



# **Tribal Right-of-Way Issues**

**National Tribal Transportation Conference**

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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.

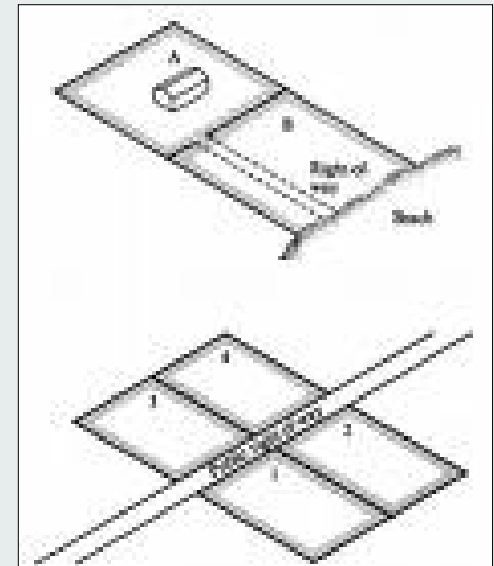
- **What is the difference between an easement and a right-of-way?**

- 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.

Understanding the  
Complexity of Right of  
Way Laws for Indian Lands,  
Indian Land Tenure Foundation,  
[www.indianlandtenure.org](http://www.indianlandtenure.org)



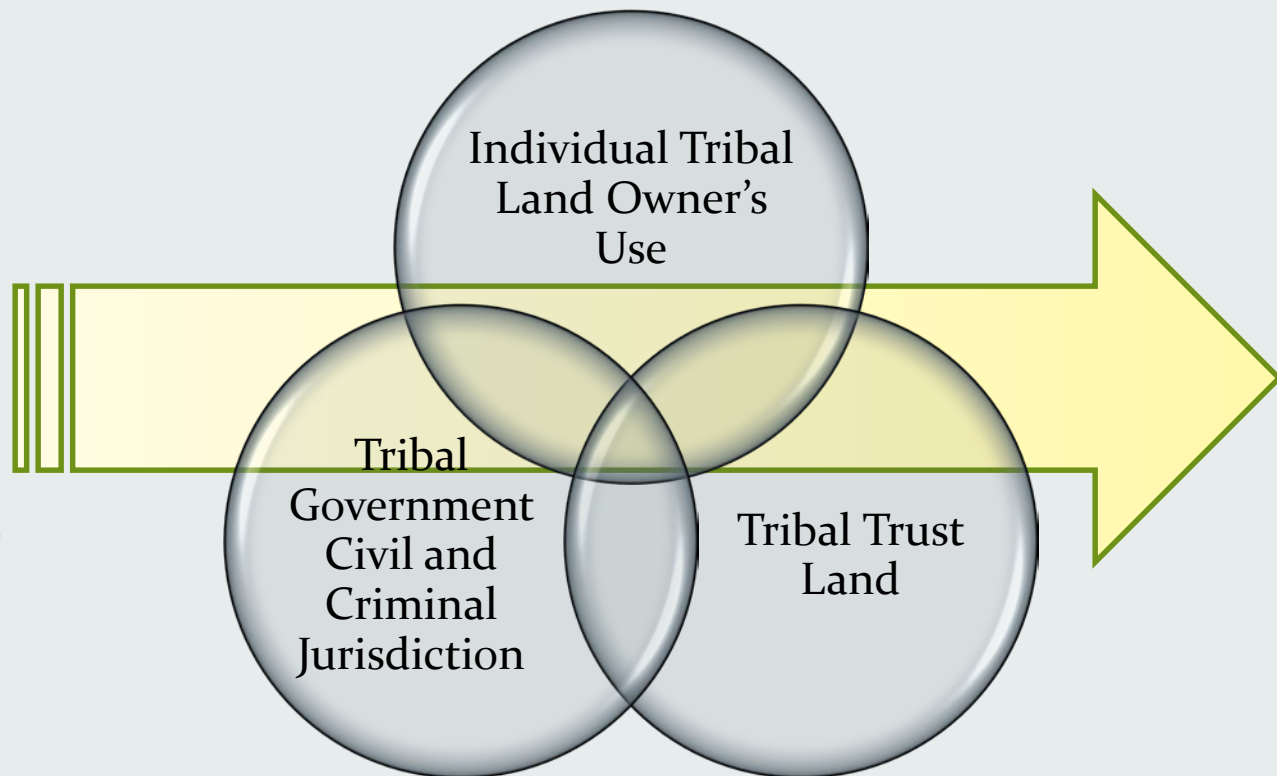
# Why is a Right of Way granted over Tribal Lands?

