Right-of-Ways over Tribal Lands
18th Annual Northwest Tribal Transportation Symposium

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Right of Way vs. Easement

- **What is an easement?**
  - An easement is a legal interest in real property authorizing a person to use the land or property of another for a particular purpose.
  - Landowners are paid a fair price for the easement and can continue to use the land for most other purposes, although some restrictions may be included in the agreement.

- **What is a right-of-way?**
  - A right-of-way is the actual land area acquired for a specific purpose, such as a transmission line or roadway.
  - Real property, or interests therein, acquired, dedicated or reserved for the construction, operation and maintenance of a roadway or other facilities. Right of way may be an interest in fee, easement or lease, or other legally binding conveyance.

- **What is the difference between an easement and a right-of-way?**
  - Generally, an easement is a legal interest in real property and a right-of-way is the physical land area which is dedicated to a particular use or where facilities are located.
What is a Right of Way?

- Generally, a right of way occurs when a “landowner” gives a “user” the right to use or to pass over the owner’s land without transferring ownership of the land to the user.
- A landowner can be an individual, tribe or group of individuals who share interest in an allotment or parcel of land.

Why is a Right of Way granted over Tribal Lands?

- Normally, a right of way is sought for a public purpose by tribal, local, state or federal governments for roads, railroads, utilities or other public access needs.

- For example, utility companies seek rights of way for placement of equipment, such as telephone poles and power lines, to provide services to their customers.
The impact of a ROW over tribal lands has broad impacts. Tribal civil and criminal jurisdiction over people, places and activities on tribal lands are directly tied to the characterization of tribal lands as “Indian Country” or as “non-Indian owned fee lands”.

Impacts of ROWs over Tribal Lands

- Broad Impacts of ROW over Tribal Lands
  - Individual Tribal Land Owner's Use
  - Tribal Government Civil and Criminal Jurisdiction
  - Tribal Trust Land

Diagram: Venn diagram showing the overlap of Individual Tribal Land Owner's Use, Tribal Government Civil and Criminal Jurisdiction, and Tribal Trust Land.
Who has possessed authority to grant a Right of Way over Tribal Lands?

- Individual Acts of Congress
- Bureau of Indian Affairs
- Bureau of Land Management
- Bureau of Reclamation
- National Park Service
- U.S. Fish and Wildlife
- U.S. Forest Service
The General Allotment Act of 1887 initiated a series of rights of way statutes. As tribal lands were declared surplus and open to homesteading, these “excess” lands were acquired by settlers.

As settlers began to develop these prime lands, they needed utilities. Exercising its new-found plenary powers, Congress enacted a series of laws in the early 20th Century that delegated authority to the Secretary of the Interior to grant rights of way without landowner consent.
Initial Easements over Tribal Lands

- Railroad rights-of-way were the first easements to cross Indian lands.
- Starting in 1899, railroad companies were granted easements—for “right of way for rail lines”—across Indian lands.
- ROWs vary according to the statutory authority used to create them.
Historical Overview of ROWs over Tribal Lands

- Prior to 1899, most rights of way over Indian lands were first obtained through agreements made with tribes or individual landowners, and then afterwards ratified by Congress.
March 11, 1904; 25 USC § 321

- Congress authorizes the Secretary of Interior to grant a right-of-way in the nature of an easement for the construction . . . of pipelines for the conveyance of oil and gas through any Indian reservation or through any lands which have been allotted.

- Silent with respect to tribal consent on creation but may have required consent for renewals.
March 4, 1911; 43 USC § 961

- Congress gave the “head of the department having jurisdiction over the lands” authority to grant ROWs for electric transmission lines across Indian reservations.
1928 Regulations

- Subsequently, in 1928, the Secretary of the Interior released comprehensive regulations governing rights of way over Indian lands.
- These regulations covered oil and gas pipelines, electricity transmission lines, railroads, telephone and telegraph lines, roads, drainage and irrigation projects, and other types of rights of way.
Indian Reorganization Act of 1934

- The IRA ended the allotment process and put into place a number of policies that recognized tribal authority and encouraged tribal control of reservation land and resources.

- However, even though the IRA did include provisions on compensation and damages for rights of way, requiring tribal or landowner consent was not mentioned in the regulations.
“Consent of Allottees or Tribe”: Only required that ROW applications be presented to tribal government but did not explicitly require their consent.
Indian Right of Way Act of 1948
(62 Stat. 17, 25 USC 323-328)

- The 1948 laws did not replace the old ones; they added another level of complexity.
- For instance, they limited the power of the Secretary of the Interior over rights-of-way to trust or restricted fee lands, but they did not explain how that relates to the original language found in the statutes.
Indian Right of Way Act of 1948

• Despite their complexity, the 1948 statutes did have positive outcomes for tribes.
  • The most significant of these statutes requires that tribes organized under the IRA must give consent for rights of way across Indian lands.
  • In addition, the regulations expand the consent requirement to all tribes, not just IRA tribes.
  • The 1948 laws also make clear that landowners must be justly compensated at fair market value for rights of way. However, they also allow most rights of way to be perpetual, unless the granting document says otherwise.
  • This is important to address when granting a right of way. Landowners must insist on a time limit, or it will be perpetual by default.
Department of Interior regulations governing ROWs that established a unified procedure for applications, whether for pipelines or other purposes.
These regulations gave landowners opportunities to negotiate new or renewed rights of way.

