignment applications in less time than would usually be needed to process an application for a new grant. We have consequently restructured the processing fee categories (see section 2804.14(b)) to create a new category (final Category 1) that requires more than one, but eight or fewer hours to process. The $97 fee for this category is less than that for the existing fee category for an application for a new grant. We disagree that all information necessary to process an assignment is already in the file. Every assignment application will require new information regarding the assignee's qualifications. It may also be necessary to gather new information in order to determine if the assignor is in compliance with the terms and conditions of the grant, if it is in the public interest to approve the assignment, or if it may be appropriate for BLM to modify or add bonding requirements or to add additional terms and conditions to the grant. If BLM believes that the circumstances involved in an individual assignment application will require more than eight hours of processing time, the appropriate fee category will be determined according to section 2804.14 of this rule. The final rule provides that there will be no processing fee if BLM can process your application in one hour or less.

Several commenters believed that the oil and gas industry should not have to pay any processing fees for assignments because the oil and gas industry produces revenues in the form of royalties and bonuses and therefore pays its own way. Please see the general discussion in this preamble for an explanation of why BLM charges processing fees.

Several commenters said that in order to streamline the process, the final rule should allow BLM to process multi-assignment requests all at one time and that BLM should charge the assignor for the actual time it takes to process the assignments. BLM agrees that when multiple grants are to be assigned to the

same assignee, processing a single mass assignment is usually more efficient than processing the assignment of each grant separately. The final rule does not require an individual application for each grant that is to be assigned. An applicant may include as many grants in a single application as is desired. BLM will determine the processing fee category based on the estimated number of hours that we will need to process the application.

Several commenters opposed any blanket condition of approval that would allow for changing the terms of the grant. The commenters said the provision would make it very difficult to assign a right-of-way where the assignee would have no idea what BLM may change or add to it. Section 505 of FLPMA provides in part that:

> Each right-of-way shall contain (a) terms and conditions which will * * * (iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and (iv) require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards;

To implement this and other requirements of section 505, the FLPMA right-of-way regulations have contained the following provision (previous section 2801.2(a)(1)) since 1980:

> An applicant by accepting a right-of-way grant, temporary use permit, assignment, amendment or renewal agrees and consents to comply with and be bound by the following terms and conditions, excepting those which the Secretary may waive in a particular case: (1) To the extent practicable, all State and Federal laws applicable to the authorized use and such additional State and Federal laws, along with the implementing regulations, that may be enacted and issued during the term of the grant or permit.

Final section 2805.12 is consistent with previous section 2801.2(a)(1).

BLM believes that it is appropriate to review a grant's terms and conditions when it is being assigned to determine if the terms and conditions are consistent with applicable laws and regulations then in effect and to modify the grant, including additional terms and conditions, if needed, to make the grant consistent with applicable laws and regulations. The grant holder is responsible for complying with applicable laws and regulations whether or not the terms and conditions of the grant are currently consistent with those laws and regulations. We believe that it is desirable for both parties, however, that the terms and conditions of a grant reflect current legal and regulatory requirements as accurately as possible. We anticipate that grant modifications incorporated as part of the approval of an assignment application will be uncommon, but that when they are made, will be made judiciously and for good reason. You may appeal any decision requiring such a grant modification under section 2801.10 of the final rule.

Several commenters said that there should be no requirement to submit a new application for an assignment because the substance of the grant will not change. BLM disagrees. Whenever a grant holder proposes to transfer some or all of the rights contained in the grant to another party, BLM must determine, among other things:

(A) If the proposed assignee is qualified to hold the grant under applicable provisions of law and the regulations in subpart 2803;

(B) Whether the proposed assignee may be exempt from rent or eligible for a waiver or reduced rent;

(C) If it is in the public interest to approve the assignment; and

(D) If it may be appropriate to modify or add bonding or other requirements.

BLM believes that the most efficient way to obtain the information it needs to make these determinations and to meet its responsibilities under applicable law and regulations is through the filing of an application for assignment.

Section 2807.22 How Do I Renew My Grant?

This section explains that if your grant specifies that it is renewable and you choose to renew it, you must apply to BLM to renew the grant at least 120 calendar days before your grant expires. BLM will renew the grant if you are complying with the terms, conditions, and stipulations of the grant and applicable laws and regulations.

If your grant does not address whether it is renewable, you may apply to BLM to renew the grant. You must send BLM your application at least 120 calendar days before your grant expires. In your application you must show that you are complying with the terms, conditions, and stipulations of the grant and applicable laws and regulations. BLM has the discretion to renew the grant if doing so is in the public interest.

You must submit your application in the manner stated in paragraph (a) or (b) of this section and include the same information necessary for a new application. You must reimburse BLM in advance for the administrative costs of processing the renewal in accordance with section 2804.14 of this part. BLM will review your application and determine the applicable terms and conditions of any renewed grant.

BLM will not renew grants issued before October 21, 1976. Section 510(a) of FLPMA supports this practice. If you hold such a grant and would like to continue to use the right-of-way beyond your grant's expiration date, you must apply to BLM for a new FLPMA grant (see subpart 2804 of this part). You must send BLM your application at least 120 days before your grant expires. If BLM denies your application, you may appeal the decision under section 2801.10 of this part.

We made several changes to the final rule to make it clearer and more complete. We modified paragraph (a), which discusses grants that specify that they are renewable, to state that you must apply to BLM at least 120 calendar days before your grant expires if you choose to renew it. The proposed rule specified that an application for renewal was required (see proposed section 2807.22(c)), but did not state when the application should be filed for such grants. Since a grant cannot be renewed after it has expired, it is important that BLM receive the renewal application in sufficient time to enable us to complete our review process prior to grant expiration. The final rule sets the same 120 calendar day requirement for all grants.

We reworded paragraph (b) to remove unnecessary language and to make clear that a request for renewal must be in the form of an application.

We added a new paragraph (e) to the final rule stating that grants issued before October 21, 1976, under authorities FLPMA repealed will not be renewed under those authorities and that if the holder of such a grant wishes to continue using the right-of-way beyond the grant's expiration date, the holder will need to apply for a new FLPMA grant. We added this language to improve the completeness of the section and to reflect long-standing BLM practice.

We also added a new paragraph (f) to inform you that if BLM denies your renewal application, you may appeal the decision to IBLA under section 2801.10 of this part. We added this paragraph to give you additional notice of your appeal rights, especially since previous section 2803.6–5(e) states that decisions denying renewals of grants that do not contain a provision for renewal are final with no right of review or appeal.

Several commenters said that there should be no charge for renewing an existing grant. They said this was particularly appropriate for right-of-way

grant renewals that are categorically excluded from the National Environmental Policy Act compliance process. We disagree. BLM charges processing fees to everyone who files a renewal application, except those specifically exempted by law or regulation. Please see the discussion above addressing our authority to recover processing costs.

Several commenters said that the fee for grant renewal should be an administrative fee based on the time and cost it takes to renew the grant and not be based on the fee category and information used in processing the original grant. Some commenters said that the administrative costs of processing such right-of-way renewals should be minimal, and the costs of seeking cost recovery could outweigh the reasonable costs of processing. Many commenters also said that the administrative requirements for a renewal would likely be minimal and would not justify charging a grantee the same fees associated with a new grant request. Several commenters said that the review time for renewals should be minimal since a renewal does not require the same paperwork and review that an application for a new right-of-way would. One commenter said that the regulations should provide sufficient flexibility to charge fees based on the most applicable fee structure to the project. The commenter said that fees could be:

(A) Based on the amount of time it takes to process the renewal;

(B) Derived from the cost of staff time used to establish the processing fee for the original application; or

(C) Based on an ''as-they-are-processed'' method.

BLM agrees that we can process most routine renewal applications in less time than would usually be needed to process an application for a new grant. We have consequently restructured the processing fee categories (see section 2804.14(b)) to create a new category (Category 1) for assignments and renewals that require more than one, but eight or fewer hours to process. If BLM believes that the circumstances involved with an individual renewal application will require more than eight hours of processing time, we will determine the appropriate fee category according to section 2804.14 of this rule. Please see the discussion on processing fee categories in the discussion of section 2807.21 for more discussion of this matter.

Several commenters said that BLM should not require grant holders to submit a formal application for a grant renewal if they do not propose to modify their existing grant and that a simple notice or letter of request should suffice. Several commenters also said that they did not see a need to submit the same information in a grant renewal application as they initially submitted for the grant. We disagree. In renewing a grant, BLM is responsible for complying with section 501(b)(1) of FLPMA which states that:

> The Secretary concerned shall require, prior to granting, issuing, or renewing a right-of-way, that the applicant submit and disclose those plans, contracts, agreements, or other information reasonably related to the use, or intended use, of the right-of-way, including its effect on competition, which he deems necessary to a determination, in accordance with the provisions of this Act, as to whether a right-of-way shall be granted, issued, or renewed and the terms and conditions which should be included in the right-of-way.

Statutes such as the National Environmental Policy Act also require BLM to assess the impacts of uses of the public lands before authorizing or allowing such uses, including authorizing the continuation of an existing use. BLM believes that the most efficient way to obtain the information it needs to enable it to meet its obligations under such statutes is through the filing of an application using Standard Form 299. If the authorized facility has already been constructed, the information you must include in the renewal application is only that which is relevant to the continuing operation, maintenance, and termination of the facility. If any of the information required on Standard Form 299 was provided in the original grant application and there has been no change, a statement to that effect will generally suffice.

Several commenters said that BLM should not change the terms and conditions of the existing grant for the renewed grant. One commenter said the renewals should include only the minimal administrative exercise of ensuring that a grant holder has upheld the terms of the grant. BLM is responsible for assuring that the right-of-way authorizations it approves are in compliance with applicable statutes and regulations in effect at the time the authorization is approved. This applies to renewals since a renewal creates a right to use public land that would not exist if the BLM does not approve the renewal. In order to meet this responsibility, BLM needs to:

(A) Review the circumstances of an expiring grant beyond the holder's compliance with the terms of the grant; and

(B) Add or modify terms and conditions in order to bring the renewed grant into compliance with current regulations and statutes.

Therefore, we have not adopted the commenters' suggestions.

One commenter said that the final rule should eliminate annual renewals in favor of 5-year renewals or renewals for the original term of the grant. Neither the proposed nor final rule contains a provision or requirement for annual renewals. In your renewal application you may request the renewal term you prefer. BLM determines the term of the renewed grant and will do so in the same manner as the term for new grants (see section 2805.11(b)).

Subpart 2808—Trespass

This subpart contains regulations having to do with trespass on public lands. It explains:

(A) What trespass is, including distinguishing between willful and non-willful trespass;

(B) What actions BLM will take if it determines you are in trespass; and

(C) The limitations for receiving a new grant if you are or have been in trespass.

Section 2808.10 What Is Trespass?

This section explains that trespass is using, occupying, or developing the public lands or their resources without a required authorization or in a way that is beyond the scope and terms and conditions of your authorization. Trespass is a prohibited act. The final language is slightly different from that in proposed section 2808.10(a). We replaced ''and specific limitations of your authorization'' with ''and terms and conditions of your authorization.'' The new language more accurately and clearly describes trespass.

This section also explains that trespass includes acts or omissions causing undue or unnecessary degradation to the public lands or their resources. In determining if such degradation is occurring, BLM may consider the effects of the activity on resources and land uses outside the area of the activity. This sentence is new to this section in the final rule, but is consistent with the previous regulation's definition of ''unnecessary or undue degradation'' (see previous section 2800.0–5(x)).

The section also explains that there are two kinds of trespass, willful and non-willful.

(A) ''Willful trespass'' is voluntary or conscious trespass and includes trespass committed with criminal or malicious intent. It includes a consistent pattern of

actions taken with knowledge, even if those actions are taken in the belief that the conduct is reasonable or legal.

(B) ''Non-willful trespass'' is trespass committed by mistake or inadvertence.

With the exception of editorial changes and the change mentioned above, this section remains as proposed.

Several commenters said that the final rule should follow the common definition of trespass, which requires notice and knowledge and then a willful and knowing act. Commenters also said that trespass, by definition, cannot be by accident. Commenters said, ''Trespass laws require entering or remaining on the property of another knowing that consent to remain or enter is denied.''

We disagree with the commenters. The meaning of the term ''trespass'' is broader than commenters assert (see Black's Law Dictionary and Webster's New University Dictionary). BLM's definition of trespass in these and previous regulations is based on section 303(g) of FLPMA (43 U.S.C. 1733) which states:

> The use, occupancy, or development of any portion of the public lands contrary to any regulation of the Secretary or other responsible authority, or contrary to any order issued pursuant to any such regulation, is unlawful and prohibited.

Several commenters said in the final rule we should replace ''unnecessary or undue degradation'' with ''damage.'' The final rule continues to use the term ''unnecessary or undue degradation.'' The use of the term is consistent with both previous section 2800.0–5(u)), proposed section 2808.10(a), and with FLPMA's mandate that BLM ''take any action necessary to prevent unnecessary or undue degradation of the lands'' (see section 302(b)).

Other commenters said that the proposed rule is too subjective and open-ended. We disagree. The key to trespass is set forth in the terms and conditions of the right-of-way grant, which each holder will receive in writing from BLM. If there exists a question whether the proposed activity goes beyond the scope of the grant, a holder should consult BLM in advance to determine if a grant amendment is necessary.

Section 2808.11 What Will BLM Do if It Determines That I Am in Trespass?

If BLM determines you are in trespass, we will notify you in writing of the trespass and explain your liability. Your liability includes:

(A) Reimbursing the United States for all costs incurred in investigating and terminating the trespass;

(B) Paying rental for the lands, as provided for in subpart 2806 of this part, for the current and past years of trespass, or, where applicable, the cumulative value of the current use fee, amortization fee, and maintenance fee for unauthorized use of any BLM-administered road; and

(C) Rehabilitating and restoring any damaged lands or resources. If you do not rehabilitate and restore the lands and resources within the time BLM provides in the notice, you will be liable for the costs the United States incurs in rehabilitating and restoring the lands and resources.

This section explains that in addition to amounts you owe under paragraph (a) of this section, BLM may assess penalties as follows:

(A) For willful or repeated non-willful trespass, the penalty is two times the rent. For roads, the penalty is two times the charges for road use, amortization, and maintenance, which have accrued since the trespass began;

(B) For non-willful trespass not resolved within 30 calendar days after receiving the written notice under paragraph (a) of this section, the penalty is an amount equal to the rent. To resolve the trespass you must meet one of the conditions identified in 43 CFR 9239.7–1. For roads, the penalty is an amount equal to the charges for road use, amortization, and maintenance, which have accrued since the trespass began; and

(C) The penalty will not be less than the fee for a Processing Category 2 application for non-willful trespass or less than three times this value for willful or repeated non-willful trespass. You must pay whichever is the higher of the:

(1) Amount computed in paragraph (b) of this section; or

(2) The minimum penalty amount. We amended this section of the rule to make clearer what the amount of the penalty would be. The language change does not change the intent of the proposed rule.

In addition to civil penalties under paragraph (b) of this section, you may be tried before a United States magistrate and fined no more than $1,000 or imprisoned for no more than 12 months, or both, for a knowing and willful trespass, as provided at 43 CFR 9262.1 and 43 U.S.C. 1733(a).

Until you comply with the requirements of 43 CFR 9239.7–1, BLM will not process any of your applications for any activities on BLM lands. We amended this section of the final regulations to be consistent with existing regulatory authority in 43 CFR 9239.7–1.

This section also explains that you may appeal a trespass decision under section 2801.10 of this part and that nothing in this section limits your liability under any other Federal or state law.

Several commenters said that as stewards of the land, it is BLM's job to manage the public land, and therefore, there should be no cost to the grantee for investigations of trespass. We disagree with the commenters. Existing 43 CFR 9239.7–1 requires a trespasser to pay ''costs, damages and penalties'' for a trespass against the United States. These final rules are consistent with that provision of existing regulations.

Several commenters said that since land ownership lines are not always clear, it seems unfair to require a penalty for trespass without giving the permit holder an opportunity to correct the problem. The commenters said that the expense of surveying Federal land in the vicinity of their facilities would be very expensive and in most cases completely unnecessary. The commenters suggested that BLM modify the section to state that when an ''encroachment'' is identified, the encroacher will pursue reasonable efforts to correct the ''encroachment'' to BLM's satisfaction. The commenters said that if after a reasonable period of time the ''encroachment'' is not removed and/or resolved, only then should BLM impose a trespass penalty. We did not amend the final regulations as suggested by the commenters. However, in many circumstances where BLM determines a party is in trespass, we will allow a period of time to correct the trespass violation before initiating formal trespass proceedings. BLM must maintain the flexibility to immediately begin trespass proceedings for those situations where we need to immediately curtail activities that may cause damage to the public lands or health and safety.

Section 2808.12 May I Receive a Grant if I Am or Have Been in Trespass?

This section explains that until you satisfy liability for a trespass, BLM will not process any applications you have pending for any activity on BLM-administered lands. A history of trespass will not necessarily disqualify you from receiving a grant. In order to correct a trespass, you must apply under the procedures described at subpart 2804. BLM will process your application as if it were a new use. Prior unauthorized use does not create a preference for receiving a grant.

We substantially revised this section. In addition to wording changes, we moved proposed section 2808.11(e) to this section. We also added the phrase ''or have been'' to the section title. We did this to provide a more accurate

description of the contents of the final section, since unsatisfied trespass liability may include liability incurred as the result of prior trespass actions, even if those actions are no longer occurring. We also added language stating that a history of trespass will not necessarily disqualify you from receiving a grant and that prior unauthorized use does not create a preference for receiving a grant. These provisions reflect long-standing BLM practice and policy. We added them to provide a more complete description of how we deal with applications filed by parties with a history of trespass.

Several commenters said that proposed section 2808.11(e) (now in final section 2808.12) is arbitrary and capricious, since under this rule, if there is a trespass dispute under appeal, BLM would not process other applications. This rule is not arbitrary and capricious. As stated above, it is consistent with current practice and with regulations that were subject to the Administrative Procedure Act's notice and comment rulemaking. Moreover, 43 CFR 9239.7–1(b) and (c) provides for filing a bond as one means of satisfying trespass liability. Payment of trespass liability under protest during the pendency of an appeal is another means of resolving commenters' concerns.

One commenter said that proposed section 2808.12 was unclear as to whether it refers to trespass on other lands or other grants. We agree that the proposed section was not as clear or complete as it could have been and believe that the changes made in the final rule, as described above, make it clear that BLM will not process any applications you have pending for any activity on BLM-administered land if you have an unsatisfied trespass liability. This includes pending applications for activities other than those involved in the trespass and located on lands other than those where the trespass occurred.

Subpart 2809—Grants for Federal Agencies

This subpart:

(A) Gives information about grants that BLM issues to other Federal agencies;

(B) Explains that these regulations apply to Federal agencies and describes limitations; and

(C) States that Federal agencies are generally not required to pay rent for a right-of-way grant.

The final rule changes the way BLM deals with right-of-way grants we issue to other Federal agencies. Under previous regulations in subpart 2807 we issued right-of-way ''reservations'' to Federal agencies rather than right-of-way grants. In those regulations, right-of-way reservations contained different terms and conditions than right-of-way grants that we issued to individuals, associations, partnerships, and corporations. Under this final rule, BLM will issue to Federal agencies a right-of-way grant on BLM Form 2800–14 Right-of-Way Grant/Temporary Use Permit for right-of-way uses on public land. This grant will contain the same terms and conditions as the grants BLM issues to any other party, unless circumstances warrant different terms (see section 2805.12 for terms and conditions contained in right-of-way grants). BLM does not typically require bonding from Federal agencies. However, this section continues to allow BLM the discretion to require it.

This subpart is different from that which we proposed. We deleted proposed section 2809.10 because we state in final section 2809.10 that these regulations apply to Federal agencies to the extent possible; it is therefore redundant to say that a Federal agency must apply for a grant. We deleted proposed section 2809.11, since the provisions in that proposed rule are all covered elsewhere in the regulations (see for example final section 2805.12). Proposed section 2809.12 is covered in final section 2809.10.

Section 2809.10 Do the Regulations in This Part Apply to Federal Agencies?

This section explains that the regulations in this part apply to Federal agencies to the extent possible. However, BLM may suspend or terminate a Federal agency's grant only if the terms and conditions of the Federal agency's grant allow it or the agency head holding the grant consents to it. This section also explains that under these regulations Federal agencies are generally not required to pay rent for a grant (see section 2806.14).

Several commenters said that the final regulations should make clear that none of the provisions outside of subpart 2804 apply to Federal agencies. We disagree. Section 507(a) of FLPMA (43 U.S.C. 1767) states that the Secretary ''may provide under applicable provisions of this title for the use of any department or agency of the United States a right-of-way over, upon, under or through the land administered by him, subject to such terms and conditions as he may impose.'' Clearly, other sections of Title V of FLPMA and other sections of this rule apply to grants we issue to other Federal agencies. For example, BLM can add terms and conditions (see section 505 of FLPMA and subpart 2805 of this rule) to a grant issued to another Federal agency appropriate to site-specific conditions.

Other commenters said that the final rule should make clear which provisions do apply to Federal agencies. All provisions of the final rule apply to grants we issue to other Federal agencies to the extent possible. BLM did not change the final rule as a result of this comment.

Several commenters said that BLM does not have the authority to charge Federal agencies rents (fair market value) for rights-of-way granted to them. The commenters stated that FLPMA does not give BLM the authority to charge rent because FLPMA does not include Federal agencies in the definition of ''holder'' at 43 U.S.C. 1702(b). The commenters also stated that by charging other Federal agencies rent, BLM is acting outside the scope of its authority. For the same reason, the commenters stated that BLM could not impose on Federal agencies requirements for liability, bonding, or allow BLM to release third parties from liability for environmental damages.

Under this final rule (at section 2806.14(b)(1)), a Federal agency does not have to pay rent for its use of a right-of-way unless it is using the facility, system, space, or any part of the right-of-way for a commercial purpose. We believe that we have the authority to require other Federal agencies to pay rent for their rights-of-way. The commenters base their argument on the use of the term ''holder'' in section 504(g) of FLPMA (43 U.S.C. 1764(g)), but overlook the provision of that section authorizing the Secretary to issue rights-of-way to Federal agencies ''for such lesser charge, including free use,'' as the Secretary finds equitable and in the public interest. This provision authorizing reduced rent, or no rent at all, would be unnecessary if the Secretary lacked authority to charge Federal agencies rent.

Section 507 of FLPMA (43 U.S.C. 1767) provides that the Secretary may issue rights-of-way to any U.S. department or agency, subject to ''such terms and conditions as he may impose.'' Charging other Federal agencies rent in appropriate circumstances is one such applicable term. The broad language of section 507 contradicts commenter's statements.

Part 2880—Rights-of-Way Under the Mineral Leasing Act

We received many comments on the proposed rule that addressed issues in both the part 2800 and part 2880 regulations. So as not to be redundant, we addressed the comments only in the

section they pertained to in the part 2800 regulations. In the following discussion of the part 2880 regulations, if a comment on the part 2800 regulations also pertains to a section in the 2880s, instead of repeating the discussion again here, we provide a cross-reference to the appropriate section in the part 2800 preamble discussion.

General Comments

Several commenters said it was inappropriate and a ''conflict of due process' to include rules addressing the appeal process and oil and gas at a later date. We disagree. Nothing precludes a Federal agency from promulgating rules covering different areas of the same program as long as the public has notice of any regulatory changes and the opportunity to comment. Notice and comment on a rule is due process.

Several commenters believe that the rule mixes many disparate industries in the requirements for a right-of-way. They said that oil and gas operations are significantly different from interstate transmission lines, communication equipment, or other industries, and therefore provisions relating to them should be taken out of the rule. BLM disagrees with this comment and believes that there is no significant difference in the process to analyze a right-of-way application regardless of the industry involved. In this respect, oil and gas pipelines are not so dissimilar to water pipelines, roads, or other linear surface-disturbing facilities that right-of-way grants authorize. In addition, any special character belonging to oil and gas operations is accommodated by our treatment of them in part 2880, distinct from the part 2800 rights-of-way authorized by FLPMA.

Several commenters said that the rule is another financial disincentive for oil and gas development on public lands. We disagree. With the exception of major transmission pipelines, nearly all feeder pipeline and trunk pipeline right-of-way applications fall in Processing Categories 1 through 4 of the rule. These processing fees range from $97 to $923. The minor fee increase this rule implements is insignificant compared to the overall cost of constructing an oil and gas pipeline. In addition, the oil and gas industry has been paying cost reimbursement for grant applications since the previous regulations became effective in 1987.

Several commenters said that the differences between MLA and FLPMA regulations are confusing to BLM and the oil and gas industry. The commenters asked that the final rule spell out any distinction between the MLA right-of-way regulations and the FLPMA right-of-way regulations. Please see the table in the general discussion in this preamble that explains some of the significant differences and similarities between FLPMA and MLA grants.

Subpart 2881—General Information

This subpart contains general information that pertains to right-of-way grants that BLM issues under the Mineral Leasing Act (MLA). It contains policy, procedure, and acronyms and definitions that apply to the part 2880 regulations.

Section 2881.2 What Is the Objective of BLM's Right-of-Way Program?

This section is new to the final rule and explains it is BLM's objective to grant rights-of-way to any qualified individual, business, or government entity, and to direct and control the use of rights-of-way on public lands in a manner that:

(A) Protects the natural resources;

(B) Prevents unnecessary or undue degradation to public lands;

(C) Promotes the use of rights-of-way in common; and

(D) Coordinates, to the fullest extent possible, all BLM actions under the regulations with state and local governments, interested individuals, and appropriate quasi-public entities.

We added this section to the final rule to provide overall guidance for BLM's MLA right-of-way program. It is consistent with 30 U.S.C. 185 and existing policy.

Section 2881.5 What Acronyms and Terms Are Used in These Regulations?

This section contains the acronyms and defines terms used in part 2880. Unless an acronym or term is listed in this section, the acronyms and terms in part 2800 of this title apply to this part. Paragraph (a) is new to the final rule and contains acronyms that are frequently used in this part of the final rule.

Paragraph (b) of this section defines the terms used in this part of the rule.

We deleted the definition of the term ''agency head'' from the final rule because the term is only used once in final section 2886.11. That section describes an agency head as the head of an agency having administrative jurisdiction over the Federal lands involved in an application.

In the final rule we amended the definition of ''casual use'' to mean ''activities ordinarily resulting in no or negligible disturbance of the public lands, resources, or improvements.'' We also replaced the proposed example with ''Surveying, marking routes, and collecting data to use to prepare applications for grants or TUPs.'' We believe the final rule's definition of ''casual use'' is a more accurate and useful description because it recognizes that casual use may cause little or no disturbance and because it gives examples that are more useful than those provided in the proposed definition.

In the final rule we amended the definition of ''facility'' by removing the reference to communication site rights-of-way or uses, since the only communication site uses authorized under the Mineral Leasing Act are for internal operations of the pipeline. BLM authorizes these internal communication uses as part of the MLA linear right-of-way grant and not a communication use lease that would allow the holder to sublease space for commercial purposes.

In the final rule we amended the definition of ''Federal lands'' to mean all lands owned by the United States, except lands:

(A) In the National Park System;

(B) Held in trust for an Indian or Indian tribe; or

(C) On the Outer Continental Shelf.

The proposed rule excepted lands administered by the Tennessee Valley Authority (TVA) from the definition, which is incorrect. TVA lands are acquired lands and are owned by the United States. For the purposes of these regulations TVA lands are considered Federal lands. We deleted the phrase ''whether surface or mineral estate or both'' to make the definition consistent with 30 U.S.C. 185(b)(1). We also deleted the phrase ''without reference to how the lands were acquired'' because the phrase is unnecessary and does not add to the definition.

BLM deleted the proposed definition of, and use of the term, ''field examination'' from the final rule. For all categories of applications, labor costs are by far the largest portion of the costs of processing an application. Costs associated with environmental analysis and other application processing steps are predominately labor and time related. While a portion of labor costs are reflected in the amount of time it takes to do field examinations for an application, a significant amount of time is also spent coordinating with staff, the applicant, and other involved parties, drafting documents, and keeping case file records current. It is more accurate to base a processing fee on the total estimated number of hours it will take for involved staff to process an application, than to count the number of field examinations needed to process

the application. For the same reasons, we eliminated the definition of ''field examination'' from section 2801.5 of this part.

We added a definition of ''grant'' to this part because the definition of the term in final section 2801.5 is for authorizations BLM issues under Title V of FLPMA or a previous right-of-way authority, and the grant definition in this part of the rule is for authorizations BLM issues under the Mineral Leasing Act (30 U.S.C. 185). The final definition is consistent with previous section 2880.0–5(n).

In the final rule we added a definition of ''monitoring'' to this part that is the same as in section 2801.5 of the FLPMA right-of-way regulations. We added the definition to this part since ''monitoring'' is defined in terms of grants and ''grant'' is defined differently in the two parts.

We made edits to the definition of ''production facilities'' that do not change the meaning of the term, but make the definition more clear. We replaced the proposed definition's phrasing ''on the leasehold'' with ''on its Federal oil and gas lease.''

We added a definition of ''right-of-way'' to this part of the final rule because the definition of right-of-way in section 2801.5 is legally inaccurate for this part. The proposed and final definitions for part 2800 refer to ''public lands.'' This final definition uses ''Federal lands'' instead. This is an important distinction because BLM's authority to issue grants under the MLA applies not just to public lands, but to all Federal lands if the right-of-way crosses lands under two or more agencies' jurisdiction, even those lands managed by departments other than the Department of the Interior.

We made edits to the definition of the term ''related facilities.'' We removed the proposed definition's use of the phrase ''and which are authorized under the Act'' because it is unnecessary to the meaning of the term. We would not consider facilities to be related unless they were authorized under the Act. Therefore the wording was surplus.

We added a definition of the term ''substantial deviation'' to this section of the final rule. We use the term in two sections of this final rule and we define it here to indicate a change, in location or use, from the terms of a grant or TUP under the MLA.

In the final rule we amended the definition of ''Temporary Use Permit (TUP)'' to mean ''a revocable, nonpossessory privilege to use specified Federal lands in the vicinity of and in connection with a right-of-way to construct, operate, maintain, or terminate a pipeline or to protect the environment or public safety. A TUP does not convey any interest in land.'' We made editorial changes to this definition and added a sentence stating that TUPs do not convey an interest in land. We added this sentence to better explain the nature of a TUP, as set forth in previous section 2881.1–2.

In the final rule we added the definition of ''third party'' to mean any person or entity other than BLM, an applicant, or a right-of-way grant holder. Third party is used several times in these regulations, but it was not defined, so we included a definition here.

Section 2881.7 Scope

We combined proposed section 2881.8 with this section and reworded it slightly. This section explains that the regulations in this part apply to:

(A) Issuing grants and TUPs, and to administering, amending, assigning, renewing, and terminating grants and TUPs for oil and gas pipelines. We replaced the phrase ''oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced from these materials'' with the phrase ''oil and gas'' because the definition of oil or gas includes those products;

(B) All grants and TUPs BLM and its predecessors previously issued under the Mineral Leasing Act. In the final rule we deleted the phrase ''and to those [grants or permits] issued by the Secretary of the Interior or his delegate in connection with the Trans-Alaska Oil Pipeline System [TAPS],'' because it is inaccurate. Under these regulations the term ''grant'' means an authorization issued under 30 U.S.C. 185. TAPS authorizations are issued under 43 U.S.C. 1652(b), not 30 U.S.C. 185. As a result of this change, we added a new paragraph (c) to this section (see the explanation below); and

(C) Pipeline systems, or parts thereof, on a Federal oil and gas lease owned by:

(1) A party who is not the lessee or lease operator; or

(2) The lessee or lease operator that are downstream from a custody transfer metering device. We reworded this paragraph in the final rule and removed the phrase ''from storage tanks or a'' and replaced it with ''a custody transfer'' because the statement as proposed was incorrect. There are situations where a lessee may install a series of oil storage tanks which are authorized by the terms of the lease. Pipelines located on-lease that are associated with these tanks, either upstream or downstream of the tank, can also be authorized by the terms of the lease and do not need a right-of-way grant. It is at the point on a lease where the oil or gas is metered and sold to a third party pipeline carrier that a right-of-way grant is required. This is because after the point of sale, the third party is responsible for transporting the product downstream. The third party would need a right-of-way for any Federal lands crossed downstream from the custody point. A right-of-way grant is also needed for any oil or gas pipeline located off the lease, regardless of ownership.

We proposed paragraph (b) of this section as section 2881.8. We added this paragraph to this section to make the rule more readable. This paragraph explains that these regulations do not apply to:

(A) Production facilities on an oil and gas lease which operate for the benefit of the lease. The lease authorizes these production facilities. We reworded this paragraph to make it clear that any production related facilities which operate for the benefit of the lease do not need a right-of-way;

(B) Pipelines on Federal lands under the jurisdiction of a single Federal department or agency, including bureaus and agencies within the Department of the Interior, other than BLM. We made minor changes to this paragraph in the final rule, but did not change the meaning from the proposed rule;

(C) Authorizations BLM issues to Federal agencies for oil or gas transportation. We deleted the phrase that was in the proposed rule ''Such grants are subject to the regulations at part 2800 of this chapter'' and substituted for it a reference to section 2801.6; or

(D) Authorizations issued under the authority of the Federal Land Policy and Management Act of 1976 (see part 2800 of this chapter).

We added a new paragraph (c) to this section to explain that notwithstanding the definition of ''grant'' in section 2881.5 of this subpart, the regulations in this part apply, consistent with 43 U.S.C. 1652(c), to any authorization issued by the Secretary of the Interior or his or her delegate under 43 U.S.C. 1652(b) for the Trans-Alaska Oil Pipeline System. We made this change to the final rule to be consistent with the statute. The terms of 43 U.S.C. 1652(c) expressly except certain provisions of 30 U.S.C. 185 from a TAPS authorization. Chief among these exceptions is a holder's liability for damages, which is addressed by TAPS at 43 U.S.C. 1653. In determining whether the regulations in part 2880 can be applied to a TAPS authorization ''consistent with 43 U.S.C. 1652(c),'' a careful reading of 43 U.S.C. 1652–1653 will be required.

Section 2881.8 Information Collection Matters

We deleted this section from the final rule because it is not necessary to publish this information in the text of the regulations.

These regulations contain information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), we submitted a copy of the proposed information collection requirements to the Office of Management and Budget (OMB) for review. OMB approved the information collection requirements under Control Number 1004–0189, which expires October 31, 2005.

Section 2881.9 Severability

This section was proposed as section 2881.10, and explains that if a court holds any provisions of these rules or their applicability to any person or circumstances invalid, the remainder of these rules and their applicability to other people or circumstances will not be affected. With the exception of editorial changes, this section remains as proposed.

Section 2881.10 How Do I Appeal a BLM Decision Issued Under the Regulations in This Part?

This is a new section to these regulations. The proposed rule listed the basic contents of this section in each place there is a right to appeal. This final rule replaces the appeals language in each of those sections with a cross-reference to this section. This eliminates redundancy and brings this rule in line with other BLM regulations that address appeals. This rule makes no changes to current BLM policy and practice regarding appeals.

Section 2881.11 When Do I Need a Grant From BLM for an Oil and Gas Pipeline?

This section is new to the final rule and explains that you must have a BLM grant issued under the Mineral Leasing Act for an oil and gas pipeline or related facility to cross Federal lands under:

(A) BLM's jurisdiction; or

(B) The jurisdiction of two or more Federal agencies.

We added this section to the final rule to make it clear that a BLM grant under 30 U.S.C. 185 is necessary for an oil or gas pipeline that crosses the jurisdiction of two or more Federal agencies, or crosses lands under BLM's sole jurisdiction. This is consistent with previous section 2880.0–7 and 30 U.S.C. 185(c). ''Federal agencies'' includes Interior agencies such as BLM, U.S. Fish and Wildlife Service, and Bureau of Reclamation (the MLA at 30 U.S.C. 185(b) specifically excludes National Park System lands from the definition of Federal lands and also lands held in trust for an Indian or Indian tribe). It also includes non-Interior agencies such as the Forest Service, Department of Defense agencies, Department of Energy, Corps of Engineers, and Tennessee Valley Authority. Further, under the statute, even when BLM is not one of the ''two or more Federal agencies'' whose land is crossed, BLM still has the responsibility to issue grants and renewals for the Federal lands.

Section 2881.12 When Do I Need a TUP for an Oil and Gas Pipeline?

This section is new to the final rule and explains that you must obtain a TUP from BLM when you require temporary use of more land than your grant authorizes to construct, operate, maintain, or terminate your pipeline, or to protect the environment or public safety. We added this section to the final rule to make it clear that any temporary use taking place outside the boundary of your right-of-way for a pipeline will require you to obtain a TUP from BLM prior to engaging in the use. BLM may grant a TUP for uses occurring any time during the life of the right-of-way. This section is consistent with existing policy and previous section 2881.1–2.

Subpart 2882—Lands Available for MLA Grants and TUPs

This subpart explains which lands are available for Mineral Leasing Act right-of-way grants and temporary use permits.

Section 2882.10 What Lands Are Available for Grants or TUPs?

This section explains that for lands BLM exclusively manages, we use the same criteria to determine whether lands are available for MLA right-of-way grants or TUPs as we do to determine whether lands are available for FLPMA right-of-way grants.

This section also explains that where a proposed oil or gas pipeline right-of-way involves lands managed by two or more Federal agencies, the regulation at section 2884.26 of this part will be followed.

Finally, this section explains that BLM may require common use of a right-of-way and may restrict new grants to existing corridors where safety and other considerations allow. Generally, BLM land use plans designate corridors. The Forest Service also has the authority to designate corridors in its Forest Management Plans. Any MLA right-of-way BLM authorizes would respect these corridors.

We amended the proposed rule at subpart 2882 to more accurately describe our criteria for determining availability of lands for right-of-way authorizations. In the final rule we added the phrase ''for lands BLM exclusively manages'' to the beginning of the section to make it clear that we use the process in subpart 2802 to determine the lands available for MLA right-of-way use only if those lands are exclusively under BLM's jurisdiction. Final paragraph (c) was proposed as the second sentence to this section.

Final paragraph (b) specifies that BLM may require common use of a right-of-way or restrict new grants to existing corridors where safety and other considerations allow. The concept of corridors is new to this rule. We added this paragraph to be consistent with existing BLM policy and previous section 2881.1–3(c). In addition, 30 U.S.C. 185(p) requires the use of rights-of-way in common to the extent practical in order to minimize adverse environmental impacts and the proliferation of separate rights-of-way.

We received several comments related to common use of right-of-way corridors and requiring placement of rights-of-way in existing corridors. Several commenters said that instead of designating specific corridors, BLM should encourage operators to use existing rights-of-way to the extent it is possible and practical. The final rule encourages common use of right-of-way areas and 30 U.S.C. 185(p) specifies that the use of rights-of-way in common ''shall be required to the extent practical.'' BLM reserves the right to require common use as part of the terms of all grants we issue under these regulations. This means that we may grant an additional right-of-way use that may adjoin or overlap your right-of-way. Usually, it is practical and efficient to overlap rights-of-ways and locate facilities as close together as possible to minimize surface disturbance. However, there may be situations where for technical or safety reasons it is not practical to overlap them. An example is constructing oil or gas pipelines under high voltage transmission lines where the transmission line creates corrosion problems for steel pipe buried below the transmission line. We will notify you in advance if we anticipate issuing an additional grant for the lands covered by your grant. However, we do not agree with the comment that using existing rights-of-way will replace designated utility corridors on public lands. Corridor designations in land use plans serve an important purpose in planning and siting major utility projects. Locating a new project in a

designated corridor may speed up the NEPA analysis for a project.

Several commenters questioned whether the corridor requirement can be applied to MLA rights-of-way. The commenters had concerns over siting oil and gas utilities in the same corridor as others. They were concerned that their ability to operate, maintain, and prevent leaks not be compromised. We believe that oil and gas pipelines are well suited to corridor development. There are many thousands of miles of major oil and gas pipelines that are located in designated right-of-way corridors in the United States. As stated above, our standard procedure is to contact existing grant holders whose right-of-way is inside a corridor when any new right-of-way is proposed for the same corridor. BLM must consider compatibility of uses and possible public health and safety issues that can result from utility placement on public lands. Under FLPMA, BLM has the authority to designate corridors and require corridor use on all public lands, including lands through which an MLA right-of-way has or will be authorized. On non-BLM lands, the ''Secretary concerned'' has authority to establish corridors and require their use.

Several commenters said that forcing the use of corridors could make a lease operation uneconomical and result in the waste of minerals and associated royalties. We understand the concern that locating a right-of-way corridor on an existing oil and gas lease could limit uses or production on a lease. Corridor designations are a land use planning decision that we make based on a multi-disciplinary analysis. This rule does not address the designation of right-of-way corridors. We did not change the final rule as a result of this comment.

Another commenter said that BLM should use caution when requiring all rights-of-way to be placed in the same corridor and that BLM must recognize that oil and gas rights-of-way must not be compromised in any way by another right-of-way grantee, particularly in light of the liability requirements BLM proposes to place on grantees. We did not change the final rule as a result of this comment. New grants are subject to valid existing uses, including the uses of other right-of-way holders inside or outside of corridors. In response to a liability issue similar to that raised by commenter, previous regulations and policy established liability requirements for right-of-way grant holders in a manner similar to that contained in these regulations. BLM will continue to consult with all grant holders when we consider common use of existing rights-of-way or designated corridors so as not to compromise existing rights.