- 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.

# Impacts of ROWs over Tribal Lands

- 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”.

**Broad  
Impacts of  
ROW over  
Tribal Lands**

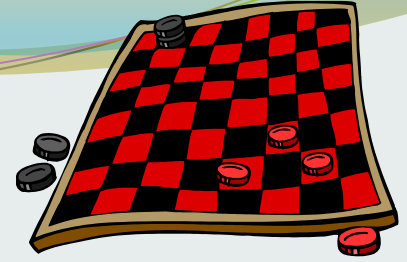


# Who has possessed authority to grant a Right of Way over Tribal Lands?

- 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

# General Allotment Act of 1887

*(and the specific Allotment Acts applied to the Oklahoma Tribes in 1893)*



- 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

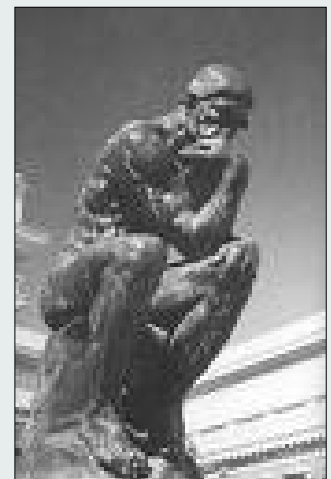
- Railroad rights-of-way were the first easements to cross Indian lands.
- Starting in 1899, railroad companies were granted easements—for “right of way for rail lines”—across Indian lands.
- ROWs vary according to the statutory authority used to create them.





# 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.
- Direct negotiation with tribes by any non-federal entity was illegal under the Non-Intercourse Acts.



# 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.
- What type of Jx?



# 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.

## 25 CFR § 256.83 (circa 1939)

- “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.**



# 1951 Regulations; 16 Fed. Reg. 8578 (1951)

- Department of Interior regulations governing ROWs that established a unified procedure for applications, whether for pipelines or other purposes.

# 1971 BIA Manual for ROWs on Indian Lands

- 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.

# 25 C.F.R. 169; Rights-of-Way over Indian Lands

- 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.

## Energy Policy Act of 2005, Section 1813 Indian Land Rights-of-Way Study

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*Report to Congress*

May 2007



U.S. Department of Energy



U.S. Department of the Interior

# December 2012 – Management of Trust Land (77 FR 72440)

- Prompted the most recent updates to the ROW regulations
  - June 17, 2014: Proposed ROW rule published (79 FR 34455)
  - November 19, 2015: Final rule published (80 FR 72492)

# Final ROW Rule, November 19, 2015, (80 FR 72492) \*

- Simplifies approach
  - Relies only on 1948 Act as statutory authority
- Streamlines approval process
  - Establishes timelines for BIA review of ROW requests
  - Eliminates requirement for BIA approval of access to land for surveys
- Provides certainty in process
  - Clarifies processes for BIA review of ROW documents
  - Clarifies “service line” versus ROW (ROW requires BIA approval)
  - Allows BIA disapproval only if BIA states a compelling reason

\* BIA Webinar: Sharlene Roundface, Chief, Div. of Realty, BIA,  
[Sharlene.Roundface@bia.gov](mailto:Sharlene.Roundface@bia.gov);  
<https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/mp4/idc1-033472.mp4>