The compensation section requires that not less than fair market value must be paid, unless waived in writing, and the Secretary “shall obtain and advise the landowners of the appraisal information to assist them . . . in negotiations for a right of way or renewal.”

The regulations further state that the applicant must pay landowners all damages resulting from surveys or the construction and maintenance of the facilities.
These regulations cover all types of easements including those required for State and local highways.

The process of acquiring easements over Native American lands is similar to the steps required to obtain property not held in trust: the acquiring Agency identifies land requirements; surveys the proposed acquisition; identifies ownerships; appraises the property and conducts negotiations.

The main difference when lands are held in trust for Native Americans is that the recourse to use eminent domain is generally not available, except in rare instances. No authority exists for using condemnation to acquire Tribal lands and allotted lands are rarely condemned since jurisdiction is retained in the Federal courts.

- ROW for RRs – 169.23
- ROW for RRs in OK – 169.24
- ROW for Oil and Gas Pipelines – 169.25
- ROW for Communications – 169.26
- ROW for Public Hwys. – 169.26
- ROW for Power Projects – 169.27
Energy Policy Act of 2005

- The Energy Policy Act of 2005 contains new provisions that authorize tribes to “grant a right of way over tribal land for a pipeline or an electric transmission or distribution line without approval by the Secretary” in certain circumstances. This is a significant departure from prior law and is designed to encourage tribes to develop their own energy resources.
Spheres of interest over Roads in Indian Country

- Criminal Jx (Veh. Mansltr.)
- Civil Adj. Jx (Car Accident)
- Civil Regulatory Jx (TERO, Taxation, Permits)
- Liability
- Non-Owner Users
- Owners, Rights & Docs.
- Land Type
Strate v. A-1 Contractors (1997) [Civil Adjudicatory Jurisdiction]

- **Facts:** In 1997, the U.S. Supreme Court heard a case that arose on the Ft. Berthold Reservation, North Dakota.
- Gisella Fredericks, non-Indian, widow formally married to tribal member and she has children enrolled in the tribe.
- A-1 Contractors performing work under contract with the tribe. Ms. Fredericks and an A-1 truck driver collide on a road which runs through the reservation. This road includes a right-of-way given to the state.
- Ms. Fredericks and her children bring suit in tribal court, asking for 6 figure damages.
The U.S. Supreme Court held that a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction, finding that subject to controlling provisions in treaties and statutes, and the exceptions outlined in Montana v. U.S., the civil authority of Indian tribes and tribal courts does not extend to the actions of non-tribal members on non-Indian fee lands.
Definition of Indian Country, 18 USC § 1151

- U.S. Supreme Court ignores the definition of Indian country most commonly used which includes as Indian country all rights-of-way.
- § 1151. Indian country defined; Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter, means
  - (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
  - (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
  - (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
Montana Test

✓ There is a presumption of state civil regulatory jurisdiction over a non-Indian’s activities on non-Indian owned fee land UNLESS:

✓ There is a consensual relationship between the non-Indian and the Tribe? (May include contracts or other dealings.) OR

✓ The Non-Indian’s activity threatens or has a direct impact upon:

✓ Economic Security of the Tribe,
✓ Political Integrity of the Tribe, or
✓ Health, Safety or Welfare of the Tribe.
This rule permitting tribal authority over non-Indians on a public right-of-way is thus a concession to the need for legitimate tribal law enforcement against Indians in Indian country, including the state highways. The amount of intrusion or inconvenience to the non-Indian motorist is relatively minor, and is justified by the tribal law enforcement interest. Ordinarily, there must be some suspicion that a tribal law is being violated, probably by erratic driving or speeding, to cause a stop, and the amount of time it takes to determine that the violator is not an Indian is not great. If it is apparent that a state or federal law has been violated, the officer may detain the non-Indian for a reasonable time in order to turn him or her over to state or federal authorities. *Id.*
Indian Country

- General Allotment Act (1887 - 1934)
- Termination Plans (1953 – 1983)

Tribal Jurisdiction
State Jurisdiction
Federal Jurisdiction

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<th>Indian owned Fee Land</th>
<th>Non-Indian owned Fee Land</th>
<th>Individual Trust</th>
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Why Does Land Status Matter?

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<th>Tribal/Federal Jx</th>
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? - Depends on how the right of way was crafted, Jx, and the activity on the land.
The historic use of a Right of Way does not necessarily mean that the state has exclusive jurisdiction over the Right of Way.

In some cases, Rights of Way have been presumed by the state. If the state claims a Right of Way exists, they should produce the documentation showing BIA approval.
Issues of Concern for ROWs over Tribal Lands

- Documentation for current Rights of Way over tribal lands should be part of the tribal archives.
  - They should be reviewed for date of expiration.
  - Renegotiated at market value.
- Is the original purpose of the ROW still in place or has it changed?
- Jurisdiction over the ROW and activities
- Excavation activities for new ROWs
- Payment for damages to implement the ROW
- Application of TERO to projects on ROW
**ROW Document Elements**

- **Date or finite time for the ROW**
  - Watch out for perpetual ROWs (or ROWs with no end)
  - There may be an argument depending on date of creation of a ROW that if not date is set for expiration, then it may be perpetual. Must look at original statutory authority.

- Accurate Legal Descriptions of the ROW. Is the ROW actually where it is supposed to be?

- Construction or landscape changes to implement the ROW

- Which government will have jurisdiction over the ROW and related activities?

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www.IndianLandTenure.org and www.ILWG.org