Subpart 2883—Qualifications for Holding MLA Grants and TUPs

This subpart explains who is eligible and who is ineligible to hold grants and TUPs. It also explains:

(A) How you prove to BLM that you meet the qualifications to hold a grant or TUP; and

(B) What happens if BLM issues you a grant or TUP and later determines that you are not qualified to hold it.

Section 2883.10 Who May Hold a Grant or TUP?

This section explains that to hold a grant or TUP under these regulations, you must be:

(A) A United States citizen, an association of such citizens, or a corporation, partnership, association, or similar business entity organized under the laws of the United States, or of any state therein, or a state or local government; and

(B) Financially and technically able to construct, operate, maintain, and terminate the proposed facilities.

We added TUPs to this section since they were mistakenly left out of the proposed rule. We added them here and other places in the final rule to be consistent with previous regulations and policy and 30 U.S.C. 185(e). We also added the phrase ''and terminate'' to paragraph (b) of this section. We inadvertently omitted it from the proposed rule, but it is in previous section 2882.2–3(a)(4).

Section 2883.11 Who May Not Hold a Grant or TUP?

This section explains that aliens may not acquire or hold any direct or indirect interest in grants or TUPs, except that they may own or control stock in corporations holding grants or TUPs if the laws of their country do not deny similar or like privileges to citizens of the United States. This section contains minor rewording changes, but is consistent with the proposed rule and previous section 2882.2–1.

Section 2883.12 How Do I Prove I Am Qualified To Hold a Grant or TUP?

This section explains how you prove to BLM that you are qualified to hold a grant or TUP. If you are a private individual, BLM requires no proof of citizenship with your application. However, BLM may request you provide proof of your citizenship should a question of this nature arise during processing your application.

If you are a partnership, corporation, association, or other business entity, you must submit the following information in your application:

(A) Copies of the formal documents creating the business entity, such as articles of incorporation, and including the corporate bylaws. We inadvertently omitted this provision from the proposed rule, but in order to comply with 30 U.S.C. 185(i) and (j), we added the requirement to the final rule. BLM needs this information to assist us in tracking changes in corporate ownership, corporate mergers, and reorganizations. This requirement is consistent with section 2886.12. BLM believes it is reasonable to ask corporations to identify how they are structured and who is responsible in the organization, especially in light of several major corporations' recent financial difficulties;

(B) Evidence that the party signing the application has the authority to bind the applicant. This provision is new to the final rule. We added the provision because of our past experiences in working with representatives of some companies. It is common for applicants to enlist agents to act on their behalf and they may be the only contact BLM has with the applicant. It is important and reasonable for us to know that the person purporting to be an agent of the grant holder or applicant actually has authority to act as such;

(C) The name, address, and citizenship of each participant in the business entity;

(D) The name, address, and citizenship of each shareholder owning 3 percent or more of the shares, and the number and percentage of any class of voting shares of the business entity which such shareholder is authorized to vote;

(E) The name and address of each affiliate of the business;

(F) The number of shares and the percentage of any class of voting stock owned by the business entity, directly or indirectly, in any affiliate controlled by the business; and

(G) The number of shares and the percentage of any class of voting stock owned by an affiliate, directly or indirectly, in the business entity controlled by the affiliate.

If you have already supplied this information to BLM and the information remains accurate, you only need to reference the grant serial number under which you filed it.

Section 2883.13 What Happens if BLM Issues Me a Grant or TUP and Later Determines That I Am Not Qualified To Hold It?

This section explains that if BLM issues you a grant or TUP, and later determines that you are not qualified to hold it, BLM will terminate your grant or TUP under 30 U.S.C. 185(o). You may appeal this decision under section 2881.10 of this part.

In the final rule we added a cross-reference to the appropriate section of the Mineral Leasing Act to indicate our authority for terminating a grant that you are not qualified to hold. We also added a cross-reference to the appeals provisions of these rules.

Section 2883.14 What Happens to My Application, Grant, or TUP if I Die?

This section explains what happens to an application that we have not completely processed or to a grant or TUP that we have issued when the applicant or holder dies. This section is new to this part, although we addressed this same issue at section 2803.13 of the proposed FLPMA regulations (''What happens to my grant if I die?''). We inadvertently omitted a similar provision from the MLA regulations, and therefore are adding it now. This section is based on and is consistent with final section 2803.12 of this rule. This section explains:

(A) If an applicant or grant or TUP holder dies, any inheritable interest in the application, grant, or TUP will be distributed under state law. The word ''inheritable'' is not used here in its technical sense. It refers to property passing by will or intestate succession; and

(B) If the distributee of a grant or TUP is not qualified to hold a grant or TUP under section 2883.10 of this subpart, BLM will recognize the distributee as the grant or TUP holder and allow the distributee to hold its interest in the grant or TUP for up to two years. During that period the distributee must either become qualified or divest itself of the interest.

We added this provision to the final rule to make sure we have consistent processes in place for cases where an applicant or a grant holder dies.

Subpart 2884—Applying for MLA Grants or TUPs

Subpart 2884 explains how to apply for a grant or TUP. More specifically, it explains:

(A) The preapplication process;

(B) What you need to provide in your application;

(C) The processing fees for applications;

(D) Where to file your application;

(E) The public notification requirements for right-of-way and TUP applications; and

(F) Processing of applications for grants and TUPs.

Section 2884.10 What Should I Do Before I File My Application?

This section explains that when you determine that a proposed oil and gas pipeline system would cross Federal lands under BLM's jurisdiction, or under the jurisdiction of two or more Federal agencies, you should notify BLM. Advance notice to us about your intent to propose an oil and gas pipeline system will assist us in planning and in processing your application. The preapplication meeting will also benefit you by providing you information on known resource issues, land use plan constraints, and potential problems you may be able to avoid when filling out your application. It may also save you time completing your application since we can help you determine the information that you need to include in your application.

Before filing an application with BLM, we encourage you to make an appointment for a preapplication meeting with the appropriate personnel in the BLM field office nearest the lands you seek to use. If your project affects multiple states or multiple BLM field offices within a state, you may want to coordinate with the BLM state office so that appropriate offices and agencies can be involved in the preapplication meeting. During the preapplication meeting BLM can:

(A) Identify potential routing and other constraints;

(B) Determine whether or not the lands in the proposed application are located within a designated or existing right-of-way corridor;

(C) Tentatively schedule the processing of your proposed application;

(D) Provide you information about qualifications for holding grants and TUPs, and processing, monitoring, and rent costs; and

(E) Identify any work which will require obtaining one or more TUPs.

BLM may share this information with Federal, state, tribal, and local government agencies to ensure that these agencies are aware of any authorizations you may need from them. BLM will keep confidential any information that you mark as ''confidential'' or ''proprietary'' to the extent allowed by law.

We amended paragraph (a) of proposed section 2884.10 by deleting the phrase ''or the Secretary of the Interior.'' We deleted the phrase because the Secretary has delegated to BLM authority over rights-of-way and therefore it would be more appropriate for you to contact BLM, rather than the Secretary.

We also added a new paragraph (d) to this section to make it clear that BLM will keep confidential any information that you mark as ''confidential'' or ''proprietary'' to the extent allowed by law. This is consistent with existing policy and the Department's Freedom of Information Act regulations in part 2 of this title.

Section 2884.11 What Information Must I Submit in My Application?

This section explains the information you must submit in your application for a MLA right-of-way grant. It explains that you must file your application on Form SF–299, as part of an Application for Permit to Drill or Reenter (BLM Form 3160–3), or Sundry Notice and Report on Wells (BLM Form 3160–5). In your application you must provide a complete description of the project, including:

(A) The exact diameters of the pipes and locations of the pipelines;

(B) Proposed construction and reclamation techniques; and

(C) The estimated life of the facility.

This section also explains that you must file with BLM copies of any applications you file with other Federal agencies, such as the Federal Energy Regulatory Commission (FERC) (see Title 18 of the Code of Federal Regulations for FERC regulations), for licenses, certificates, or other authorities involving the right-of-way. This provision is consistent with previous section 2882.2–1(c). Copies of applications to other Federal agencies, such as the FERC application referenced above, may be sufficient for much of the data we may require to process your application.

To assist us in processing your application, BLM may ask you to submit additional information beyond what the form requires. This information may include:

(A) A list of any Federal and state approvals required for the proposal;

(B) A description of the alternative route(s) and mode(s) considered when developing the proposal;

(C) Copies of, or reference to, all similar applications or grants you have submitted, currently hold, or have held in the past. In the final rule we added the phrase ''or have held in the past'' to this paragraph to help us evaluate your financial or technical capability to implement the project;

(D) A statement of need and economic feasibility of the proposed project;

(E) The estimated schedule for constructing, operating, maintaining, and terminating the project (a Plan of Development). This was proposed in section 2884.19(a);

(F) A map of the project, showing its proposed location and showing existing facilities adjacent to the proposal. This is new to this section, but is consistent with previous section 2882.2–3(a)(3);

(G) A statement certifying that you are of legal age and authorized to do business in the state(s) where the right-of-way would be located and that you have submitted correct information to the best of your knowledge;

(H) A statement of the environmental, social, and economic effects of the proposal;

(I) A statement of your financial and technical ability to construct, operate, maintain, and terminate the project;

(J) Proof that you are a United States citizen. This provision is in previous sections 2882.2–1(a) and 2882.2–3(a)(6). We inadvertently left it out of the proposed rule and therefore added it here; and

(K) Any other information BLM considers necessary to process your application. Previous section 2882.3(d) allowed BLM to require a right-of-way applicant to submit such information as is necessary for review of the application. This requirement appears in the proposed rule at section 2884.11(c)(5).

Before BLM reviews your application for a grant, grant amendment, or grant renewal, you must submit the following information and material to ensure that the facilities will be constructed, operated, and maintained as common carriers:

(A) Conditions for, and agreements among, owners or operators, adding pumping facilities and looping, or to otherwise increase the pipeline or terminal's throughput capacity in response to actual or anticipated increases in demand;

(B) Conditions for adding or abandoning intake, offtake, or storage points or facilities; and

(C) Minimum shipment or purchase tenders.

We added the phrase ''grant amendment'' to the opening sentence of proposed section 2884.11(c) (final section 2884.11(d)) to clarify that we may also require an applicant who is amending an existing grant to submit this information.

If conditions or information affecting your application change, promptly notify BLM and submit to BLM in writing the necessary changes to your application. BLM may deny your application if you fail to do so.

For information purposes, in the final rule we added a cite in paragraph (b) to FERC's regulations.

Several commenters said that all the information this section requires is already in the right-of-way application form and that any information BLM requires should be in the form. We agree with this comment in theory, however, in practice our experience has shown that it is nearly impossible for an applicant to anticipate every question, and design their project to address all the issues at the application stage of processing. BLM requests for additional information to process an application are common, and the provisions of this paragraph are necessary to help us to efficiently process applications.

Section 2884.12 What Is the Processing Fee for a Grant or TUP Application?

This section explains that you must pay a nonrefundable processing fee with your application to cover costs to the Federal Government of processing your application before the Federal Government incurs them. We categorize the fees based on an estimate of the amount of time that the Federal Government will expend to process your application and to issue a decision granting or denying the application. The section also explains that there is no processing fee if the work is estimated to take one hour or less. This section contains a chart that lists the processing fees by category and is based on proposed section 2884.12. For Processing Categories 1 through 4, labor costs are by far the largest percentage of processing costs. Costs associated with environmental analysis and other application processing steps for these categories are predominately labor and time costs. The costs of supplies, printing, fuel, and lodging are small.

For Processing Category 5 and 6 applications, the complexity of the required environmental analysis is usually an important factor in determining processing costs, particularly if the application requires an environmental impact statement. Processing costs for Category 5 and 6 applications are, however, worked out in advance between BLM and the applicant either through a Master Agreement or a detailed accounting of work hours BLM estimates it will spend on processing the application. Because the non-labor costs are insignificant compared to labor costs, we eliminated the term ''field examination'' from the category definitions for Categories 1 through 4, and in final section 2881.5 of this part.

BLM updates the fees for Categories 1 through 4 in the schedule each calendar year, based on the previous year's change in the IPD–GDP, as measured second quarter to second quarter. BLM will round these changes to the nearest dollar. You may obtain a copy of the annually revised schedule from any BLM state or field office or on BLM's Internet Home Page at *http://www.blm.gov.*

After an initial review of your application, BLM will notify you in writing of the category into which your application fits. You must then submit to BLM the appropriate payment for that category before BLM processes your application. If you disagree with the category that BLM has determined for your application, you may appeal the decision under section 2881.10 of this part.

Your signature on a cost recovery Master Agreement (Category 5) constitutes your agreement with the processing category decision. Inherent in the concept of a Master Agreement is a cooperative relationship between BLM and an applicant. BLM is committed to working with any applicant wishing to pursue a Master Agreement. Under the provisions of the proposed rule and this final rule, an applicant's signature on a Master Agreement constitutes an agreement with the processing category decision. More generally, an applicant's signature on a Master Agreement constitutes agreement with all of its provisions, including the negotiated application processing costs. A signed Master Agreement documents BLM's decision on the processing category and the applicant's agreement with it. Therefore, we believe that an appeal of the negotiated agreement would be rare. Any disagreements during a Master Agreement negotiation process that could not be resolved would not result in consummation and signature of a Master Agreement. At that point, BLM would have to make a processing category decision outside the context of a Master Agreement, and that decision could be the subject of an administrative appeal.

If you have submitted the processing fee and you appeal a Processing Category 1 through 4 or a Processing Category 6 determination to IBLA, BLM will process your application while the appeal is pending. If IBLA finds in your favor, you will receive a refund or adjustment of your processing fee. We added this provision to the final rule to explain existing processes.

BLM may determine at any time that the application requires preparing an EIS. If this occurs, BLM will send you a decision changing your processing

category to Processing Category 6. You may appeal the decision under section 2881.10 of this part.

If you hold a grant or TUP relating to the Trans-Alaska Pipeline System (TAPS), BLM will send you a written statement seeking reimbursement of actual costs within 60 calendar days after the close of each quarter. Quarters end on the last day of March, June, September, and December. In the final rule we added language explaining that in processing your application and administering authorizations relating to TAPS, the Department of the Interior will avoid unnecessary employment of personnel and needless expenditure of funds. This provision was not in the proposed rule. We added it to be consistent with previous section 2883.1–1(d).

We added a new provision to paragraph (b) of this section explaining that there is no fee if it takes one hour or less to process your application. We believe that the minimal costs involved to process an application do not justify charging a fee. We also added a new Category 1 for processing routine applications that require greater than one hour but less than or equal to eight hours to process. Please see the preamble to section 2804.14 of this rule for a discussion of why we added this new category.

Several commenters objected to BLM charging grant holders ''actual'' costs. Some of the commenters claimed that the distinction was artificial, as the MLA did not use the word ''actual,'' and BLM should charge MLA grant holders reasonable costs, as it does FLPMA grant holders.

BLM charges MLA grant holders actual costs because the law requires it. Section 28 of the MLA (30 U.S.C. 185(l)) requires applicants for MLA pipeline rights-of-way to reimburse the United States for ''administrative and other costs'' incurred in processing applications and in monitoring the construction, operation, maintenance, and termination of an MLA pipeline. The MLA does not limit or qualify this requirement, nor does it list any factors that BLM may take into account when determining reimbursable costs. This is in marked contrast to section 304(b) of FLPMA, which addresses cost recovery for rights-of-way issued under FLPMA (see 49 FR 25972 (June 25, 1984)). Thus, BLM charges its actual administrative and other costs.

On July 25, 1986, in the preamble to the previous cost recovery regulations at subpart 2808, BLM discussed ''actual costs'' (51 FR 26836–26837). As explained in that preamble and in previous section 2800.0–5(o), ''actual costs'' are the financial measures of resources an agency expends on processing an application for a right-of-way or in monitoring the construction, operation, and termination of a facility BLM authorizes by a grant or permit. BLM bases actual cost information on Federal accounting and reporting systems which conform to the accounting principles and standards of the U.S. Comptroller General. Costs are divided into ''direct'' and ''indirect'' costs.

Direct costs include agency expenditures for labor, material, stores, and equipment usage associated with performing right-of-way responsibilities. These costs include such items as gross wages and employee benefits, material, stores, equipment, and contract costs.

Indirect costs are those costs an agency incurs for providing common services not specific to a particular application and include purchasing, property management, office fixed costs, accounting, automated data management, and personnel services. BLM assesses administrative charges against right-of-way cost recovery accounts on a percentage basis in order to recover costs of indirect support services. Executive and managerial direction are not included in indirect costs.

For Processing Categories 1 through 4, the established fees reflect both direct and indirect costs. For Processing Categories 5 and 6, we apply the annual indirect cost percentage to the direct costs that we determine for a specific application.

''Actual costs'' do not include management overhead costs. We have defined ''management overhead costs'' in section 2801.5 as Federal expenditures associated with BLM's directorate, including all BLM State Directors and the entire Washington Office staff, except where a State Director or Washington Office staff member is required to perform work on a specific right-of-way case. We also note that the costs of studies or other work which BLM must do regardless of whether it receives an application are considered independent public benefits and are not included in processing fees. This work includes preparing land use plans.

Several commenters suggested that BLM and the applicant should agree on what the ''reasonable'' costs of processing an application should be. They were also concerned that under these regulations BLM would do additional field work that is not necessary. Section 504(g) of FLPMA requires reimbursement of ''reasonable'' administrative and other costs incurred in processing applications for grants, and section 304(b) identifies factors to consider in determining reasonable costs. The MLA, in contrast, requires that applicants for grants and TUPs reimburse the United States for ''administrative and other costs'' incurred in processing applications, without providing additional criteria to consider, as does FLPMA. Therefore, BLM must determine administrative and other costs to process an MLA grant or TUP application without considering the factors that FLPMA requires us to consider for FLPMA rights-of-way (see 49 FR 25972 (June 25, 1984)). BLM will undertake or require only that work that is necessary to process an application efficiently and in compliance with applicable laws and regulations. There is no provision in section 28 of the MLA, or in this or previous regulations, that permits BLM to collect processing fees from a grant or TUP applicant for any work beyond what is necessary to process an application.

Some commenters also asked for the basis for costs and the staff hourly rates. Staff hourly rates are set by a government-wide general schedule (see the Office of Personnel Management website at OPM.gov) for most BLM employees, and include hourly rates for various levels or ''grades''of BLM specialists. Please see section 2804.14 and the opening paragraphs of this preamble section for further discussion of processing fees.

Several commenters indicated that the rule uses the wrong ''inflation factor'' and said they believed that the Consumer Price Index would be more appropriate. Previous section 2883.1–1(c), which established cost recovery categories in 1985, had no provision to make annual adjustments in cost recovery categories I through V. This final rule uses the IPD–GDP as the basis for making annual adjustments in the new categories 1 through 4. This is an appropriate standard where, as here, fees are heavily dependent on labor costs. As noted in the preamble to the proposed rule at 64 FR 32109 (June 15, 1999), the Consumer Price Index does not reflect a sufficiently high labor intensiveness to be used to adjust the cost recovery fee structure. Please see the preamble discussion for section 2804.14 for more information.

Several commenters said that significant technological improvements are taking place and offer significant cost savings since the 1986 study and that these savings should be included in the calculations. Please see section 2804.14 for more discussion of comments on processing fees and a response to this comment.

Several commenters asked if they had a right to an appeal if they disagreed with BLM's category determination. Final sections 2884.12(d) and (e) clearly provide that if an applicant disagrees with a final BLM processing category decision, the applicant has the right to appeal that decision. This is consistent with previous sections 2883.1–1(a)(4) and 2884.1 and proposed sections 2884.12(d) and (f).

Section 2884.13 Who Is Exempt From Paying Processing and Monitoring Fees?

This section explains that you are exempt from paying processing and monitoring fees if you are a state or local government or an agency of such a government and BLM issues the grant for governmental purposes benefitting the general public. If your principal source of revenue results from charges you levy on customers for services similar to those of a profit-making corporation or business, you are not exempt.

This section is based on proposed section 2885.14 which cross-referenced the proposed subpart 2804 regulations. That proposed subpart contained proposed section 2804.15, on which this section is based.

Section 2884.14 When Does BLM Reevaluate the Processing and Monitoring Fees?

This is a new section to the final rule that explains that BLM reevaluates processing and monitoring fees for each category, and the categories themselves, within 5 years after they go into effect and at 10-year intervals after that. This section also lists some examples of the types of factors BLM considers when reevaluating these fees. Several comments suggested a periodic review and evaluation of the processing and monitoring fees and categories, and this section is responsive to those concerns. Any adjustment that BLM makes to the fees or fee structure as a result of a review under this section, apart from applying the IPD-GDP, would require a separate rulemaking.

We deleted proposed section 2884.14 because the provisions in that section are covered elsewhere in this final rule.

Section 2884.15 What Is a Master Agreement (Processing Category 5) and What Information Must I Provide to BLM When I Request One? and

Section 2884.16 What Provisions Do Master Agreements Contain and What Are Their Limitations?

The provisions in these two sections were proposed in section 2884.13. That section cross-referenced proposed section 2804.7. In this final rule, instead of the cross-reference, we added the requirements for a Master Agreement application to the sections. Sections 2884.15 and 2884.16 contain one difference from the final FLPMA right-of-way regulations in sections 2804.17 and 2804.18: The provision for the waiver of reductions of processing and monitoring fees in final section 2804.18(c) for FLPMA grants does not appear in this final section because the MLA does not provide for reductions.

Please see the discussion in preamble sections 2804.17 and 2804.18 for more detailed information on the Master Agreement provisions and responses to comments concerning Master Agreements.

Section 2884.17 How Will BLM Process My Processing Category 6 Application?

This section describes how BLM will process a Category 6 application. In processing your application BLM will:

(A) Determine the issues subject to analysis under NEPA;

(B) Prepare a preliminary work plan that identifies data needs, studies, surveys and other reporting requirements, the level of NEPA documentation, consultation and coordination requirements, public involvement needs, and a proposed schedule to complete application processing;

(C) Develop a preliminary financial plan that estimates the actual costs of processing your application and monitoring the project;

(D) Discuss with you the preliminary plans discussed above; and

(E) Work with you to develop final work and financial plans which reflect any work you have agreed to do. As part of this process BLM will complete our final estimate of the costs you must pay BLM for processing the application and monitoring the project.

BLM may allow you to prepare environmental documents and conduct any studies related to your application. However, if BLM agrees to allow you to perform this work, you must do it to BLM standards.

Finally, this section states that BLM will set out timeframes for periodic estimates of processing costs for a specific work period. If your payment exceeds the costs that the United States incurred for the work, BLM will either adjust the next billing to reflect the excess, or refund you the excess under 43 U.S.C. 1734. You may not deduct any amount from a payment without BLM's prior written approval. You must pay any amount due before we will continue to process your application.

Please see the preamble discussion of section 2804.19 for a discussion of Category 6 applications and responses to comments.

Section 2884.18 What If There Are Two or More Competing Applications for the Same Pipeline?

This section explains that if there are two or more competing applications for the same pipeline and your application is in:

(A) Processing Category 1 through 4, you must reimburse BLM for processing costs as if the other application or applications had not been filed; or

(B) Processing Category 6, you are responsible for processing costs identified in your application. You must pay the processing fee in advance. Consistent with existing policy, BLM will not process your application without the advance payment. Cost sharing by competing applicants may be arranged.

This section also explains that BLM determines whether applications are compatible in a single right-of-way, or are competing applications for the same pipeline.

Finally, this section explains that if BLM determines that competition exists, BLM will describe the procedures for a competitive bid through a bid announcement in a newspaper of general circulation in the area affected by the potential right-of-way and by a notice in the **Federal Register**.

This section was proposed as section 2884.15 and it mirrors final section 2804.23. Please see that final section's discussion for an explanation of competing applications, responses to comments, and changes to the final rule.

Section 2884.19 Where Do I File My Application for a Grant or TUP?

This section was proposed as section 2884.16 and explains where you should file your application for a grant or TUP. Under this section, if BLM has exclusive jurisdiction over the lands involved, you should file your application with the BLM field office having jurisdiction over the lands described in the application. One of the changes we made to the final rule was to replace ''State Office'' with ''Field Office,'' because field offices are the most appropriate place of first contact, where applicants can readily obtain information about land use planning, resources, and issues in the area or areas where their pipeline is proposed.

If another Federal agency has exclusive jurisdiction over the land involved, you should file your application with that agency and refer to its regulations for its requirements. If there are no BLM-administered lands involved, but the lands are under the

jurisdiction of two or more Federal agencies, including other Department of the Interior agencies (but not the National Park Service), you should file your application at the BLM office in the vicinity of the pipeline. BLM will notify you where to direct future communications about the pipeline.

If two or more Federal agencies, including BLM, but not the National Park Service, have jurisdiction over the lands in the application, file it at any BLM office having jurisdiction over a portion of the Federal lands. BLM will notify you where to direct future communications about the pipeline.

With the exception of editorial changes and the change discussed above, this section remains as proposed.

Section 2884.20 What Are the Public Notification Requirements for My Application?

This section was proposed as section 2884.17. It explains the public notification requirements for grant applications. When BLM receives your application, it will publish a notice in the **Federal Register** or a newspaper of general circulation in the vicinity of the lands involved. If BLM determines the pipeline will have only minor environmental impacts, it is not required to publish this notice. This final rule continues to require procedures that are consistent with previous section 2882.3(b) and proposed section 2884.17.

If we do publish a notice, it will, at a minimum, contain:

(A) A description of the pipeline system; and

(B) A statement of where the application and related documents are available for review.

BLM will send copies of the published notice for review and comment to the:

(A) Governor of each state within which the pipeline system would be located;

(B) Head of each local government or jurisdiction or tribal government within which the pipeline system would be located; and

(C) Heads of other Federal agencies whose jurisdiction includes areas within which the pipeline system would be located.

If your application involves a pipeline that is 24 inches or more in diameter, BLM will also send notice of the application to the appropriate committees of Congress in accordance with 30 U.S.C. 185(w). We revised previous section 2882.3(a) on September 30, 2002 (67 FR 61276) to incorporate this Congressional notification requirement to comply with amended 30 U.S.C. 185(w). This requirement is carried forward in final section 2884.20(c). Please see the preamble to the September 30, 2002 rule for an explanation of new paragraph (c).

BLM may hold public hearings or meetings on your application if we determine there is sufficient interest to warrant the time and expense of such hearings or meetings. BLM will publish a notice of any such hearings or meetings in advance in the **Federal Register** or in a newspaper of general circulation in the vicinity of the lands involved. If BLM determines that public hearings or meetings are needed, BLM may pay for the cost of holding them, the applicant may pay, or both BLM and the applicant may share the costs. Before BLM holds any public hearings or meetings, BLM and the applicant must reach an agreement on responsibilities and costs associated with them.

We amended proposed section 2884.17(b)(2) by adding ''or tribal government'' to the list of governments we would notify. This corrects an omission in the proposed rule and more accurately describes our notification process.

We amended proposed paragraph (d) in the final rule to make it clear that we will publish any notices of meetings in a newspaper of general circulation in the vicinity of the lands involved. The proposal only said ''local newspaper.'' This change makes this section consistent with other provisions in the rule and more accurately describes where we would publish the notice.

Several commenters said that the public notification requirements should not apply to transmission pipelines and that oil and gas field production operations should be excluded from this regulation. We disagree. Although oil and gas production facilities, including on and off-lease flowlines, generally have minor environmental impacts, there may be some instances where potential impacts warrant formal public notice. This final rule at paragraph (a) states that BLM is not required to provide formal notification through publication in the **Federal Register** or a newspaper of general circulation if it determines that proposed rights-of-way will have minor impacts. This final rule is consistent with previous section 2882.3(b), which provided BLM with discretion in determining whether or not to provide formal notice of applications, based on a review of each application. A blanket exclusion of public notice for all oil and gas pipelines serving oil and gas production facilities could result in the public not being provided formal notice in cases where it should occur and consequently, we did not make the change suggested by commenters.

Several commenters said that publication of the notice in the **Federal Register** should suffice and that there is no need to also publish in local newspapers. The commenter's suggestion is consistent with previous section 2882.3(b). We agree with the commenters in part. The final rule leaves it up to local BLM officials to determine whether it is more appropriate to publish in either the **Federal Register** or a local newspaper.

Several commenters said that the requirement to notify the Governor and local governments should not apply to oil field projects. They also objected that there is no time limit for the Governor or local governments to respond after receiving the notice. As discussed above, the formal notification requirement would ordinarily not apply to ''routine'' oil and gas field production grants and TUPs where environmental impacts would be minor. However, when formal notification is necessary, BLM will send copies of the published notice to the Governor and local or tribal governments, and heads of other affected Federal agencies. Although not a regulatory requirement, BLM will identify in the notification an appropriate review time and request that comments be provided within a reasonable period. As a matter of practice, BLM does not provide open-ended review and comment when we make these notifications.

Several commenters stated that we should revise proposed section 2884.17(c) by replacing the word ''refer'' with the word ''notice'' to be consistent with the 1990 amendments to the MLA. Final section 2884.20(c) is consistent with this suggestion.

Some commenters suggested that we revise proposed paragraphs (b) and (c) to include notification of Indian tribes with jurisdiction over lands affected by a right-of-way grant application. We added ''tribal government'' to the list of those we will notify in final section 2884.20(b)(2) to address this comment.

Section 2884.21 How Will BLM Process My Application?

Under this section BLM will notify you in writing when it receives your application and will identify your processing fee. BLM will process your completed application following the timeframes in the chart in paragraph (b) of this section.

This section was proposed as section 2884.18, which contained little more than cross-references to the applicable provisions of the part 2800 regulations.

This final rule replaces the cross-references with the provisions of the rule from the part 2800 regulations. Since this final section mirrors final section 2804.25 of this rule, please see the discussion of that section for changes to the rule and responses to comments.

Section 2884.22 Can BLM Ask Me for Additional Information?

This section was proposed as section 2884.19 and explains that BLM may ask you for additional information necessary to process your application. If we require additional information, we will follow the procedures in final section 2804.25(b) and therefore we cross reference that section here.

This section also explains that we may also ask other Federal agencies for additional information, terms and conditions, and advice on whether to issue the grant.

Section 2884.23 Under What Circumstances May BLM Deny My Application?

This section explains that BLM may deny your application if:

(A) The proposed use is inconsistent with the purpose for which BLM or other Federal agencies manage the lands described in the application;

(B) The proposed use would not be in the public interest;

(C) You are not qualified to hold a grant or TUP;

(D) Issuing the grant or TUP would be inconsistent with the Act, other laws, or these or other regulations;

(E) You do not have or cannot demonstrate the technical or financial capability to construct the pipeline or operate facilities within the right-of-way or TUP area; or

(F) You do not adequately comply with a deficiency notice or with any BLM requests for additional information needed to process the application.

You may appeal BLM's decision to deny your application under section 2881.10 of this part.

This section was proposed as section 2884.20 and mirrors the provisions in final section 2804.26. The only difference is that the MLA allows for TUPs, whereas the FLPMA regulations in part 2800 of this rule address short-term right-of-way authorizations. The provisions in this section replace a cross-reference in proposed section 2884.20. We made this change to minimize the need for applicants to refer back to the FLPMA regulations. Please see the discussion of section 2804.26 in this preamble for a discussion of responses to public comments.

Section 2884.24 What Fees Do I Owe If BLM Denies My Application or If I Withdraw My Application?

This section was proposed as section 2884.21 and explains that if BLM denies, or you withdraw, your application, you owe the processing fee, unless you have a Category 5 or 6 application. Then, the following conditions apply:

(A) If BLM denies your Category 5 or 6 application, you are liable for all actual costs that the United States incurred in processing it. The money you have not paid is due within 30 calendar days of receiving a notice for the amount due; and

(B) You may withdraw your application in writing before BLM issues a grant or TUP. If you withdraw your application before BLM issues a grant or TUP, you are liable for all actual processing costs the United States has incurred up to the time you withdraw the application and for the actual costs of terminating your application. Any money you have not paid is due within 30 calendar days after receiving a bill for the amount due. Processing fees in Categories 1 through 4 are not refundable. We replaced the cross reference in proposed 2884.21 with the text in this final rule to minimize the need to refer back to the FLPMA regulations.

Several commenters said that oil and gas lessees should not owe any money if BLM rejects their applications. We disagree. The Mineral Leasing Act at 30 U.S.C. 185(l) says that ''[t]he applicant for a right-of-way or permit shall reimburse the United States for administrative and other costs incurred in processing the application * * *.'' The plain meaning of the statute and the use of the word ''applicant'' rather than ''holder,'' which is used elsewhere in the section to indicate that an application has been approved, suggests that Congress intended that applicants should reimburse costs, whether or not BLM approved or rejected the application. We did not amend this section as a result of this comment.

Section 2884.25 What Activities May I Conduct on BLM Lands Covered By My Application for a Grant or TUP While BLM Is Processing My Application?

This section was proposed as section 2884.22 and explains the activities you may conduct before BLM makes a decision on your application. Under these regulations you may conduct casual use activities (see final section 2881.5 for a definition of ''casual use'') on BLM lands covered by the application, as may any other member of the public. No grant or TUP is required for casual use on BLM lands.

This section also explains that for any activities on BLM lands that are not casual use, such as surface disturbing surveys or data collection, you must obtain prior BLM approval. To conduct activities on lands administered by other Federal agencies, you must obtain any prior approval those agencies require.

We amended proposed section 2884.22 by making it clear that a grant or TUP is not required for activities on BLM lands that are casual use. This change is consistent with existing policy and regulation (see previous section 2882.1(d)). We also added language explaining that for activities on non-BLM lands administered by other Federal agencies, you must follow the rules and obtain any prior approvals from those agencies.

Section 2884.26 When Will BLM Issue a Grant or TUP When the Lands Are Managed By Two or More Federal Agencies?

This section was proposed as 2884.23. It explains the processes BLM must follow before we issue or renew right-of-way grants or TUPs.

This section explains that if the application involves lands managed by two or more Federal agencies, BLM will not issue or renew the grant or TUP until the heads of the agencies administering the lands involved have concurred. For example, if a pipeline crosses Bureau of Reclamation and U.S. Corps of Engineers lands, BLM would be the issuing agency. Likewise, if a pipeline crosses Forest Service and Department of Energy lands, BLM would be the issuing agency. BLM would also be the issuing agency if a pipeline crossed BLM lands and another Federal agency's lands. Where concurrence is not reached, the Secretary of the Interior, after consultation with these agencies, may issue or renew the grant or TUP, but not through lands within a Federal reservation where doing so would be inconsistent with the purposes of the reservation.

We deleted proposed paragraph (d) in the final rule because the statement made in that section is unnecessary.

Section 2884.27 What Additional Requirement Is Necessary for Grants or TUPs for Pipelines 24 or More Inches in Diameter?

This section explains that if an application is for a pipeline 24 inches or more in diameter, BLM will not issue or renew the grant or TUP until after we notify the appropriate committees of

Congress in accordance with 30 U.S.C. 185(w). On September 30, 2002, we published this provision as a stand-alone amendment to our regulations. Please see 67 FR 61274 for a discussion of that final rule. This paragraph is consistent with that final rule.

Subpart 2885—Terms and Conditions of MLA Grants and TUPs

This subpart contains information and policies about the terms and conditions of grants and TUPs. It also explains:

(A) When grants and TUPs are effective;

(B) What the terms and conditions of a grant or TUP are;

(C) How much it costs to hold a grant or TUP; and

(D) What happens if you default on rental or other payments.

Section 2885.10 When Is a Grant or TUP Effective?

This section explains that a grant or TUP is effective after both you and BLM sign it. You must accept its terms and conditions in writing and pay any necessary rent and monitoring fees.

After receiving and reviewing your application, BLM may send you an unsigned right-of-way grant or TUP for you to review. It will include terms, conditions, and stipulations that are discussed in section 2885.11. If you agree with the terms, conditions, and stipulations of the unsigned grant or TUP, you should sign and return it to BLM with any monitoring fee payment that may still be due for the application. If there has been no change in the terms, conditions, or stipulations, and all regulations, including section 2884.23, remain satisfied, BLM will then sign the grant or TUP and return it to you with a decision letter. If we deny your application, the decision letter will notify you of the reason(s) and how you can correct any deficiencies.

Your written acceptance of the grant or TUP constitutes an agreement between you and the United States that your right to use the Federal lands, as specified in the grant or TUP, is subject to the terms and conditions of the grant or TUP and applicable laws and regulations.

Proposed section 2885.10 cross-referenced section 2805.11 of the proposed rule (final section 2805.13). The final rule replaces the cross-reference with the actual provision that was cross-referenced. In the final rule we also added a cross-reference to the rent and monitoring fee provisions of the subpart. With the exception of these changes and some minor editorial changes, the rule remains as proposed. This section is based on final section 2805.13. Please see the discussion of section 2805.13 for an explanation of the other changes to that and this section.

Section 2885.11 What Terms and Conditions Must I Comply With?

This section explains the duration and the terms and conditions of use of grants and TUPs. Proposed section 2885.11 stated that the general provisions of proposed sections 2805.10, 2805.12, and 2805.13 of this chapter apply. In this final rule we eliminated the cross-references and replaced them with the actual provisions concerning the terms and conditions of grants. Grants or TUPs contain the following terms and conditions, as applicable:

(A) *Duration:* The term of a grant may not exceed 30 years. Grants that BLM issues for a term of one year or longer will terminate on December 31 of the final year of the grant. The year in which we issued the grant, even though it may be only a partial year, counts as the first full year of the grant. This is because the MLA does not allow grants for terms of greater than 30 years. For example, a grant issued for 30 years on June 12, 2004, would expire on December 31, 2033. Another example, a grant issued for ''two years'' on September 21, 2004, would expire on December 31, 2005.

The term of a TUP may not exceed 3 years. BLM frequently issues TUPs on an anniversary year basis. For example, if BLM issued a grant on September 1, 2003, and also issued an associated TUP for a three-year term, the TUP would expire on September 1, 2006.

BLM considers the following factors in establishing the term of a grant or TUP:

(1) The cost of the pipeline and related facilities you plan to construct, operate, maintain, or terminate. In the final rule we reworded this sentence by adding ''and related facilities you plan to construct, operate, maintain or terminate'' because we wanted to be clear that the cost includes the cost of any related facilities and other costs incurred over the life of the project, not just the cost of project construction;

(2) The pipeline or facility's useful life;

(3) The public purpose served; and

(4) Any potentially conflicting land uses.

Paragraph (a) of this section contains minor editorial changes to make it easier to understand. We added the provision stating that grants with a term of one year or longer terminate on December 31 to make this section consistent with the corresponding FLPMA regulation at section 2805.11. We did this so that grant expirations will coincide with rental periods that are paid through December 31 of the rental period. We also added language to final paragraph (a) explaining that the maximum term for a TUP is three years. This provision is consistent with existing policy. We mistakenly omitted it from the proposed rule;

(B) By accepting a grant or TUP, you agree to use the lands described in the grant or TUP for the purposes set forth in the grant or TUP. We reworded the final rule by removing the cross-reference to section 2805.10(c) and replaced it with the actual provisions from that section. We also included language stating that BLM may modify your proposed use or change the route or location of the facilities in your application. This provision was proposed as section 2885.11, which cross references proposed section 2805.10. This section states that by accepting a grant or TUP, you also agree to comply with, and be bound by, the terms and conditions set forth in paragraph (b) of this section.