# Final ROW Rule, November 19, 2015, (80 FR 72492) \*

- Supports landowner decisions regarding use of their land
  - Defers to Tribes on compensation amount for Tribal land and on the reasonableness of the duration of the right-of-way
  - Allows landowner negotiation of ROW terms
- Protects trust property
  - Prohibits “piggybacking”
  - Explicitly requires BIA approval and consent for assignments, amendments, mortgages of ROWs
  - Establishes guidelines for “reasonable” durations of rights-of-way on allotted land (generally, no ROWs in perpetuity)
  - Requires bond, insurance, or other security with application in lieu of deposit

\* BIA Webinar:

<https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/mp4/idc1-033472.mp4>

# **Final ROW Rule, November 19, 2015, (80 FR 72492) \***

- Subpart A – Purpose, Definitions, General Provisions
- Subpart B – Service Line Agreements
- Subpart C – Obtaining a Right-of-Way
- Subpart D – Duration, Renewals, Amendments, Assignments, Mortgages
- Subpart E – Effectiveness
- Subpart F – Compliance and Enforcement
- Effective Date

\* BIA Webinar:

<https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/mp4/idc1-033472.mp4>



# **Final ROW Rule, November 19, 2015, (80 FR 72492) \***

- Subpart A – Purpose, Definitions, General Provisions
- Rule applies to rights-of-way over or across Indian land and BIA land
  - Indian land includes trust or restricted land and Tribal and allotted land
- Rule does not apply if Tribe authorizes a right-of-way to a wholly owned Tribal entity over land the Tribe fully owns
  - If the Tribe owns only fractional interests in the land, the Tribal entity must obtain the consent of the owners of a majority interest in the land

\* BIA Webinar:

<https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/mp4/indc1-033472.mp4>

# **Final ROW Rule, November 19, 2015, (80 FR 72492) \***

- Subpart A – Purpose, Definitions, General Provisions
- ROWs are subject to Federal law
- ROWs are subject to Tribal law
  - Except to the extent Tribal law is inconsistent with Federal law
- ROWs are generally not subject to State or local law

\* BIA Webinar:

<https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/mp4/idc1-033472.mp4>

# Final ROW Rule, November 19, 2015, (80 FR 72492) \*

- Subpart A – Purpose, Definitions, General Provisions
- Effect on Tribal Jurisdiction
  - ROW grant will specify that it does not diminish Tribe's jurisdiction over the land subject to, and any person or activity within, the ROW
  - Tribe's power to tax the land, any improvements on the land, or any person or activity within, ROW
  - Tribe's authority to enforce Tribal law of general or particular application on the land subject to and within the ROW as if there were no ROW grant
  - Tribe's inherent sovereign power to exercise civil jurisdiction over non-members on Indian land
  - The character of the land subject to the ROW as Indian country under 18 U.S.C. 1151.

\* BIA Webinar:

<https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/mp4/idc1-033472.mp4>

# Final ROW Rule, November 19, 2015, (80 FR 72492) \*

- Subpart B – Service Line Agreements
- No ROW is required for service lines, but a service line agreement must be filed with BIA
- Service Line Definition:
  - Utility line running from a main line that is used only for supplying telephone, water, electricity, gas, internet service, or other utility service to a house, business, or other structure
  - In the case of a power line, a service line is limited to a voltage of 14.5 kv or less, or a voltage of 34.5 kv or less if serving irrigation pumps and commercial and industrial uses
- If what you call a “service line” does not meet this definition, then a ROW is required

\* BIA Webinar:

<https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/mp4/idc1-033472.mp4>

# **Final ROW Rule, November 19, 2015, (80 FR 72492) \***

- Subpart C – Obtaining a ROW
- Surveying in preparation for requesting a ROW
  - No BIA approval required to survey land
  - Landowner consent is required (directly contact landowners for permission to access the land)
    - The local BIA agency can provide you with a list of landowners and contact information

\* BIA Webinar:

<https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/mp4/idc1-033472.mp4>

# Final ROW Rule, November 19, 2015, (80 FR 72492) \*

- Subpart C – Obtaining a ROW
- **Application**
  - Identify applicant, tract, ROW location, purpose, and duration, and who owns and is responsible for permanent improvements associated with the ROW
  - Required supporting documentation:
    - Legal description of ROW and associated parcels
    - Map of definite location
    - **Bond or alternative security** (see next slide)
    - **Record of notice to all landowners** (see later slides)
    - **Record of landowner consent** (see later slides)
    - **Valuation, if applicable** (see later slides)
    - Corporate documentation, if applicable
    - Environmental and archeological reports
    - Statement that proposed use is in conformance with Tribal law, if required

\* BIA Webinar: <https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/mp4/idc1-033472.mp4>

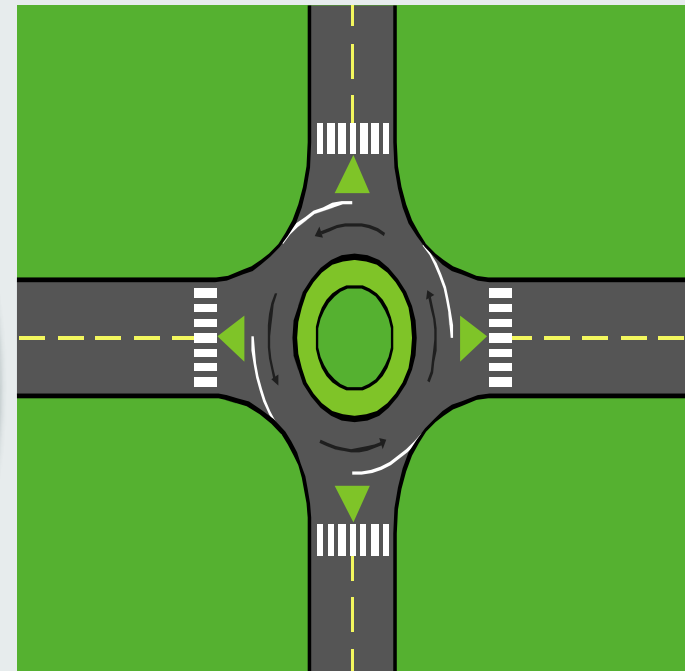
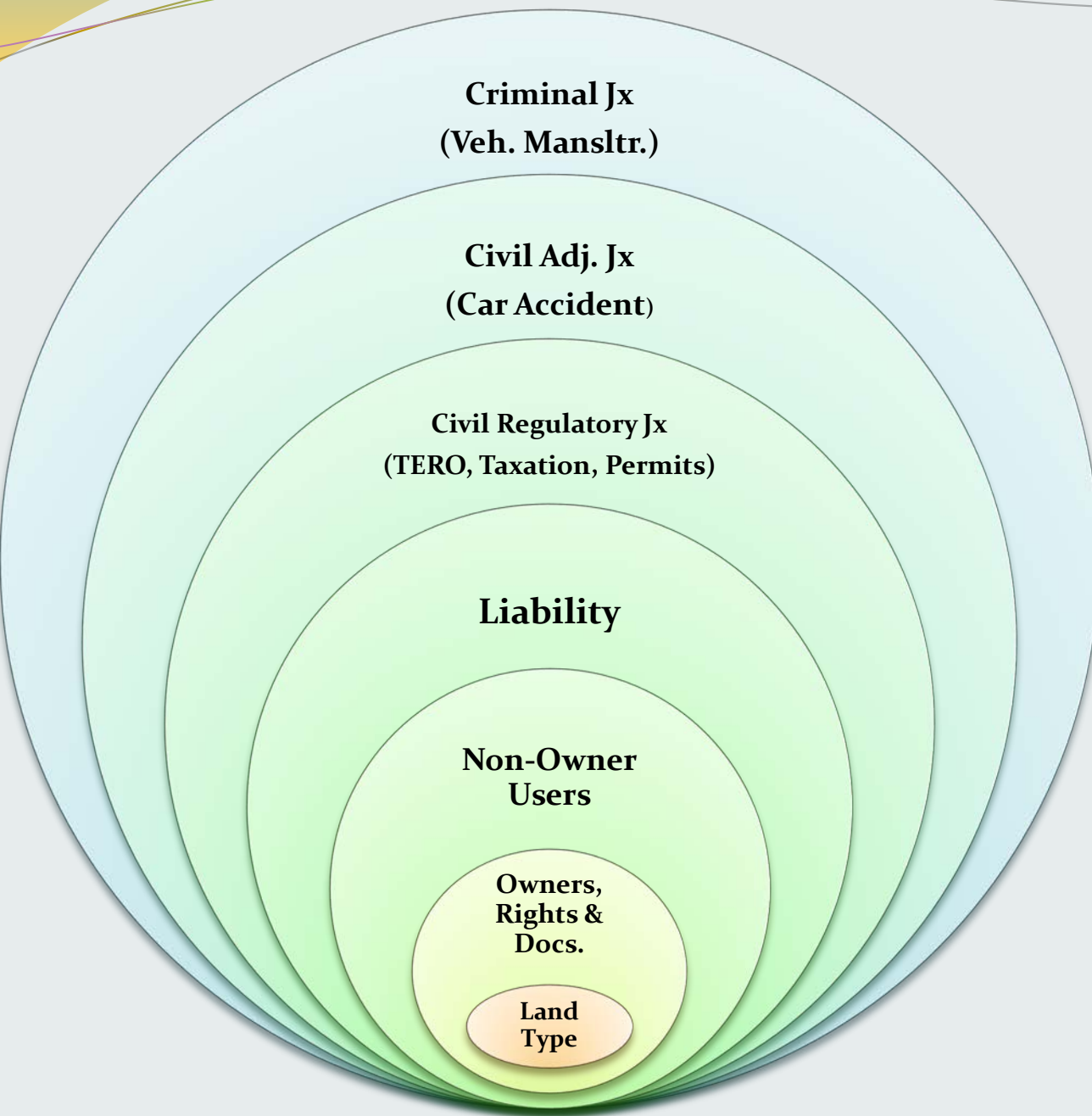
# **Final ROW Rule, November 19, 2015, (80 FR 72492) \***