Under this final rule, during construction, operation, maintenance, and termination of the project you must:

(1) To the extent practicable, comply with all existing and subsequently enacted, issued, or amended Federal laws and regulations and state laws and regulations applicable to the authorized use. We reworded this provision in the final rule by adding the phrase ''To the extent practicable,'' a phrase that has been in the Department's regulations since 1979. A slight variation of this phrase appears in section 28(v) of the MLA, 30 U.S.C. 185(v), which states that the Secretary ''shall take into consideration and to the extent practical comply with State standards for right-of-way construction, operation, and maintenance.'' It is worth noting that section 28(h)(2) states in part that the Secretary ''shall issue regulations * * * which shall include * * * requirements to insure that activities in connection with the right-of-way or permit will not violate applicable air and water quality standards nor related facility siting standards established by or pursuant to law'' (see 30 U.S.C. 185(h)(2)). This section also makes clear that a holder must comply with any changes to applicable law or regulation that occur during the term of a right-of-way grant. This is consistent with longstanding policy and previous section 2881.2(a);

(2) Rebuild and repair roads, fences, and established trails destroyed or damaged by constructing, operating, maintaining, or terminating the project;

(3) Build and maintain suitable crossings for existing roads and significant trails that intersect the project;

(4) Do everything reasonable to prevent and suppress fires on or in the immediate vicinity of the right-of-way or TUP area. We reworded this paragraph by removing the phrase ''on your own or at BLM's request'' because it was not necessary;

(5) Not discriminate against any employee or applicant for employment during any phase of the project because of race, creed, color, sex, or national origin. You must also require subcontractors to not discriminate. We added the phrase ''during any phase of the project'' to make it clear that the provision not to discriminate against any employee applied not only during the construction of the facility, but for the term of the grant;

(6) Pay the monitoring fees and rent;

(7) If BLM requires, obtain and/or certify that you have a surety bond or other acceptable security to cover any losses, damages, or injury to human health, the environment, and property incurred in connection with your use and occupancy of the right-of-way or TUP area, including terminating the grant or TUP, and to secure all obligations imposed by the grant or TUP and applicable laws and regulations. We added the phrase ''including terminating the grant or TUP'' to emphasize that the termination phase of a grant is a time when substantial surface disturbing activities may occur, necessitating use or modification of the bond. We also added the phrase ''and to secure all obligations imposed by the grant or TUP and applicable laws and regulations'' to make this section consistent with 30 U.S.C. 185(m) of the MLA. This section also explains that your bond must cover liability for damages or injuries resulting from releases or discharges of hazardous materials. We took out the phrase ''actual or threatened'' before ''releases or discharges of hazardous materials'' since we do not require a bond for liability for threatened releases, only actual releases. BLM may require a bond or increase or decrease the value of an existing bond or other acceptable security at any time during the term of the grant. We also added the phrase ''or other acceptable security'' to be consistent with language in previous regulations and 30 U.S.C. 185(m) of the MLA. It is not only surety bonds that may increase or decrease, but also any other acceptable security that was used to secure the obligations imposed by the grant or TUP;

(8) Assume full liability if third parties are injured or damages occur to property on or near the right-of-way or TUP area (see section 2886.13);

(9) Comply with project-specific terms, conditions, and stipulations, including requirements to:

(i) Restore, revegetate, and curtail erosion or any other rehabilitation measure BLM determines is necessary;

(ii) Ensure that activities in connection with the grant or TUP comply with air and water quality standards or related facility siting standards contained in applicable Federal or state law or regulations;

(iii) Control or prevent damage to scenic, aesthetic, cultural, and environmental values, including fish and wildlife habitat, and to public and private property and public health and safety. We added the phrase ''scenic, aesthetic, cultural, and'' to the final rule to make it consistent with final section 2805.12(i)(3) and existing policy and added ''private'' property to be consistent with 30 U.S.C. 185(h)(2)(C);

(iv) Protect the interests of individuals living in the general area who rely on the area for subsistence uses as that term is used in Title VIII of ANILCA (16 U.S.C. 3111 *et seq.*). In the final rule we replaced the term ''subsistence purposes'' with ''subsistence uses'' because that is the term ANILCA uses. We also added the cite to ANILCA; and

(v) Ensure that you construct, operate, maintain, and terminate the facilities on the lands in the right-of-way or TUP area in a manner consistent with the grant or TUP;

(10) Immediately notify all Federal, state, tribal, and local agencies of any release or discharge of hazardous materials reportable to such entity under applicable law. You must also notify BLM at the same time, and send BLM a copy of any written notification you delivered. We reworded this paragraph to make it easier to understand and removed the phrase ''actual or threatened release'' from the proposed rule. Several commenters pointed out that there is no requirement to report threatened releases;

(11) Not dispose of or store hazardous materials on your right-of-way or TUP area, except as provided by the terms, conditions, and stipulations of your grant or TUP. Any storage of hazardous waste on site must be in compliance with applicable Federal and state law. The proposed rule specified that you may not store hazardous materials on your right-of-way for more than 90 days, less if required by law. We received several comments related to crude oil storage that would be on lease for the life of an oil well and comments that some chemicals will be on lease for more than 90 days. After reviewing this clause, we amended the final rule because it would be difficult to enforce and monitor and a more effective means to address the issue is available. The final rule states that you may only store or dispose of hazardous materials in accordance with the terms, conditions, and stipulations of your grant or TUP;

(12) Certify your compliance with all requirements of the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. 11001 *et seq.,* when you receive, assign, renew, amend, or terminate your grant or TUP. The proposed rule required an annual certification from holders that they have complied with all provisions of the Emergency Planning and Community Right to Know Act. We amended the final rule to remove this annual certification because we did not want to impose unnecessary requirements on holders. We also added ''amend'' to the list of occasions you would need to certify that you are in compliance with the EPCRA;

(13) Control and remove any release or discharge of hazardous material on or near the right-of-way or TUP area arising in connection with your use and occupancy of the right-of-way or TUP area, whether or not the release or discharge is authorized under the grant or TUP. You must also remediate and restore lands and resources affected by the release or discharge to BLM's satisfaction and to the satisfaction of any other Federal, state, tribal, or local agency having jurisdiction over the land, resource, or hazardous material;

(14) Comply with all liability and indemnification provisions and stipulations in the grant or TUP;

(15) As BLM directs, provide diagrams or maps showing the location of any constructed facility. In the final rule we added this provision to specify that BLM may require holders to provide as-built surveys, maps, or diagrams of constructed facilities. This provision is consistent with existing policy and previous section 2881.2(b) which states that BLM grants ''shall contain such terms, conditions, and stipulations as may be prescribed by the authorized officer regarding extent, duration, survey, location, construction, operation, maintenance, use, and termination;''

(16) Construct, operate, and maintain the pipeline as a common carrier. This means that the pipeline owners and operators must accept, convey, transport, or purchase without discrimination all oil or gas delivered to the pipeline without regard to where the oil and gas was produced (*i.e.,* whether

on Federal or non-federal lands). Where natural gas not subject to state regulatory or conservation laws governing its purchase by pipeline companies is offered for sale, each pipeline company must purchase, without discrimination, any such natural gas produced in the vicinity of the pipeline. Common carrier provisions of this paragraph do not apply to natural gas pipelines operated by:

(A) A person subject to regulation under the Natural Gas Act (15 U.S.C. 717 *et seq.*); or

(B) A public utility subject to regulation by state or municipal agencies with the authority to set rates and charges for the sale of natural gas to consumers within the state or municipality.

We reworded proposed section 2885.11(b) by removing the phrase ''or a logical part of the system of which this pipeline right-of-way is a part'' from the description of pipeline because the language was not consistent with 30 U.S.C. 185(r)(1) of the MLA or with previous regulations. We removed a reference to ''joint owners'' for the same reason. We also added ''Where natural gas not subject to state regulatory or conservation laws governing its purchase by pipeline companies is offered for sale, each pipeline company must purchase, without discrimination, any such natural gas produced in the vicinity of the pipeline'' because it is in previous regulations and in 30 U.S.C. 185(r)(3)(B) of the MLA. We erroneously omitted it from the proposed rule;

(17) Within 30 calendar days after BLM requests it, file rate schedules and tariffs for oil and gas, or derivative products, transported by the pipeline as a common carrier with the agency BLM prescribes, and provide BLM proof that you made the required filing. This provision is in the final rule to resolve situations where a holder may not have allowed other companies to transport products in its pipelines at a reasonable cost. If the pipeline is an interstate pipeline, the operator would have to provide its rate schedule to the FERC. If FERC determined the operator was not operating the pipeline as a common carrier, BLM would then take corrective action, including issuing an immediate temporary suspension of the grant for not complying with the common carrier provisions of the grant. If the pipeline is an intrastate line, the operator would need to provide its rate schedules to the appropriate state agency, such as a state oil and gas commission, who would make the same determination as to reasonable costs;

(18) With certain exceptions (listed in the statute), not export domestically produced crude oil by pipeline without Presidential approval (30 U.S.C. 185(u) and (s) and 50 U.S.C. App. 2401);

(19) Not exceed the right-of-way width that is specified in the grant without BLM's prior written authorization. If you need a right-of-way wider than 50 feet plus the ground occupied by the pipeline and related facilities, see section 2885.14 of this subpart. We reworded this paragraph to make it clear that an MLA pipeline right-of-way may not always be 50-feet wide. BLM can issue a grant authorizing a right-of-way less than 50-feet wide if site specific conditions warrant, or if 50 feet is not necessary to construct the pipeline. Additionally, section 185(d) of the MLA states that a right-of-way ''shall not exceed fifty feet plus the ground occupied by the pipeline * * * unless the Secretary or agency head finds, and records the reason for his finding, that in his judgment a wider right-of-way is necessary for operation and maintenance after construction, or to protect the environment or public safety;''

(20) Not use the right-of-way or TUP area for any use other than that authorized by the grant or TUP. If you require other pipelines, looping lines, or other improvements not authorized by the grant or TUP, you must first secure BLM's written authorization;

(21) Not use or construct on the land in the right-of-way or TUP area until:

(i) BLM approves your detailed plan for construction, operation, and termination of the pipeline, including provisions for rehabilitation of the right-of-way or TUP area and environmental protection. We amended the proposed section 2885.11(b)(6) by removing the phrase ''If appropriate'' from this requirement for approval of a detailed plan prior to construction because all pipeline rights-of-way must have this detailed plan; and

(ii) You receive a Notice to Proceed for all or any part of the right-of-way. In certain situations BLM may waive this requirement in writing. We changed proposed section 2885.11(b)(6) to state that BLM may not issue a Notice to Proceed (NTP) for some MLA right-of-way grants. Your grant will specifically state if an NTP is required prior to construction. An NTP is typically issued as part of a preconstruction conference with BLM, the holder, and its contractor(s); and

(22) Comply with all other stipulations that BLM may require.

We received many comments regarding bonding for right-of-way grants. Several commenters suggested that the regulations set a $5 million maximum or an amount comparable to the foreseeable risk and hazards present as the bond amount. They said that this would make the bond provision consistent with the liability provisions of the rule. We did not change the final rule as a result of this comment. There is no limitation set by this rule on the maximum bond amount. We believe that the bond amount should be set on a case-by-case basis and the amount is dependent on the nature and risk of an authorized use. The $5 million limit referenced by this commenter seems to be referring to the maximum limit for strict liability found at proposed section 2807.12(f). In the final rule, we reduced the upper limit for strict liability to $2 million. Liability in excess of $2 million is possible under parts 2800 and 2880, but such liability will be determined by the ordinary rules of evidence.

Several commenters said that BLM must identify how we determine the amount of the bond. Commenters said that BLM should list those factors, which the agency considers when setting the amount of the bond. We did not change the final rule as a result of this comment. We believe it reasonable to establish the bond amount on a case-by-case basis. This decision will be part of the administrative record for the case. Among the factors that we will use to determine bond amounts are the expected costs to the agency to restore and reclaim disturbed areas and to repair damage to scenic, aesthetic, cultural, and environmental values and to protect public health and safety. Those costs can include both direct costs for things such as equipment and labor and indirect costs for administrative overhead costs.

Several commenters said that applicants should have the right to appeal the bond amount, especially since the BLM retains the right to increase an existing bond at any time during the term of the grant. BLM agrees with the commenter and the final rule contains a provision that provides for the appeal of any of the terms, conditions, and stipulations of a grant (see section 2881.10 of these regulations). If a new right-of-way grant has a bond requirement as one of the terms and conditions, the holder would be able to appeal that term and condition. If BLM added a bond requirement to an existing right-of-way grant, it would be accomplished by sending a new decision changing the terms and conditions of the grant. This decision is also appealable.

Several commenters said that there was ''no such thing as liability coverage for potential or threatened damages.'' They said that when damage occurs, then there is an event that causes

damage. BLM agrees and changed the rule in several locations to remove the phrase ''threatened release.''

Section 2885.12 What Rights Does a Grant or TUP Convey?

This section is new to the final rule. The proposed rule at section 2885.11 only cross-referenced similar provisions in proposed section 2805.12. This section states the provisions from that section instead. It states that a grant or TUP conveys only those rights which it expressly contains. BLM issues grants and TUPs subject to the valid existing rights of others, including the United States. The rights conveyed to a holder by a grant or TUP include the right to:

(A) Use the described lands to construct, operate, maintain, and terminate facilities within the right-of-way or TUP area for authorized purposes under the terms and conditions of the grant or TUP;

(B) Allow others to use the land as your agent in the exercise of the rights that the grant or TUP specifies;

(C) Do minor trimming, pruning, and removing of vegetation on the right-of-way or TUP areas to maintain the areas or any facility;

(D) Use common varieties of stone and soil which are necessarily removed during construction of the pipeline, without additional BLM authorization or payment, in constructing the pipeline within the authorized right-of-way or TUP area; and

(E) Assign the grant or TUP to another, provided that you obtain BLM's prior written approval.

We did not carry forward into this final rule the provisions in proposed section 2805.12(b), because BLM does not issue grants under the MLA that would authorize the holder to sublease or allow other parties to use the facility.

Section 2885.13 What Rights Does the United States Retain?

This section is new to the final rule. Proposed section 2885.11 only cross-referenced similar provisions in proposed section 2805.13. This section states the provisions instead. This section describes the rights that the United States retains and explains that the United States may exercise any rights the grant or TUP does not expressly convey to you. These include the United States' right to:

(A) Access the lands covered by the grant or TUP at any time and enter any facility you construct on the right-of-way or TUP area. BLM will give you reasonable notice before it enters any facility on the right-of-way or TUP area;

(B) Require common use of your right-of-way or TUP area, including subsurface and air space, and authorize use of the right-of-way or TUP area for compatible uses. You may not charge for the use of the lands made subject to such additional right-of-way grants;

(C) Retain ownership of the resources of the land covered by the grant or TUP, including timber and vegetative or mineral materials. You have no right to use these resources, except as noted in section 2885.12 of this subpart. In the final rule we replaced the phrase ''products of the land including living and non living resources'' with the phrase ''resources of the land covered by the grant or TUP, including timber and vegetative or mineral materials and any other living or non-living resources.'' This is consistent with proposed section 2805.13(c). The amended wording makes it clear that the United States retains control over the resources located on the right-of-way or TUP areas. Except as noted in section 2885.12, if the holder needs to remove timber, vegetative, or mineral materials from these areas during construction, it needs a Materials Act permit for that action;

(D) Determine whether or not your grant is renewable; and

(E) Change the terms and conditions of your grant or TUP as a result of changes in legislation, regulation, or as otherwise necessary to protect public health or safety or the environment.

We did not carry forward proposed section 2805.13(d) into this final section because reciprocal access roads do not apply to oil and gas pipelines.

Section 2885.14 What Happens If I Need a Right-of-Way Wider Than 50 Feet Plus the Ground Occupied By the Pipeline and Related Facilities?

This section explains that you may apply to BLM at any time for a right-of-way wider than 50 feet plus the ground occupied by the pipeline and related facilities. In your application you must show that the wider right-of-way is necessary to:

(A) Properly operate and maintain the pipeline after you have constructed it;

(B) Protect the environment; or

(C) Provide for public safety.

BLM will notify you in writing of its finding(s) and its decision on your application for a wider right-of-way. If the decision is adverse to you, you may appeal it under section 2881.10 of this part.

Section 2885.15 How Will BLM Charge Me Rent?

This section explains how BLM will charge rent for MLA right-of-way grants or TUPs. Please note that unlike FLPMA, the MLA does not provide for any reductions or waivers of rent.

BLM will charge rent beginning on the first day of the month following the effective date of the grant or TUP through the last day of the month when the grant or TUP terminates. *Example:* If a grant or TUP becomes effective on January 10 and terminates on September 16, the rental period would be February 1 through September 30, or 8 months. You would pay rent for 8/12 of the year.

BLM sets or adjusts the annual rental periods to coincide with the calendar year by prorating the first year's rent based on 12 months. For example, a 10-year grant issued August 29, 2004, would expire on December 31, 2013. Annual rent would be calculated using the linear rent schedule and total rent for the term of the grant would be calculated by multiplying the annual rent rate by 9 4/12. If you disagree with the rent that BLM charges, you may appeal the decision under section 2881.10 of this part.

Section 2885.16 When Do I Pay Rent?

This section explains that you must pay rent for the initial rental period before BLM issues you a grant or TUP. For example, a 30-year grant issued on July 20, 2004, with a ten-year rental payment plan, would expire on December 31, 2033. The initial rental period would be from August 1, 2004 through December 31, 2013 or 9 5/12 years. The rent for the initial rental period would be the annual rental rate (from the 2004 linear rent schedule) multiplied by 9 5/12. You make all other rental payments according to the payment plan described in section 2885.21. After the first rental payment, all rental payments are due on January 1 of the first year of each succeeding rental period for the term of your grant. The second rental payment period in this example would be from January 1, 2014 through December 31, 2023. The rent for the second rent payment period would be the annual rental rate (from the 2014 linear rent schedule) multiplied by 10. The third rental payment period would be from January 1, 2024 through December 31, 2033. The rent for the third rental payment period would be the annual rental rate (from the 2024 linear rent schedule) multiplied by 10.

In proposed sections 2885.11 and 2885.13 we cross-referenced, but did not repeat, the parallel rental provisions in part 2800 to make them applicable to the part 2880 regulations. We added this section to the final rule so it would stand alone. See the discussion in the preamble for section 2806.12 for

additional information on rental payments.

Section 2885.17 What Happens If I Pay the Rent Late?

Proposed section 2885.15 incorrectly cross-referenced proposed section 2806.12 rather than proposed section 2806.13. Instead of merely correcting the cross reference in this section, we repeat here the discussion of the late payment policy in final section 2806.13. Please see that section of the preamble for a complete discussion of the changes from the proposed rule.

This section explains that if BLM does not receive the rent payment within 15 calendar days after the rent was due, BLM will charge you a late payment of $25.00 or 10 percent of the rent you owe, whichever is greater, not to exceed $500 per authorization. If BLM does not receive your rent payment and late payment fee within 30 days after rent was due, BLM may collect other administrative fees as provided by statute, such as the Debt Collection Improvement Act of 1996. If BLM does not receive the rent, late payment fee, and any administrative fees within 90 calendar days after the rent was due, BLM may terminate your grant and you may not remove any facility or equipment without BLM's written permission. The rent due, late payment fee, and any administrative fees remain a debt that you owe to the United States.

If you pay the rent, late payment fees, and any administrative fees after BLM has terminated the grant, the grant is not automatically reinstated. You must file a new application with BLM. BLM will consider the history of your failure to timely pay rent in deciding whether to issue you a new grant. This is consistent with the proposed rule.

The most significant change to the rental provisions of this rule is adding a late payment fee. We asked for comments on this subject in the proposed rule at 64 FR 32112 (June 15, 1999). The procedures are the same for both FLPMA and MLA grants. Please see the preamble for final section 2806.13 and the discussion related to late payment fees and administrative fees for more information about the process.

You may appeal to the Interior Board of Land Appeals any adverse action BLM takes against your grant or TUP under section 2881.10 of this part.

We received several comments on late payment assessments. Please see the preamble discussion of section 2806.13 for a discussion of the comments.

Section 2885.18 When Must I Make Estimated Rent Payments to BLM?

This section explains that to assist us in processing your application for a right-of-way in a timely manner, BLM may estimate rent payments and require you to pay that amount when it issues the grant or TUP. The rent amount may change once BLM determines the actual rent of the grant or TUP. BLM will credit you for any rental overpayment, and you are liable for any underpayment. This section does not apply to rent payments made under the linear rent schedule in this part. This section is the same as section 2806.16 of this rule. It does not apply to rental determined from the linear schedule, only for rent determined by an appraisal or by some other means. See the preamble discussion in section 2806.16 for an explanation of why we have this rule.

Section 2885.19 What Is the Rent for a Linear Right-of-Way?

This section explains that, except as noted in paragraph (b) of this section, BLM will use the Per Acre Rent Schedule at section 2806.20(b) of this chapter to calculate the rent for MLA grants and TUPs and that the schedule is updated annually.

This section also explains that BLM may determine your rent using the methods described in section 2806.50 of this title, rather than by using the rent schedule cited in paragraph (a) of this section, if the rent determined by comparable commercial practices or an appraisal would be 10 or more times the rent from the schedule. This section gives BLM the discretion to deviate from the schedule only if certain conditions apply. Current policy constrains our use of alternate means to determine rent as provided under section 2806.50 of this title. BLM policy guidance, outlined in instruction memorandum WO–IM 2002–172, states that BLM, at this time, will only use the current schedule to calculate rent for all linear right-of-way uses. The current policy of not deviating from the linear schedule is in response to Congressional direction contained in the appropriations act for the Department of the Interior for FY 2001 (Pub. L. 106–291). Once you are on a rent schedule, BLM will not remove you from it unless the BLM State Director decides to remove you from paying rent under paragraph (b) of this section, or you file an application to amend your grant.

You may obtain the current linear right-of-way rent schedule from any BLM state or field office or by writing to: Director, BLM 1849 C St. NW., Mail Stop 1000 LS, Washington, DC 20240. BLM also posts the current linear schedule on BLM's National Home Page on the Internet at *http://www.blm.gov.*

Several commenters said that it was arbitrary and capricious for BLM to exclude the oil and gas industry from reductions in rent payments. We did not change the final rule as a result of this comment. The oil and gas industry is not excluded from hardship rental reductions for access roads under FLPMA (see section 2806.15). The MLA, however, does not permit us to reduce rents for oil and gas pipelines. This policy is not new and has been part of previous BLM regulations and policy (see previous section 2883.1–2).

Section 2885.20 How Will BLM Calculate My Rent for Linear Rights-of-Way the Schedule Covers?

This section explains that BLM calculates your rent for a linear right-of-way by multiplying the rent per acre for the appropriate category of use and county zone price from the current schedule by the number of acres in the right-of-way or TUP area that fall into those categories and the number of years in the rental period. For example: (rent per acre) X (number of acres) X (number of years in the rental period) = rent for a linear right-of-way. If BLM has not previously used the rent schedule to calculate your rent, we may do so after giving you reasonable written notice. BLM intends to give reasonable written notice to the holders of any existing grant that we put on the schedule when rent was previously determined by some other means. With the exception of minor editorial changes, this section is similar to proposed sections 2885.13 and 2806.16 and final section 2806.22.

Section 2885.21 How Must I Make Rent Payments for My Grant or TUP?

Under this section, you must make either annual payments or payment for more than 1 year, as follows:

(A) For TUPs you must make a one-time nonrefundable payment for the term of the TUP. For grants, you must make either nonrefundable annual payments or nonrefundable payments for more than 1 year. Any holder may make a one-time payment of the required rent in advance for the entire term of the grant. If you choose not to make a one-time payment, you must pay according to one of the following methods:

(1) If you are an individual and your annual rent is $100 or less, you must pay at 10-year intervals not to exceed the term of the grant. If your annual rent is greater than $100, you may pay

annually or at multi-year intervals that you may choose; or

(2) Everyone else must pay rent in advance at ten-year intervals not to exceed the term of the grant. For example, if you are a corporation and your annual rent is $110, you are required to pay rent at ten year intervals and the rent due would be $1,100;

(B) BLM considers the first partial calendar year in the rent payment period to be the first year of the rental payment term. BLM pro-rates the first year rental amount based on the number of months left in the calendar year after the effective date (issuance date) of the grant. For example, if BLM issued the grant in the example described above on September 10, 2003, and the annual rental for the grant is $110, the first year's rent would be prorated for the 3 months (rent begins the first day of the month following the effective date of the grant (see section 2885.15)) remaining in 2003, or $27.50. Therefore the total rental for the first ten years of this grant would be $1,017.50 ($27.50 for the first year + $110 per year for the next 9 years).

This section is based on final section 2806.23 of this rule.

Section 2885.22 How Will BLM Calculate Rent for Communication Uses Ancillary to a Linear Grant, TUP, or Other Use Authorization?

This section explains that when a communication use is ancillary to, and authorized by BLM under, a grant or TUP for a linear use, or some other type of authorization (e.g., a mineral lease or sundry notice), BLM will determine the rent using the linear rent schedule or rent scheme associated with the other authorization, and not the communication use rent schedule.

It is common for oil and gas companies to need communications facilities for internal two-way radio communications and for internal microwave relays to control valves and monitor large pipelines. Sometimes these facilities are located along the linear pipeline right-of-way area and sometimes they may be located on nearby mountain tops. In either case, these facilities may be authorized by an MLA pipeline right-of-way grant as long as they are for internal communications. In these cases we do not use the communication use schedule (see section 2806.30) to determine rent. This is because the communication use only supports the operation of the primary use (the pipeline), and rent for a pipeline is determined by the linear schedule. Instead, we add the acres for the ancillary communication site into the linear rental calculation for the pipeline. The holder cannot operate ancillary communication facilities for a commercial purpose, (e.g., containing tenants or customers). If a grant holder's communication facility is not authorized as part of a pipeline grant, TUP, or other authorization, BLM would process a communication use lease under part 2800 of this title and we would calculate rent for the facility under section 2806.30 of the FLPMA right-of-way regulations. We proposed this provision at section 2806.25 and include it in this part to cover these situations. On occasion, BLM authorizes internal communications uses for the holder of an oil and gas lease under the oil and gas lease itself if the communication facility is located inside the boundary of the oil and gas lease and the function of the facility is to serve the lease.

Section 2885.23 If I Hold a Grant or TUP, What Monitoring Fees Must I Pay?

This section is based on proposed section 2885.13 and final section 2805.16. This section explains that you must pay to BLM a fee for any costs the United States incurs in monitoring the following six activities: Construction, operation, maintenance, and termination of the pipeline and protection and rehabilitation of the affected Federal lands your grant or TUP covers. We replaced the phrases ''within grant areas'' and ''protecting and rehabilitating the affected area'' with ''of the pipeline'' and ''protection and rehabilitation of the affected Federal lands'' to make it clear what activities we are monitoring and where.

This final section explains that all holders must pay to BLM a fee for any costs the United States incurs in monitoring the construction, operation, maintenance, and termination of a pipeline and protection and rehabilitation of Federal land. This is consistent with section 28(l) of the Mineral Leasing Act which states, ''The applicant for a right-of-way or permit shall reimburse the United States for administrative and other costs incurred in processing the application, and the holder of a right-of-way or permit shall reimburse the United States for the costs incurred in monitoring the construction, operation, maintenance, and termination of any pipeline and related facilities on such right-of-way or permit area * * *.'' (30 U.S.C. 185(l)).

BLM bases the monitoring category on the estimated number of work hours necessary to monitor your grant or TUP just as we base the processing fee on the estimated number of hours to process the grant. See the preamble discussion at final section 2805.16 for a discussion of the rationale for changing the criteria for charging for monitoring. Our proposal at section 2885.13(b) would have placed a holder in the same category for monitoring purposes as the holder occupied for processing purposes. Alternatively, we noted that if we should establish monitoring fees separate from processing fees, we would establish monitoring categories based on the number of work hours involved, including field examinations (see 64 FR 32109).

The fee for monitoring Categories 1 through 4 are one-time fees and are not refundable. We added this language to the final rule to be consistent with previous section 2883.1–1(c), which made these application category fees non-refundable.

This section contains a chart that explains the fees for monitoring categories based on the estimated work hours involved. In the final rule we add the chart to illustrate the categories, work hours, and associated monitoring fee as of the effective date of the rule, similar to the chart in section 2805.16 and to make the sections consistent.

This section also explains that BLM annually updates Category 1 through 4 monitoring fees in the manner described at section 2884.12(c) of this part. BLM updates Category 5 monitoring fees as specified in the Master Agreement. The monitoring cost schedule is available from any BLM state or field office and on BLM's National Home Page on the Internet at *http://www.blm.gov.*

We received several comments on the monitoring fees in the proposed rule. These comments relate to both part 2800 and 2880. Please see the discussion of those comments in the preamble of final section 2805.16.

Section 2885.24 When Do I Pay Monitoring Fees?

This section explains that for Monitoring Categories 1 through 4, unless BLM otherwise directs, you must pay monitoring fees when you submit to BLM your written acceptance of the terms and conditions of the grant or TUP. If you have a Master Agreement (Monitoring Category 5) you must pay the monitoring fees as specified in the agreement. BLM will not issue your grant or TUP until it receives the required payment. Proposed section 2885.13(c) used the words ''BLM will not accept your written acceptance of the grant until you pay the fees.'' In the final rule we replaced this phrase with ''BLM will not issue your grant or TUP until it receives the required payment'' to be more clear.

If you have a Monitoring Category 6 application, BLM may periodically

estimate the costs of monitoring your use of the grant and will include this in the costs associated with processing fees described in section 2884.12 of this part. If BLM has underestimated the monitoring costs, we will notify you of the shortfall. If your payments exceed the actual costs that Federal employees incur for monitoring, BLM will reimburse you the difference or adjust the next payment to reflect the overpayment. Unless BLM gives you written authorization, you may not offset or deduct the overpayment from your payments. The financial plan for your Processing Category 6 application will include BLM's estimate of the actual processing and monitoring costs. Both fees are deposited into the same project account for your project. If our estimates were accurate, we will have spent all the processing fees by the time we are ready to issue the grant and you will be asked to deposit the monitoring fee estimate when you accept the terms and conditions of the grant or TUP. If there is processing money still available in the account when the grant is issued, we will apply the balance to the monitoring fee amount. At the end of the project, we will return any remaining balance in the account to the holder.

For Monitoring Categories 1 through 4 and 6, if you disagree with BLM's category determination, you may appeal the decision under section 2881.10 of this part.

This section was proposed as section 2885.13. We made minor word changes to the final rule that do not alter the meaning of the section, but make it consistent with wording in section 2805.17 of this title.

Subpart 2886—Operations On MLA Grants and TUPs

Subpart 2886 regulates operational activities on grants and TUPs. It explains:

(A) When you can start activities on your grant or TUP and who regulates your activities;

(B) The times you must contact BLM;

(C) Your liabilities under the grant or TUP;

(D) What happens with your grant or TUP if the lands in the grant change jurisdiction;

(E) The conditions under which BLM may suspend your activities or terminate a grant or TUP; and

(F) What happens to any facilities on a grant or TUP when it terminates.

Section 2886.10 When Can I Start Activities Under My Grant or TUP?

This section explains when you can start activities under a grant or TUP. When you can start depends on the terms of your grant or TUP. You can start activities when you receive the grant or TUP you and BLM signed, unless the grant or TUP requires that BLM provide a written Notice to Proceed. If your grant or TUP contains a Notice to Proceed requirement, you may not initiate construction, operation, maintenance, or termination on the right-of-way or TUP area until BLM issues you a Notice to Proceed.

Under this section, before you begin operating your pipeline or related facility authorized by a grant or TUP, you must certify in writing to BLM that the pipeline system:

(A) Has been constructed and tested according to the terms of the grant or TUP; and

(B) Is in compliance with all required plans, specifications, and Federal and state laws and regulations.

In the proposed rule at section 2886.10, the first sentence of this section cross-referenced proposed section 2807.10. In the final rule we took the revised language from final section 2807.10, expanded it to include TUPs, and put it in this section as paragraph (a), rather than cross-referencing it. We also restructured the remainder of the proposed section as paragraph (b), which is consistent with previous section 2883.3. With the exception of the substitution and minor editorial changes, this section remains as proposed. We received no substantive comments on this section.

Section 2886.11 Who Regulates Activities Within My Right-of-Way or TUP Area?

This section explains that after BLM issues the grant or TUP, the head of the agency having administrative jurisdiction over the Federal lands involved will regulate your grant or TUP activities in conformance with the Act, appropriate regulations, and the terms and conditions of the grant or TUP. It also explains that BLM and the other agency head may reach another agreement for administrative jurisdiction.

Section 28(c)(2) of the MLA, 30 U.S.C. 185(c)(2), provides that ''Each agency head shall administer and enforce the provisions of this section, appropriate regulations, and the terms and conditions of rights-of-way or permits insofar as they involve Federal lands under the agency head's jurisdiction.'' In the context of final section 2886.11, ''activities'' refers to construction and operational activities, and amendments, assignments, suspensions, terminations, and collecting rent and monitoring fees. Under this final rule, BLM is responsible for regulating these activities on lands under its jurisdiction.

For grants and TUPs involving lands under the jurisdiction of more than one agency (including agencies of the Department of the Interior other than BLM), the head of each agency will be responsible for regulating the grant or TUP on the lands under its jurisdiction, using its own regulations if such regulations exist. BLM and another agency may enter into an agreement that specifies that BLM may regulate some or all of the activities on the other agency's lands. The MLA at 30 U.S.C. 185(c)(2) allows for these agreements. Such agreements could be specific to individual grants or TUPs or they could be more general, covering all MLA grants and TUPs that include lands administered by the other agency. Under these regulations and 30 U.S.C. 185(c)(2), BLM is responsible for processing renewal applications for all grants involving its lands and those involving lands under the jurisdiction of two or more agencies, just as it is for processing applications for new grants or TUPs.

We received no substantive comments on this section. With the exception of editorial changes, this section remains as proposed.

Section 2886.12 When Must I Contact BLM During Operations?

This section explains that you must contact BLM:

(A) At the times specified in your grant or TUP;

(B) When your use requires a substantial deviation from the grant or TUP. You must obtain BLM's approval before you begin any activity that is a substantial deviation;

(C) When there is a change affecting your application, grant, or TUP, including, but not limited to, changes in:

(1) Mailing address;

(2) Partners;

(3) Financial conditions; or

(4) Business or corporate status; or

(D) When BLM requests it.

We proposed this section as section 2886.13, which cross-referenced proposed section 2807.11. In the final rule we took the revised language from final section 2807.11 and put it in this section, rather than cross-referencing it. We deleted proposed paragraph 2807.11(d) from the final rule because submitting the certificate of construction itself is a contact with BLM and therefore adding it to the list of times you must contact BLM is unnecessary. We also added references to TUPs, where appropriate. Please see the discussion of section 2807.11 for an

explanation of the other changes to this final section and responses to public comments.

Section 2886.13 If I Hold a Grant or TUP, for What Am I Liable?

This section explains your liabilities as a grant or TUP holder. You are liable to the United States for any damage or injury it incurs in connection with your use and occupancy of the right-of-way or TUP area. Similarly, you are liable to third parties for any damage or injury they incur in connection with your use and occupancy of the right-of-way or TUP area.

You are also strictly liable for any activity or facility associated with your right-of-way or TUP area which BLM determines presents a foreseeable hazard or risk of damage or injury to the United States. BLM will specify in the grant or TUP any activity or facility posing such hazard or risk, and the financial limitations on damages commensurate with such hazard or risk. BLM will not impose strict liability for damage or injury resulting primarily from an act of war or the negligence of the United States, except as otherwise provided by law. As used in this section, strict liability extends to costs incurred by the Federal Government to control or abate conditions, such as fire or oil spills, which threaten life, property, or the environment, even if the threat occurs to areas that are not under Federal jurisdiction. This liability is separate and apart from liability under other provisions of law.

This section explains that you are strictly liable to the United States for damage or injury up to $2 million for any one incident. This financial limitation does not apply to the release or discharge of hazardous substances on or near the grant or TUP area, or as otherwise provided by law. BLM will determine your liability under Parts 2800 and 2880 for any amount in excess of the $2 million strict liability limitation (as adjusted) through the ordinary rules of negligence. Please see the discussion in section 2807.12 of this preamble for a further discussion of the strict liability cap.

This section explains that the rules of subrogation apply in cases where a third party caused the damage or injury. This means that when a grant or TUP holder compensates the United States in strict liability for damage or injury caused by a third party, the grant or TUP holder steps into the place of the United States and has the right to pursue compensation from the third party for the damage or injury done to the United States. A similar provision appears at 30 U.S.C. 185(x)(7), calling for application of laws of the jurisdiction where the damages occurred.

If you cannot satisfy claims for injury or damage, any owners of an interest in a grant or TUP and all affiliates or subsidiaries of any holder of a grant or TUP, except for corporate stockholders, are jointly and severally liable to the United States. If BLM issues a grant or TUP to more than one holder, each is jointly and severally liable. Joint and several liability in this context means that each person is responsible for the full amount of liability if the other(s) cannot satisfy the liability. This provision is in previous regulations at sections 2883.1–4(g) and (i).

This section also explains that by accepting the grant or TUP, you agree to fully indemnify or hold the United States harmless for liability, damage, or claims arising in connection with your use and occupancy of right-of-way or TUP areas.

The provisions of this section do not limit or exclude other remedies. This provision is consistent with existing policy and previous section 2883.1–4(h).

In the proposed rule at section 2886.15, we cross-referenced proposed section 2807.12. In the final rule we took the revised language from final section 2807.12 and put it in this section, rather than cross-referencing it. We also made this section applicable to TUPs. The language in section 2807.12 does not include TUPs because final part 2800 does not provide for TUPs. The MLA does provide for TUPs, so it was necessary to add the references to them. Please see the discussion of final section 2807.12 for an explanation of the other changes to this final rule.

There were numerous public comments on the liability sections of the proposed rules. Three comments specifically related to the proposed MLA rule, saying that no company can agree to strict liability for facilities in the oil field which are required by BLM to be open to the public. Please see the discussion of final section 2807.12 for responses to these and the other liability provision comments.

Section 2886.14 As Grant or TUP Holders, What Liabilities Do State, Tribal, and Local Governments Have?

This section explains that if you are a state, tribal, or local government or its agency or instrumentality, you are liable to the fullest extent law allows at the time that BLM issues your grant or TUP. If you do not have the legal power to assume full liability, you must repair damages or make restitution to the fullest extent of your powers. Senate Report No. 93–207, in commenting on section 104(g) of S. 1081, a predecessor to section 28(x)(1) of the MLA, notes that governmental entities may not be legally able to assure protection of the United States because of limitations in state law or State Constitutions.

The section also explains that BLM may require you to provide a bond, insurance, or other acceptable security to:

(A) Protect the liability exposure of the United States to claims by third parties arising out of your use and occupancy of the right-of-way or TUP area;

(B) Cover any losses, damages, or injury to human health, the environment, and property incurred in connection with your use and occupancy of the right-of-way or TUP area; and

(C) Cover any damages or injuries resulting from the release or discharge of hazardous materials incurred in connection with your use and occupancy of the right-of-way or TUP area. We took out the phrase ''actual or threatened'' before ''release or discharge of hazardous materials'' since we do not require a bond for liability for threatened releases, only actual releases.

The section also explains that based on your record of compliance and changes in risk and conditions, BLM may require you to increase or decrease the amount of your security.

The provisions of this section do not limit or exclude other remedies.

This section was proposed as part of section 2886.15, which cross-references proposed section 2807.12, which in turn cross-references proposed section 2807.13. In the final rule we took the revised language from final section 2807.13 and put it in this section, rather than cross-referencing it, and also added references to TUPs.

Please see the discussion of section 2807.13 for an explanation of the other changes to this final rule and responses to public comments.

Section 2886.15 How Is Grant or TUP Administration Affected if the BLM Land My Grant or TUP Encumbers Is Transferred to Another Federal Agency or Out of Federal Ownership?

The section explains that if there is a proposal to transfer the BLM land your grant or TUP encumbers to another Federal agency, BLM may, after reasonable notice to you, transfer administration of your grant or TUP, for the lands BLM formerly administered, to another Federal agency, unless doing so would diminish your rights. If BLM determines that your rights would be diminished by such a transfer, BLM can still transfer the land, but retain

administration of your grant or TUP under existing terms and conditions.

It also explains that if there is a proposal to transfer the BLM land your grant or TUP encumbers out of Federal ownership, BLM may, after reasonable notice to you and in conformance with existing policies and procedures, do one of the following three things:

(A) Transfer the land subject to your grant or TUP. In this case, administration of your grant or TUP, for the lands BLM formerly administered, is transferred to the new owner of the land;

(B) Transfer the land, but BLM retains administration of your grant or TUP; or

(C) Reserve to the United States the land the grant or TUP encumbers, and BLM retains administration of your grant or TUP.

This section also explains that BLM or the new land owner may negotiate new grant or TUP terms and conditions with you.

This section was proposed as section 2886.16, which cross-referenced proposed section 2807.14 (now final section 2807.15). In the final rule we took the revised language from final section 2807.15 and put it in this section, rather than cross-referencing it. We removed the second sentence of the proposed section, which stated the section also applied to TUPs, and instead inserted references to TUPs at appropriate places in the text. We also added ''BLM'' and ''for the lands BLM formerly administered'' in several places to make clear that this section applies only to lands under BLM's jurisdiction. Because 30 U.S.C. 185(c)(2) provides that ''Each agency head shall administer and enforce the provisions of this section, appropriate regulations, and the terms and conditions of rights-of-way or permits insofar as they involve Federal lands under the agency head's jurisdiction,'' BLM believes that it can address only lands under its jurisdiction in this section.

When BLM-administered land encumbered by a grant or TUP is proposed for transfer out of Federal ownership, BLM will consider the comments and input of the grant or TUP holder in determining which of the three options discussed above we will take. Holder input is especially important when only part of the BLM-administered land in a grant or TUP is proposed for transfer, because BLM will want to avoid unnecessary disruption of the holder's operations, particularly when a major pipeline is involved. If significant disruption of the holder's operations would result from transfer of a portion of the BLM lands out of Federal ownership, reservation (non-transfer) of the lands included in the grant could be the most desirable option.

See the discussion of final section 2807.15 for an explanation of the other changes to the final rule and responses to public comments. Please also note that the discussion of considering extending the term of an existing grant to that of a perpetual grant before transferring the land does not apply to grants made under this part. The MLA limits grants BLM issues under this part to 30-year terms.

Section 2886.16 Under What Conditions May BLM Order an Immediate Temporary Suspension of My Activities?

We have restructured proposed sections 2886.17 and 2886.18 to create final sections 2886.16, 2886.17, and 2886.18. These sections contain the provisions on suspension or termination of grants and TUPs. We reorganized them to be more clear and to be as consistent as possible with the comparable provisions of part 2800.

Final section 2886.16 explains that, subject to section 2886.11, BLM can order an immediate temporary suspension of grant or TUP activities within the right-of-way or TUP area to protect public health or safety or the environment. In contrast to section 506 of FLPMA, 43 U.S.C. 1766, and final section 2807.16(a) of this rule, BLM's determination that you have violated the terms and conditions of your grant is not a necessary preliminary finding (see 30 U.S.C. 185(o)). BLM can require you to stop your activities before holding an administrative proceeding on the matter and may order immediate remedial action. We added ''subject to § 2886.11'' to paragraph (a) of this section to make it clear that the head of the agency having administrative jurisdiction over the Federal lands involved will regulate your grant or TUP unless another agreement is reached. Therefore, the other Federal agency will act under 30 U.S.C. 185(o) unless there is agreement that BLM will administer the grant. We made the same addition to sections 2886.17 and 2886.19 of this part.