- Subpart F – Compliance and Enforcement
- BIA may investigate compliance with a ROW
  - BIA will promptly initiate investigation if an Indian landowner notifies that a specific violation has occurred May enter the right-of-way to ensure compliance: At any reasonable time, upon reasonable notice; and
  - Consistent with any notice requirements under applicable Tribal law and applicable ROW documents
  - Tribe with jurisdiction may investigate compliance consistent with Tribal law

\* BIA Webinar:

<https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/mp4/idc1-033472.mp4>

# Spheres of interest over Roads in Indian Country

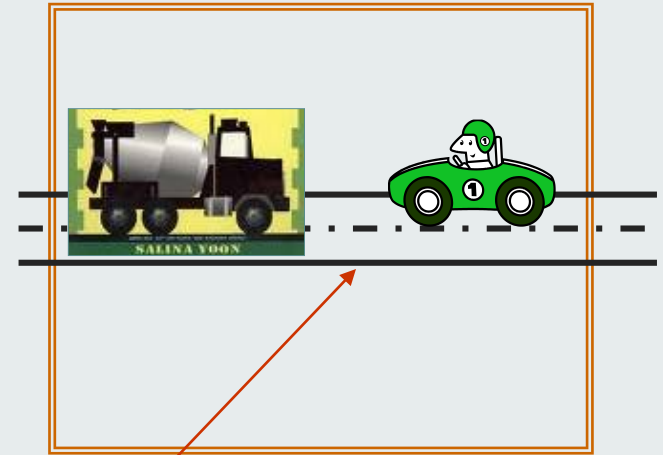




# *Strate v. A-1 Contractors (1997)* [Civil Adjudicatory Jurisdiction]

- 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.