BLM may issue the immediate temporary suspension order orally or in writing to you, your contractor, or subcontractor, or to any representative, agent, or employee representing you or conducting the activity. BLM may take this action whether or not any action is being or has been taken by other Federal or state agencies. When you receive the order, you must stop the activity immediately. BLM will, as soon as practical, confirm an oral order by sending or hand delivering to you or your agent at your address a written suspension order explaining the reasons for it.

You may file a written request for permission to resume activities at any time after BLM issues the order giving the facts supporting your request and the reason(s) you believe that BLM should lift the order. BLM must grant or deny your request within 5 business days after receiving it. If BLM does not respond within 5 business days, BLM has denied your request. You may appeal the denial under section 2881.10 of this part.

The immediate temporary suspension order is effective until you receive BLM's written notice to proceed with your activities. Any stay of BLM's order is addressed by final section 2881.10.

This final section replaces proposed section 2886.18(a). We also added final paragraph (c) to this section. It discusses how you may file a request to resume and how BLM will respond. The provisions of this paragraph are in previous sections 2883.5(e) and (f). We inadvertently omitted them from the proposed rule.

Several commenters said that the regulations should give industry the opportunity to ''correct the endangerment'' before suspending or terminating activities under the grant. This section provides that BLM can order an immediate temporary suspension of activities within the right-of-way or TUP area when it believes it is necessary ''to protect public health or safety or the environment.'' Section 185(o) of the MLA provides authority and direction for this section of the rule. It states:

> If the Secretary or agency head determines that an immediate temporary suspension of activities within a right-of-way or permit area is necessary to protect public health or safety or the environment, he may abate such activities prior to an administrative proceeding.

This provision of the MLA establishes the standard that BLM uses to determine whether to issue an immediate temporary suspension order, namely that such an order is necessary ''to protect public health or safety or the environment.'' This provision is consistent with the Administrative Procedure Act at 5 U.S.C. 558. In those situations involving the suspension or termination of a grant or TUP, final section 2886.18 states that BLM will provide ''a reasonable opportunity to correct the violation'' before taking further action.

Please see the discussion of final section 2807.16 for an explanation of the other changes to this final section.

Section 2886.17 Under What Conditions May BLM Suspend or Terminate My Grant or TUP?

This section explains that subject to section 2886.11, BLM may suspend or terminate your grant if you do not comply with applicable laws and regulations or any terms, conditions, or stipulations of the grant (such as rent payments), or if you abandon the right-of-way. Subject to section 2886.11, BLM may also suspend or terminate your TUP if you do not comply with applicable laws and regulations or any terms, conditions, or stipulations of the TUP, or if you abandon the TUP area.

This section also explains that a grant or TUP also terminates when:

(A) The grant or TUP contains a term or condition that has been met that requires the grant or TUP to terminate;

(B) BLM consents in writing to your request to terminate the grant or TUP; or

(C) It is required by law to terminate.

Your failure to use your right-of-way for its authorized purpose for any continuous 2-year period creates a presumption of abandonment. BLM will notify you in writing of this presumption. You may rebut the presumption of abandonment by proving that you used the right-of-way or that your failure to use the right-of-way was due to circumstances beyond your control, such as acts of God, war, or casualties not attributable to you.

You may appeal a decision under this section under section 2881.10 of this part.

This final section replaces proposed sections 2886.17(a) and (c). Proposed section 2886.17(a) erroneously mixed terminology pertaining to ''grants'' and ''temporary use permits'' which made the paragraph unclear and confusing. It also inadvertently omitted several provisions of previous sections 2883.6–1 and 2883.6–2. We added several provisions to the final rule to make it clearer and more consistent with the previous regulations and also to comply with the requirements of section 185(o) of the MLA.

We also redrafted final paragraphs (a) and (b) to separately address when BLM may suspend or terminate a grant or a TUP for non-compliance with applicable laws and regulations or any terms, conditions, or stipulations of the authorization, or for abandonment. These final paragraphs more accurately follow the previous rule and resolve the confusion created by proposed section 2886.17(a).

We added paragraph (c) to specify that your grant or TUP would also terminate when it contains a term or condition that has been met that requires it to terminate, when BLM consents in writing to your request to terminate it, or when it is required by law to terminate. We did this to complete the section and to be consistent with final section 2807.17. Please see the discussion of final section 2807.17 for an additional discussion of these provisions.

We also added final paragraph (d) to explain that your failure to use your right-of-way for its authorized purpose for any continuous 2-year period creates a presumption of abandonment. This provision is in previous section 2883.6–1(b) and section 185(o)(3) of the MLA. We added it to be consistent with the MLA and the previous rule.

Proposed section 2886.17(c) is now final section 2886.17(e). We reworded it to be consistent with final section 2807.17(d).

Several commenters suggested that the regulations define ''abandonment.'' The commenters said that facilities may be necessary for future enhanced oil recovery projects and that the grantee may have to wait until oil and gas prices go up. We did not add a definition of ''abandonment'' to the final rule. The MLA does not define the term or describe specific circumstances that would constitute abandonment (other than stating at 30 U.S.C. 185(o)(3) that ''Deliberate failure of the holder to use the right-of-way for the purpose for which it was granted or renewed for any continuous two-year period shall constitute a rebuttable presumption of abandonment of the right-of-way''). We believe that it is appropriate for BLM and grant and TUP holders to rely on the normal meaning of the term and the statutory language in interpreting and applying the rule.

Section 2886.18 How Will I Know That BLM Intends To Suspend or Terminate My Grant or TUP?

This section explains that when BLM determines that it will suspend or terminate your grant, it will send you a written notice of this determination. The determination will provide you a reasonable opportunity to correct the violation, start your use, or resume your use of the right-of-way, as appropriate. In the notice BLM will state the date by which you must correct the violation or start or resume use of the right-of-way. If you have not corrected the violation or started or resumed use of the right-of-way by the date specified in the notice, BLM will refer the matter to the Office of Hearings and Appeals (OHA). An administrative law judge (ALJ) in OHA will provide an appropriate administrative proceeding under 5 U.S.C. 554 and determine whether grounds for suspension or termination exist. BLM will suspend or terminate the grant if the ALJ determines that grounds exist for this action and that the suspension or termination is justified. Consistent with 30 U.S.C. 185(o), no administrative proceeding is required where the grant provides that it terminates on the occurrence of a fixed or agreed upon condition, event, or time.

When we determine that we will suspend or terminate your TUP, we will send you a written notice of our determination and provide you a reasonable opportunity to correct the violation or start or resume use of the TUP area. The notice will also provide you information on how to file a written request for reconsideration.

You may file a written request with the BLM office that issued the notice, asking for reconsideration of the determination there. BLM must receive this request within 10 business days after you receive the notice.

BLM will provide you with a written decision within 20 business days after receiving your request for reconsideration. The decision will include a finding of fact made by the next higher level of authority in BLM than the person who made the initial suspension or termination determination. The decision will also inform you of whether BLM has suspended or terminated your TUP or cancelled the notice made under paragraph (b) of this section. If the decision is adverse to you, you may appeal it under section 2881.10 of these regulations.

This section was proposed as sections 2886.17(b) and (c). These proposed paragraphs were not clear regarding which provisions applied to grants and which applied to TUPs. Therefore, in this final section we reworded the text and separated the provisions addressing grants (final section 2886.18(a)) from those addressing TUPs (final section 2886.18(b)).

In the final rule we moved proposed section 2886.18(b) to final sections 2886.18(a) and (a)(1), which are discussed below. We also moved proposed section 2886.17(b) to final sections 2886.18(b), (b)(1), and (b)(2), which are discussed above. Proposed section 2886.17(c) is now final section 2886.18(b)(3).

In addition to editorial changes, we made a number of changes and additions to improve the clarity and completeness of the process description and to make it more consistent with previous sections 2883.6–1(c), 2883.6–2(b), and (c), and the MLA.

In the first sentence of paragraph (a) we added the phrase ''under § 2886.17 of this subpart'' to indicate for which suspensions and terminations BLM will send a written notice. We also added the phrase ''and provide you a reasonable opportunity to correct the violation, start your use, or resume your use of the right-of-way, as appropriate'' and the sentence ''In the notice BLM will state the date by which you must correct the violation or start or resume use of the right-of-way.'' Section 28(o)(1) of the MLA, 30 U.S.C. 185(o)(1), states that ''Abandonment of a right-of-way or noncompliance with any provision of this section may be grounds for suspension or termination of the right-of-way if (A) after due notice to the holder of the right-of-way, (B) a reasonable opportunity to comply with this section, and * * *.'' We added the phrase and sentence to make the regulation consistent with the MLA and in response to comments (see discussion under section 2886.16 above).

We added the phrase ''If you have not corrected the violation or started or resumed use of the right-of-way by the date specified in the notice'' to the first sentence of final section 2886.18(a)(1) to make clear when BLM will refer the matter to OHA. We also added a new sentence to the end of this paragraph stating that ''No administrative proceeding is required where the grant by its terms provides that it terminates on the occurrence of a fixed or agreed upon condition, event, or time.'' This is provided for at 30 U.S.C. 185(o)(1) and we added the new sentence to be consistent with the Act.

In paragraph (b), we added the phrase ''and provide you a reasonable opportunity to correct the violation or start or resume use of the TUP area'' and the sentence ''The notice will also provide you information on how to file a written request for reconsideration.'' We added the phrase to be consistent with the MLA (see discussion regarding paragraph (a) above) and in response to comments (see discussion under section 2886.16 above). The sentence reflects longstanding BLM policy and practice and we added it to provide a more complete and accurate description of the process.

Section 2886.19 When My Grant or TUP Terminates, What Happens to Any Facilities on It?

In the proposed rule, this section cross-referenced proposed section 2807.18. In the final rule we took the revised language from that section (final section 2807.19) and put it in this section, rather than cross-referencing it. We also made this section applicable to TUPs. Please see the discussion of final section 2807.19 for an explanation of the other changes to this section.

Subpart 2887—Amending, Assigning, or Renewing MLA Grants and TUPs

Subpart 2887 contains provisions on amending, assigning, and renewing grants and TUPs.

Section 2887.10 When Must I Amend My Application, Seek An Amendment of My Grant or TUP, or Obtain a New Grant or TUP?

This section explains that you must amend your application or seek an amendment of your grant or TUP when there is a proposed substantial deviation in location or use. The requirements to amend an application, grant, or TUP are the same as those for a new application, including paying processing and monitoring fees and rent according to sections 2884.12, 2885.23, and 2885.19 of this part.

This section also explains that any activity not authorized by your grant or TUP may subject you to prosecution under applicable law and to trespass charges under subpart 2888 of this part.

Under this section if you hold a pipeline grant issued before November 16, 1973 (prior to the MLA amendment), and there is a proposed substantial deviation in location or use of the right-of-way, you must apply for a new right-of-way grant.

BLM may ratify or confirm a grant that was issued before November 16, 1973, if we can modify the grant to comply with the MLA and these regulations. BLM and you must jointly agree to any modification of a grant made under this paragraph. This provision is consistent with 30 U.S.C. 185(t).

This final rule is different from the proposal. In the proposed rule, paragraph (a) contained a cross-reference to proposed section 2807.19. This final rule replaces that cross-reference with final paragraphs (a) and (b) and contains references to TUPs. Proposed section 2807.19 (final section 2807.20) does not address TUPs. The MLA does provide for TUPs, however, so we added references to them to this section. Since this section is based on final section 2807.20, please see the discussion of that section for other changes to the final rule.

The last sentence of proposed paragraph (a) is now final paragraph (c). Proposed paragraphs (b) and (c) are now final paragraphs (d) and (e). We also changed the title of the section to more accurately reflect its contents. With the exception of other minor editorial changes, the remainder of this final rule is as it was proposed.

Section 2887.11 May I Assign My Grant or TUP?

This section explains that with BLM's approval, you may assign, in whole or in part, any right or interest in a grant or TUP. In order to assign a grant or TUP, the proposed assignee must file an application with BLM and satisfy the same procedures and standards as for a new grant or TUP, including paying processing fees.

The assignment application must also include:

(A) Documentation that the assignor agrees to the assignment; and

(B) A signed statement that the proposed assignee agrees to comply with and to be bound by the terms and conditions of the grant or TUP that is being assigned, and all applicable laws and regulations.

BLM will not recognize an assignment until we approve it in writing. BLM will approve the assignment if doing so is in the public interest. BLM may modify the grant or TUP or add bonding and other requirements, including terms and conditions, to the grant or TUP when approving the assignment. If BLM approves the assignment, the benefits and liabilities of the grant or TUP apply to the new grant or TUP holder.

The processing time and conditions for original applications, as described at section 2884.21 of this part, apply to processing assignment applications.

The previous rule provided for the assignment of TUPs (see previous 2881.1–2(e)). We inadvertently omitted reference to assigning TUPs in the proposed rule. Therefore, we added references to TUPs in the final rule.

We modified proposed paragraph (c)(2) by replacing the phrase ''A stipulation that * * *'' with ''A signed statement that * * *.'' We made this change so as not to confuse the signed statement with stipulations that we may attach to an approved grant or TUP.

We also changed proposed paragraph (d) to add provisions that ''BLM will approve the assignment if doing so is in the public interest'' and ''If BLM approves the assignment, the benefits and liabilities of the grant or TUP apply to the new grant or TUP holder.'' We added this first sentence to explain that BLM may deny an assignment application if it determines that approval of the assignment would not be in the public interest. Previous section 2882.3(e) provides that ''An application for a right-of-way grant or temporary use permit * * * may be denied if the authorized officer determines that the right-of-way or use

applied for would be inconsistent with the purpose to which the Federal lands involved have been committed, or would otherwise not be in the public interest.'' Previous section 2881.1–1(g) makes an assignee bound by the terms and conditions of the grant and the assignee must meet all of the requirements of the original grantee. Therefore, the public interest requirement in this section is consistent with previous regulations. We added the second sentence to make clear that any modifications to the grant or TUP during the assignment process (*e.g.*, modified or additional terms and conditions) apply to the assignee, a fact implicit in section 2887.11(c)(2).

In final paragraph (e) we replaced the cross-reference to section 2804.19(c) with a cross reference to section 2884.21, because we incorporated the customer service standard referenced into the final part 2880 rule, rather than by cross-reference to part 2800, as we proposed. Except for the changes discussed above and minor editorial changes, the final section remains as proposed.

We received many comments on various aspects of assignments that could apply to the 2800 regulations and these regulations. Please see the discussion of final section 2807.21 for descriptions of the comments on assignments and responses to them.

Section 2887.12 How Do I Renew My Grant?

This section explains that you must apply to BLM to renew your grant at least 120 calendar days before your grant expires. BLM will renew your grant if you are operating the pipeline and maintaining it in accordance with the grant, these regulations, and the Act. If your grant has expired or terminated, you must apply for a new grant under subpart 2884 of this part.

BLM may modify the terms and conditions of the grant at the time of renewal, and you must pay the processing fees in advance.

The time and conditions for processing applications for rights-of-way, as described at section 2884.21 of this part, apply to applications for renewals.

Under final paragraph (a) you must submit to BLM an application for renewal at least 120 calendar days prior to grant termination. We added this time requirement to the final rule because we require at least 120 calendar days to process an application for renewal and approve it before the grant expires. The same 120-day standard was proposed in section 2807.22(b) and is in final section 2807.22(a) and (b).

We also revised the title of the section from ''May I renew my grant?'' to ''How do I renew my grant?'' to more accurately describe its content.

Except for the changes discussed above and minor editorial changes, the final section remains as proposed.

Several commenters said that the renewal of an existing right-of-way should be a simple request in writing. Please see the discussion of final section 2807.22 for the response to this comment.

A few commenters asked if BLM can deny a grant renewal request if the current and continued use, operation, and maintenance of an existing facility is causing environmental effects that are inconsistent with a current land use and resource management plan. A few commenters also asked if modifications of the terms and conditions of a grant, at the time of renewal, could include provisions requiring the relocation of segments of the facility, if necessary, to comply with then-existing laws, regulations, and resource management plans. Final section 2887.12(a) states that ''BLM will renew the grant if the pipeline is being operated and maintained in accordance with the grant, these regulations, and the Act.'' Final section 2885.11(b) states that ''During construction, operation, maintenance and termination of the project you must: (1) To the extent practicable, comply with all existing and subsequently enacted, issued, or amended Federal laws and regulations * * * applicable to the authorized use.'' We may modify the terms and conditions of the grant at the time of renewal to require the grant holder to bring its operations and facilities into compliance with the laws and regulations mentioned in section 2885.11(b). The modification could include provisions requiring the relocation of segments of the facility, if necessary, to comply with then existing laws and regulations. If the holder does not accept such modified terms and conditions, BLM may deny the renewal application. Inconsistencies with current resource management plans are addressed at 43 CFR 1610.5–3.

One commenter stated that under existing regulations TAPS receives unique treatment since it is permitted to make its cost recovery payments 60 days after the close of each quarter, rather than in advance. The commenter said that to avoid confusion, the final regulations should make it explicit that the quarterly reimbursement schedule applies to renewal costs as well. The final rule states at paragraph (b) ''* * * you must pay the processing fees (see § 2884.12 of this part) in advance.'' Final section 2884.12(f) provides for payments for applications related to TAPS to be made within 60 days after the close of each quarter. We believe that the cross-reference to section 2884.12 of this part is sufficient to make clear that the payment provisions of section 2884.12(f) apply to renewal applications.

A few commenters asked what would happen if the grant holder did not request a renewal in time for the agency to fully process the application prior to the expiration date of the current authorization. The final rule states that you must apply to BLM to renew a grant at least 120 calendar days before the grant expires. BLM will not accept a renewal application if we receive it less than120 calendar days before the grant expires. In these circumstances, the grant holder should instead file an application for a new authorization under subpart 2884. If BLM is able to complete processing such an application for a new authorization before the original grant expires, BLM may, at its discretion, renew the original grant.

Subpart 2888—Trespass

This subpart contains provisions pertaining to trespass on Federal lands and:

(A) Defines trespass;

(B) Cross-references trespass provisions in the part 2800 regulations that are applicable to the part 2880 regulations; and

(C) Explains that other Federal agencies address trespass on non-BLM lands under their respective laws and regulations.

Section 2888.10 What Is Trespass?

This section explains that:

(A) Trespass is using, occupying, or developing the public lands or their resources without a required authorization or in a way that is beyond the scope and terms and conditions of your authorization. Trespass is a prohibited act;

(B) Trespass includes acts or omissions causing unnecessary or undue degradation to the public lands or their resources. In determining whether such degradation is occurring, BLM may consider the effects of the activity on resources and land uses outside the area of the activity;

(C) BLM will administer trespass actions for grants and TUPs as set forth in sections 2808.10(c) and 2808.11 of this chapter; and

(D) Other Federal agencies address trespass on non-BLM lands under their respective laws and regulations.

This proposed section included only cross-references to proposed subpart 2808 and part 2800 of the rule. In the final rule, we replace those general cross-references with an explanation of what trespass is, some additional information about trespass on BLM and other agency lands, and more specific cross-references to the final trespass rules in part 2800. We also added language to this section explaining that the rent exemption provisions of the part 2800 regulations do not apply to grants issued under this part. This section does not impose additional requirements to the rule as it was proposed, but is more specific and informative.

Section 2888.11 May I Receive a Grant If I Am or Have Been in Trespass?

This section is new to this part of the final rule. It was proposed as section 2808.12 and made applicable in the proposed rule to this part via a cross-reference.

This section explains that until you satisfy liability for a trespass, BLM will not process any applications you have pending for any activity on BLM-administered lands. A history of trespass will not necessarily disqualify you from receiving a grant. In order to correct a trespass, you must apply under the procedures described at subpart 2884. BLM will process your application as if it were a new use. Prior unauthorized use does not create a preference for receiving a grant.

Please see the preamble to section 2808.12 for a discussion of the changes to this section and for responses to public comment.

This final rule also corrects cross-references to this rule in existing regulations in sections 2812.1–3, 2920.6, 9239.7–1, and 9262.1.

III. Procedural Matters

Executive Order 12866, Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, this rule is not a significant regulatory action. The Office of Management and Budget will make the final determination as to its significance under Executive Order 12866.

a. This rule will not have an annual economic effect of $100 million or more or adversely affect in a material way an economic sector, productivity, jobs, competition, the environment, public health or safety, other units of government, or communities. A cost-benefit and economic analysis has not been prepared.

Processing and monitoring fee increases. The rule could potentially increase processing and monitoring revenues to BLM and conversely, costs to applicants and grant holders, by an estimated maximum of $9.0 million each year. This number represents the largest impact possible under the revised rules. To arrive at the $9.0 million, we assume that all right-of-way actions would be assessed the maximum fixed processing fee and the maximum fixed monitoring fee. The following shows the maximum possible annual economic effect of increasing the right-of-way cost recovery processing and monitoring fees.

Assumptions

(1) The average number of FLPMA and MLA right-of-way applications processed over a four year period in FY 2001–2004 for amended, assigned, new, and renewed grants represents the demand for right-of-way services for a typical year and is appropriate for use in this calculation.

(2) The number of all types of right-of-way applications that BLM processed can be accurately derived from BLM's automated lands records data bases (LR 2000).

(3) The number of applications that BLM rejects each year is less than 1 percent and will not affect these calculations significantly.

(4) The regulations will not affect the processing and monitoring costs associated with the full reasonable (FLPMA) and full actual (MLA) cost categories because applicants currently pay these amounts under existing rules.

(5) To determine whether the rule has an economic effect of $100 million or more annually, it is appropriate to use the ''worst case'' scenario, that is, using the most expensive fixed fee application processing and monitoring categories to make the calculations (Processing Category 4 and Monitoring Category 4).

(6) The rate of inflation in the economic indicator used will not significantly increase over the next 5 years. It is not likely that there will be a period of deflation.

Calculations

The average number of FLPMA right-of-way applications for new or amended grants and assignments and renewals processed in FY 2001–2004 (2,855) multiplied by (the final rule's fees for FLPMA Processing Category 4 ($923) plus the final rule's fees for FLPMA Monitoring Category 4 ($923)):

($923 + $923) × (2,855) = $5,270,330

The average number of MLA right-of-way applications for new or amended grants and assignments and renewals processed in FY 2001–2004 (2,624) multiplied by the final rule's fees for MLA Processing Category 4 ($923) plus the final rule's fees for MLA Monitoring Category 4 ($923):

($923 + $923) × (2,624) = $4,843,904

The maximum total annual collection of FLPMA right-of-way cost recovery processing and monitoring fees for new or amended grants and assignments and renewals ($5,270,330) plus the maximum total annual collection of MLA right-of-way cost recovery processing and monitoring fees for new or amended grants and assignments and renewals ($4,843,904) equals the maximum total annual collection of right-of-way cost recovery processing and monitoring fees ($10,114,234).

$5,270,330 + $4,843,904 = $10,114,234 (Maximum total annual collection of FLPMA and MLA right-of-way cost recovery processing and monitoring fees).

Average FY 2001–2004 FLPMA and MLA processing and monitoring fees collected = $1,086,556.

$10,114,234 (Maximum total annual collection of FLPMA and MLA processing and monitoring fees) minus (−) $1,086,556 (Average of 2001–2004 FLPMA and MLA processing and monitoring fees collected) = $9,027,678) (or, rounded down to $9.0 million) (maximum annual impact of fee increases).

The final processing fees are generally the fees in the 1999 proposed rule adjusted for increases in the IPD-GDP between the date of the proposed rule and now. However, in the final rule we made four important additional adjustments in the fee schedule which affect the final amounts and number of categories for both the processing and monitoring schedules.

The first adjustment is that in the final rule we define each processing and monitoring category by only the estimated number of Federal work hours necessary to process or monitor the application/grant rather than a combination of criteria (number of hours, availability of data, number of field examinations, and need for land use plan amendment) which in the proposed rule were used to define all the categories (except the Master Agreement category). In doing so, it was necessary to determine a ''mean'' or average hour for each category, and then apply the appropriate hourly rate to the mean hour in each FLPMA or MLA category. This ensures that each category is cost-weighted the same.

The second adjustment establishes a new category (Category 1) for any right-of-way action that is estimated to take more than 1 hour, but eight hours or

less, to process or monitor. Under the final rule no fee is assessed for any action that takes 1 hour or less to process. We then adjusted new Category 2 to include actions that are estimated to take a maximum of 24 hours but greater than eight hours. New Categories 3 (> 24 hours ≤ 36 hours) and 4 (> 36 hours ≤ 50 hours) are the same as proposed Categories II and III.

The third adjustment recognizes that for categories 1 through 4, processing and monitoring fees under FLPMA are identical to the analogous category under the MLA. For example, a category 2 processing fee under FLPMA is identical to a category 2 processing fee under the MLA. A category 3 monitoring fee under FLPMA is identical to a category 3 monitoring fee under the MLA.

The preamble discussion of section 2804.14 explains in detail how the six ''reasonableness'' factors at section 304(b) of FLPMA apply to right-of-way projects under FLPMA. As explained there, factors such as public benefit and public service could potentially cause BLM to charge processing or monitoring fees for a FLPMA right-of-way at less than actual costs. We note, however, that we found in 1986 that for non-major projects, there is little opportunity for public benefits or public services because of the local nature of such projects (see the preamble to the proposed rule at 51 FR 26840, July 25, 1986). We note further that in practice any small benefit or service to the public provided by the processing of a fixed fee application or monitoring a fixed fee project was outweighed by the monetary value to the applicant of the right or privilege sought by the applicant.

Again in 1999, we noted: ''Actual costs, less management overhead, forms the amount to which BLM applies the reasonability factors listed in section 304(b) of FLPMA. For all but complex projects * * * the reasonability factors have little or no effect on actual costs'' (see 64 FR 32110 (June 15, 1999)).

Our decision to equate FLPMA and MLA fees for categories 1 through 4 was aided by a 1996 Solicitor's Opinion on cost recovery (M–36987), entitled ''BLM's Authority to Recover Costs of Minerals Document Processing.'' That opinion clarified that ''[a] factor such as 'the monetary value of the rights or privileges sought by the applicant' could, when that value is greater than BLM's processing costs, be weighed as an enhancing factor, offsetting a diminution due to another factor such as 'the public service provided' '' (see M–36987 at 36). Major categories 5 and 6 are more likely to reflect differences in FLPMA and MLA fees.

The fourth adjustment applies the mean per hour rate of $21.46 to the mean hour of each category. The basis for this $21.46 rate is data assembled for category 4 projects (category III in the proposed rule). Category 4 projects are those requiring more than 36 hours to process (and less than or equal to 50 hours). The mean hour for category 4 is 43 (which is equal to (50 − 36)/2 + 36). Multiplying $21.46 by 43 gives the fee for category 4 ($923). Multiplying $21.46 by the mean hour for categories 1 through 3 likewise gives the fee for these categories.

As stated earlier, BLM conducted field studies in 1982 and 1983 which measured the costs of processing right-of-way applications and monitoring grants (see also 64 FR 32107 (June 15, 1999)). Between November 12, 1982, and July 25, 1986, BLM field offices kept and reported actual time and cost on some 500 right-of-way projects in non-major categories (see 51 FR 26840 (July 25, 1986)). In 1986, the agency conducted an extensive field study of processing and monitoring costs, which generally verified the processing costs developed from the earlier studies (see 64 FR 32108).

When we set the MLA processing fees in 1985 (see 50 FR 1308, Jan. 10, 1985), we set fixed MLA processing and monitoring fees at our estimated actual cost, as required by section 28 of the MLA. The preamble to the rule proposing MLA cost recovery fees in 1983 makes plain that the fees were developed by a BLM task force consisting of employees with expertise in the processing and monitoring of right-of-way cases, budgeting, and cost accounting. The task force analyzed data from a representative sample of actual right-of-way cases and examined several demographic variables which might influence cost, including location and area of the right-of-way or temporary use area. Fees were based on the estimated work effort required to accomplish the processing actions, including personnel costs, fringe benefits, vehicle usage, and indirect costs (see 48 FR 48478, 48479 (Oct. 19, 1983) and 64 FR 32108 (June 15, 1999)).

In 1995, BLM program experts analyzed a cross section of our right-of-way cases. This analysis showed that the cost of processing right-of-way cases, including labor costs, had increased since 1986 at approximately the same rate as the Implicit Price Deflator—Gross Domestic Product (see 64 FR 32109 (June 15, 1999)).

To verify the appropriateness of the above fees, we offer the following brief analysis:

The $21.46 mean per hour rate for processing and monitoring fees would approximately equal the hourly wage in 2005 for an employee at the GS 9, Step 3 level.

These rates compare favorably with the 1987 processing fees which, if adjusted to a mean per hour rate, would average $11 per mean hour or an hourly wage earned by an employee in 1987 (when the existing rule was published) at the GS 9, Step 2 level (according to the 1987 General Schedule).

Most right-of-way actions are processed and monitored by employees who are at the GS 9 to GS 11 levels and who will earn between $20.02 (GS 9/1) and $31.48 (GS 11/10) per hour in 2005.

Under the final rule, FLPMA and MLA fees are identical for fixed fee categories. Because of the change in category definitions, we expect that 70 percent of the new FLPMA applications will be assessed either a Category 3 ($644) or Category 4 ($923) processing fee. Under the 1987 FLPMA processing fee schedule, 60 percent of the new applications were assessed a Category II ($300) fee. For MLA applications, we expect that 55 percent of the new applications will be assessed either a Category 3 ($644) or Category 4 ($923) processing fee. Under the 1987 MLA fee schedule, 63 percent of the applications were assessed a Category II ($275) fee. As a result, BLM expects to collect a minimum of $344 ($644 − $300 = $344) in increased processing fees per application for the majority of processing actions under the new cost recovery fee schedules. To put these figures in perspective, the 1995 IG audit found for 1993 that BLM was collecting, on average, $280 to process a typical right-of-way application, while its costs were $493 (or a deficit of $213 per application for processing fees). When adjusted for inflation (the change in IPD-GDP from 1993 to 2005 is 25 percent), the BLM must collect, on average, approximately $616 per application (an additional $336 above the current fee average identified by the IG) to process a typical right-of-way application. We believe that the adjustments made in the FLPMA and MLA processing fee schedules, as described above, will allow BLM to recover the appropriate costs associated with processing all right-of-way applications in 2005 and beyond.

Under the 1987 rules BLM determined the monitoring category based on the processing cost categories. For example, a Category I application for processing fees would automatically be considered a Category I application for monitoring fees. This technique for

charging monitoring fees has proven inadequate. BLM collected nearly $1.2 million in minor category processing and monitoring fees in FY 2004. However, less than $222,000 of the total fees (or an average $65 per grant) were for monitoring purposes. In most cases, the same employees which process the application, also monitor grant activities, so the hourly cost is the same. The primary variable between processing activities and monitoring activities, which could vary widely, is the number of hours required to accomplish each activity. For this reason, in the final rule, BLM will have the ability to determine monitoring categories separately from processing categories, and as a result, should have adequate resources to properly conduct these activities. The economic impact of this change will be minimal since increases in one fee category will tend to cancel out decreases in another. That is because we believe that it is just as likely that an application will fall into a higher category under the new rule as it is that they will fall into a lower category.

However, we estimate the total maximum economic impact from the new monitoring fees will be $4.8 million. This figure is calculated by multiplying the average number of FLPMA (2,855) and MLA (2,624) right-of-way actions for FY 2001, FY 2002, FY 2003 and FY 2004 (5,479 total applications) by the maximum monitoring fee in the final rule ($923) (5,479 multiplied by $923), or $5,057,117, less $221,910 (the total monitoring fees collected in FY 2004 for the fixed fee categories) or $4.8 million (5,057,117 minus $221,910 = $4,835,207 or $4.8 million).

Clarifications to communication site right-of-way policies. The revisions to the communication site right-of-way policies will have no direct economic effects. They clarify how BLM assesses rents for communication site rights-of-way, based on regulatory changes made in November 1995. Communication site rights-of-way fall within one of three major categories of communication uses on public lands:

(1) Broadcast, including television, FM radio, rebroadcast devices, and cable television;

(2) Non-broadcast, including commercial mobile radio service, cellular telephone service, private mobile communications, common carrier and microwave communications; and

(3) Other, including small, unobtrusive, low-power uses serving small numbers of customers.

Rents correlate to the population of the community served or to the community where the facility is located, or both. The communication site rent schedule became effective in late 1995. This final rule contains revisions that address the most frequently asked questions about applying the rent schedule to various situations and clarifies certain policies that were ambiguous. This final rule does not change the rent amounts except by the amount of the yearly change in the CPI-U, which is consistent with existing rules and policy.

REA-financed v. *Eligible for REA financing.* As mentioned earlier, the Omnibus Parks and Public Lands Management Act of 1996 amended section 504(g) of FLPMA. The effect of the amendment is to increase the number of rights-of-way that may qualify for an exemption from paying rent. Prior to 1996, Section 504(g) specified that the holder of a right-of-way pay the fair market value for the use authorized by the grant, but specifically exempted from rent rights-of-way for electric or telephone facilities ''financed'' under the Rural Electrification Act of 1936, as amended (REA). The 1996 amendment replaced the phrase ''financed pursuant to the Rural Electrification Act of 1936, as amended,'' with ''eligible for financing pursuant to the Rural Electrification Act of 1936, as amended, determined without regard to any application requirement under that Act.'' This change allows rights-of-way for electric or telephone facilities that are ''eligible for financing'' under the REA to receive an exemption from rent payments. The final rule is consistent with the statute.

The REA exemption is only for electric or telephone facilities that provide service to rural areas. BLM exempts rent for electric or telephone facilities when the Rural Utility Service (at the request of the applicant/holder) provides the necessary documentation that the facility is being financed with loans pursuant to the REA, or is eligible for financing under that statute. Loans are only provided for electric and telephone facilities that serve rural areas, as those terms are defined by REA.

Since the expanded REA exemption is new to BLM regulations and since the request for rent exemption must be initiated by the grant holder, it is impossible to predict with any certainty the actual economic impact of this rule change. However, the potential loss of rental receipts due to the REA exemption can be estimated as follows:

The average annual rent received in 2004 per right-of-way grant was $249 ($12,005,260 (total rental income) divided by 48,190 (total number of grants paying rent) = $249).

Of the 48,190 grants paying rent, 10,760 are grants for electric transmission, telephone, or fiber optic facilities which are not financed by REA loans, but which might be eligible for financing.

Currently, 7,278 electric and telephone facilities are not being assessed rent.

If all grants for electric and telephone facilities that now pay rent (10,760), become rent exempt, the loss of rental revenue would be approximately $2,679,240 ($249 (average annual rent per grant) X 10,760 (number of existing electric and telephone facilities now paying rent)).

In summary, $2.7 million of annual rental receipts could be lost if all currently authorized telephone and electric lines now paying rent were to become rent exempt. In a ''worst case'' scenario, where all current rental receipts of $12.0 million were to be lost, this rule will not have an annual economic effect of $100 million and the economic impact would not be significant, even when combined with the other changes the rule makes.

b. This rule will not create serious inconsistencies or otherwise interfere with other agencies' actions. BLM has worked closely with the Forest Service in assuring the maximum consistency possible between the policies of the two agencies with respect to managing communication site rights-of-way. BLM and the Forest Service have several working groups examining various aspects of their right-of-way programs, including ensuring consistency of regulations and policies to the extent possible. In fact, the Forest Service plans to publish cost recovery regulations similar to BLM's.

c. This rule will not materially alter the budgetary impact of entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. This rule does increase processing and monitoring fees, but only in amounts necessary to ensure that the Federal government receives fees to pay for the reasonable or actual costs of processing applications and monitoring grants consistent with FLPMA and the MLA. The increases in processing and monitoring fees will not be retroactive, but they will apply to existing grant holders who apply for new authorizations under the regulations.

Under the final rule, Federal agencies and their instrumentalities are no longer automatically exempt from paying processing and monitoring costs. However, these agencies may still benefit from the ''reasonableness factors'' listed in section 304(b) of FLPMA. Hardship is one such factor. Removing the automatic exemption would not affect any agency's ability or eligibility to benefit from these factors.

d. This rule will not raise novel legal or policy issues. Section 304 of FLPMA allows the Secretary of the Interior to ''establish reasonable filing and service fees and reasonable charges, and commissions with respect to applications and other documents relating to the public lands * * *'' and to ''require a deposit of any payments intended to reimburse the United States for reasonable costs with respect to applications and other documents relating to such lands.'' The reasonable costs include the costs of special studies, environmental analyses, and the monitoring of construction, operation, maintenance, and termination of any authorized facility * * *'' Section 28(l) of the Mineral Leasing Act of 1920, as amended, requires applicants for oil and gas pipeline rights-of-way to reimburse the United States for the administrative and other costs, i.e., actual costs, for processing the application and for monitoring activities under their grants. BLM currently collects these fees.

Other regulatory revisions clarify existing right-of-way regulations in determining rents for communication site rights-of-way and implement a statutory change relating to rent exemptions for facilities that are eligible for REA financing. These regulations also add a provision requiring that grant holders who use hazardous materials in the operation of their grant provide bonding to cover liability for damages or injuries resulting from releases or discharges of hazardous materials. BLM has always had the authority to require this type of bonding and adding this provision makes explicit what has always been implicit in our regulations.

Regulatory Flexibility Act

This rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). A Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required. The BLM has estimated that approximately 18 percent of all applicants and grantees (approximately 5 percent of MLA applicants and grantees and approximately 23 percent of FLPMA applicants and grantees) may qualify as small entities. Of these applicants and grantees which may qualify as small entities, we estimate that less than 5 percent will be adversely affected by the rule. Although the processing and monitoring fee changes vary widely in percentage terms, in absolute dollar amounts, they range from a minus $77 to a plus $723, with the largest increases occurring in monitoring fees for MLA applications. Processing and monitoring fees for fixed fee categories are one-time fees and when compared to the average cost of constructing, operating, and maintaining a right-of-way, are not significant.

BLM does not officially track right-of-way costs, but grant holders have estimated that pipeline facilities cost between $300,000 (12″ pipeline) to $1.5 million per mile (36″ pipeline); rocked logging roads cost between $40,000/mile for a ridge top road to $150,000/mile for a full bench road or an average of $70,000 /mile for a road through moderate terrain; electric distribution and transmission lines cost between $24,000/mile (24kV distribution line) to $1 million/mile (500kV transmission line); wind turbines average $1 million per installed megawatt; and cellular communication facilities can vary between $250,000 and $500,000. (These estimated costs come from informal contacts BLM made with several current grant holders in December 2003.) When compared to the cost of constructing a right-of-way, the fee increases this final rule makes are relatively small.

Applicants of most large utility projects will pay either reasonable or actual processing and monitoring costs under the final rule, as they currently do, and would not be significantly impacted by the final rule. Many other facilities such as oil and gas gathering pipelines, domestic water pipelines, buried telephone lines, and all-weather roads can be installed for less than $25,000 per mile. BLM can process most of these types of applications, depending upon the length and total surface disturbance, in less than 36 hours. This correlates to a fee of $644 under the final rule for both FLPMA and MLA applications. Under the current fee schedules, an applicant might only pay $300 (FLPMA) or $275 (MLA) for the same application, primarily due to the category definitions of the new fee schedules compared to the current fee schedules.

Small entities are more likely to apply for rights-of-way having the lowest fixed fees (Categories 1 through 3) than they are for Categories 4 through 6, which have the highest fees. The fee increases in Categories 1 through 3, as well as the differences between fee categories, are both relatively small. When compared to the overall cost of constructing rights-of-ways under this final rule, the increases in the fees will not significantly impact even small entities.

Based on a comparison with the size characteristics for each industry code from the Census of Business in 1997, we estimated the number of firms which are eligible for Small Business Administration (SBA) programs and likely to hold right-of-way grants. Based on these comparisons across industry codes, we estimate that about 5.3% of existing MLA grantees may be eligible for SBA programs and about 22.9% of FLPMA grantees may be eligible for SBA programs. Whether they choose to join the SBA programs is strictly an individual firm's decision as is whether or not a small business applies for a right-of-way grant under these regulations.

The proportion of grantees eligible for SBA programs shows that there is an opportunity for small businesses in BLM's right-of-way program. However, the burden of increased cost recovery fees will not have a significant economic impact on a substantial number of small entities or fall disproportionately on small businesses.

Moreover, any entity which believes that it might be adversely affected by the fee schedule may qualify for hardship consideration. A review of the right-of-way data base indicates that of the approximately 13,586 applications for grants, amended grants, assignments, and renewals in FY 2004, BLM exempted 271 applicants from processing and monitoring fees and granted reductions or waivers from processing and monitoring costs to 39 applicants for various reasons, including undue financial hardship (*see* existing 43 CFR 2808.5 and final section 2804.21).

Small Business Regulatory Enforcement Fairness Act

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

a. Does not have an annual effect on the economy of $100 million or more. See the Executive Order 12866 discussion above.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions. As discussed above, when compared to the cost of constructing a right-of-way, the fee increases this final rule makes are relatively small and therefore should not cause any major increase in costs or prices. In addition, any applicant that believes that the fee increases will cause them difficulty may benefit from the criteria set forth at section 304(b) of FLPMA, especially the hardship criteria. The rule will affect Federal agencies by eliminating the automatic exemption from cost recovery for Federal agencies. Federal agencies, however, are able to

benefit from the section 304(b) criteria as well. Currently, many Federal agencies fund BLM's processing of their applications for rights-of-way across Federal lands. The amount they pay results from lengthy negotiations, a process which does not always produce consistency across BLM organizational units. The final rule will help achieve consistency by assigning each Federal project to a cost recovery category. The category designation will enable other Federal agencies to determine their costs in advance and will also reduce the administrative paperwork involved in Federal transactions. The fee increases this rule makes are small when compared to costs of right-of-way operations on Federal lands (*see* the discussion above). Therefore, the fee increases should not cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The rule should result in no change in any of the above factors. See the discussions above for a discussion of the economic effects of the fee increases. In general, the fee increases are small in comparison with the overall costs of constructing, maintaining, operating, and terminating large projects located within right-of-way grants. With the possible exception of MLA grants for pipelines, the projects located on right-of-way grants support domestic, not foreign, activities and do not involve products and services which are exported. MLA pipelines may transport oil and gas and their related products destined for foreign markets, but the increase in fees, compared to the cost of, and profits from, running an oil and gas pipeline that would feed into a foreign market, is minimal.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

a. This rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. See the Executive Order 12866 discussion above.

b. This rule will not produce a Federal mandate on state, local, or tribal governments, in the aggregate, or the private sector of $100 million or greater in any year, *i.e.*, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The total maximum increases in cost recovery fees (processing and monitoring fees) are estimated to be approximately $9.0 million per year.

Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights (Takings)

In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. A right-of-way application is not private property. BLM has discretion under the governing statutes to issue a grant or not (see 30 U.S.C. 185(a) and 43 U.S.C. 1761(a)). Once a grant is issued, a holder's continued use of the land covered by the grant is conditioned upon compliance with various statutes, regulations, and terms and conditions. Consistent with FLPMA and the MLA, violation of the relevant statutes, regulations, or terms and conditions of the grant can result in termination of the grant before the end of the grant's term. The holder of a grant acknowledges this possibility in accepting a grant. Increased cost recovery fees (processing and monitoring fees) for right-of-way grants authorizing use of Federal lands do not have takings implications.

Executive Order 13132, Federalism

In accordance with Executive Order 13132, the rule does not have Federalism implications to warrant the preparation of a Federalism assessment. A Federalism assessment is not required because the rule does not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Under the final rule qualifying states continue to be exempt from paying processing and monitoring fees and the final rule does not otherwise affect states, the national government's relationship with them, or the distribution of power and responsibilities among the various levels of government.

Executive Order 12988, Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. For example, we have reviewed these regulations to eliminate drafting errors and ambiguity. They have been written to minimize litigation, provide clear legal standards for affected conduct rather than general standards, and promote simplification and burden reduction. Drafting the regulations in plain language and working closely with legal counsel assists in all of these areas.

Paperwork Reduction Act

This regulation requires an information collection under the Paperwork Reduction Act. The current rule is covered by OMB Approval Number 1004–0189, which expires on October 31, 2005.

National Environmental Policy Act and Endangered Species Act

We have analyzed this rule in accordance with the criteria of the National Environmental Policy Act and 516 DM. This rule does not constitute a major Federal action significantly affecting the quality of the human environment. The BLM prepared an environmental assessment and determined that the rule will not have a significant effect on the quality of the human environment because:

(a) The direct economic impacts resulting from increasing processing and monitoring fees are not significant and would not be substantial enough to cause applicants or grant holders to withdraw their applications or forfeit their grants; and

(b) The procedural and clarifying changes would have no meaningful impact of any kind on the physical or economic environment.

Any environmental effects of issuing right-of-way grants on public and Federal lands are analyzed on a case-by-case basis and in land use plans. BLM has issued a Finding of No Significant Impact. The Environmental Assessment is part of the Administrative Record for the rule.

We have examined this rule to determine whether it requires compliance under section 7 of the Endangered Species Act (ESA). The ESA requires agencies to consult or confer with the Fish and Wildlife Service or National Marine Fisheries Service (Service) on an action when there is ''discretionary Federal involvement or control'' over the action. 50 CFR 402.03. Formal consultation under section 7 of the ESA is required when an agency determines that a proposed action may affect listed species or critical habitat. If an agency determines that a proposed action is not likely to adversely affect listed species or critical habitat, the agency may request concurrence with this determination from the Service. If, however, an agency determines that a proposed action will have no effect on listed species or critical habitat, no further compliance under Section 7 is required.

We have determined that except for section 2801.6 of the final rule (dealing with certain, private pre-FLPMA rights-of-way) this rule governs discretionary Federal control over rights-of-way and is therefore subject to compliance with the ESA. We have further determined that the final rule will have no effect on listed or proposed species or on designated or proposed critical habitat under the ESA and therefore consultation under section 7 of the ESA is not required. Our determination is based on the fact that nothing in the final rule changes existing processes and procedures that ensure the protection of listed or proposed species or designated or proposed critical habitat. Existing processes and procedures have been in effect since BLM promulgated right-of-way regulations in 1979–80. Moreover, the promulgation of regulations is not an ongoing agency action in that once a rule is adopted, the Federal action is complete. See *Norton* v. *Southern Utah Wilderness Alliance,* 124 S. Ct. 2372 (2004). Therefore, any further compliance with the ESA will occur when an application for a right-of-way is filed with BLM.

The rule's provision relating to rights-of-way for reservoirs, ditches, and canals established by the Mining Act of July 26, 1866 is not subject to ESA compliance. Section 2801.6 of the final rule reflects long-standing law by providing that these rights-of-way are not subject to the rule. Rights-of-way under the 1866 Act are Congressional grants that are perpetual and do not require renewal; no authorization under FLPMA exists or is required in the future. Therefore, unless the holder of the right-of-way acts in a manner that exceeds the scope of, or is otherwise inconsistent with, the right-of-way granted (*e.g.*, by moving the existing ditch), no opportunity exists for BLM to exercise its discretion. And where there is no Federal discretion or control, section 7 of the ESA does not apply.

In March, 2004, the District Court for the District of Idaho ruled that BLM has discretion to impose conditions on the operation of water diversions authorized by the 1866 Act and that BLM's decision not to impose conditions—as evidenced by BLM's right-of-way regulations—constitute an action that triggers consultation under the ESA. *Western Watersheds Project, et al.* v. *Matejko, et al.*, No. CIV 01–0259–E–BLW (D. Idaho 2004). The United States has filed a protective notice of appeal of this ruling. As noted above, this final rule reflects well-established law and is consistent with BLM's historical practice related to 1866 Act rights-of-way.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, BLM evaluated possible effects on federally recognized Indian tribes and determined that there are no potential effects. The rule does not contain policies that have tribal implications. The BLM may only issue right-of-way grants across public lands that it manages or across Federal lands held by two or more Federal agencies. Indian tribes have jurisdiction over their own lands, subject to the Secretary's trust responsibility. To our knowledge, no Indian tribes are involved in any multi-agency grants.

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This regulation is not a significant energy action and, accordingly, no Statement of Energy Effects is required. This rule is not likely to have a significant adverse effect on the nation's energy supply, distribution, or use. To the extent that the rule will have any effect, we anticipate it will be positive. The rule makes application and other procedures clearer, which should expedite application processing.

Authors

The principal authors of this final rule are Bil Weigand, Idaho State Office, and Rick Stamm, Washington Office, Mike DeKeyrel, Utah State Office, and Tom Hurshman, Montrose Field Office, assisted by Ian Senio of the Regulatory Affairs Group and Michael Hickey of the Office of the Solicitor.

List of Subjects

43 CFR Part 2800

Communications, Electric power, Highways and roads, Penalties, Public lands and rights-of-way, and Reporting and recordkeeping requirements.

43 CFR Part 2810

Highways and roads, Public lands rights-of-way, and Reporting and recordkeeping requirements.

43 CFR Part 2880

Administrative practice and procedures, Common carriers, Pipelines, Public lands rights-of-way, and Reporting and recordkeeping requirements.

43 CFR Part 2920

Penalties, Public lands, and Reporting and recordkeeping requirements.

43 CFR Part 9230

Penalties and Public lands.

43 CFR Part 9260

Continental shelf, Forests and forest products, Law enforcement, Penalties, Public lands, Range management, Recreation and recreation areas, and Wildlife.

Dated: November 4, 2004.

Rebecca W. Watson,

Assistant Secretary, Land and Minerals Management.

Editorial Note: This document was received at the Office of the Federal Register on April 11, 2005.

■ For the reasons set out in the preamble and under the authorities cited below, amend Title 43, Subtitle B, Chapter II, Subchapter B, Parts 2800, 2810, 2880, and 2920, and Subchapter I, Parts 9230 and 9260 as follows:

■ 1. Revise part 2800 to read as follows:

PART 2800—RIGHTS-OF-WAY UNDER THE FEDERAL LAND POLICY MANAGEMENT ACT

Subpart 2801—General Information

Sec.

Subpart 2802—Lands Available for FLPMA Grants

Subpart 2803—Qualifications for Holding FLPMA Grants

Subpart 2804—Applying for FLPMA Grants

Authority: 43 U.S.C. 1733, 1740, 1763, and 1764.

Subpart 2801—General information

§ 2801.2 What is the objective of BLM's right-of-way program?

It is BLM's objective to grant rights-of-way under the regulations in this part to any qualified individual, business, or government entity and to direct and control the use of rights-of-way on public lands in a manner that:

(a) Protects the natural resources associated with public lands and adjacent lands, whether private or administered by a government entity;

(b) Prevents unnecessary or undue degradation to public lands;

(c) Promotes the use of rights-of-way in common considering engineering and technological compatibility, national security, and land use plans; and

(d) Coordinates, to the fullest extent possible, all BLM actions under the regulations in this part with state and local governments, interested individuals, and appropriate quasi-public entities.

§ 2801.5 What acronyms and terms are used in the regulations in this part?

(a) *Acronyms.* As used in this part:

ALJ means Administrative Law Judge.

BLM means the Bureau of Land Management.

CERCLA means the Comprehensive Environmental Response Compensation and Liability Act (42 U.S.C. 9601 *et seq.*).

EA means environmental assessment.

EIS means environmental impact statement.

IBLA means the Department of the Interior, Board of Land Appeals.

IPD–GDP means the Implicit Price Deflator, Gross Domestic Product, as published in the most recent edition of the Survey of Current Business of the Department of Commerce, Bureau of Economic Analysis.

NEPA means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

RMA means the Ranally Metro Area Population Ranking as published in the most recent edition of the Rand McNally Commercial Atlas and Marketing Guide.

(b) *Terms.* As used in this part, the term:

Act means the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*).

Actual costs means the financial measure of resources the Federal government expends or uses in processing a right-of-way application or in monitoring the construction, operation, and termination of a facility authorized by a grant or permit. Actual costs includes both direct and indirect costs, exclusive of management overhead costs.

Base rent means the dollar amount required from a grant or lease holder on BLM managed lands based on the communication use with the highest value in the associated facility or facilities, as calculated according to the communication use rent schedule. If a facility manager's or facility owner's scheduled rent is equal to the highest rent charged a tenant in the facility or facilities, then the facility manager's or facility owner's use determines the dollar amount of the base rent. Otherwise, the facility owner's, facility manager's, customer's, or tenant's use with the highest value, and which is not otherwise excluded from rent, determines the base rent.

Casual use means activities ordinarily resulting in no or negligible disturbance of the public lands, resources, or improvements. *Examples of casual use include:* Surveying, marking routes, and collecting data to use to prepare grant applications.

Commercial purpose or activity refers to the circumstance where a holder attempts to produce a profit by allowing the use of its facilities by an additional party. BLM may assess an appropriate rent for such commercial activities. The holder's use may not otherwise be subject to rent charges under BLM's rental provisions.

Communication use rent schedule is a schedule of rents for the following types of communication uses, including related technologies, located in a facility associated with a particular grant or lease. All use categories include ancillary communications equipment, such as internal microwave or internal one-or two-way radio, that are directly related to operating, maintaining, and monitoring the primary uses listed below. The Federal Communications Commission (FCC) may or may not license the primary uses. The type of use and community served, identified on an FCC license, if one has been issued, do not supersede either the definitions in this subpart or the procedures in § 2806.30 of this part for calculating rent for communication facilities and uses located on public land:

(1) *Television broadcast* means a use that broadcasts UHF and VHF audio and video signals for general public reception. This category does not include low-power television (LPTV) or rebroadcast devices, such as translators, or transmitting devices, such as microwave relays serving broadcast translators;

(2) *AM and FM radio broadcast* means a use that broadcasts amplitude modulation (AM) or frequency modulation (FM) audio signals for general public reception. This category does not include low-power FM radio; rebroadcast devices, such as translators; or boosters or microwave relays serving broadcast translators;

(3) *Cable television* means a use that transmits video programming to multiple subscribers in a community over a wired or wireless network. This category does not include rebroadcast devices that retransmit television signals of one or more television broadcast stations, or personal or internal antenna systems, such as private systems serving hotels and residences;

(4) *Broadcast translator, low-power television, and low-power FM radio* means a use of translators, LPTV, or low-power FM radio (LPFM). Translators receive a television or FM radio broadcast signal and rebroadcast it on a different channel or frequency for local reception. In some cases the translator relays the true signal to an amplifier or another translator. LPTV and LPFM are broadcast translators that originate programming. This category also includes translators associated with public telecommunication services;

(5) *Commercial mobile radio service (CMRS)/facility manager* means commercial mobile radio uses that provide mobile communication service to individual customers. *Examples of CMRS include:* Community repeaters, trunked radio (specialized mobile radio), two-way radio voice dispatch, public switched network (telephone/data) interconnect service, microwave communications link equipment, and other two-way voice and paging services. ''Facility Managers'' are grant or lease holders that lease building, tower, and related facility space to a variety of tenants and customers as part of the holder's business enterprise, but do not own or operate communication equipment in the facility for their own uses;

(6) *Cellular telephone* means a system of mobile or fixed communication devices that use a combination of radio and telephone switching technology and provide public switched network services to fixed or mobile users, or both, within a defined geographic area. The system consists of one or more cell sites containing transmitting and receiving antennas, cellular base station radio, telephone equipment, or microwave communications link equipment. *Examples of cellular telephone include:* Personal Communication Service, Enhanced Specialized Mobile Radio, Improved Mobile Telephone Service, Air-to-Ground, Offshore Radio Telephone Service, Cell Site Extenders, and Local Multipoint Distribution Service;

(7) *Private mobile radio service (PMRS)* means uses supporting private mobile radio systems primarily for a single entity for mobile internal communications. PMRS service is not sold and is exclusively limited to the user in support of business, community activities, or other organizational communication needs. *Examples of PMRS include:* Private local radio dispatch, private paging services, and ancillary microwave communications equipment for controlling mobile facilities;

(8) *Microwave* means communication uses that:

(i) Provide long-line intrastate and interstate public telephone, television, and data transmissions; or

(ii) Support the primary business of pipeline and power companies, railroads, land resource management companies, or wireless internet service provider (ISP) companies; and

(9) *Other communication uses* means private communication uses, such as amateur radio, personal/private receive-only antennas, natural resource and environmental monitoring equipment, and other small, low-power devices used to monitor or control remote activities;

Customer means an occupant who is paying a facility manager, facility owner, or tenant for using all or any part

of the space in the facility, or for communication services, and is not selling communication services or broadcasting to others. We consider persons or entities benefitting from private or internal communication uses located in a holder's facility as customers for purposes of calculating rent. Customer uses are not included in calculating the amount of rent owed by a facility owner, facility manager, or tenant, except as noted in §§ 2806.34(b)(4) and 2806.42 of this part. *Examples of customers include:* Users of PMRS, users in the microwave category when the microwave use is limited to internal communications, and all users in the category of ''Other communication uses'' (*see* paragraph (a) of the definition of Communication Use Rent Schedule in this section).

Designated right-of-way corridor means a parcel of land with specific boundaries identified by law, Secretarial order, the land-use planning process, or other management decision, as being a preferred location for existing and future rights-of-way and facilities. The corridor may be suitable to accommodate more than one type of right-of-way use or facility or one or more right-of-way uses or facilities which are similar, identical, or compatible.

Discharge has the meaning found at 33 U.S.C. 1321(a)(2) of the Clean Water Act.

Facility means an improvement or structure, whether existing or planned, that is or would be owned and controlled by the grant or lease holder within a right-of-way. For purposes of communication site rights-of-way or uses, facility means the building, tower, and related incidental structures or improvements authorized under the terms of the grant or lease.

Facility manager means a person or entity that leases space in a facility to communication users and:

(1) Holds a communication use grant or lease;

(2) Owns a communications facility on lands covered by that grant or lease; and

(3) Does not own or operate communications equipment in the facility for personal or commercial purposes.

Facility owner means a person or entity that may or may not lease space in a facility to communication users and:

(1) Holds a communication use grant or lease;

(2) Owns a communications facility on lands covered by that grant or lease; and

(3) Owns and operates his or her own communications equipment in the facility for personal or commercial purposes.

Grant means any authorization or instrument (e.g., easement, lease, license, or permit) BLM issues under Title V of the Federal Land Policy and Management Act, 43 U.S.C. 1761 *et seq.,* and those authorizations and instruments BLM and its predecessors issued for like purposes before October 21, 1976, under then existing statutory authority. It does not include authorizations issued under the Mineral Leasing Act (30 U.S.C. 185).

Hazardous material means:

(1) Any substance or material defined as hazardous, a pollutant, or a contaminant under CERCLA at 42 U.S.C. 9601(14) and (33);

(2) Any regulated substance contained in or released from underground storage tanks, as defined by the Resource Conservation and Recovery Act at 42 U.S.C. 6991;

(3) Oil, as defined by the Clean Water Act at 33 U.S.C. 1321(a) and the Oil Pollution Act at 33 U.S.C. 2701(23); or

(4) Other substances applicable Federal, state, tribal, or local law define and regulate as ''hazardous.''

Holder means any entity with a BLM right-of-way authorization.

Management overhead costs means Federal expenditures associated with BLM's directorate, including all BLM State Directors and the entire Washington Office staff, except where a State Director or Washington Office staff member is required to perform work on a specific right-of-way case.

Monetary value of the rights and privileges you seek means the objective value of the right-of-way or what the right-of-way grant is worth in financial terms to the applicant.

Monitoring means those actions the Federal government performs to ensure compliance with the terms, conditions, and stipulations of a grant.

(1) For Monitoring Categories 1 through 4, the actions include inspecting construction, operation, maintenance, and termination of permanent or temporary facilities and protection and rehabilitation activities until the holder completes rehabilitation of the right-of-way and BLM approves it;

(2) For Monitoring Category 5 (Master Agreements), those actions agreed to in the Master Agreement; and

(3) For Monitoring Category 6, those actions agreed to between BLM and the applicant before BLM issues the grant.

Public lands means any land and interest in land owned by the United States within the several states and administered by the Secretary of the Interior through BLM without regard to how the United States acquired ownership, except lands:

(1) Located on the Outer Continental Shelf; and

(2) Held for the benefit of Indians, Aleuts, and Eskimos.

Reasonable costs has the meaning found at section 304(b) of the Act.

Release has the meaning found at 42 U.S.C. 9601(22) of CERCLA.

Right-of-way means the public lands BLM authorizes a holder to use or occupy under a grant.

Site means an area, such as a mountaintop, where a holder locates one or more communication or other right-of-way facilities.

Substantial deviation means a change in the authorized location or use which requires:

(1) Construction or use outside the boundaries of the right-of-way; or

(2) Any change from, or modification of, the authorized use. *Examples of substantial deviation include:* Adding equipment, overhead or underground lines, pipelines, structures, or other facilities not included in the original grant.

Tenant means an occupant who is paying a facility manager, facility owner, or other entity for occupying and using all or any part of a facility. A tenant operates communication equipment in the facility for profit by broadcasting to others or selling communication services. For purposes of calculating the amount of rent that BLM charges, a tenant's use does not include:

(1) Private mobile radio or internal microwave use that is not being sold; or

(2) A use in the category of ''Other Communication Uses'' (*see* paragraph (a) of the definition of Communication Use Rent Schedule in this section).

Third party means any person or entity other than BLM, the applicant, or the holder of a right-of-way authorization.

Tramway means a system for carrying passengers, logs, or other material using traveling carriages or cars suspended from an overhead cable or cables supported by a series of towers, hangers, tailhold anchors, guyline trees, etc.

Transportation and utility corridor means a parcel of land, without fixed limits or boundaries, that holders use as the location for one or more transportation or utility rights-of-way.

Zone means one of eight geographic groupings necessary for linear right-of-way rent assessment purposes, covering all lands in the contiguous United States.

§ 2801.6 Scope.

(a) *What do these regulations apply to?* The regulations in this part apply to:

(1) Grants for necessary transportation or other systems and facilities which are in the public interest and which require the use of public lands for the purposes identified in 43 U.S.C. 1761, and administering, amending, assigning, renewing, and terminating them;

(2) Grants to Federal departments or agencies for transporting by pipeline and related facilities oil, natural gas, synthetic liquid or gaseous fuels, and any refined products produced from them; and

(3) Grants issued on or before October 21, 1976, under then existing statutory authority, unless application of these regulations would diminish or reduce any rights conferred by the original grant or the statute under which it was issued. Where there would be a diminishment or reduction in any right, the grant or statute applies.

(b) *What don't these regulations apply to?* The regulations in this part do not apply to:

(1) Federal Aid Highways, for which Federal Highway Administration procedures apply;

(2) Roads constructed or used according to reciprocal and cost share road use agreement under subpart 2812 of this chapter;

(3) Lands within designated wilderness areas, although BLM may authorize some uses under parts 2920 and 6300 of this chapter;

(4) Grants to holders other than Federal departments or agencies for transporting by pipeline and related facilities oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced from them (see part 2880 of this chapter);

(5) Public highways constructed under the authority of Revised Statute (R.S.) 2477 (43 U.S.C. 932, repealed October 21, 1976);

(6) Reservoirs, canals, and ditches constructed under the authority of R.S. 2339 and R.S. 2340 (43 U.S.C. 661, repealed in part, October 21, 1976); or

(7)(i) Any project or portion of a project that, prior to October 24, 1992, was licensed under, or granted an exemption from, part I of the Federal Power Act (FPA) (16 U.S.C. 791a et seq.) which:

(A) Is located on lands subject to a reservation under section 24 (16 U.S.C. 818) of the FPA;

(B) Did not receive a grant under Title V of the Federal Land Policy and Management Act (FLPMA) before October 24, 1992; and

(C) Includes continued operation of such project (license renewal) under section 15 (16 U.S.C. 808) of the FPA;

(ii) Paragraph (b)(7)(i) of this section does not apply to any additional public lands the project uses that are not subject to the reservation in paragraph (b)(7)(i)(A) of this section.

§ 2801.8 Severability.

If a court holds any provisions of the regulations in this part or their applicability to any person or circumstances invalid, the remainder of these rules and their applicability to other people or circumstances will not be affected.

§ 2801.9 When do I need a grant?

(a) You must have a grant under this part when you plan to use public lands for systems or facilities over, under, on, or through public lands. These include, but are not limited to:

(1) Reservoirs, canals, ditches, flumes, laterals, pipelines, tunnels, and other systems which impound, store, transport, or distribute water;

(2) Pipelines and other systems for transporting or distributing liquids and gases, other than water and other than oil, natural gas, synthetic liquid or gaseous fuels, or any refined products from them, or for storage and terminal facilities used in connection with them;

(3) Pipelines, slurry and emulsion systems, and conveyor belts for transporting and distributing solid materials and facilities for storing such materials in connection with them;

(4) Systems for generating, transmitting, and distributing electricity;

(5) Systems for transmitting or receiving electronic signals and other means of communication;

(6) Transportation systems, such as roads, trails, highways, railroads, canals, tunnels, tramways, airways, and livestock driveways; and

(7) Such other necessary transportation or other systems or facilities which are in the public interest and which require rights-of-way.

(b) If you apply for a right-of-way grant for generating, transmitting, and distributing electricity, you must also comply with the applicable requirements of the Federal Energy Regulatory Commission under the Federal Power Act of 1935, 16 U.S.C. 791a *et seq.,* and 18 CFR chapter I.

(c) See part 2880 of this chapter for information about authorizations BLM issues under the Mineral Leasing Act for transporting oil and gas resources.

§ 2801.10 How do I appeal a BLM decision issued under the regulations in this part?

(a) You may appeal a BLM decision issued under the regulations in this part in accordance with part 4 of this title.

(b) All BLM decisions under this part remain in effect pending appeal unless the Secretary of the Interior rules otherwise, or as noted in this part. You may petition for a stay of a BLM decision under this part with the Office of Hearings and Appeals, Department of the Interior. Unless otherwise noted in this part, BLM will take no action on your application while your appeal is pending.

Subpart 2802—Lands Available for FLPMA Grants

§ 2802.10 What lands are available for grants?

(a) In its discretion, BLM may grant rights-of-way on any lands under its jurisdiction except when:

(1) A statute, regulation, or public land order specifically excludes rights-of-way;

(2) The lands are specifically segregated or withdrawn from right-of-way uses; or

(3) BLM identifies areas in its land use plans or in the analysis of an application as inappropriate for right-of-way uses.

(b) BLM may require common use of a right-of-way and may require, to the extent practical, location of new rights-of-way within existing or designated right-of-way corridors (*see* § 2802.11 of this subpart). Safety and other considerations may limit the extent to which you may share a right-of-way. BLM will designate right-of-way corridors through land use plan decisions.

(c) You should contact the BLM office nearest the lands you seek to use to:

(1) Determine whether or not the land you want to use is available for that use; and

(2) Begin discussions about any application you may need to file.

§ 2802.11 How does BLM designate corridors?

(a) BLM may determine the locations and boundaries of right-of-way corridors during the land-use planning process described in part 1600 of this chapter. During this process BLM coordinates with other Federal agencies, state, local, and tribal governments, and the public to identify resource-related issues, concerns, and needs. The process results in a resource management plan or plan amendment, which addresses to what extent you may use public lands and resources for specific purposes.

(b) When determining which lands may be suitable for right-of-way corridors, the factors BLM considers include, but are not limited to, the following:

(1) Federal, state, and local land use plans, and applicable Federal, state, local, and tribal laws;

(2) Environmental impacts on cultural resources and natural resources, including air, water, soil, fish, wildlife, and vegetation;

(3) Physical effects and constraints on corridor placement due to geology, hydrology, meteorology, soil, or land forms;

(4) Costs of construction, operation, and maintenance and costs of modifying or relocating existing facilities in a proposed right-of-way corridor (i.e., the economic efficiency of placing a right-of-way within a proposed corridor);

(5) Risks to national security;

(6) Potential health and safety hazards imposed on the public by facilities or activities located within the proposed right-of-way corridor;

(7) Social and economic impacts of the right-of-way corridor on public land users, adjacent landowners, and other groups or individuals;

(8) Transportation and utility corridor studies previously developed by user groups; and

(9) Engineering and technological compatibility of proposed and existing facilities.

(c) BLM may designate any transportation and utility corridor existing prior to October 21, 1976, as a transportation and utility corridor without further review.

(d) The resource management plan or plan amendment may also identify areas where BLM will not allow right-of-way corridors for environmental, safety, or other reasons.

Subpart 2803—Qualifications for Holding FLPMA Grants

§ 2803.10 Who may hold a grant?

To hold a grant under these regulations, you must be:

(a) An individual, association, corporation, partnership, or similar business entity, or a Federal agency or state, tribal, or local government;

(b) Technically and financially able to construct, operate, maintain, and terminate the use of the public lands you are applying for; and

(c) Of legal age and authorized to do business in the state where the right-of-way you seek is located.

§ 2803.11 Can another person act on my behalf?

Another person may act on your behalf if you have authorized the person to do so under the laws of the state where the right-of-way is or will be located.

§ 2803.12 What happens to my application or grant if I die?

(a) If an applicant or grant holder dies, any inheritable interest in an application or grant will be distributed under state law.

(b) If the distributee of a grant is not qualified to hold a grant under § 2803.10 of this subpart, BLM will recognize the distributee as grant holder and allow the distributee to hold its interest in the grant for up to two years. During that period, the distributee must either become qualified or divest itself of the interest.

Subpart 2804—Applying for FLPMA Grants

§ 2804.10 What should I do before I file my application?

(a) Before filing an application with BLM, we encourage you to make an appointment for a preapplication meeting with the appropriate personnel in the BLM field office having jurisdiction over the lands you seek to use. During the preapplication meeting, BLM can:

(1) Identify potential routing and other constraints;

(2) Determine whether or not the lands are located within a designated or existing right-of-way corridor;

(3) Tentatively schedule the processing of your proposed application; and

(4) Inform you of your financial obligations, such as processing and monitoring costs and rents.

(b) Subject to § 2804.13 of this subpart, BLM may share any information you provide under paragraph (a) of this section with Federal, state, tribal, and local government agencies to ensure that:

(1) These agencies are aware of any authorizations you may need from them; and

(2) We initiate effective coordinated planning as soon as possible.

§ 2804.11 Where do I file my grant application?

(a) You must file the grant application in the BLM field office having jurisdiction over the lands affected by your application.

(b) If your application affects more than one BLM administrative unit, you may file at any BLM office having jurisdiction over any part of the project. BLM will notify you where to direct subsequent communications.

§ 2804.12 What information must I submit in my application?

(a) File your application on Standard Form 299, available from any BLM office, and fill in the required information as completely as possible. Your completed application must include:

(1) A description of the project and the scope of the facilities;

(2) The estimated schedule for constructing, operating, maintaining, and terminating the project;

(3) The estimated life of the project and the proposed construction and reclamation techniques;

(4) A map of the project, showing its proposed location and existing facilities adjacent to the proposal;

(5) A statement of your financial and technical capability to construct, operate, maintain, and terminate the project;

(6) Any plans, contracts, agreements, or other information concerning your use of the right-of-way and its effect on competition; and

(7) A statement certifying that you are of legal age and authorized to do business in the state(s) where the right-of-way would be located, and that you have submitted correct information to the best of your knowledge.

(b) If you are a business entity, you must also submit the following information:

(1) Copies of the formal documents creating the entity, such as articles of incorporation, and including the corporate bylaws;

(2) Evidence that the party signing the application has the authority to bind the applicant;

(3) The name and address of each participant in the business;

(4) The name and address of each shareholder owning 3 percent or more of the shares, and the number and percentage of any class of voting shares of the entity which such shareholder is authorized to vote;

(5) The name and address of each affiliate of the business;

(6) The number of shares and the percentage of any class of voting stock owned by the business, directly or indirectly, in any affiliate controlled by the business;

(7) The number of shares and the percentage of any class of voting stock owned by an affiliate, directly or indirectly, in the business controlled by the affiliate; and

(8) If you have already provided the information in paragraphs (b)(1) through (7) of this section to BLM and the information remains accurate, you need only reference the BLM serial number under which you previously filed it.

(c) BLM may require you to submit additional information at any time while processing your application. See § 2884.11(c) of this chapter for the type of information we may require.

(d) If you are a Federal oil and gas lessee or operator and you need a right-of-way for access to your production facilities or oil and gas lease, you may include your right-of-way requirements with your Application for Permit to Drill or Sundry Notice required under parts 3160 through 3190 of this chapter.

(e) If you are filing with another Federal agency for a license, certificate of public convenience and necessity, or other authorization for a project involving a right-of-way on public lands, simultaneously file an application with BLM for a grant. Include a copy of the materials, or reference all the information, you filed with the other Federal agency.

§ 2804.13 Will BLM keep my information confidential?

BLM will keep confidential any information in your application that you mark as ''confidential'' or ''proprietary'' to the extent allowed by law.

§ 2804.14 What is the processing fee for a grant application?

(a) Unless you are exempt under § 2804.16 of this subpart, you must pay a fee to BLM for the reasonable costs of processing your application before the Federal Government incurs them. The fees for Processing Categories 1 through 4 (see paragraph (b) of this section) are one-time fees and are not refundable. The fees are categorized based on an estimate of the amount of time that BLM will expend to process your application and issue a decision granting or denying the application.

(b) There is no processing fee if BLM's work is estimated to take one hour or less. Processing fees are based on categories. These categories and fees for 2005 are:

2005 PROCESSING FEE SCHEDULE

Processing category	Federal work hours involved	Processing fee per application as of June 21, 2005. To be adjusted annually for changes in the IPD–GDP. See paragraph (c) of this section for update information
(1) Applications for new grants, assignments, renewals, and to existing grants assignments, renewals, and amendments to existing grants.	Estimated Federal work hours are >1 ≤ 8.	$97.
(2) Applications for new grants, assignments, renewals, and amendments to existing grants.	Estimated Federal work hours are > 8 ≤ 24.	$343.
(3) Applications for new grants, assignments, renewals, and amendments to existing grants.	Estimated Federal work hours are > 24 ≤ 36.	$644.
(4) Applications for new grants, assignments, renewals, and amendments to existing grants.	Estimated Federal work hours are > 36 ≤ 50.	$923.
(5) Master agreements	Varies	As specified in the agreement.
(6) Applications for new grants, assignments, renewals, and amendments to existing grants.	Estimated Federal work hours are > 50.	Full reasonable costs.

(c) BLM will revise paragraph (b) of this section to update the processing fees for Categories 1 through 4 in the schedule each calendar year, based on the previous year's change in the IPD–GDP, as measured second quarter to second quarter. BLM will round these changes to the nearest dollar. BLM will update Category 5 processing fees as specified in the Master Agreement. You also may obtain a copy of the current schedule from any BLM state or field office or by writing: Director, BLM, 1849 C St., NW., Mail Stop 1000LS, Washington, DC 20240. BLM also posts the current schedule on the BLM Homepage on the Internet at *http://www.blm.gov.*

(d) After an initial review of your application, BLM will notify you of the processing category into which your application fits. You must then submit the appropriate payment for that category before BLM begins processing your application. Your signature on a cost recovery Master Agreement constitutes your agreement with the processing category decision. If you disagree with the category that BLM has determined for your application, you may appeal the decision under § 2801.10 of this part. For Processing Categories 5 and 6 applications, *see* §§ 2804.17, 2804.18, and 2804.19 of this subpart. If you paid the processing fee and you appeal a Processing Category 1 through 4 or a Processing Category 6 determination, BLM will process your application while the appeal is pending. If IBLA finds in your favor, you will receive a refund or adjustment of your processing fee.

(e) In processing your application, BLM may determine at any time that the application requires preparing an EIS. If this occurs, BLM will send you a decision changing your processing category to Processing Category 6. You may appeal this decision under § 2801.10 of this part.

(f) To expedite processing of your application, you may notify BLM in writing that you are waiving paying reasonable costs and are electing to pay the full actual costs incurred by BLM in processing your application and monitoring your grant.

§ 2804.15 When does BLM reevaluate the processing and monitoring fees?

BLM reevaluates the processing and monitoring fees (*see* § 2805.16 of this part) for each category and the categories themselves within 5 years after they go into effect and at 10-year intervals after that. When reevaluating processing and monitoring fees, BLM considers all factors that affect the fees, including, but not limited to, any changes in:

(a) Technology;

(b) The procedures for processing applications and monitoring grants;

(c) Statutes and regulations relating to the right-of-way program; or

(d) The IPD–GDP.

§ 2804.16 Who is exempt from paying processing and monitoring fees?

You are exempt from paying processing and monitoring fees if:

(a) You are a state or local government, or an agency of such a government, and BLM issues the grant for governmental purposes benefitting the general public. If your principal source of revenue results from charges you levy on customers for services similar to those of a profit-making corporation or business, you are not exempt; or

(b) Your application under this subpart is associated with a cost-share

road or reciprocal right-of-way agreement.

§ 2804.17 What is a Master Agreement (Processing Category 5) and what information must I provide to BLM when I request one?

(a) A Master Agreement (Processing Category 5) is a written agreement covering processing and monitoring fees (*see* § 2805.16 of this part) negotiated between BLM and you that involves multiple BLM grant approvals for projects within a defined geographic area.

(b) Your request for a Master Agreement must:

(1) Describe the geographic area covered by the Agreement and the scope of the activity you plan;

(2) Include a preliminary work plan. This plan must state what work you must do and what work BLM must do to process your application. Both parties must periodically update the work plan, as specified in the Agreement, and mutually agree to the changes;

(3) Contain a preliminary cost estimate and a timetable for processing the application and completing the projects;

(4) State whether you want the Agreement to apply to future applications in the same geographic area that are not part of the same projects; and

(5) Contain any other relevant information that BLM needs to process the application.

§ 2804.18 What provisions do Master Agreements contain and what are their limitations?

(a) A Master Agreement:

(1) Specifies that you must comply with all applicable laws and regulations;

(2) Describes the work you will do and the work BLM will do to process the application;

(3) Describes the method of periodic billing, payment, and auditing;

(4) Describes the processes, studies, or evaluations you will pay for;

(5) Explains how BLM will monitor the grant and how BLM will recover monitoring costs;

(6) Contains provisions allowing for periodic review and updating, if required;

(7) Contains specific conditions for terminating the Agreement; and

(8) Contains any other provisions BLM considers necessary.

(b) BLM will not enter into any Agreement that is not in the public interest.

(c) If you sign a Master Agreement, you waive your right to request a reduction of processing and monitoring fees.

§ 2804.19 How will BLM process my Processing Category 6 application?

(a) For Processing Category 6 applications, you and BLM must enter into a written agreement that describes how BLM will process your application. The final agreement consists of a work plan and a financial plan.

(b) In processing your application, BLM will:

(1) Determine the issues subject to analysis under NEPA;

(2) Prepare a preliminary work plan;

(3) Develop a preliminary financial plan, which estimates the reasonable costs of processing your application and monitoring your project;

(4) Discuss with you:

(i) The preliminary plans and data;

(ii) The availability of funds and personnel;

(iii) Your options for the timing of processing and monitoring fee payments; and

(iv) Financial information you must submit; and

(5) Complete final scoping and develop final work and financial plans which reflect any work you have agreed to do. BLM will also present you with the final estimate of the reasonable costs you must reimburse BLM, including the cost for monitoring the project, using the factors in §§ 2804.20 and 2804.21 of this subpart.

(c) BLM retains the option to prepare any environmental documents related to your application. If BLM allows you to prepare any environmental documents and conduct any studies that BLM needs to process your application, you must do the work following BLM standards. For this purpose, you and BLM may enter into a written agreement. BLM will make the final determinations and conclusions arising from such work.

(d) BLM will periodically, as stated in the agreement, estimate processing costs for a specific work period and notify you of the amount due. You must pay the amount due before BLM will continue working on your application. If your payment exceeds the reasonable costs that BLM incurred for the work, BLM will either adjust the next billing to reflect the excess, or refund you the excess under 43 U.S.C. 1734. You may not deduct any amount from a payment without BLM's prior written approval.

§ 2804.20 How does BLM determine reasonable costs for Processing Category 6 or Monitoring Category 6 applications?

BLM will consider the factors in paragraph (a) of this section and § 2804.21 of this subpart to determine reasonable costs. Submit to the BLM field office having jurisdiction over the lands covered by your application a written analysis of those factors applicable to your project, unless you agree in writing to waive consideration of reasonable costs and elect to pay full actual costs (*see* § 2804.14(f) of this subpart). Submitting your analysis with the application will expedite its handling. BLM may require you to submit additional information in support of your position. While we consider your written analysis, BLM will not process your Category 6 application.

(a) *FLPMA factors.* If your application is for a Processing Category 6, or a Monitoring Category 6 project, the BLM State Director having jurisdiction over the lands you are applying to use will apply the following factors set forth at section 304(b) of FLPMA, 43 U.S.C. 1734(b), to determine the amount you owe. With your application, submit your analysis of how each of the following factors applies to your application:

(1) Actual costs to BLM (exclusive of management overhead costs) of processing your application and of monitoring construction, operation, maintenance, and termination of a facility authorized by the right-of-way grant;

(2) Monetary value of the rights or privileges you seek;

(3) BLM's ability to process an application with maximum efficiency and minimum expense, waste, and effort;

(4) Costs incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant. That is, the costs for studies and data collection that have value to the Federal Government or the general public apart from processing the application;

(5) Any tangible improvements, such as roads, trails, and recreation facilities, which provide significant public service and are expected in connection with constructing and operating the project; and

(6) Other factors relevant to the reasonableness of the costs (*see* § 2804.21 of this subpart).

(b) *Fee determination.* After considering your analysis and other information, BLM will notify you in writing of what you owe. If you disagree with BLM's determination, you may appeal it under § 2801.10 of this part.

§ 2804.21 What other factors will BLM consider in determining processing and monitoring fees?

(a) *Other factors.* If you include this information in your application, in arriving at your processing or

monitoring fee in any category, the BLM State Director will consider whether:

(1) Payment of actual costs would:

(i) Result in undue financial hardship to your small business, and you would receive little monetary value from your grant as compared to the costs of processing and monitoring; or

(ii) Create such undue financial hardship as to prevent your use and enjoyment of your right-of-way for a non-commercial purpose.

(2) The costs of processing the application and monitoring the issued grant grossly exceed the costs of constructing the project;

(3) You are a non-profit organization, corporation, or association which is not controlled by or a subsidiary of a profit-making enterprise; and

(i) The studies undertaken in connection with processing the application or monitoring the grant have a public benefit; or

(ii) The facility or project will provide a benefit or special service to the general public or to a program of the Secretary;

(4) You need a grant to prevent or mitigate damages to any lands or property or to mitigate hazards or danger to public health and safety resulting from an act of God, an act of war, or negligence of the United States;

(5) You have a grant and need to secure a new or amended grant in order to relocate an authorized facility to comply with public health and safety and environmental protection laws, regulations, and standards which were not in effect at the time BLM issued your original grant;

(6) You have a grant and need to secure a new grant to relocate facilities which you have to move because a Federal agency or federally-funded project needs the lands and the United States does not pay the costs associated with your relocation; or

(7) For whatever other reason, such as public benefits or public services provided, collecting processing and monitoring fees would be inconsistent with prudent and appropriate management of public lands and with your equitable interests or the equitable interests of the United States.

(b) *Fee determination.* With your written application, submit your analysis of how each of the factors, as applicable, in paragraph (a) of this section pertain to your application. BLM will notify you in writing of the BLM State Director's fee determination. You may appeal this decision under § 2801.10 of this part.

§ 2804.22 How will the availability of funds affect the timing of BLM's processing?

If BLM has insufficient funds to process your application, we will not process it until funds become available or you elect to pay full actual costs under § 2804.14(f) of this part.

§ 2804.23 What if there are two or more competing applications for the same facility or system?

(a) If there are two or more competing applications for the same facility or system and your application is in:

(1) *Processing Category 1 through 4.* You must reimburse BLM for processing costs as if the other application or applications had not been filed.

(2) *Processing Category 6.* You are responsible for processing costs identified in your application. If BLM cannot readily separate costs, such as costs associated with preparing environmental analyses, you and any competing applicants must pay an equal share or a proportion agreed to in writing among all applicants and BLM. If you agree to share costs that are common to your application and that of a competing applicant, and the competitor does not pay the agreed upon amount, you are liable for the entire amount due. The applicants must pay the entire processing fee in advance. BLM will not process your application until we receive the advance payments.

(b) *Who determines whether competition exists?* BLM determines whether the applications are compatible in a single right-of-way system or are competing applications for the same system.

(c) If BLM determines that competition exists, BLM will describe the procedures for a competitive bid through a bid announcement in a newspaper of general circulation in the area affected by the potential right-of-way and by a notice in the **Federal Register**.

§ 2804.24 Do I always have to submit an application for a grant using Standard Form 299?

You do not have to file an application using Standard Form 299 if:

(a) BLM determines that competition exists (*see* § 2804.23(c) of this subpart); or

(b) You are an oil and gas operator. You may include your right-of-way requirements for a FLPMA grant as part of your Application for Permit to Drill or Sundry Notice under the regulations in parts 3160 through 3190 of this chapter.

§ 2804.25 How will BLM process my application?

(a) BLM will notify you in writing when it receives your application and will identify your processing fee described at § 2804.14 of this subpart.

(b) BLM may require you to submit additional information necessary to process the application. This information may include a detailed construction, operation, rehabilitation, and environmental protection plan, *i.e.*, a ''Plan of Development,'' and any needed cultural resource surveys or inventories for threatened or endangered species. If BLM needs more information, we will identify this information in a written deficiency notice asking you to provide the additional information within a specified period of time. BLM will notify you of any other grant applications which involve all or part of the lands for which you applied.

(c) *Customer service standard.* BLM will process your completed application as follows:

Processing category	Processing time	Conditions
1–4	60 calendar days	If processing your application will take longer than 60 calendar days, BLM will notify you in writing of this fact prior to the 30th calendar day and inform you of when you can expect a final decision on your application.
5	As specified in the Master Agreement	BLM will process applications as specified in the Agreement.
6	Over 60 calendar days	BLM will notify you in writing within the initial 60-day processing period of the estimated processing time.

(d) Before issuing a grant, BLM will:

(1) Complete a NEPA analysis for the application or approve a NEPA analysis previously completed for the application, as required by 40 CFR parts 1500 through 1508;

(2) Determine whether or not your proposed use complies with applicable Federal and state laws;

(3) If your application is for a road, determine whether it is in the public interest to require you to grant the United States an equivalent authorization across lands that you own;

(4) Consult, as necessary, with other governmental entities;

(5) Hold public meetings if sufficient public interest exists to warrant their time and expense. BLM will publish a notice in the **Federal Register**, a newspaper of general circulation in the vicinity of the lands involved, or both, announcing in advance any public hearings or meetings; and

(6) Take any other action necessary to fully evaluate and decide whether to approve or deny your application.

§ 2804.26 Under what circumstances may BLM deny my application?

(a) BLM may deny your application if:

(1) The proposed use is inconsistent with the purpose for which BLM manages the public lands described in your application;

(2) The proposed use would not be in the public interest;

(3) You are not qualified to hold a grant;

(4) Issuing the grant would be inconsistent with the Act, other laws, or these or other regulations;

(5) You do not have or cannot demonstrate the technical or financial capability to construct the project or operate facilities within the right-of-way; or

(6) You do not adequately comply with a deficiency notice (*see* § 2804.25(b) of this subpart) or with any BLM requests for additional information needed to process the application.

(b) If BLM denies your application, you may appeal this decision under § 2801.10 of this part.

§ 2804.27 What fees do I owe if BLM denies my application or if I withdraw my application?

If BLM denies your application or you withdraw it, you owe the processing fee set forth at § 2804.14 of this subpart, unless you have a Processing Category 5 or 6 application. Then, the following conditions apply:

(a) If BLM denies your Processing Category 5 or 6 application, you are liable for all reasonable costs that the United States incurred in processing it. The money you have not paid is due within 30 calendar days after receiving a bill for the amount due.

(b) You may withdraw your application in writing before BLM issues a grant. If you do so, you are liable for all reasonable processing costs the United States has incurred up to the time you withdraw the application and for the reasonable costs of terminating your application. Any money you have not paid is due within 30 calendar days after receiving a bill for the amount due. Any money you paid that is not used to cover costs the United States incurred as a result of your application will be refunded to you.

§ 2804.28 What processing fees must I pay for a BLM grant application associated with Federal Energy Regulatory Commission (FERC) licenses or re-license applications under part I of the Federal Power Act (FPA)?

(a) You must reimburse BLM for the costs which the United States incurs in processing your grant application associated with a FERC project, other than those described at § 2801.6(b)(7) of this part. BLM also requires reimbursement for processing a grant application associated with a FERC project licensed before October 24, 1992, that involves the use of additional public lands outside the original area reserved under section 24 of the FPA.

(b) BLM will determine the amount you must pay by using the processing fee categories described at § 2804.14 of this subpart and bill you for the costs. FERC will address other costs associated with processing a FERC license or relicense (*see* 18 CFR chapter I).

§ 2804.29 What activities may I conduct on the lands covered by the proposed right-of-way while BLM is processing my application?

(a) You may conduct casual use activities on the BLM lands covered by the application, as may any other member of the public. BLM does not require a grant for casual use on BLM lands.

(b) For any activities on BLM lands that are not casual use, you must obtain prior BLM approval.

Subpart 2805—Terms and Conditions of Grants

§ 2805.10 How will I know whether BLM has approved or denied my application?

(a) BLM will send you a written response on your application. If we do not deny the application, we will send you an unsigned grant for your review and signature that:

(1) Includes any terms, conditions, and stipulations that BLM determines to be in the public interest. This includes modifying your proposed use or changing the route or location of the facilities;

(2) May include terms that prevent your use of the right-of-way until you have an approved Plan of Development and BLM has issued a Notice to Proceed; and

(3) Will impose a specific term for the grant. Each grant that BLM issues for 20 or more years will contain a provision requiring periodic review at the end of the twentieth year and subsequently at 10-year intervals. BLM may change the terms and conditions of the grant as a result of these reviews in accordance with § 2805.15(e) of this subpart.

(b) If you agree with the terms and conditions of the unsigned grant, you should sign and return it to BLM with any payment required under § 2805.16 of this subpart. BLM will sign the grant and return it to you with a final decision issuing the grant if the regulations in this part, including § 2804.26, remain satisfied. You may appeal this decision under § 2801.10 of this part.

(c) If BLM denies your application, we will send you a written decision that will:

(1) State the reasons for the denial (*see* § 2804.26 of this part);

(2) Identify any processing costs you must pay (*see* § 2804.14 of this part); and

(3) Notify you of your right to appeal this decision under § 2801.10 of this part.

§ 2805.11 What does a grant contain?

The grant states what your rights are on the lands subject to the grant and contains information about:

(a) *What lands you can use or occupy.* The lands may or may not correspond to those for which you applied. BLM will limit the grant to those lands which BLM determines:

(1) You will occupy with authorized facilities;

(2) Are necessary for constructing, operating, maintaining, and terminating the authorized facilities;

(3) Are necessary to protect the public health and safety;

(4) Will not unnecessarily damage the environment; and

(5) Will not result in unnecessary or undue degradation.

(b) *How long you can use the right-of-way.* Each grant will state the length of time that you are authorized to use the right-of-way.

(1) BLM will consider the following factors in establishing a reasonable term:

(i) The public purpose served;

(ii) Cost and useful life of the facility;

(iii) Time limitations imposed by licenses or permits required by other Federal agencies and state, tribal, or local governments; and

(iv) The time necessary to accomplish the purpose of the grant.

(2) All grants, except those issued for a term of less than one year and those issued in perpetuity, expire on December 31 of the final year of the grant.

(c) *How you can use the right-of-way.* You may only use the right-of-way for the specific use the grant authorizes.

§ 2805.12 What terms and conditions must I comply with?

By accepting a grant, you agree to comply with and be bound by the following terms and conditions. During construction, operation, maintenance, and termination of the project you must:

(a) To the extent practicable, comply with all existing and subsequently enacted, issued, or amended Federal laws and regulations and state laws and regulations applicable to the authorized use;

(b) Rebuild and repair roads, fences, and established trails destroyed or damaged by the project;

(c) Build and maintain suitable crossings for existing roads and significant trails that intersect the project;

(d) Do everything reasonable to prevent and suppress wildfires on or in the immediate vicinity of the right-of-way area;

(e) Not discriminate against any employee or applicant for employment during any phase of the project because of race, creed, color, sex, or national origin. You must also require subcontractors to not discriminate;

(f) Pay monitoring fees and rent described in § 2805.16 of this subpart and subpart 2806 of this part;

(g) If BLM requires, obtain, and/or certify that you have obtained, a surety bond or other acceptable security to cover any losses, damages, or injury to human health, the environment, and property in connection with your use and occupancy of the right-of-way, including terminating the grant, and to secure all obligations imposed by the grant and applicable laws and regulations. If you plan to use hazardous materials in the operation of your grant, you must provide a bond that covers liability for damages or injuries resulting from releases or discharges of hazardous materials. BLM may require a bond, an increase or decrease in the value of an existing bond, or other acceptable security at any time during the term of the grant;

(h) Assume full liability if third parties are injured or damages occur to property on or near the right-of-way (*see* § 2807.12 of this part);

(i) Comply with project-specific terms, conditions, and stipulations, including requirements to:

(1) Restore, revegetate, and curtail erosion or conduct any other rehabilitation measure BLM determines necessary;

(2) Ensure that activities in connection with the grant comply with air and water quality standards or related facility siting standards contained in applicable Federal or state law or regulations;

(3) Control or prevent damage to:

(i) Scenic, aesthetic, cultural, and environmental values, including fish and wildlife habitat;

(ii) Public and private property; and

(iii) Public health and safety;

(4) Protect the interests of individuals living in the general area who rely on the area for subsistence uses as that term is used in Title VIII of Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3111 *et seq.*);

(5) Ensure that you construct, operate, maintain, and terminate the facilities on the lands in the right-of-way in a manner consistent with the grant;

(6) When the state standards are more stringent than Federal standards, comply with state standards for public health and safety, environmental protection, and siting, constructing, operating, and maintaining any facilities and improvements on the right-of-way; and

(7) Grant BLM an equivalent authorization for an access road across your land if BLM determines the reciprocal authorization is needed in the public interest and the authorization BLM issues to you is also for road access;

(j) Immediately notify all Federal, state, tribal, and local agencies of any release or discharge of hazardous material reportable to such entity under applicable law. You must also notify BLM at the same time, and send BLM a copy of any written notification you prepared;

(k) Not dispose of or store hazardous material on your right-of-way, except as provided by the terms, conditions, and stipulations of your grant;

(l) Certify your compliance with all requirements of the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. 11001 *et seq.*, when you receive, assign, renew, amend, or terminate your grant;

(m) Control and remove any release or discharge of hazardous material on or near the right-of-way arising in connection with your use and occupancy of the right-of-way, whether or not the release or discharge is authorized under the grant. You must also remediate and restore lands and resources affected by the release or discharge to BLM's satisfaction and to the satisfaction of any other Federal, state, tribal, or local agency having jurisdiction over the land, resource, or hazardous material;

(n) Comply with all liability and indemnification provisions and stipulations in the grant;

(o) As BLM directs, provide diagrams or maps showing the location of any constructed facility; and

(p) Comply with all other stipulations that BLM may require.

§ 2805.13 When is a grant effective?

A grant is effective after both you and BLM sign it. You must accept its terms and conditions in writing and pay any necessary rent and monitoring fees as set forth in subpart 2806 of this part and § 2805.16 of this subpart. Your written acceptance constitutes an agreement between you and BLM that your right to use the public lands, as specified in the grant, is subject to the terms and conditions of the grant and applicable laws and regulations.

§ 2805.14 What rights does a grant convey?

The grant conveys to you only those rights which it expressly contains. BLM issues it subject to the valid existing rights of others, including the United States. Rights which the grant conveys to you include the right to:

(a) Use the described lands to construct, operate, maintain, and terminate facilities within the right-of-way for authorized purposes under the terms and conditions of the grant;

(b) If your grant specifically authorizes, allow other parties to use your facility for the purposes specified in your grant and you may charge for such use. If your grant does not specifically authorize it, you may not let anyone else use your facility and you may not charge for its use unless BLM authorizes or requires it in writing;

(c) Allow others to use the land as your agent in the exercise of the rights that the grant specifies;

(d) Do minor trimming, pruning, and removing of vegetation to maintain the right-of-way or facility;

(e) Use common varieties of stone and soil which are necessarily removed during construction of the project, without additional BLM authorization or payment, in constructing the project within the authorized right-of-way; and

(f) Assign the grant to another, provided that you obtain BLM's prior written approval.

§ 2805.15 What rights does the United States retain?

The United States retains and may exercise any rights the grant does not expressly convey to you. These include BLM's right to:

(a) Access the lands covered by the grant at any time and enter any facility

you construct on the right-of-way. BLM will give you reasonable notice before it enters any facility on the right-of-way;

(b) Require common use of your right-of-way, including subsurface and air space, and authorize use of the right-of-way for compatible uses. You may not charge for the use of the lands made subject to such additional right-of-way grants;

(c) Retain ownership of the resources of the land, including timber and vegetative or mineral materials and any other living or non-living resources. You have no right to use these resources, except as noted in § 2805.14(e) of this subpart;

(d) Determine whether or not your grant is renewable; and

(e) Change the terms and conditions of your grant as a result of changes in legislation, regulation, or as otherwise necessary to protect public health or safety or the environment.

§ 2805.16 If I hold a grant, what monitoring fees must I pay?

(a) *Monitoring fees.* You must pay a fee to BLM for the reasonable costs the Federal government incurs in monitoring the construction, operation, maintenance, and termination of the project and protection and rehabilitation of the public lands your grant covers. BLM categorizes the monitoring fees based on the estimated number of work hours necessary to monitor your grant. Monitoring Category 1 through 4 fees are one-time fees and are not refundable. The work hours and fees for 2005 are as follows:

2005 MONITORING FEE SCHEDULE

Monitoring category	Federal work hours involved	Monitoring fee as of June 21, 2005. To be adjusted annually for changes in the IPD–GDP. See paragraph (b) of this section for update information
(1) Applications for new grants, assignments, renewals, and amendments to existing grants.	Estimated Federal work hours are > 1 ≤ 8.	$97.
(2) Applications for new grants, assignments, renewals, and amendments to existing grants.	Estimated Federal work hours are > 8 ≤ 24.	$343.
(3) Applications for new grants, assignments, renewals, and amendments to existing grants.	Estimated Federal work hours are > 24 ≤ 36.	$644.
(4) Applications for new grants, assignments, renewals, and amendments to existing grants.	Estimated Federal work hours > 36 ≤ 50.	$923.
(5) Master Agreements	Varies	As specified in the Agreement.
(6) Applications for new grants, assignments, renewals, and amendments to existing grants.	Estimated Federal work hours are > 50.	Full reasonable costs.

(b) *Updating the schedule.* BLM will revise paragraph (a) of this section annually to update Category 1 through 4 monitoring fees in the manner described at § 2804.14(c) of this part. BLM will update Category 5 monitoring fees as specified in the Master Agreement. The monitoring cost schedule is available from any BLM state or field office or by writing: Director, Bureau of Land Management, 1849 C St., NW., Mail Stop 1000LS, Washington, DC 20240. BLM also posts the current schedule on the BLM Homepage on the Internet at *http://www.blm.gov*.

§ 2805.17 When do I pay monitoring fees?

(a) *Monitoring Categories 1 through 4.* Unless BLM otherwise directs, you must pay monitoring fees when you submit to BLM your written acceptance of the terms and conditions of the grant.

(b) *Monitoring Category 5.* You must pay monitoring fees as specified in the Master Agreement. BLM will not issue your grant until it receives the required payment.

(c) *Monitoring Category 6.* BLM may periodically estimate the costs of monitoring your use of the grant. BLM will include this fee in the costs associated with processing fees described at § 2804.14 of this part. If BLM has underestimated the monitoring costs, we will notify you of the shortfall. If your payments exceed the reasonable costs that Federal employees incurred for monitoring, BLM will either reimburse you the difference, or adjust the next billing to reflect the overpayment. Unless BLM gives you written authorization, you may not offset or deduct the overpayment from your payments.

(d) *Monitoring Categories 1–4 and 6.* If you disagree with the category BLM has determined for your grant, you may appeal the decision under § 2801.10 of this part.

Subpart 2806—Rents

General Provisions

§ 2806.10 What rent must I pay for my grant?

(a) You must pay in advance a rent BLM establishes based on sound business management principles and, as far as practical and feasible, using comparable commercial practices. Rent does not include processing or monitoring fees and rent is not offset by such fees. BLM may exempt, waive, or reduce rent for a grant under §§ 2806.14 and 2806.15 of this subpart.

(b) If BLM issued your grant on or before October 21, 1976, under then existing statutory authority, upon request, BLM will conduct an informal hearing before a proposed rent increase becomes effective. This applies to rent increases due to a BLM-initiated change in the rent or from initially being put on a rent schedule. You are not entitled to a hearing on annual adjustments once you are on a rent schedule.

§ 2806.11 How will BLM charge me rent?

(a) BLM will charge rent beginning on the first day of the month following the effective date of the grant through the last day of the month when the grant terminates. *Example:* If a grant became effective on January 10 and terminated on September 16, the rental period would be February 1 through September 30, or 8 months.

(b) BLM will set or adjust the annual billing periods to coincide with the calendar year by prorating the rent based on 12 months.

(c) If you disagree with the rent that BLM charges, you may appeal the decision under § 2801.10 of this part.

§ 2806.12 When do I pay rent?

(a) You must pay rent for the initial rental period before BLM issues you a grant.

(b) You make all other rental payments for linear rights-of-way

according to the payment plan described in § 2806.23 of this subpart.

(c) After the first rental payment, all rent is due on January 1 of the first year of each succeeding rental period for the term of your grant.

§ 2806.13 What happens if I pay the rent late?

(a) If BLM does not receive the rent payment within 15 calendar days after the rent was due under § 2806.12 of this subpart, BLM will charge you a late payment fee of $25.00 or 10 percent of the rent you owe, whichever is greater, not to exceed $500 per authorization.

(b) If BLM does not receive your rent payment and late payment fee within 30 calendar days after rent was due, BLM may collect other administrative fees provided by statute.

(c) If BLM does not receive your rent, late payment fee, and any administrative fees within 90 calendar days after the rent was due, BLM may terminate your grant under § 2807.17 of this part and you may not remove any facility or equipment without BLM's written permission (*see* § 2807.19 of this part). The rent due, late payment fees, and any administrative fees remain a debt that you owe to the United States.

(d) If you pay the rent, late payment fee, and any administrative fees after BLM has terminated the grant, BLM does not automatically reinstate the grant. You must file a new application with BLM. BLM will consider the history of your failure to timely pay rent in deciding whether to issue you a new grant.

(e) You may appeal any adverse decision BLM takes against your grant under § 2801.10 of this part.

§ 2806.14 Under what circumstances am I exempt from paying rent?

You do not have to pay rent for your use if:

(a) BLM issues the grant under a statute which does not allow BLM to charge rent;

(b) You are a Federal, state, or local government or its agent or instrumentality, unless you are:

(1) Using the facility, system, space, or any part of the right-of-way area for commercial purposes; or

(2) A municipal utility or cooperative whose principal source of revenue is customer charges;

(c) You have been granted an exemption under a statute providing for such; or

(d) Electric or telephone facilities constructed on the right-of-way were financed in whole or in part, or eligible for financing, under the Rural Electrification Act of 1936, as amended (REA) (7 U.S.C. 901 *et seq.*), or are extensions of such facilities. You do not need to have sought financing from the Rural Utilities Service to qualify for this exemption. BLM may require you to document the facility's eligibility for REA financing. For communication site facilities, adding or including non-eligible facilities as, for example, by tenants or customers, on the right-of-way will subject the holder to rent in accordance with §§ 2806.30 through 2806.44 of this subpart.

§ 2806.15 Under what circumstances may BLM waive or reduce my rent?

(a) BLM may waive or reduce your rent payment, even to zero in appropriate circumstances. BLM may require you to submit information to support a finding that your grant qualifies for a waiver or a reduction of rent.

(b) BLM may waive or reduce your rent if you show BLM that:

(1) You are a non-profit organization, corporation, or association which is not controlled by, or is not a subsidiary of, a profit making corporation or business enterprise and the facility or project will provide a benefit or special service to the general public or to a program of the Secretary;

(2) You provide without charge, or at reduced rates, a valuable benefit to the public at large or to the programs of the Secretary of the Interior;

(3) You hold a valid Federal authorization in connection with your grant and the United States is already receiving compensation for this authorization. This paragraph does not apply to oil and gas leases issued under part 3100 of this chapter; or

(4) Your grant involves a cost share road or a reciprocal right-of-way agreement not subject to subpart 2812 of this chapter. In these cases, BLM will determine the rent based on the proportion of use.

(c) The BLM State Director may waive or reduce your rent payment if the BLM State Director determines that paying the full rent will cause you undue hardship and it is in the public interest to waive or reduce your rent. In your request for a waiver or rental reduction you must include a suggested alternative rental payment plan or timeframe within which you anticipate resuming full rental payments. BLM may also require you to submit specific financial and technical data or other information that corrects or modifies the statement of financial capability required by § 2804.12(a)(5) of this part.

§ 2806.16 When must I make estimated rent payments to BLM?

To expedite the processing of your grant application, BLM may estimate rent payments and collect that amount before it issues the grant. The amount may change once BLM determines the actual rent of the right-of-way. BLM will credit any rental overpayment, and you are liable for any underpayment. This section does not apply to rent payments made under a rent schedule in this part.

Linear Rights-of-Way

§ 2806.20 What is the rent for a linear right-of-way?

(a) Except as noted in paragraph (c) of this section, BLM will use the Per Acre Rent Schedule found at paragraph (b) of this section to calculate rent for linear rights-of-way. The Per Acre Rent Schedule is updated annually in accordance with § 2806.21 of this subpart.

(b) The Per Acre Rent Schedule for calendar year 2005 is as follows:

2005 PER ACRE RENT SCHEDULE

County zone number and per acre zone price	Per acre rent for oil and gas and other energy related pipeline, and all roads, ditches, and canals. To be adjusted annually for changes in the IPD–GDP. See § 2806.21 for update information	Per acre rent for electric transmission and distributionlines, telephone lines, non-related pipelines, and other linear rights-of-way. To be adjusted annually for changes in the IPD–GDP. See § 2806.21 for update information
Zone 1 $50	$3.89	$3.40
Zone 2 $100	7.76	6.79
Zone 3 $200	15.58	13.61

2005 PER ACRE RENT SCHEDULE—Continued

County zone number and per acre zone price	Per acre rent for oil and gas and other energy related pipeline, and all roads, ditches, and canals. To be adjusted annually for changes in the IPD–GDP. See § 2806.21 for update information	Per acre rent for electric transmission and distributionlines, telephone lines, non-related pipelines, and other linear rights-of-way. To be adjusted annually for changes in the IPD–GDP. See § 2806.21 for update information
Zone 4 $300	23.31	20.43
Zone 5 $400	31.14	27.23
Zone 6 $500	38.89	34.03
Zone 7 $600	46.66	40.86
Zone 8 $1,000	77.78	68.05

(c) BLM may use an alternate means to compute your rent if the rent determined by comparable commercial practices or an appraisal would be 10 or more times the rent from the schedule.

(d) Once you are on a rent schedule, BLM will not remove you from it unless:

(1) The BLM State Director decides to remove you from the schedule under paragraph (c) of this section; or

(2) You file an application to amend your grant.

(e) You may obtain the current linear right-of-way rent schedule from any BLM state or field office or by writing: Director, BLM, 1849 C St., NW., Mail Stop 1000 LS, Washington, DC 20240. BLM also posts the most current rent schedule on the BLM Homepage on the Internet at *http://www.blm.gov.*

§ 2806.21 When and how does the linear rent schedule change?

BLM will revise § 2806.20(b) to update the rent schedule each calendar year based on the previous year's change in the IPD–GDP, as measured second quarter to second quarter.

§ 2806.22 How will BLM calculate my rent for linear rights-of-way the schedule covers?

(a) BLM calculates your rent by multiplying the rent per acre for the appropriate category of use and county zone price from the current schedule by the number of acres in the right-of-way area that fall in those categories and multiplying the result by the number of years in the rental period.

(b) If BLM has not previously used the rent schedule to calculate your rent, we may do so after giving you reasonable written notice.

§ 2806.23 How must I make rental payments for a linear grant?

(a) For linear grants, except those issued in perpetuity, you must make either nonrefundable annual payments or a nonrefundable payment for more than 1 year, as follows:

(1) *One-time payments.* You may pay in advance the required rent amount for the entire term of the grant.

(2) If you choose not to make a one-time payment, you must pay according to one of the following methods, as applicable:

(i) *Payments by individuals.* If your annual rent is $100 or less, you must pay at 10-year intervals not to exceed the term of the grant. If your annual rent is greater than $100, you may pay annually or at multi-year intervals that you may choose.

(ii) *Payments by all others.* You must pay rent at 10-year intervals not to exceed the term of the grant.

(b) BLM considers the first partial calendar year in the rent payment period to be the first year of the rental payment term. BLM prorates the first year rental amount based on the number of months left in the calendar year after the effective date of the grant.

(c) *Perpetual grants.* For linear grants issued in perpetuity, you must make a one-time rental payment before BLM will issue the grant, except individuals may choose to make rental payments as provided in paragraph (a)(2)(i) of this section. BLM determines the one-time payment as follows:

(1) BLM will calculate rent for grants issued in perpetuity by multiplying the annual rent by 100; or

(2) You may request from BLM a rent determination based on the prevailing price established by general practice in the vicinity of the right-of-way. You must:

(i) Prepare a report, at your expense, that explains how you estimated the rent;

(ii) Complete it to Federal appraisal standards; and

(iii) Submit it for consideration and approval by the BLM State Director with jurisdiction over the lands in the grant. If the BLM State Director does not approve the rent estimated in your report, you may appeal the decision under § 2801.10 of this part.

Communication Site Rights-of-Way

§ 2806.30 What are the rents for communication site rights-of-way?

(a) *Rent schedule.* (1) BLM uses the rent schedule for communication uses found in paragraph (b) of this section to calculate the rent for communication site rights-of-way. The schedule is based on nine population strata (the population served), as depicted in the most recent version of the Ranally Metro Area Population Ranking, and the type of communication use or uses for which BLM normally grants communication site rights-of-way. These uses are listed as part of the definition of ''communication use rent schedule,'' set out at § 2801.5(b) of this part. You may obtain a copy of the current schedule from any BLM state or field office or by writing: Director, BLM, 1849 C St., NW., Mail Stop 1000 LS, Washington, DC 20240. BLM also posts the current communication use rent schedule on the BLM Home Page on the Internet at *http://www.blm.gov.*

(2) BLM will revise paragraph (b) of this section annually to update the schedule based on two sources: the U.S. Department of Labor Consumer Price Index for All Urban Consumers, U.S. City Average (CPI–U), as of July of each year (difference in CPI–U from July of one year to July of the following year), and the RMA population rankings.

(3) BLM will limit the annual adjustment based on the Consumer Price Index to no more than 5 percent. At least every 10 years BLM will review the rent schedule to ensure that the schedule reflects fair market value.

(b) The annual rent schedule for communication uses for calendar year 2005 is as follows:

COMMUNICATION USE RENT SCHEDULE ANNUAL FEES

[Calendar year 2005]

Population	Television broadcast	Am/FM radio broadcast [1]	Cable television	Broadcast translator/ LPTV/LPFM	CMRS/facility manager	Cellular telephone	Private mobile radio service	Microwave	Other communication uses
5,000,000 plus	$55,861.13	$42,206.21	(2)	(2)	$14,896.30	$14,896.30	$12,413.59	$12,413.59	$93.10
2,500,000 to 4,999,999	37,240.76	26,068.54	(2)	(2)	12,413.59	12,413.59	7,448.15	9,930.88	93.10
1,000,000 to 2,499,999	22,344.46	17,379.01	(2)	(2)	9,930.88	9,930.88	7,448.15	8,689.51	93.10
500,000 to 999,999	17,379.01	12,413.59	(2)	(2)	6,206.79	7,448.15	4,965.43	6,827.47	93.10
300,000 to 499,999	14,896.30	9,930.88	(2)	(2)	4,965.43	6,206.79	3,103.39	3,103.39	93.10
100,000 to 299,999	7,448.15	4,965.43	2,979.25	2,979.25	3,724.08	4,965.43	2,482.72	2,482.72	93.10
50,000 to 99,999	3,724.08	2,482.72	1,489.63	1,489.63	1,489.63	3,724.08	1,241.36	1,862.03	93.10
25,000 to 49,999	1,862.03	1,489.63	1,241.36	620.68	1,241.36	3,103.39	744.81	1,862.03	93.10
Less Than 25,000	1,489.63	1,117.22	744.81	124.14	744.81	3,103.39	434.47	1,862.03	93.10

[1] Rent for AM Radio is 70% of the FM Scheduled Rent.
[2] Fee to be determined by appraisal or other methods.

(c) *Uses not covered by the schedule.* The communication use rent schedule does not apply to:

(1) Communication site uses, facilities, and devices located entirely within the exterior boundaries of an oil and gas lease, and directly supporting the operations of the oil and gas lease (see parts 3160 through 3190 of this chapter);

(2) Communication facilities and uses ancillary to and authorized under a linear grant, such as a railroad grant or an oil and gas pipeline grant;

(3) Communication uses not listed on the schedule, such as telephone lines, fiber optic cables, and new technologies;

(4) Grants for which BLM determines the rent by competitive bidding; or

(5) Communication facilities and uses for which the BLM State Director concurs that:

(i) The expected annual rent, as BLM estimates from market data, exceeds the rent from the rent schedule by five times; or

(ii) The communication site serves a population of one million or more and the expected annual rent for the communication use or uses is more than $10,000 above the rent from the rent schedule.

§ 2806.31 How will BLM calculate rent for a right-of-way for communication uses in the schedule?

(a) *Basic rule.* BLM calculates rents for:

(1) Single-use facilities by applying the rent from the communication use rent schedule (*see* § 2806.30 of this subpart) for the type of use and the population strata served; and

(2) Multiple-use facilities, whose authorizations provide for subleasing, by setting the rent of the highest value use in the facility or facilities as the base rent (taken from the rent schedule) and adding to it 25 percent of the rent from the rent schedule for all tenant uses in the facility or facilities, if a tenant use is not used as the base rent (rent = base rent + 25 percent of all rent due to additional tenant uses in the facility or facilities) (see also §§ 2806.32 and 2806.34 of this subpart).

(b) *Exclusions.* When calculating rent, BLM will exclude customer uses, except as provided for at §§ 2806.34(b)(4) and 2806.42 of this subpart. BLM will also exclude those uses exempted from rent by § 2806.14 of this subpart, and any uses whose rent has been waived or reduced to zero as described in § 2806.15 of this subpart.

(c) *Annual statement.* By October 15 of each year, you, as a grant or lease holder, must submit to BLM a certified statement listing any tenants and customers in your facility or facilities and the category of use for each tenant or customer as of September 30 of the same year. BLM may require you to submit any additional information needed to calculate your rent. BLM will determine the rent based on the certified statement provided. We require only facility owners or facility managers to hold a grant or lease (unless you are an occupant in a federally-owned facility as described in § 2806.42 of this subpart), and will charge you rent for your grant or lease based on the total number of communication uses within the right-of-way and the type of uses and population strata the facility or site serves.

§ 2806.32 How does BLM determine the population strata served?

(a) BLM determines the population strata served as follows:

(1) If the site or facility is within a designated RMA, BLM will use the population strata of the RMA;

(2) If the site or facility is within a designated RMA, and it serves two or more RMAs, BLM will use the population strata of the RMA having the greatest population;

(3) If the site or facility is outside an RMA, and it serves one or more RMAs, BLM will use the population strata of the RMA served having the greatest population;

(4) If the site or facility is outside an RMA and the site does not serve an RMA, BLM will use the population strata of the community it serves having the greatest population, as identified in the current edition of the Rand McNally Road Atlas;

(5) If the site or facility is outside an RMA, and it serves a community of less than 25,000, BLM will use the lowest population strata shown on the rent schedule.

(b)(1) BLM considers all facilities (and all uses within the same facility) located at one site to serve the same RMA or community. However, BLM may make case-by-case exceptions in determining the population served at a particular site by uses not located within the same facility and not authorized under the same grant or lease. BLM has the sole responsibility to make this determination. For example, when a site has a mix of high-power and low-power uses that are authorized by separate grants or leases, and only the high-power uses are capable of serving an RMA or community with the greatest population, BLM may separately determine the population strata served by the low-power uses (if not collocated in the same facility with the high-power uses), and calculate their rent as described in § 2806.30 of this subpart.

(2) For purposes of rent calculation, all uses within the same facility and/or authorized under the same grant or lease must serve the same population strata.

(3) For purposes of rent calculation, BLM will not modify the population rankings published in the Rand McNally Commercial Atlas and Marketing Guide or the population of the community served.

§ 2806.33 How will BLM calculate the rent for a grant or lease authorizing a single use communication facility?

BLM calculates the rent for a grant or lease authorizing a single-use communication facility from the communication use rent schedule (*see* § 2806.30 of this subpart), based on your authorized single use and the population strata it serves (*see* § 2806.32 of this subpart).

§ 2806.34 How will BLM calculate the rent for a grant or lease authorizing a multiple-use communication facility?

(a) *Basic rule.* BLM first determines the population strata the communication facility serves according to § 2806.32 of this subpart and then calculates the rent assessed to facility owners and facility managers for a grant or lease for a communication facility that authorizes subleasing with tenants, customers, or both, as follows:

(1) *Using the communication use rent schedule.* BLM will determine the rent of the highest value use in the facility or facilities as the base rent, and add to it 25 percent of the rent from the rent schedule (*see* § 2806.30 of this subpart) for each tenant use in the facility or facilities;

(2) If the highest value use is not the use of the facility owner or facility manager, BLM will consider the owner's or manager's use like any tenant or customer use in calculating the rent (*see* § 2806.35(b) for facility owners and § 2806.39(a) for facility managers);

(3) If a tenant use is the highest value use, BLM will exclude the rent for that tenant's use when calculating the additional 25 percent amount under paragraph (a)(1) of this section for tenant uses;

(4) If a holder has multiple uses authorized under the same grant or lease, such as a TV and a FM radio station, BLM will calculate the rent as in paragraph (a)(1) of this section. In this case, the TV rent would be the highest value use and BLM would charge the FM portion according to the rent schedule as if it were a tenant use.

(b) *Special applications.* The following provisions apply when

calculating rents for communication uses exempted from rent under § 2806.14 of this subpart or communication uses whose rent has been waived or reduced to zero under § 2806.15 of this subpart:

(1) BLM will exclude exempted uses or uses whose rent has been waived or reduced to zero (*see* §§ 2806.14 and 2806.15 of this subpart) of either a facility owner or a facility manager in calculating rents. BLM will exclude similar uses (*see* §§ 2806.14 and 2806.15 of this subpart) of a customer or tenant if they choose to hold their own grant or lease (*see* § 2806.36 of this subpart) or are occupants in a Federal facility (*see* § 2806.42(a) of this subpart);

(2) BLM will charge rent to a facility owner whose own use is either exempted from rent or whose rent has been waived or reduced to zero (*see* §§ 2806.14 and 2806.15 of this subpart), but who has tenants in the facility, in an amount equal to the rent of the highest value tenant use plus 25 percent of the rent from the rent schedule for each of the remaining tenant uses subject to rent;

(3) BLM will not charge rent to a facility owner, facility manager, or tenant (when holding a grant or lease) when all of the following occur:

(i) BLM exempts from rent, waives, or reduces to zero the rent for the holder's use (*see* §§ 2806.14 and 2806.15 of this subpart);

(ii) Rent from all other uses in the facility is exempted, waived, or reduced to zero, or BLM considers such uses as customer uses; and

(iii) The holder is not operating the facility for commercial purposes (*see* § 2801.5(b) of this part) with respect to such other uses in the facility; and

(4) If a holder, whose own use is exempted from rent or whose rent has been waived or reduced to zero, is conducting a commercial activity with customers or tenants whose uses are also exempted from rent or whose rent has been waived or reduced to zero (*see* §§ 2806.14 and 2806.15 of this subpart), BLM will charge rent, notwithstanding section 2806.31(b), based on the highest value use within the facility. This paragraph does not apply to facilities exempt from rent under § 2806.14(d) of this subpart except when the facility also includes non-eligible facilities.

§ 2806.35 How will BLM calculate rent for private mobile radio service (PMRS), internal microwave, and ''other'' category uses?

If an entity engaged in a PMRS, internal microwave, or ''other'' use is:

(a) Using space in a facility owned by either a facility owner or facility manager, BLM will consider the entity to be a customer and not include these uses in the rent calculation for the facility; or

(b) The facility owner, BLM will follow the provisions in § 2806.31 of this subpart to calculate rent for a lease involving these uses. However, we include the rent from the rent schedule for a PMRS, internal microwave, or other use in the rental calculation only if the value of that use is equal to or greater than the value of any other use in the facility. BLM excludes these uses in the 25 percent calculation (*see* § 2806.31(a) of this subpart) when their value does not exceed the highest value in the facility.

§ 2806.36 If I am a tenant or customer in a facility, must I have my own grant or lease and if so, how will this affect my rent?

(a) You may have your own authorization, but BLM does not require a separate grant or lease for tenants and customers using a facility authorized by a BLM grant or lease that contains a subleasing provision. BLM charges the facility owner or facility manager rent based on the highest value use within the facility (including any tenant or customer use authorized by a separate grant or lease) and 25 percent of the rent from the rent schedule for each of the other uses subject to rent (including any tenant or customer use a separate grant or lease authorizes and the facility owner's use if it is not the highest value use).

(b) If you own a building, equipment shelter, or tower on public lands for communication purposes, you must have an authorization under this part, even if you are also a tenant or customer in someone else's facility.

(c) BLM will charge tenants and customers who hold their own grant or lease in a facility, as grant or lease holders, the full annual rent for their use based on the BLM communication use rent schedule. BLM will also include such tenant or customer use in calculating the rent the facility owner or facility manager must pay.

§ 2806.37 How will BLM calculate rent for a grant or lease involving an entity with a single use (holder or tenant) having equipment or occupying space in multiple BLM-authorized facilities to support that single use?

BLM will include the single use in calculating rent for each grant or lease authorizing that use. For example, a television station locates its antenna on a tower authorized by grant or lease ''A'' and locates its related broadcast equipment in a building authorized by grant or lease ''B.'' The statement listing tenants and customers for each facility (*see* § 2806.31(c) of this subpart) must include the television use because each facility is benefitting economically from having the television broadcast equipment located there, even though the combined equipment is supporting only one single end use.

§ 2806.38 Can I combine multiple grants or leases for facilities located on one site into a single grant or lease?

If you hold authorizations for two or more facilities on the same site, you can combine all those uses under one grant or lease, with BLM's approval. The highest value use in all the combined facilities determines the base rent. BLM then charges for each remaining use in the combined facilities at 25 percent of the rent from the rent schedule. These uses include those uses we previously calculated as base rents when BLM authorized each of the facilities on an individual basis.

§ 2806.39 How will BLM calculate rent for a lease for a facility manager's use?

(a) BLM will follow the provisions in § 2806.31 of this subpart to calculate rent for a lease involving a facility manager's use. However, we include the rent from the rent schedule for a facility manager's use in the rental calculation only if the value of that use is equal to or greater than the value of any other use in the facility. BLM excludes the facility manager's use in the 25 percent calculation (*see* § 2806.31(a) of this subpart) when its value does not exceed the highest value in the facility.

(b) If you are a facility owner and you terminate your use within the facility, but want to retain the lease for other purposes, BLM will continue to charge you for your authorized use until BLM amends the lease to change your use to facility manager or to some other communication use.

§ 2806.40 How will BLM calculate rent for a grant or lease for ancillary communication uses associated with communication uses on the rent schedule?

If the ancillary communication equipment is used solely in direct support of the primary use (*see* the definition of communication use rent schedule in § 2801.5 of this part), BLM will calculate and charge rent only for the primary use.

§ 2806.41 How will BLM calculate rent for communication facilities ancillary to a linear grant or other use authorization?

When a communication facility is ancillary to, and authorized by BLM under, a grant for a linear use, or some other type of use authorization (e.g., a mineral lease or sundry notice), BLM will determine the rent using the linear

rent schedule (*see* § 2806.20 of this subpart) or rent scheme associated with the other authorization, and not the communication use rent schedule.

§ 2806.42 How will BLM calculate rent for a grant or lease authorizing a communication use within a federally-owned communication facility?

(a) If you are an occupant of a federally-owned communication facility, you must have your own grant or lease and pay rent in accordance with these regulations.

(b) If a Federal agency holds a grant or lease and agrees to operate the facility as a facility owner under § 2806.31 of this subpart, occupants do not need a separate BLM grant or lease and BLM will calculate and charge rent to the Federal facility owner under §§ 2806.30 through 2806.44 of this subpart.

§ 2806.43 How does BLM calculate rent for passive reflectors and local exchange networks?

(a) BLM calculates rent for passive reflectors and local exchange networks by using the same rent schedules for passive reflectors and local exchange networks as the Forest Service uses for the region in which the facilities are located. You may obtain the pertinent schedules from the Forest Service or from any BLM state or field office in the region in question. For passive reflectors and local exchange networks not covered by a Forest Service regional schedule, BLM uses the provisions in § 2806.50 of this subpart to determine rent. See Forest Service regulations at 36 CFR chapter II.

(b) For the purposes of this subpart, the term:

(1) *Passive reflector* includes various types of nonpowered reflector devices used to bend or ricochet electronic signals between active relay stations or between an active relay station and a terminal. A passive reflector commonly serves a microwave communication system. The reflector requires point-to-point line-of-sight with the connecting relay stations, but does not require electric power; and

(2) *Local exchange network* means radio service which provides basic telephone service, primarily to rural communities.

§ 2806.44 How will BLM calculate rent for a facility owner's or facility manager's grant or lease which authorizes communication uses subject to the communication use rent schedule and communication uses whose rent BLM determines by other means?

(a) BLM establishes the rent for each of the uses in the facility that are not covered by the communication use rent schedule using § 2806.50 of this subpart.

(b) BLM establishes the rent for each of the uses in the facility that are covered by the rent schedule using §§ 2806.30 and 2806.31 of this subpart.

(c) BLM determines the facility owner or facility manager's rent by identifying the highest rent in the facility of those established under paragraphs (a) and (b) of this section, and adding to it 25 percent of the rent of all other uses subject to rent.

Other Rights-of-Way

§ 2806.50 How will BLM determine the rent for a grant when neither the linear rent schedule at § 2806.20 nor the communication use rent schedule at § 2806.30 applies?

When neither the linear nor the communication use rent schedule is appropriate, BLM determines your rent through a process based on comparable commercial practices, appraisals, competitive bid, or other reasonable methods. BLM will notify you in writing of the rent determination. If you disagree with the rent determination, you may appeal BLM's final determination under § 2801.10 of this part.

Subpart 2807—Grant Administration and Operation

§ 2807.10 When can I start activities under my grant?

When you can start depends on the terms of your grant. You can start activities when you receive the grant you and BLM signed, unless the grant includes a requirement for BLM to provide a written Notice to Proceed. If your grant contains a Notice to Proceed requirement, you may not initiate construction, operation, maintenance, or termination until BLM issues you a Notice to Proceed.

§ 2807.11 When must I contact BLM during operations?

You must contact BLM:

(a) At the times specified in your grant;

(b) When your use requires a substantial deviation from the grant. You must obtain BLM's approval before you begin any activity that is a substantial deviation;

(c) When there is a change affecting your application or grant, including, but not limited to, changes in:

(1) Mailing address;

(2) Partners;

(3) Financial conditions; or

(4) Business or corporate status;

(d) When you submit a certification of construction, if the terms of your grant require it. A certification of construction is a document you submit to BLM after you have finished constructing a facility, but before you begin operating it, verifying that you have constructed and tested the facility to ensure that it complies with the terms of the grant and with applicable Federal and state laws and regulations; or

(e) When BLM requests it. You must update information or confirm that information you submitted before is accurate.

§ 2807.12 If I hold a grant, for what am I liable?

(a) If you hold a grant, you are liable to the United States and to third parties for any damage or injury they incur in connection with your use and occupancy of the right-of-way.

(b) You are strictly liable for any activity or facility associated with your right-of-way area which BLM determines presents a foreseeable hazard or risk of damage or injury to the United States. BLM will specify in the grant any activity or facility posing such hazard or risk, and the financial limitations on damages commensurate with such hazard or risk.

(1) BLM will not impose strict liability for damage or injury resulting primarily from an act of war, an act of God, or the negligence of the United States, except as otherwise provided by law.

(2) As used in this section, strict liability extends to costs incurred by the Federal government to control or abate conditions, such as fire or oil spills, which threaten life, property, or the environment, even if the threat occurs to areas that are not under Federal jurisdiction. This liability is separate and apart from liability under other provisions of law.

(3) You are strictly liable to the United States for damage or injury up to $2 million for any one incident. BLM will update this amount annually to adjust for changes in the Consumer Price Index for All Urban Consumers, U.S. City Average (CPI–U) as of July of each year (difference in CPI–U from July of one year to July of the following year), rounded to the nearest $1,000. This financial limitation does not apply to the release or discharge of hazardous substances on or near the grant, or where liability is otherwise not subject to this financial limitation under applicable law.

(4) BLM will determine your liability for any amount in excess of the $2 million strict liability limitation (as adjusted) through the ordinary rules of negligence.

(5) The rules of subrogation apply in cases where a third party caused the damage or injury.

(c) If you cannot satisfy claims for injury or damage, all owners of any interests in, and all affiliates or subsidiaries of any holder of, a grant, except for corporate stockholders, are jointly and severally liable to the United States.

(d) If BLM issues a grant to more than one person, each is jointly and severally liable.

(e) By accepting the grant, you agree to fully indemnify or hold the United States harmless for liability, damage, or claims arising in connection with your use and occupancy of the right-of-way area.

(f) We address liability of state, tribal, and local governments in § 2807.13 of this subpart.

(g) The provisions of this section do not limit or exclude other remedies.

§ 2807.13 As grant holders, what liabilities do state, tribal, and local governments have?

(a) If you are a state, tribal, or local government or its agency or instrumentality, you are liable to the fullest extent law allows at the time that BLM issues your grant. If you do not have the legal power to assume full liability, you must repair damages or make restitution to the fullest extent of your powers.

(b) BLM may require you to provide a bond, insurance, or other acceptable security to:

(1) Protect the liability exposure of the United States to claims by third parties arising out of your use and occupancy of the right-of-way;

(2) Cover any losses, damages, or injury to human health, the environment, and property incurred in connection with your use and occupancy of the right-of-way; and

(3) Cover any damages or injuries resulting from the release or discharge of hazardous materials incurred in connection with your use and occupancy of the right-of-way.

(c) Based on your record of compliance and changes in risk and conditions, BLM may require you to increase or decrease the amount of your bond, insurance, or security.

(d) The provisions of this section do not limit or exclude other remedies.

§ 2807.14 How will BLM notify me if someone else wants a grant for land subject to my grant or near or adjacent to it?

BLM will notify you in writing when it receives a grant application for land subject to your grant or near or adjacent to it. BLM will consider your written recommendations as to how the proposed use affects the integrity of, or your ability to operate, your facilities. The notice will contain a time period within which you must respond. The notice may also notify you of additional opportunities to comment.

§ 2807.15 How is grant administration affected if the land my grant encumbers is transferred to another Federal agency or out of Federal ownership?

(a) If there is a proposal to transfer the land your grant encumbers to another Federal agency, BLM may, after reasonable notice to you, transfer administration of your grant for the lands BLM formerly administered to another Federal agency, unless doing so would diminish your rights. If BLM determines your rights would be diminished by such a transfer, BLM can still transfer the land, but retain administration of your grant under existing terms and conditions.

(b) If there is a proposal to transfer the land your grant encumbers out of Federal ownership, BLM may, after reasonable notice to you and in conformance with existing policies and procedures:

(1) Transfer the land subject to your grant. In this case, administration of your grant for the lands BLM formerly administered is transferred to the new owner of the land;

(2) Transfer the land, but BLM retains administration of your grant; or

(3) Reserve to the United States the land your grant encumbers, and BLM retains administration of your grant.

(c) BLM or, if BLM no longer administers the land, the new land owner may negotiate new grant terms and conditions with you. This may include increasing the term of your grant, should you request it, to a perpetual grant under § 2806.23(c) of this part or providing for an easement.

§ 2807.16 Under what conditions may BLM order an immediate temporary suspension of my activities?

(a) If BLM determines that you have violated one or more of the terms, conditions, or stipulations of your grant, we can order an immediate temporary suspension of activities within the right-of-way area to protect public health or safety or the environment. BLM can require you to stop your activities before holding an administrative proceeding on the matter.

(b) BLM may issue the immediate temporary suspension order orally or in writing to you, your contractor or subcontractor, or to any representative, agent, or employee representing you or conducting the activity. When you receive the order, you must stop the activity immediately. BLM will, as soon as practical, confirm an oral order by sending or hand delivering to you or your agent at your address a written suspension order explaining the reasons for it.

(c) You may file a written request for permission to resume activities at any time after BLM issues the order. In the request, give the facts supporting your request and the reasons you believe that BLM should lift the order. BLM must grant or deny your request within 5 business days after receiving it. If BLM does not respond within 5 business days, BLM has denied your request. You may appeal the denial under § 2801.10 of this part.

(d) The immediate temporary suspension order is effective until you receive BLM's written notice to proceed with your activities.

§ 2807.17 Under what conditions may BLM suspend or terminate my grant?

(a) BLM may suspend or terminate your grant if you do not comply with applicable laws and regulations or any terms, conditions, or stipulations of the grant (such as rent payments), or if you abandon the right-of-way.

(b) A grant also terminates when:

(1) The grant contains a term or condition that has been met that requires the grant to terminate;

(2) BLM consents in writing to your request to terminate the grant; or

(3) It is required by law to terminate.

(c) Your failure to use your right-of-way for its authorized purpose for any continuous 5-year period creates a presumption of abandonment. BLM will notify you in writing of this presumption. You may rebut the presumption of abandonment by proving that you used the right-of-way or that your failure to use the right-of-way was due to circumstances beyond your control, such as acts of God, war, or casualties not attributable to you.

(d) You may appeal a decision under this section under § 2801.10 of this part.

§ 2807.18 How will I know that BLM intends to suspend or terminate my grant?

(a) Before BLM suspends or terminates your grant under § 2807.17(a) of this subpart, it will send you a written notice stating that it intends to suspend or terminate your grant and giving the grounds for such action. The notice will give you a reasonable opportunity to correct any noncompliance or start or resume use of the right-of-way, as appropriate.

(b) To suspend or terminate a grant issued as an easement, BLM must give you written notice and refer the matter to the Office of Hearings and Appeals for a hearing before an ALJ under 5 U.S.C. 554. No hearing is required if the grant provided by its terms for

termination on the occurrence of a fixed or agreed upon condition, event, or time. If the ALJ determines that grounds for suspension or termination exist and such action is justified, BLM will suspend or terminate the grant.

§ 2807.19 When my grant terminates, what happens to any facilities on it?

(a) After your grant terminates, you must remove any facilities within the right-of-way within a reasonable time, as determined by BLM, unless BLM instructs you otherwise in writing, or termination is due to non-payment of rent (*see* § 2806.13(c) of this part).

(b) After removing the facilities, you must remediate and restore the right-of-way area to a condition satisfactory to BLM, including the removal and clean up of any hazardous materials.

(c) If you do not remove all facilities within a reasonable period as determined by BLM, BLM may declare them to be the property of the United States. However, you are still liable for the costs of removing them and for remediating and restoring the right-of-way area.

§ 2807.20 When must I amend my application, seek an amendment of my grant, or obtain a new grant?

(a) You must amend your application or seek an amendment of your grant when there is a proposed substantial deviation in location or use.

(b) The requirements to amend an application or grant are the same as those for a new application, including paying processing and monitoring fees and rent according to §§ 2804.14, 2805.16, and 2806.10 of this part.

(c) Any activity not authorized by your grant may subject you to prosecution under applicable law and to trespass charges under subpart 2808 of this part.

(d) If your grant was issued prior to October 21, 1976, and there is a proposed substantial deviation in the location or use or terms and conditions of your right-of-way grant, you must apply for a new grant consistent with the remainder of this section. BLM may respond to your request in one of the following ways:

(1) If BLM approves your application, BLM will terminate your old grant and you will receive a new grant under 43 U.S.C. 1761 *et seq.* and the regulations in this part. BLM may include the same terms and conditions in the new grant as were in the original grant as to annual rent, duration, and nature of interest if BLM determines, based on current land use plans and other management decisions, that it is in the public interest to do so; or

(2) Alternatively, BLM may keep the old grant in effect and issue a new grant for the new use or location, or terms and conditions.

(e) You must apply for a new grant to allow realignment of your railroad and appurtenant communication facilities. BLM must issue a decision within 6 months after it receives your complete application. BLM may include the same terms and conditions in the new grant as were in the original grant as to annual rent, duration, and nature of interest if:

(1) These terms are in the public interest;

(2) The lands are of approximately equal value; and

(3) The lands involved are not within an incorporated community.

§ 2807.21 May I assign my grant?

(a) With BLM's approval, you may assign, in whole or in part, any right or interest in a grant.

(b) In order to assign a grant, the proposed assignee must file an application and satisfy the same procedures and standards as for a new grant, including paying processing fees (*see* subpart 2804 of this part).

(c) The assignment application must also include:

(1) Documentation that the assignor agrees to the assignment; and

(2) A signed statement that the proposed assignee agrees to comply with and be bound by the terms and conditions of the grant that is being assigned and all applicable laws and regulations.

(d) BLM will not recognize an assignment until it approves it in writing. BLM will approve the assignment if doing so is in the public interest. BLM may modify the grant or add bonding and other requirements, including additional terms and conditions, to the grant when approving the assignment. BLM may decrease rents if the new holder qualifies for an exemption (*see* § 2806.14 of this part), or waiver or reduction (*see* § 2806.15 of this part) and the previous holder did not. Similarly, BLM may increase rents if the previous holder qualified for an exemption or waiver or reduction and the new holder does not. If BLM approves the assignment, the benefits and liabilities of the grant apply to the new grant holder.

(e) The processing time and conditions described at § 2804.25(c) of this part apply to assignment applications.

§ 2807.22 How do I renew my grant?

(a) If your grant specifies that it is renewable, and you choose to renew it, you must apply to BLM to renew the grant at least 120 calendar days before your grant expires. BLM will renew the grant if you are complying with the terms, conditions, and stipulations of the grant and applicable laws and regulations.

(b) If your grant does not address whether it is renewable, you may apply to BLM to renew the grant. You must send BLM your application at least 120 calendar days before your grant expires. In your application you must show that you are complying with the terms, conditions, and stipulations of the grant and applicable laws and regulations. BLM has the discretion to renew the grant if doing so is in the public interest.

(c) Submit your application under paragraph (a) or (b) of this section and include the same information necessary for a new application (*see* subpart 2804 of this part). You must reimburse BLM in advance for the administrative costs of processing the renewal in accordance with § 2804.14 of this part.

(d) BLM will review your application and determine the applicable terms and conditions of any renewed grant.

(e) BLM will not renew grants issued before October 21, 1976. If you hold such a grant and would like to continue to use the right-of-way beyond your grant's expiration date, you must apply to BLM for a new FLPMA grant (*see* subpart 2804 of this part). You must send BLM your application at least 120 calendar days before your grant expires.

(f) If BLM denies your application, you may appeal the decision under § 2801.10 of this part.

Subpart 2808—Trespass

§ 2808.10 What is trespass?

(a) Trespass is using, occupying, or developing the public lands or their resources without a required authorization or in a way that is beyond the scope and terms and conditions of your authorization. Trespass is a prohibited act.

(b) Trespass includes acts or omissions causing unnecessary or undue degradation to the public lands or their resources. In determining whether such degradation is occurring, BLM may consider the effects of the activity on resources and land uses outside the area of the activity.

(c) There are two kinds of trespass, willful and non-willful.

(1) *Willful trespass* is voluntary or conscious trespass and includes trespass committed with criminal or malicious intent. It includes a consistent pattern of actions taken with knowledge, even if those actions are taken in the belief that the conduct is reasonable or legal.

(2) *Non-willful trespass* is trespass committed by mistake or inadvertence.

§ 2808.11 What will BLM do if it determines that I am in trespass?

(a) BLM will notify you in writing of the trespass and explain your liability. Your liability includes:

(1) Reimbursing the United States for all costs incurred in investigating and terminating the trespass;

(2) Paying the rental for the lands, as provided for in subpart 2806 of this part, for the current and past years of trespass, or, where applicable, the cumulative value of the current use fee, amortization fee, and maintenance fee for unauthorized use of any BLM-administered road; and

(3) Rehabilitating and restoring any damaged lands or resources. If you do not rehabilitate and restore the lands and resources within the time set by BLM in the notice, you will be liable for the costs the United States incurs in rehabilitating and restoring the lands and resources.

(b) In addition to amounts you owe under paragraph (a) of this section, BLM may assess penalties as follows:

(1) For willful or repeated non-willful trespass, the penalty is two times the rent. For roads, the penalty is two times the charges for road use, amortization, and maintenance which have accrued since the trespass began.

(2) For non-willful trespass not resolved within 30 calendar days after receiving the written notice under paragraph (a) of this section, the penalty is an amount equal to the rent. To resolve the trespass you must meet one of the conditions identified in 43 CFR 9239.7–1. For roads, the penalty is an amount equal to the charges for road use, amortization, and maintenance which have accrued since the trespass began.

(c) The penalty will not be less than the fee for a Processing Category 2 application (*see* § 2804.14 of this part) for non-willful trespass or less than three times this amount for willful or repeated non-willful trespass. You must pay whichever is the higher of:

(1) The amount computed in paragraph (b) of this section; or

(2) The minimum penalty amount in paragraph (c) of this section.

(d) In addition to civil penalties under paragraph (b) of this section, you may be tried before a United States magistrate judge and fined no more than $1,000 or imprisoned for no more than 12 months, or both, for a knowing and willful trespass, as provided at 43 CFR 9262.1 and 43 U.S.C. 1733(a).

(e) Until you comply with the requirements of 43 CFR 9239.7–1, BLM will not process any of your applications for any activities on BLM lands.

(f) You may appeal a trespass decision under § 2801.10 of this part.

(g) Nothing in this section limits your liability under any other Federal or state law.

§ 2808.12 May I receive a grant if I am or have been in trespass?

Until you satisfy your liability for a trespass, BLM will not process any applications you have pending for any activity on BLM-administered lands. A history of trespass will not necessarily disqualify you from receiving a grant. In order to correct a trespass, you must apply under the procedures described at subpart 2804 of this part. BLM will process your application as if it were a new use. Prior unauthorized use does not create a preference for receiving a grant.

Subpart 2809—Grants for Federal Agencies

§ 2809.10 Do the regulations in this part apply to Federal agencies?

The regulations in this part apply to Federal agencies to the extent possible, except that:

(a) BLM may suspend or terminate a Federal agency's grant only if:

(1) The terms and conditions of the Federal agency's grant allow it; or

(2) The agency head holding the grant consents to it; and

(b) Federal agencies are generally not required to pay rent for a grant (*see* § 2806.14 of this part).

PART 2810—TRAMROADS AND LOGGING ROADS

■ 2. Revise the authority citation for part 2810 to read as follows:

Authority: 43 U.S.C. 1181e, 1732, 1733, and 1740.

■ 3. Revise § 2812.1–3 to read as follows:

§ 2812.1–3 Unauthorized use, occupancy, or development.

Any use, occupancy, or development of the Revested Oregon and California Railroad and Reconveyed Coos Bay Wagon Road Grant Lands (O&C) lands (as is defined in 43 CFR 2812.0–5(e)), for tramroads without an authorization pursuant to this subpart, or which is beyond the scope and specific limitations of such an authorization, or that cause unnecessary or undue degradation, is prohibited and shall constitute a trespass as defined in § 2808.10 of this chapter. Anyone determined by the authorized officer to be in violation of this section shall be notified of such trespass in writing and shall be liable to the United States for all costs and payments determined in the same manner as set forth in subpart 2808 of this chapter.

■ 4. Revise part 2880 to read as follows:

PART 2880—RIGHTS-OF-WAY UNDER THE MINERAL LEASING ACT

Subpart 2881—General Information

Sec.

Subpart 2882—Lands Available for MLA Grants and TUPs

Subpart 2883—Qualifications for Holding MLA Grants and TUPs

Subpart 2884—Applying For MLA Grants or TUPs

Authority: 30 U.S.C. 185 and 189.

Subpart 2881—General Information

§ 2881.2 What is the objective of BLM's right-of-way program?

It is BLM's objective to grant rights-of-way under the regulations in this part to any qualified individual, business, or government entity and to direct and control the use of rights-of-way on public lands in a manner that:

(a) Protects the natural resources associated with Federal lands and adjacent lands, whether private or administered by a government entity;

(b) Prevents unnecessary or undue degradation to public lands;

(c) Promotes the use of rights-of-way in common considering engineering and technological compatibility, national security, and land use plans; and

(d) Coordinates, to the fullest extent possible, all BLM actions under the regulations in this part with state and local governments, interested individuals, and appropriate quasi-public entities.

§ 2881.5 What acronyms and terms are used in the regulations in this part?

(a) *Acronyms.* Unless an acronym is listed in this section, the acronyms listed in part 2800 of this chapter apply to this part. As used in this part:

MLA means the Mineral Leasing Act of 1920, as amended (30 U.S.C. 185).

TAPS means the Trans-Alaska Oil Pipeline System.

TUP means a temporary use permit.

(b) *Terms.* Unless a term is defined in this part, the defined terms in part 2800 of this chapter apply to this part. As used in this part, the term:

Act means section 28 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 185).

Actual costs means the financial measure of resources the Federal government expends or uses in processing a right-of-way application or in monitoring the construction, operation, and termination of a facility authorized by a grant or permit. Actual costs include both direct and indirect costs, exclusive of management overhead costs.

Casual use means activities ordinarily resulting in no or negligible disturbance of the public lands, resources, or improvements. Examples of casual use include: Surveying, marking routes, and collecting data to prepare applications for grants or TUPs.

Facility means an improvement or structure, whether existing or planned, that is, or would be, owned and controlled by the grant or TUP holder within the right-of-way or TUP area.

Federal lands means all lands owned by the United States, except lands:

(1) In the National Park System;

(2) Held in trust for an Indian or Indian tribe; or

(3) On the Outer Continental Shelf.

Grant means any authorization or instrument BLM issues under section 28 of the Mineral Leasing Act, 30 U.S.C. 185, authorizing a nonpossessory, nonexclusive right to use Federal lands to construct, operate, maintain, or terminate a pipeline. The term includes those authorizations and instruments BLM and its predecessors issued for like purposes before November 16, 1973, under then existing statutory authority. It does not include authorizations issued under FLPMA (43 U.S.C. 1761 *et seq.*).

Monitoring means those actions, subject to § 2886.11 of this part, that the Federal government performs to ensure compliance with the terms, conditions, and stipulations of a grant or TUP.

(1) For Monitoring Categories 1 through 4, the actions include inspecting construction, operation, maintenance, and termination of permanent or temporary facilities and protection and rehabilitation activities until the holder completes rehabilitation of the right-of-way or TUP area and BLM approves it;

(2) For Monitoring Category 5 (Master Agreements), those actions agreed to in the Master Agreement; and

(3) For Monitoring Category 6, those actions agreed to between BLM and the applicant before BLM issues the grant or TUP.

Oil or gas means oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced from them.

Pipeline means a line crossing Federal lands for transportation of oil or gas. The term includes feeder lines, trunk lines, and related facilities, but does not include a lessee's or lease operator's production facilities located on its oil and gas lease.

Pipeline system means all facilities, whether or not located on Federal lands, used by a grant holder in connection with the construction, operation, maintenance, or termination of a pipeline.

Production facilities means a lessee's or lease operator's pipes and equipment used on its oil and gas lease to aid in extracting, processing, and storing oil or gas. The term includes:

(1) Storage tanks and processing equipment;

(2) Gathering lines upstream from such tanks and equipment, or in the case of gas, upstream from the point of delivery; and

(3) Pipes and equipment, such as water and gas injection lines, used in the production process for purposes other than carrying oil and gas downstream from the wellhead.

Related facilities means those structures, devices, improvements, and sites, located on Federal lands, which may or may not be connected or contiguous to the pipeline, the substantially continuous use of which is necessary for the operation or maintenance of a pipeline, such as:

(1) Supporting structures;

(2) Airstrips;

(3) Roads;

(4) Campsites;

(5) Pump stations, including associated heliports, structures, yards, and fences;

(6) Valves and other control devices;

(7) Surge and storage tanks;

(8) Bridges;

(9) Monitoring and communication devices and structures housing them;

(10) Terminals, including structures, yards, docks, fences, and storage tank facilities;

(11) Retaining walls, berms, dikes, ditches, cuts and fills; and

(12) Structures and areas for storing supplies and equipment.

Right-of-way means the Federal lands BLM authorizes a holder to use or occupy under a grant.

Substantial deviation means a change in the authorized location or use which requires:

(1) Construction or use outside the boundaries of the right-of-way or TUP area; or

(2) Any change from, or modification of, the authorized use. Examples of substantial deviation include: Adding equipment, overhead or underground lines, pipelines, structures, or other facilities not included in the original grant or TUP.

Temporary use permit or TUP means a document BLM issues under 30 U.S.C. 185 that is a revocable, nonpossessory privilege to use specified Federal lands in the vicinity of and in connection with a right-of-way, to construct, operate, maintain, or terminate a pipeline or to protect the environment or public safety. A TUP does not convey any interest in land.

Third party means any person or entity other than BLM, the applicant, or the holder of a right-of-way authorization.

§ 2881.7 Scope.

(a) *What do these regulations apply to?* The regulations in this part apply to:

(1) Issuing grants and TUPs for pipelines to transport oil or gas, and administering, amending, assigning, renewing, and terminating them;

(2) All grants and permits BLM and its predecessors previously issued under section 28 of the Act; and

(3) Pipeline systems, or parts thereof, within a Federal oil and gas lease owned by:

(i) A party who is not the lessee or lease operator; or

(ii) The lessee or lease operator which are downstream from a custody transfer metering device.

(b) *What don't these regulations apply to?* The regulations in this part do not apply to:

(1) Production facilities on an oil and gas lease which operate for the benefit of the lease. The lease authorizes these production facilities;

(2) Pipelines crossing Federal lands under the jurisdiction of a single Federal department or agency other than BLM, including bureaus and agencies within the Department of the Interior;

(3) Authorizations BLM issues to Federal agencies for oil or gas transportation under § 2801.6 of this chapter; or

(4) Authorizations BLM issues under Title V of the Federal Land Policy and Management Act of 1976 (*see* part 2800 of this chapter).

(c) Notwithstanding the definition of ''grant'' in section 2881.5 of this subpart, the regulations in this part apply, consistent with 43 U.S.C. 1652(c), to any authorization issued by the Secretary of the Interior or his or her delegate under 43 U.S.C. 1652(b) for the Trans-Alaska Oil Pipeline System.

§ 2881.9 Severability.

If a court holds any provisions of the regulations in this part or their applicability to any person or circumstances invalid, the remainder of these rules and their applicability to other people or circumstances will not be affected.

§ 2881.10 How do I appeal a BLM decision issued under the regulations in this part?

(a) You may appeal a BLM decision issued under the regulations in this part in accordance with part 4 of this title.

(b) All BLM decisions under this part remain in effect pending appeal unless the Secretary of the Interior rules otherwise, or as noted in this part. You may petition for a stay of a BLM decision under this part with the Office of Hearings and Appeals, Department of the Interior. Unless otherwise noted in this part, BLM will take no action on your application while your appeal is pending.

§ 2881.11 When do I need a grant from BLM for an oil and gas pipeline?

You must have a BLM grant under 30 U.S.C. 185 for an oil or gas pipeline or related facility to cross Federal lands under:

(a) BLM's jurisdiction; or

(b) The jurisdiction of two or more Federal agencies.

§ 2881.12 When do I need a TUP for an oil and gas pipeline?

You must obtain a TUP from BLM when you require temporary use of more land than your grant authorizes in order to construct, operate, maintain, or terminate your pipeline, or to protect the environment or public safety.

Subpart 2882—Lands Available for MLA Grants and TUPs

§ 2882.10 What lands are available for grants or TUPs?

(a) For lands BLM exclusively manages, we use the same criteria to determine whether lands are available for grants or TUPs as we do to determine whether lands are available for FLPMA grants (*see* subpart 2802 of this chapter).

(b) BLM may require common use of a right-of-way and may restrict new grants to existing right-of-way corridors where safety and other considerations allow. Generally, BLM land use plans designate right-of-way corridors.

(c) Where a proposed oil or gas right-of-way involves lands managed by two or more Federal agencies, *see* § 2884.26 of this part.

Subpart 2883—Qualifications for Holding MLA Grants and TUPs

§ 2883.10 Who may hold a grant or TUP?

To hold a grant or TUP under these regulations, you must be:

(a)(1) A United States citizen, an association of such citizens, or a corporation, partnership, association, or similar business entity organized under the laws of the United States, or of any state therein; or

(2) A state or local government; and

(b) Financially and technically able to construct, operate, maintain, and terminate the proposed facilities.

§ 2883.11 Who may not hold a grant or TUP?

Aliens may not acquire or hold any direct or indirect interest in grants or TUPs, except that they may own or control stock in corporations holding grants or TUPs if the laws of their country do not deny similar or like privileges to citizens of the United States.

§ 2883.12 How do I prove I am qualified to hold a grant or TUP?

(a) If you are a private individual, BLM requires no proof of citizenship with your application;

(b) If you are a partnership, corporation, association, or other business entity, submit the following information, as applicable, in your application:

(1) Copies of the formal documents creating the business entity, such as articles of incorporation, and including the corporate bylaws;

(2) Evidence that the party signing the application has the authority to bind the applicant;

(3) The name, address, and citizenship of each participant (*e.g.*, partner, associate, or other) in the business entity;

(4) The name, address, and citizenship of each shareholder owning 3 percent or more of each class of shares, and the number and percentage of any class of voting shares of the business entity which such shareholder is authorized to vote;

(5) The name and address of each affiliate of the business entity;

(6) The number of shares and the percentage of any class of voting stock owned by the business entity, directly or indirectly, in any affiliate controlled by the business entity; and

(7) The number of shares and the percentage of any class of voting stock owned by an affiliate, directly or indirectly, in the business entity controlled by the affiliate.

(c) If you have already supplied this information to BLM and the information remains accurate, you only need to reference the existing or previous BLM serial number under which it is filed.

§ 2883.13 What happens if BLM issues me a grant or TUP and later determines that I am not qualified to hold it?

If BLM issues you a grant or TUP, and later determines that you are not qualified to hold it, BLM will terminate your grant or TUP under 30 U.S.C. 185(o). You may appeal this decision under § 2881.10 of this part.

§ 2883.14 What happens to my application, grant, or TUP if I die?

(a) If an applicant or grant or TUP holder dies, any inheritable interest in the application, grant, or TUP will be distributed under state law.

(b) If the distributee of a grant or TUP is not qualified to hold a grant or TUP under § 2883.10 of this subpart, BLM will recognize the distributee as grant or TUP holder and allow the distributee to hold its interest in the grant or TUP for up to two years. During that period, the distributee must either become qualified or divest itself of the interest.

Subpart 2884—Applying for MLA Grants or TUPs

§ 2884.10 What should I do before I file my application?

(a) When you determine that a proposed oil and gas pipeline system would cross Federal lands under BLM jurisdiction, or under the jurisdiction of two or more Federal agencies, you should notify BLM.

(b) Before filing an application with BLM, we encourage you to make an appointment for a preapplication meeting with the appropriate personnel in the BLM field office nearest the lands you seek to use. During the preapplication meeting BLM can:

(1) Identify potential routing and other constraints;

(2) Determine whether or not the lands are located within a designated or existing right-of-way corridor;

(3) Tentatively schedule the processing of your proposed application;

(4) Provide you information about qualifications for holding grants and TUPs, and inform you of your financial obligations, such as processing and monitoring costs and rents; and

(5) Identify any work which will require obtaining one or more TUPs.

(c) BLM may share this information with Federal, state, tribal, and local government agencies to ensure that these agencies are aware of any authorizations you may need from them.

(d) BLM will keep confidential any information in your application that you mark as ''confidential'' or ''proprietary'' to the extent allowed by law.

§ 2884.11 What information must I submit in my application?

(a) File your application on Form SF–299 or as part of an Application for Permit to Drill or Reenter (BLM Form 3160–3) or Sundry Notice and Report on Wells (BLM Form 3160–5), available from any BLM office. Provide a complete description of the project, including:

(1) The exact diameters of the pipes and locations of the pipelines;

(2) Proposed construction and reclamation techniques; and

(3) The estimated life of the facility.

(b) File with BLM copies of any applications you file with other Federal agencies, such as the Federal Energy Regulatory Commission (*see* 18 CFR chapter I), for licenses, certificates, or other authorities involving the right-of-way.

(c) BLM may ask you to submit additional information beyond that required in the form to assist us in processing your application. This information may include:

(1) A list of any Federal and state approvals required for the proposal;

(2) A description of alternative route(s) and mode(s) you considered when developing the proposal;

(3) Copies of, or reference to, all similar applications or grants you have submitted, currently hold, or have held in the past;

(4) A statement of the need and economic feasibility of the proposed project;

(5) The estimated schedule for constructing, operating, maintaining, and terminating the project (a Plan of Development);

(6) A map of the project, showing its proposed location and showing existing facilities adjacent to the proposal;

(7) A statement certifying that you are of legal age and authorized to do business in the state(s) where the right-of-way would be located, and that you have submitted correct information to the best of your knowledge;

(8) A statement of the environmental, social, and economic effects of the proposal;

(9) A statement of your financial and technical capability to construct, operate, maintain, and terminate the project;

(10) Proof that you are a United States citizen; and

(11) Any other information BLM considers necessary to process your application.

(d) Before BLM reviews your application for a grant, grant amendment, or grant renewal, you must submit the following information and material to ensure that the facilities will be constructed, operated, and maintained as common carriers under 30 U.S.C. 185(r):

(1) Conditions for, and agreements among, owners or operators to add pumping facilities and looping, or otherwise to increase the pipeline or terminal's throughput capacity in response to actual or anticipated increases in demand;

(2) Conditions for adding or abandoning intake, offtake, or storage points or facilities; and

(3) Minimum shipment or purchase tenders.

(e) If conditions or information affecting your application change, promptly notify BLM and submit to BLM in writing the necessary changes to your application. BLM may deny your application if you fail to do so.

§ 2884.12 What is the processing fee for a grant or TUP application?

(a) You must pay a fee with the application to cover the costs to the Federal Government of processing your application before the Federal Government incurs them. The fees for Processing Categories 1 through 4 (see paragraph (b) of this section) are one-time fees and are not refundable. The fees are categorized based on an estimate of the amount of time that the Federal Government will expend to process your application and issue a decision granting or denying the application.

(b) There is no processing fee if work is estimated to take one hour or less. Processing fees are based on categories. These categories and fees for 2005 are:

2005 PROCESSING FEE SCHEDULE

Processing category	Federal work hours involved	Processing fee per application as of June 21, 2005. To be adjusted annually for changes in the IPD–GDP. See paragraph (c) of this section for update information
(1) Applications for new grants or TUPs, assignments, renewals, and amendments to existing grants or TUPs.	Estimated Federal work hours are >1 ≤8.	$97.
(2) Applications for new grants or TUPs, assignments, renewals, and amendments to existing grants or TUPs.	Estimated Federal work hours are >8 ≤24.	$343.
(3) Applications for new grants or TUPs, assignments, renewals, and amendments to existing grants or TUPs.	Estimated Federal work hours are >24 ≤36.	$644.
(4) Applications for new grants or TUPs, assignments, renewals, and amendments to existing grants or TUPs.	Estimated Federal work hours are >36 ≤50.	$923.
(5) Master Agreements.	Varies	As specified in the Agreement.
(6) Applications for new grants or TUPs, assignments, renewals, and amendments to existing grants or TUPs.	Estimated Federal work hours are >50.	Actual costs (*see* § 2884.17 of this part).

(c) BLM will revise paragraph (b) of this section to update the processing fees for Categories 1 through 4 in the schedule each calendar year, based on the previous year's change in the IPD–GDP, as measured second quarter to second quarter. BLM will round these changes to the nearest dollar. BLM will update Category 5 processing fees as specified in the Master Agreement. You also may obtain a copy of the current schedule from any BLM state or field office or by writing: Director, BLM, 1849 C St., NW., Mail Stop 1000LS, Washington, DC 20240. BLM also posts the current schedule on the BLM Homepage on the Internet at *http://www.blm.gov.*

(d) After an initial review of your application, BLM will notify you of the processing category into which your application fits. You must then submit the appropriate payment for that category before BLM begins processing your application. Your signature on a cost recovery Master Agreement constitutes your agreement with the processing category decision. If you disagree with the category that BLM has determined for your application, you may appeal the decision under § 2881.10 of this part. If you paid the processing fee and you appeal a Processing Category 1 through 4 or a Processing Category 6 determination to IBLA, BLM will process your application while the appeal is pending. If IBLA finds in your favor, you will receive a refund or adjustment of your processing fee.

(e) In processing your application, BLM may determine at any time that the application requires preparing an EIS. If this occurs, BLM will send you a decision changing your processing category to Processing Category 6. You may appeal the decision under § 2881.10 of this part.

(f) If you hold an authorization relating to TAPS, BLM will send you a written statement seeking reimbursement of actual costs within 60 calendar days after the close of each quarter. Quarters end on the last day of March, June, September, and December. In processing applications and administering authorizations relating to TAPS, the Department of the Interior will avoid unnecessary employment of personnel and needless expenditure of funds.

§ 2884.13 Who is exempt from paying processing and monitoring fees?

You are exempt from paying processing and monitoring fees if you are a state or local government or an agency of such a government and BLM issues the grant for governmental purposes benefitting the general public. If your principal source of revenue results from charges you levy on customers for services similar to those of a profit-making corporation or business, you are not exempt.

§ 2884.14 When does BLM reevaluate the processing and monitoring fees?

BLM reevaluates the processing and monitoring fees (*see* § 2885.23 of this part) for each category and the categories themselves within 5 years after they go into effect and at 10-year intervals after that. When reevaluating processing and monitoring fees, BLM considers all factors that affect the fees, including, but not limited to, any changes in:

(a) Technology;

(b) The procedures for processing applications and monitoring grants;

(c) Statutes and regulations relating to the right-of-way program; or

(d) The IPD–GDP.

§ 2884.15 What is a Master Agreement (Processing Category 5) and what information must I provide to BLM when I request one?

(a) A Master Agreement (Processing Category 5) is a written agreement covering processing and monitoring fees (*see* § 2885.23 of this part) negotiated between BLM and you that involves multiple BLM grant or TUP approvals for projects within a defined geographic area.

(b) Your request for a Master Agreement must:

(1) Describe the geographic area covered by the Agreement and the scope of the activity you plan;

(2) Include a preliminary work plan. This plan must state what work you

must do and what work BLM must do to process your application. Both parties must periodically update the work plan, as specified in the Agreement, and mutually agree to the changes;

(3) Contain a preliminary cost estimate and a timetable for processing the application and completing the project;

(4) State whether you want the Agreement to apply to future applications in the same geographic area that are not part of the same project(s); and

(5) Contain any other relevant information that BLM needs to process the application.

§ 2884.16 What provisions do Master Agreements contain and what are their limitations?

(a) A Master Agreement:

(1) Specifies that you must comply with all applicable laws and regulations;

(2) Describes the work you will do and the work BLM will do to process the application;

(3) Describes the method of periodic billing, payment, and auditing;

(4) Describes the processes, studies, or evaluations you will pay for;

(5) Explains how BLM will monitor the grant and how BLM will recover monitoring costs;

(6) Contains provisions allowing for periodic review and updating, if required;

(7) Contains specific conditions for terminating the Agreement; and

(8) Contains any other provisions BLM considers necessary.

(b) BLM will not enter into any Agreement that is not in the public interest.

§ 2884.17 How will BLM process my Processing Category 6 application?

(a) For Processing Category 6 applications, you and BLM must enter into a written agreement that describes how BLM will process your application. The final agreement consists of a work plan and a financial plan.

(b) In processing your application, BLM will:

(1) Determine the issues subject to analysis under NEPA;

(2) Prepare a preliminary work plan;

(3) Develop a preliminary financial plan, which estimates the actual costs of processing your application and monitoring your project;

(4) Discuss with you:

(i) The preliminary plans and data;

(ii) The availability of funds and personnel;

(iii) Your options for the timing of processing and monitoring fee payments; and

(iv) Financial information you must submit; and

(5) Complete final scoping and develop final work and financial plans which reflect any work you have agreed to do. BLM will also present you with the final estimate of the costs you must reimburse the United States, including the cost for monitoring the project.

(c) BLM retains the option to prepare any environmental documents related to your application. If BLM allows you to prepare any environmental documents and conduct any studies that BLM needs to process your application, you must do the work following BLM standards. For this purpose, you and BLM may enter into a written agreement. BLM will make the final determinations and conclusions arising from such work.

(d) BLM will periodically, as stated in the agreement, estimate processing costs for a specific work period and notify you of the amount due. You must pay the amount due before BLM will continue working on your application. If your payment exceeds the costs that the United States incurred for the work, BLM will either adjust the next billing to reflect the excess, or refund you the excess under 43 U.S.C. 1734. You may not deduct any amount from a payment without BLM's prior written approval.

§ 2884.18 What if there are two or more competing applications for the same pipeline?

(a) If there are two or more competing applications for the same pipeline and your application is in:

(1) *Processing Categories 1 through 4.* You must reimburse BLM for processing costs as if the other application or applications had not been filed.

(2) *Processing Category 6.* You are responsible for processing costs identified in your application. If BLM cannot readily separate costs, such as costs associated with preparing environmental analyses, you and any competing applicants must pay an equal share or a proportion agreed to in writing among all applicants and BLM. If you agree to share costs that are common to your application and that of a competing applicant, and the competitor does not pay the agreed upon amount, you are liable for the entire amount due. The applicants must pay the entire processing fee in advance. BLM will not process the application until we receive the advance payments.

(b) *Who determines whether competition exists?* BLM determines whether the applications are compatible in a single right-of-way or are competing applications to build the same pipeline.

(c) If BLM determines that competition exists, BLM will describe the procedures for a competitive bid through a bid announcement in a newspaper of general circulation in the area affected by the potential right-of-way and by a notice in the **Federal Register**.

§ 2884.19 Where do I file my application for a grant or TUP?

(a) If BLM has exclusive jurisdiction over the lands involved, file your application with the BLM Field Office having jurisdiction over the lands described in the application.

(b) If another Federal agency has exclusive jurisdiction over the land involved, file your application with that agency and refer to its regulations for its requirements.

(c) If there are no BLM-administered lands involved, but the lands are under the jurisdiction of two or more Federal agencies, you may file your application at the BLM office in the vicinity of the pipeline. BLM will notify you where to direct future communications about the pipeline.

(d) If two or more Federal agencies, including BLM, have jurisdiction over the lands in the application, file it at any BLM office having jurisdiction over a portion of the Federal lands. BLM will notify you where to direct future communications about the pipeline.

§ 2884.20 What are the public notification requirements for my application?

(a) When BLM receives your application, it will publish a notice in the **Federal Register** or a newspaper of general circulation in the vicinity of the lands involved. If BLM determines the pipeline(s) will have only minor environmental impacts, it is not required to publish this notice. The notice will, at a minimum, contain:

(1) A description of the pipeline system; and

(2) A statement of where the application and related documents are available for review.

(b) BLM will send copies of the published notice for review and comment to the:

(1) Governor of each state within which the pipeline system would be located;

(2) Head of each local or tribal government or jurisdiction within which the pipeline system would be located; and

(3) Heads of other Federal agencies whose jurisdiction includes lands within which the pipeline system would be located.

(c) If your application involves a pipeline that is 24 inches or more in

diameter, BLM will also send notice of the application to the appropriate committees of Congress in accordance with 30 U.S.C. 185(w).

(d) BLM may hold public hearings or meetings on your application if we determine there is sufficient interest to warrant the time and expense of such hearings or meetings. BLM will publish a notice of any such hearings or meetings in advance in the **Federal Register** or in a newspaper of general circulation in the vicinity of the lands involved.

§ 2884.21 How will BLM process my application?

(a) BLM will notify you in writing when it receives your application and will identify your processing fee described at § 2884.12 of this subpart.

(b) *Customer service standard.* BLM will process your completed application as follows:

Processing category	Processing time	Conditions
1–4	60 calendar days	If processing your application will take longer than 60 calendar days, BLM will notify you in writing of this fact prior to the 30th calendar day and inform you of when you can expect a final decision on your application.
5	As specified in the Master Agreement	BLM will process applications as specified in the Agreement.
6	Over 60 calendar days	BLM will notify you in writing within the initial 60 day processing period of the estimated processing time.

(c) Before issuing a grant or TUP, BLM will:

(1) Complete a NEPA analysis for the application or approve a NEPA analysis previously completed for the application, as required by 40 CFR parts 1500 through 1508;

(2) Determine whether or not your proposed use complies with applicable Federal and state laws, regulations, and local ordinances;

(3) Consult, as necessary, with other governmental entities;

(4) Hold public meetings, if sufficient public interest exists to warrant their time and expense. BLM will publish a notice in the **Federal Register**, a newspaper of general circulation in the vicinity of the lands involved, or both, announcing in advance any public hearings or meetings; and

(5) Take any other action necessary to fully evaluate and decide whether to approve or deny your application.

§ 2884.22 Can BLM ask me for additional information?

(a) If we ask for additional information we will follow the procedures in § 2804.25(b) of this chapter.

(b) BLM may also ask other Federal agencies for additional information, for terms and conditions or stipulations which the grant or TUP should contain, and for advice as to whether or not to issue the grant or TUP.

§ 2884.23 Under what circumstances may BLM deny my application?

(a) BLM may deny your application if:

(1) The proposed use is inconsistent with the purpose for which BLM or other Federal agencies manage the lands described in your application;

(2) The proposed use would not be in the public interest;

(3) You are not qualified to hold a grant or TUP;

(4) Issuing the grant or TUP would be inconsistent with the Act, other laws, or these or other regulations;

(5) You do not have or cannot demonstrate the technical or financial capability to construct the pipeline or operate facilities within the right-of-way or TUP area; or

(6) You do not adequately comply with a deficiency notice (see § 2804.25(b) of this chapter) or with any BLM requests for additional information needed to process the application.

(b) If BLM denies your application, you may appeal the decision under § 2881.10 of this part.

§ 2884.24 What fees do I owe if BLM denies my application or if I withdraw my application?

If BLM denies your application, or you withdraw it, you owe the processing fee set forth at § 2884.12(b) of this subpart, unless you have a Processing Category 5 or 6 application. Then, the following conditions apply:

(a) If BLM denies your Processing Category 5 or 6 application, you are liable for all actual costs that the United States incurred in processing it. The money you have not paid is due within 30 calendar days after receiving a bill for the amount due; and

(b) You may withdraw your application in writing before BLM issues a grant or TUP. If you do so, you are liable for all actual processing costs the United States has incurred up to the time you withdraw the application and for the actual costs of terminating your application. Any money you have not paid is due within 30 calendar days after receiving a bill for the amount due.

§ 2884.25 What activities may I conduct on BLM lands covered by my application for a grant or TUP while BLM is processing my application?

(a) You may conduct casual use activities on BLM lands covered by the application, as may any other member of the public. BLM does not require a grant or TUP for casual use on BLM lands.

(b) For any activities on BLM lands that are not casual use, you must obtain prior BLM approval. To conduct activities on lands administered by other Federal agencies, you must obtain any prior approval those agencies require.

§ 2884.26 When will BLM issue a grant or TUP when the lands are managed by two or more Federal agencies?

If the application involves lands managed by two or more Federal agencies, BLM will not issue or renew the grant or TUP until the heads of the agencies administering the lands involved have concurred. Where concurrence is not reached, the Secretary of the Interior, after consultation with these agencies, may issue or renew the grant or TUP, but not through lands within a Federal reservation where doing so would be inconsistent with the purposes of the reservation.

§ 2884.27 What additional requirement is necessary for grants or TUPs for pipelines 24 or more inches in diameter?

If an application is for a grant or TUP for a pipeline 24 inches or more in diameter, BLM will not issue or renew the grant or TUP until after we notify the appropriate committees of Congress in accordance with 30 U.S.C. 185(w).

Subpart 2885—Terms and Conditions of MLA Grants and TUPs

§ 2885.10 When is a grant or TUP effective?

A grant or TUP is effective after both you and BLM sign it. You must accept its terms and conditions in writing and pay any necessary rent and monitoring fees as set out in §§ 2885.19 and 2885.23

of this subpart. Your written acceptance constitutes an agreement between you and the United States that your right to use the Federal lands, as specified in the grant or TUP, is subject to the terms and conditions of the grant or TUP and applicable laws and regulations.

§ 2885.11 What terms and conditions must I comply with?

(a) *Duration.* All grants with a term of one year or longer will terminate on December 31 of the final year of the grant. The term of a grant may not exceed 30 years. The term of a TUP may not exceed 3 years. BLM will consider the following factors in establishing a reasonable term:

(1) The cost of the pipeline and related facilities you plan to construct, operate, maintain, or terminate;

(2) The pipeline's or related facility's useful life;

(3) The public purpose served; and

(4) Any potentially conflicting land uses; and

(b) *Terms and conditions of use.* BLM may modify your proposed use or change the route or location of the facilities in your application. By accepting a grant or TUP, you agree to use the lands described in the grant or TUP for the purposes set forth in the grant or TUP. You also agree to comply with, and be bound by, the following terms and conditions. During construction, operation, maintenance, and termination of the project you must:

(1) To the extent practicable, comply with all existing and subsequently enacted, issued, or amended Federal laws and regulations, and state laws and regulations applicable to the authorized use;

(2) Rebuild and repair roads, fences, and established trails destroyed or damaged by constructing, operating, maintaining, or terminating the project;

(3) Build and maintain suitable crossings for existing roads and significant trails that intersect the project;

(4) Do everything reasonable to prevent and suppress fires on or in the immediate vicinity of the right-of-way or TUP area;

(5) Not discriminate against any employee or applicant for employment during any phase of the project because of race, creed, color, sex, or national origin. You must also require subcontractors to not discriminate;

(6) Pay the rent and monitoring fees described in §§ 2885.19 and 2885.23 of this subpart;

(7) If BLM requires, obtain and/or certify that you have obtained a surety bond or other acceptable security to cover any losses, damages, or injury to human health, the environment, and property incurred in connection with your use and occupancy of the right-of-way or TUP area, including terminating the grant or TUP, and to secure all obligations imposed by the grant or TUP and applicable laws and regulations. Your bond must cover liability for damages or injuries resulting from releases or discharges of hazardous materials. BLM may require a bond, an increase or decrease in the value of an existing bond, or other acceptable security at any time during the term of the grant or TUP. This bond is in addition to any individual lease, statewide, or nationwide oil and gas bonds you may have;

(8) Assume full liability if third parties are injured or damages occur to property on or near the right-of-way or TUP area (*see* § 2886.13 of this part);

(9) Comply with project-specific terms, conditions, and stipulations, including requirements to:

(i) Restore, revegetate, and curtail erosion or any other rehabilitation measure BLM determines is necessary;

(ii) Ensure that activities in connection with the grant or TUP comply with air and water quality standards or related facility siting standards contained in applicable Federal or state law or regulations;

(iii) Control or prevent damage to scenic, aesthetic, cultural, and environmental values, including fish and wildlife habitat, and to public and private property and public health and safety;

(iv) Protect the interests of individuals living in the general area who rely on the area for subsistence uses as that term is used in Title VIII of ANILCA (16 U.S.C. 3111 *et seq.*); and

(v) Ensure that you construct, operate, maintain, and terminate the facilities on the lands in the right-of-way or TUP area in a manner consistent with the grant or TUP;

(10) Immediately notify all Federal, state, tribal, and local agencies of any release or discharge of hazardous material reportable to such entity under applicable law. You must also notify BLM at the same time, and send BLM a copy of any written notification you prepared;

(11) Not dispose of or store hazardous material on your right-of-way or TUP area, except as provided by the terms, conditions, and stipulation of your grant or TUP;

(12) Certify that your compliance with all requirements of the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. 11001 *et seq.*, when you receive, assign, renew, amend, or terminate your grant or TUP;

(13) Control and remove any release or discharge of hazardous material on or near the right-of-way or TUP area arising in connection with your use and occupancy of the right-of-way or TUP area, whether or not the release or discharge is authorized under the grant or TUP. You must also remediate and restore lands and resources affected by the release or discharge to BLM's satisfaction and to the satisfaction of any other Federal, state, tribal, or local agency having jurisdiction over the land, resource, or hazardous material;

(14) Comply with all liability and indemnification provisions and stipulations in the grant or TUP;

(15) As BLM directs, provide diagrams or maps showing the location of any constructed facility;

(16) Construct, operate, and maintain the pipeline as a common carrier. This means that the pipeline owners and operators must accept, convey, transport, or purchase without discrimination all oil or gas delivered to the pipeline without regard to where the oil and gas was produced (*i.e.*, whether on Federal or non-federal lands). Where natural gas not subject to state regulatory or conservation laws governing its purchase by pipeline companies is offered for sale, each pipeline company must purchase, without discrimination, any such natural gas produced in the vicinity of the pipeline. Common carrier provisions of this paragraph do not apply to natural gas pipelines operated by a:

(i) Person subject to regulation under the Natural Gas Act (15 U.S.C. 717 *et seq.*); or

(ii) Public utility subject to regulation by state or municipal agencies with the authority to set rates and charges for the sale of natural gas to consumers within the state or municipality.

(17) Within 30 calendar days after BLM requests it, file rate schedules and tariffs for oil and gas, or derivative products, transported by the pipeline as a common carrier with the agency BLM prescribes, and provide BLM proof that you made the required filing;

(18) With certain exceptions (listed in the statute), not export domestically produced crude oil by pipeline without Presidential approval (*see* 30 U.S.C. 185(u) and (s) and 50 U.S.C. App. 2401);

(19) Not exceed the right-of-way width that is specified in the grant without BLM's prior written authorization. If you need a right-of-way wider than 50 feet plus the ground occupied by the pipeline and related facilities, *see* § 2885.14 of this subpart;

(20) Not use the right-of-way or TUP area for any use other than that authorized by the grant or TUP. If you

require other pipelines, looping lines, or other improvements not authorized by the grant or TUP, you must first secure BLM's written authorization;

(21) Not use or construct on the land in the right-of-way or TUP area until:

(i) BLM approves your detailed plan for construction, operation, and termination of the pipeline, including provisions for rehabilitation of the right-of-way or TUP area and environmental protection; and

(ii) You receive a Notice to Proceed for all or any part of the right-of-way or TUP area. In certain situations BLM may waive this requirement in writing; and

(22) Comply with all other stipulations that BLM may require.

§ 2885.12 What rights does a grant or TUP convey?

The grant or TUP conveys to you only those rights which it expressly contains. BLM issues it subject to the valid existing rights of others, including the United States. Rights which the grant or TUP conveys to you include the right to:

(a) Use the described lands to construct, operate, maintain, and terminate facilities within the right-of-way or TUP area for authorized purposes under the terms and conditions of the grant or TUP;

(b) Allow others to use the land as your agent in the exercise of the rights that the grant or TUP specifies;

(c) Do minor trimming, pruning, and removing of vegetation to maintain the right-of-way or TUP area or facility;

(d) Use common varieties of stone and soil which are necessarily removed during construction of the pipeline, without additional BLM authorization or payment, in constructing the pipeline within the authorized right-of-way or TUP area; and

(e) Assign the grant or TUP to another, provided that you obtain BLM's prior written approval.

§ 2885.13 What rights does the United States retain?

The United States retains and may exercise any rights the grant or TUP does not expressly convey to you. These include the United States' right to:

(a) Access the lands covered by the grant or TUP at any time and enter any facility you construct on the right-of-way or TUP area. BLM will give you reasonable notice before it enters any facility on the right-of-way or TUP area;

(b) Require common use of your right-of-way or TUP area, including subsurface and air space, and authorize use of the right-of-way or TUP area for compatible uses. You may not charge for the use of the lands made subject to such additional right-of-way grants;

(c) Retain ownership of the resources of the land covered by the grant or TUP, including timber and vegetative or mineral materials and any other living or non-living resources. You have no right to use these resources, except as noted in § 2885.12 of this subpart;

(d) Determine whether or not your grant is renewable; and

(e) Change the terms and conditions of your grant or TUP as a result of changes in legislation, regulation, or as otherwise necessary to protect public health or safety or the environment.

§ 2885.14 What happens if I need a right-of-way wider than 50 feet plus the ground occupied by the pipeline and related facilities?

(a) You may apply to BLM at any time for a right-of-way wider than 50 feet plus the ground occupied by the pipeline and related facilities. In your application you must show that the wider right-of-way is necessary to:

(1) Properly operate and maintain the pipeline after you have constructed it;

(2) Protect the environment; or

(3) Provide for public safety.

(b) BLM will notify you in writing of its finding(s) and its decision on your application for a wider right-of-way. If the decision is adverse to you, you may appeal it under § 2881.10 of this part.

§ 2885.15 How will BLM charge me rent?

(a) BLM will charge rent beginning on the first day of the month following the effective date of the grant or TUP through the last day of the month when the grant or TUP terminates. *Example:* If a grant or TUP becomes effective on January 10 and terminates on September 16, the rental period would be February 1 through September 30, or 8 months.

(b) There are no reductions or waivers of rent for grants or TUPs.

(c) BLM will set or adjust the annual billing periods to coincide with the calendar year by prorating the rent based on 12 months.

(d) If you disagree with the rent that BLM charges, you may appeal the decision under § 2881.10 of this part.

§ 2885.16 When do I pay rent?

(a) You must pay rent for the initial rental period before BLM issues you a grant or TUP.

(b) You make all other rental payments according to the payment plan described in § 2885.21 of this subpart.

(c) After the first rental payment, all rent is due on January 1 of the first year of each succeeding rental period for the term of your grant.

§ 2885.17 What happens if I pay the rent late?

(a) If BLM does not receive the rent payment within 15 calendar days after the rent was due under § 2885.16 of this subpart, BLM will charge you a late payment fee of $25.00 or 10 percent of the rent you owe, whichever is greater, not to exceed $500 per authorization.

(b) If BLM does not receive your rent payment and late payment fee within 30 calendar days after rent was due, BLM may collect other administrative fees provided by statute.

(c) If BLM does not receive your rent, late payment fee, and any administrative fees within 90 calendar days after the rent was due, BLM may terminate your grant under § 2886.17 of this part and you may not remove any facility or equipment without BLM's written permission. The rent due, late payment fees, and any administrative fees remain a debt that you owe to the United States.

(d) If you pay the rent, late payment fees, and any administrative fees after BLM has terminated the grant, BLM does not automatically reinstate the grant. You must file a new application with BLM. BLM will consider the history of your failure to timely pay rent in deciding whether to issue you a new grant.

(e) You may appeal any adverse decision BLM takes against your grant or TUP under § 2881.10 of this part.

§ 2885.18 When must I make estimated rent payments to BLM?

To expedite the processing of your application for a grant or TUP, BLM may estimate rent payments and require you to pay that amount when it issues the grant or TUP. The rent amount may change once BLM determines the actual rent of the grant or TUP. BLM will credit you any rental overpayment, and you are liable for any underpayment. This section does not apply to rent payments made under the rent schedule in this part.

§ 2885.19 What is the rent for a linear right-of-way?

(a) Except as noted in paragraph (b) of this section, BLM will use the Per Acre Rent Schedule at § 2806.20(b) of this chapter to calculate the rent. The Per Acre Rent Schedule is updated annually in accordance with § 2806.21 of this chapter.

(b) BLM may determine your rent using the methods described in § 2806.50 of this chapter, rather than by using the rent schedule cited in paragraph (a) of this section if the rent determined by comparable commercial practices or an appraisal would be 10 or more times the rent from the schedule.

(c) Once you are on a rent schedule, BLM will not remove you from it, unless:

(1) The BLM State Director decides to remove you from the schedule under paragraph (b) of this section; or

(2) You file an application to amend your grant.

(d) You may obtain the current linear right-of-way rent schedule from any BLM state or field office or by writing: Director, BLM, 1849 C St., NW., Mail Stop 1000 LS, Washington, DC 20240. BLM also posts the current rent schedule on the BLM Homepage on the Internet at *http://www.blm.gov*.

§ 2885.20 How will BLM calculate my rent for linear rights-of-way the schedule covers?

(a) BLM calculates your rent by multiplying the rent per acre for the appropriate category of use and county zone price from the current schedule by the number of acres in the right-of-way or TUP area that fall in those categories and multiplying the result by the number of years in the rental period.

(b) If BLM has not previously used the rent schedule to calculate your rent, we may do so after giving you reasonable written notice.

§ 2885.21 How must I make rent payments for my grant or TUP?

(a) For TUPs you must make a one-time nonrefundable payment for the term of the TUP. For grants, you must make either nonrefundable annual payments or nonrefundable payments for more than 1 year, as follows:

(1) *One-time payments.* You may pay in advance the required rent amount for the entire term of the grant.

(2) If you choose not to make a one-time payment, you must pay according to one of the following methods, as applicable:

(i) *Payments by individuals.* If your annual rent is $100 or less, you must pay at 10-year intervals not to exceed the term of the grant. If your annual rent is greater than $100, you may pay annually or at multi-year intervals that you may choose.

(ii) *Payments by all others.* You must pay rent in advance at ten-year intervals not to exceed the term of the grant.

(b) BLM considers the first partial calendar year in the rent payment period to be the first year of the rental payment term. BLM prorates the first year rental amount based on the number of months left in the calendar year after the effective date of the grant.

§ 2885.22 How will BLM calculate rent for communication uses ancillary to a linear grant, TUP, or other use authorization?

When a communication use is ancillary to, and authorized by BLM under, a grant or TUP for a linear use, or some other type of authorization (*e.g.*, a mineral lease or sundry notice), BLM will determine the rent using the linear rent schedule (*see* § 2885.19 of this subpart) or rent scheme associated with the other authorization, and not the communication use rent schedule (*see* § 2806.30 of this chapter).

§ 2885.23 If I hold a grant or TUP, what monitoring fees must I pay?

(a) *Monitoring fees.* Subject to § 2886.11 of this part, you must pay a fee to BLM for any costs the Federal Government incurs in monitoring the construction, operation, maintenance, and termination of the pipeline and protection and rehabilitation of the affected Federal lands your grant or TUP covers. BLM categorizes the monitoring fees based on the estimated number of work hours necessary to monitor your grant or TUP. Category 1 through 4 monitoring fees are one-time fees and are not refundable. The work hours and fees for 2005 are as follows:

2005 MONITORING FEE SCHEDULE

Monitoring category	Federal work hours involved	Monitoring fee as of June 21, 2005. To be adjusted annually for changes in the IPD–GDP. See paragraph (b) of this section for update information
(1) Applications for new grants and TUPs, assignments, renewals, and amendments to existing grants and TUPs.	Estimated Federal work hours are > 1 ≤ 8.	$97.
(2) Applications for new grants and TUPs, assignments, renewals, and amendments to existing grants and TUPs.	Estimated Federal work hours are > 8 ≤ 24.	$343.
(3) Applications for new grants and TUPs, assignments, renewals, and amendments to existing grants and TUPs.	Estimated Federal work hours are > 24 ≤ 36.	$644.
(4) Applications for new grants and TUPs, assignments, renewals, and amendments to existing grants and TUPS.	Estimated Federal work hours are > 36 ≤ 50.	$923.
(5) Master Agreements	Varies	As specified in the Agreement.
(6) Applications for new grants and TUPs, assignments, renewals, and amendments to existing grants and TUPs.	Estimated Federal work hours > 50.	Actual costs.

(b) *Updating the schedule.* BLM will revise paragraph (a) of this section annually to update Category 1 through 4 monitoring fees in the manner described at § 2884.12(c) of this part. BLM will update Category 5 monitoring fees as specified in the Master Agreement. The monitoring cost schedule is available from any BLM state or field office or by writing: Director, Bureau of Land Management, 1849 C St., NW., Mail Stop 1000LS, Washington, DC 20240. BLM also posts the current schedule on the BLM Homepage on the Internet at *http://www.blm.gov*.

§ 2885.24 When do I pay monitoring fees?

(a) *Monitoring Categories 1 through 4.* Unless BLM otherwise directs, you must pay monitoring fees when you submit to BLM your written acceptance of the terms and conditions of the grant or TUP.

(b) *Monitoring Category 5.* You must pay the monitoring fees as specified in the Master Agreement. BLM will not issue your grant or TUP until it receives the required payment.

(c) *Monitoring Category 6.* BLM may periodically estimate the costs of monitoring your use of the grant or TUP. BLM will include this fee in the costs associated with processing fees described at § 2884.12 of this part. If BLM has underestimated the monitoring costs, we will notify you of the shortfall. If your payments exceed the actual costs that Federal employees incurred for monitoring, BLM will either reimburse you the difference, or adjust the next billing to reflect the overpayment. Unless BLM gives you written authorization, you may not offset or deduct the overpayment from your payments.

(d) *Monitoring Categories 1–4 and 6.* If you disagree with the category BLM has determined for your application,

you may appeal the decision under § 2881.10 of this part.

Subpart 2886—Operations on MLA Grants and TUPs

§ 2886.10 When can I start activities under my grant or TUP?

(a) When you can start depends on the terms of your grant or TUP. You can start activities when you receive the grant or TUP you and BLM signed, unless the grant or TUP includes a requirement for BLM to provide a written Notice to Proceed. If your grant or TUP contains a Notice to Proceed requirement, you may not initiate construction, operation, maintenance, or termination until BLM issues you a Notice to Proceed.

(b) Before you begin operating your pipeline or related facility authorized by a grant or TUP, you must certify in writing to BLM that the pipeline system:

(1) Has been constructed and tested according to the terms of the grant or TUP; and

(2) Is in compliance with all required plans, specifications, and Federal and state laws and regulations.

§ 2886.11 Who regulates activities within my right-of-way or TUP area?

After BLM has issued the grant or TUP, the head of the agency having administrative jurisdiction over the Federal lands involved will regulate your grant or TUP activities in conformance with the Act, appropriate regulations, and the terms and conditions of the grant or TUP. BLM and the other agency head may reach another agreement under 30 U.S.C. 185(c).

§ 2886.12 When must I contact BLM during operations?

You must contact BLM:

(a) At the times specified in your grant or TUP;

(b) When your use requires a substantial deviation from the grant or TUP. You must obtain BLM's approval before you begin any activity that is a substantial deviation;

(c) When there is a change affecting your application, grant, or TUP including, but not limited to changes in:

(1) Mailing address;

(2) Partners;

(3) Financial conditions; or

(4) Business or corporate status; and

(d) When BLM requests it, such as to update information or confirm that information you submitted before is accurate.

§ 2886.13 If I hold a grant or TUP, for what am I liable?

(a) If you hold a grant or TUP, you are liable to the United States and to third parties for any damage or injury they incur in connection with your use and occupancy of the right-of-way or TUP area.

(b) You are strictly liable for any activity or facility associated with your right-of-way or TUP area which BLM determines presents a foreseeable hazard or risk of damage or injury to the United States. BLM will specify in the grant or TUP any activity or facility posing such hazard or risk, and the financial limitations on damages commensurate with such hazard or risk.

(1) BLM will not impose strict liability for damage or injury resulting primarily from an act of war or the negligence of the United States, except as otherwise provided by law.

(2) As used in this section, strict liability extends to costs incurred by the Federal government to control or abate conditions, such as fire or oil spills, which threaten life, property, or the environment, even if the threat occurs to areas that are not under Federal jurisdiction. This liability is separate and apart from liability under other provisions of law.

(3) You are strictly liable to the United States for damage or injury up to $2 million for any one incident. BLM will update this amount annually to adjust for changes in the Consumer Price Index for All Urban Consumers, U.S. City Average (CPI–U) as of July of each year (difference in CPI–U from July of one year to July of the following year), rounded to the nearest $1,000. This financial limitation does not apply to the release or discharge of hazardous substances on or near the grant or TUP area, or where liability is otherwise not subject to this financial limitation under applicable law.

(4) BLM will determine your liability for any amount in excess of the $2 million strict liability limitation (as adjusted) through the ordinary rules of negligence.

(5) The rules of subrogation apply in cases where a third party caused the damage or injury.

(c) If you cannot satisfy claims for injury or damage, all owners of any interests in, and all affiliates or subsidiaries of any holder of, a grant or TUP, except for corporate stockholders, are jointly and severally liable to the United States.

(d) If BLM issues a grant or TUP to more than one holder, each is jointly and severally liable.

(e) By accepting the grant or TUP, you agree to fully indemnify or hold the United States harmless for liability, damage, or claims arising in connection with your use and occupancy of the right-of-way or TUP area.

(f) We address liability of state, tribal, and local governments in § 2886.14 of this subpart.

(g) The provisions of this section do not limit or exclude other remedies.

§ 2886.14 As grant or TUP holders, what liabilities do state, tribal, and local governments have?

(a) If you are a state, tribal, or local government or its agency or instrumentality, you are liable to the fullest extent law allows at the time that BLM issues your grant or TUP. If you do not have the legal power to assume full liability, you must repair damages or make restitution to the fullest extent of your powers.

(b) BLM may require you to provide a bond, insurance, or other acceptable security to:

(1) Protect the liability exposure of the United States to claims by third parties arising out of your use and occupancy of the right-of-way or TUP area;

(2) Cover any losses, damages, or injury to human health, the environment, and property incurred in connection with your use and occupancy of the right-of-way or TUP area; and

(3) Cover any damages or injuries resulting from the release or discharge of hazardous materials incurred in connection with your use and occupancy of the right-of-way or TUP area.

(c) Based on your record of compliance and changes in risk and conditions, BLM may require you to increase or decrease the amount of your bond, insurance, or security.

(d) The provisions of this section do not limit or exclude other remedies.

§ 2886.15 How is grant or TUP administration affected if the BLM land my grant or TUP encumbers is transferred to another Federal agency or out of Federal ownership?

(a) If there is a proposal to transfer the BLM land your grant or TUP encumbers to another Federal agency, BLM may, after reasonable notice to you, transfer administration of your grant or TUP, for the lands BLM formerly administered, to another Federal agency, unless doing so would diminish your rights. If BLM determines your rights would be diminished by such a transfer, BLM can still transfer the land, but retain administration of your grant or TUP under existing terms and conditions.

(b) If there is a proposal to transfer the BLM land your grant or TUP encumbers out of Federal ownership, BLM may, after reasonable notice to you and in conformance with existing policies and procedures:

(1) Transfer the land subject to your grant or TUP. In this case, administration of your grant or TUP, for the lands BLM formerly administered, is transferred to the new owner of the land;

(2) Transfer the land, but BLM retains administration of your grant or TUP; or

(3) Reserve to the United States the land your grant or TUP encumbers, and BLM retains administration of your grant or TUP.

(c) BLM or, if BLM no longer administers the land, the new land owner may negotiate new grant or TUP terms and conditions with you.

§ 2886.16 Under what conditions may BLM order an immediate temporary suspension of my activities?

(a) Subject to § 2886.11, BLM can order an immediate temporary suspension of grant or TUP activities within the right-of-way or TUP area to protect public health or safety or the environment. BLM can require you to stop your activities before holding an administrative proceeding on the matter and may order immediate remedial action.

(b) BLM may issue the immediate temporary suspension order orally or in writing to you, your contractor or subcontractor, or to any representative, agent, or employee representing you or conducting the activity. BLM may take this action whether or not any action is being or has been taken by other Federal or state agencies. When you receive the order, you must stop the activity immediately. BLM will, as soon as practical, confirm an oral order by sending or hand delivering to you or your agent at your address a written suspension order explaining the reasons for it.

(c) You may file a written request for permission to resume activities at any time after BLM issues the order. In the request, give the facts supporting your request and the reasons you believe that BLM should lift the order. BLM must grant or deny your request within 5 business days after receiving it. If BLM does not respond within 5 business days, BLM has denied your request. You may appeal the denial under § 2881.10 of this part.

(d) The immediate temporary suspension order is effective until you receive BLM's written notice to proceed with your activities.

§ 2886.17 Under what conditions may BLM suspend or terminate my grant or TUP?

(a) Subject to § 2886.11, BLM may suspend or terminate your grant if you do not comply with applicable laws and regulations or any terms, conditions, or stipulations of the grant, or if you abandon the right-of-way.

(b) Subject to § 2886.11, BLM may suspend or terminate your TUP if you do not comply with applicable laws and regulations or any terms, conditions, or stipulations of the TUP, or if you abandon the TUP area.

(c) A grant or TUP also terminates when:

(1) The grant or TUP contains a term or condition that has been met that requires the grant or TUP to terminate;

(2) BLM consents in writing to your request to terminate the grant or TUP; or

(3) It is required by law to terminate.

(d) Your failure to use your right-of-way for its authorized purpose for any continuous 2-year period creates a presumption of abandonment. BLM will notify you in writing of this presumption. You may rebut the presumption of abandonment by proving that you used the right-of-way or that your failure to use the right-of-way was due to circumstances beyond your control, such as acts of God, war, or casualties not attributable to you.

(e) You may appeal a decision under this section under § 2881.10 of this part.

§ 2886.18 How will I know that BLM intends to suspend or terminate my grant or TUP?

(a) *Grants.* When BLM determines that it will suspend or terminate your grant under § 2886.17 of this subpart, it will send you a written notice of this determination. The determination will provide you a reasonable opportunity to correct the violation, start your use, or resume your use of the right-of-way, as appropriate. In the notice BLM will state the date by which you must correct the violation or start or resume use of the right-of-way.

(1) If you have not corrected the violation or started or resumed use of the right-of-way by the date specified in the notice, BLM will refer the matter to the Office of Hearings and Appeals. An ALJ in the Office of Hearings and Appeals will provide an appropriate administrative proceeding under 5 U.S.C. 554 and determine whether grounds for suspension or termination exist. No administrative proceeding is required where the grant by its terms provides that it terminates on the occurrence of a fixed or agreed upon condition, event, or time.

(2) BLM will suspend or terminate the grant if the ALJ determines that grounds exist for suspension or termination and the suspension or termination is justified.

(b) *TUPs.* When BLM determines that it will suspend or terminate your TUP, it will send you a written notice and provide you a reasonable opportunity to correct the violation or start or resume use of the TUP area. The notice will also provide you information on how to file a written request for reconsideration.

(1) You may file a written request with the BLM office that issued the notice, asking for reconsideration of the determination to suspend or terminate your TUP. BLM must receive this request within 10 business days after you receive the notice.

(2) BLM will provide you with a written decision within 20 business days after receiving your request for reconsideration. The decision will include a finding of fact made by the next higher level of authority than that who made the suspension or termination determination. The decision will also inform you whether BLM suspended or terminated your TUP or cancelled the notice made under paragraph (b) of this section.

(3) If the decision is adverse to you, you may appeal it under § 2881.10 of this part.

§ 2886.19 When my grant or TUP terminates, what happens to any facilities on it?

(a) Subject to § 2886.11, after your grant or TUP terminates, you must remove any facilities within the right-of-way or TUP area within a reasonable time, as determined by BLM, unless BLM instructs you otherwise in writing, or termination is due to non-payment of rent (*see* § 2885.17(c) of this part).

(b) After removing the facilities, you must remediate and restore the right-of-way or TUP area to a condition satisfactory to BLM, including the removal and clean-up of any hazardous materials.

(c) If you do not remove all facilities within a reasonable period, as determined by BLM, BLM may declare them to be the property of the United States. However, you are still liable for the costs of removing them and for remediating and restoring the right-of-way or TUP area.

Subpart 2887—Amending, Assigning, or Renewing MLA Grants and TUPs

§ 2887.10 When must I amend my application, seek an amendment of my grant or TUP, or obtain a new grant or TUP?

(a) You must amend your application or seek an amendment of your grant or TUP when there is a proposed substantial deviation in location or use.

(b) The requirements to amend an application or a grant or TUP are the same as those for a new application, including paying processing and monitoring fees and rent according to

§§ 2884.12, 2885.23, 2885.19, and 2886.11 of this part.

(c) Any activity not authorized by your grant or TUP may subject you to prosecution under applicable law and to trespass charges under subpart 2888 of this part.

(d) Notwithstanding paragraph (a) of this section, if you hold a pipeline grant issued before November 16, 1973, and there is a proposed substantial deviation in location or use of the right-of-way, you must apply for a new grant.

(e) BLM may ratify or confirm a grant that was issued before November 16, 1973, if we can modify the grant to comply with the Act and these regulations. BLM and you must jointly agree to any modification of a grant made under this paragraph.

§ 2887.11 May I assign my grant or TUP?

(a) With BLM's approval, you may assign, in whole or in part, any right or interest in a grant or TUP.

(b) In order to assign a grant or TUP, the proposed assignee, subject to § 2886.11 of this part, must file an application and satisfy the same procedures and standards as for a new grant or TUP, including paying processing fees (*see* § 2884.12 of this part).

(c) The assignment application must also include:

(1) Documentation that the assignor agrees to the assignment; and

(2) A signed statement that the proposed assignee agrees to comply with and to be bound by the terms and conditions of the grant or TUP that is being assigned, and all applicable laws and regulations.

(d) BLM will not recognize an assignment until we approve it in writing. BLM will approve the assignment if doing so is in the public interest. BLM may modify the grant or TUP or add bonding and other requirements, including terms and conditions, to the grant or TUP when approving the assignment. If BLM approves the assignment, the benefits and liabilities of the grant or TUP apply to the new grant or TUP holder.

(e) The processing time and conditions described at § 2884.21 of this part apply to assignment applications.

§ 2887.12 How do I renew my grant?

(a) You must apply to BLM to renew the grant at least 120 calendar days before your grant expires. BLM will renew the grant if the pipeline is being operated and maintained in accordance with the grant, these regulations, and the Act. If your grant has expired or terminated, you must apply for a new grant under subpart 2884 of this part.

(b) BLM may modify the terms and conditions of the grant at the time of renewal, and you must pay the processing fees (*see* § 2884.12 of this part) in advance.

(c) The time and conditions for processing applications for rights-of-way, as described at § 2884.21 of this part, apply to applications for renewals.

Subpart 2888—Trespass

§ 2888.10 What is trespass?

(a) Trespass is using, occupying, or developing the public lands or their resources without a required authorization or in a way that is beyond the scope and terms and conditions of your authorization. Trespass is a prohibited act.

(b) Trespass includes acts or omissions causing unnecessary or undue degradation to the public lands or their resources. In determining whether such degradation is occurring, BLM may consider the effects of the activity on resources and land uses outside the area of the activity.

(c) BLM will administer trespass actions for grants and TUPs as set forth in §§ 2808.10(c), and 2808.11 of this chapter, except that the rental exemption provisions of part 2800 do not apply to grants issued under this part.

(d) Other Federal agencies will address trespass on non-BLM lands under their respective laws and regulations.

§ 2888.11 May I receive a grant if I am or have been in trespass?

Until you satisfy your liability for a trespass, BLM will not process any applications you have pending for any activity on BLM-administered lands. A history of trespass will not necessarily disqualify you from receiving a grant. In order to correct a trespass, you must apply under the procedures described at subpart 2884 of this part. BLM will process your application as if it were a new use. Prior unauthorized use does not create a preference for receiving a grant.

PART 2920—LEASES, PERMITS, AND EASEMENTS

■ 5. The authority citation for part 2920 continues to read as follows:

Authority: 43 U.S.C. 1740.

■ 6. Amend § 2920.6 by revising the second sentence of paragraph (b) and the third sentence of paragraph (c) as follows:

§ 2920.6 Reimbursement of costs.

* * * * *

(b) * * * The reimbursement of costs shall be in accordance with the provisions of §§ 2804.14 and 2805.16 of this chapter, except that any permit whose total rental is less than $250 shall be exempt from reimbursement of costs requirements.

(c) * * * This payment shall be determined in accordance with the provisions of §§ 2804.14 and 2805.16 of this chapter.

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PART 9230—TRESPASS

■ 7. Revise the authority citation for part 9230 to read as follows:

Authority: R.S. 2478 and 43 U.S.C. 1740.

■ 8. Amend § 9239.7–1 by revising the introductory paragraph to read as follows:

§ 9239.7–1 Public lands.

The filing of an application under part 2800, 2810, or 2880, of this chapter does not authorize the applicant to use or occupy the public lands for right-of-way purposes, except as provided by the definition of ''Casual use'' in § 2801.5(b) and by §§ 2804.29 and 2884.25 of this chapter, until written authorization has been issued by the authorized officer. Any unauthorized occupancy or use of public lands or improvements for right-of-way purposes constitutes a trespass against the United States for which the trespasser is liable for costs, damages, and penalties as provided in subpart 2808 and §§ 2812.1–3 and 2888.10 of this chapter. No new permit, license, authorization, or grant of any kind shall be issued to a trespasser until:

* * * * *

PART 9260—LAW ENFORCEMENT—CRIMINAL

■ 9. Revise the authority citation for part 9260 to read as follows:

Authority: 16 U.S.C. 4601–6a, 16 U.S.C. 670h, 16 U.S.C. 1246(i), 16 U.S.C. 1336, 43 U.S.C. 315a, 43 U.S.C. 1733(a), 43 U.S.C. 1740, and Executive Order 11644, 37 FR 2877, 3 CFR, 1971–1975 Comp., p. 666.

■ 10. Revise § 9262.1 to read as follows:

9262.1 Penalties for unauthorized use, occupancy, or development of public lands.

Under section 303(a) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1733(a)) any person who knowingly and willfully violates the provisions of §§ 2808.10(a), 2812.1–3, 2888.10, or 2920.1–2(a) of this chapter, by using public lands without the requisite authorization, may be tried before a United States magistrate and fined no more than $1,000 or

imprisoned for no more than 12 months, or both.

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