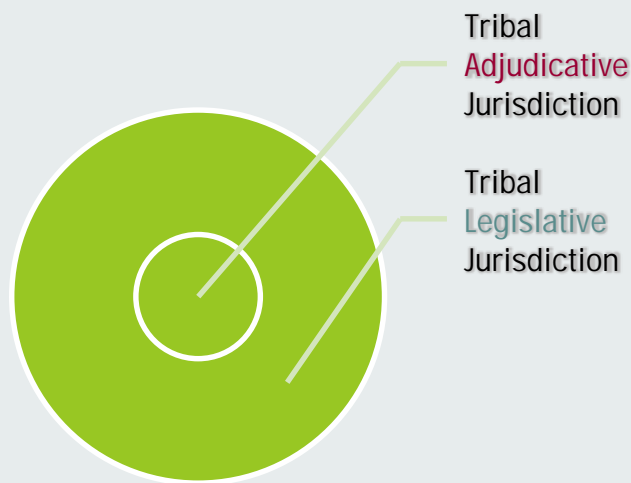
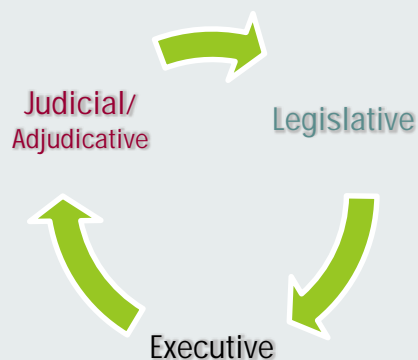
## **Ft. Berthold Reservation**



**State ROW**

# Strate v. A-1 Contractors (1997)

- 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.**

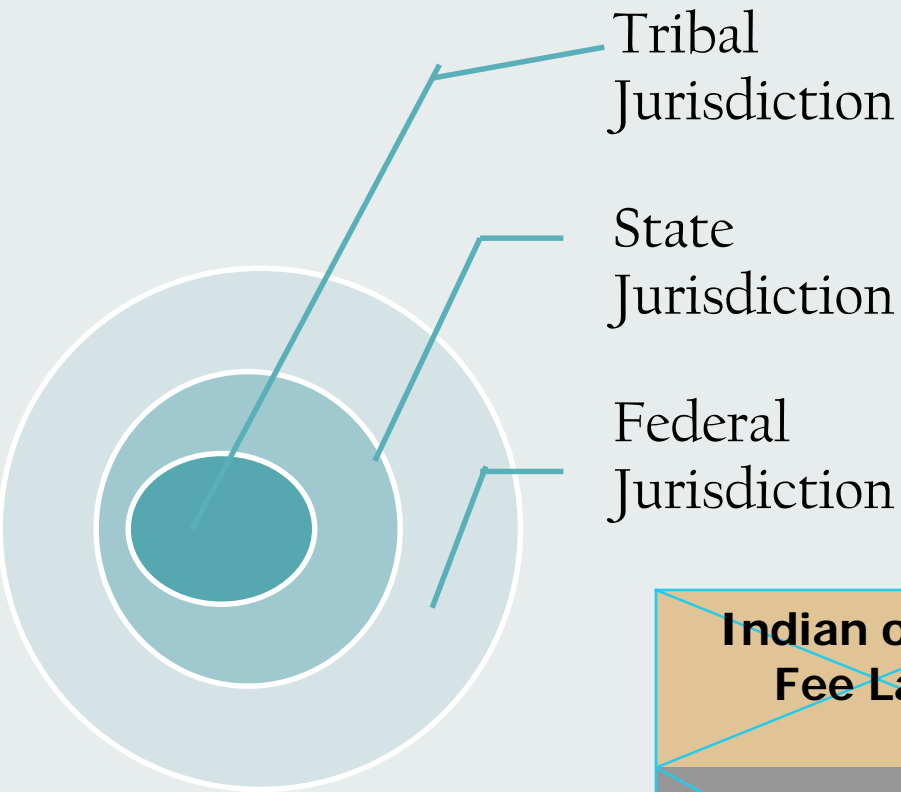
# Montana Test

- ✓ 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.

# Arizona v. Bressi, (9<sup>th</sup> Cir. Apr. 09)

- [3] 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

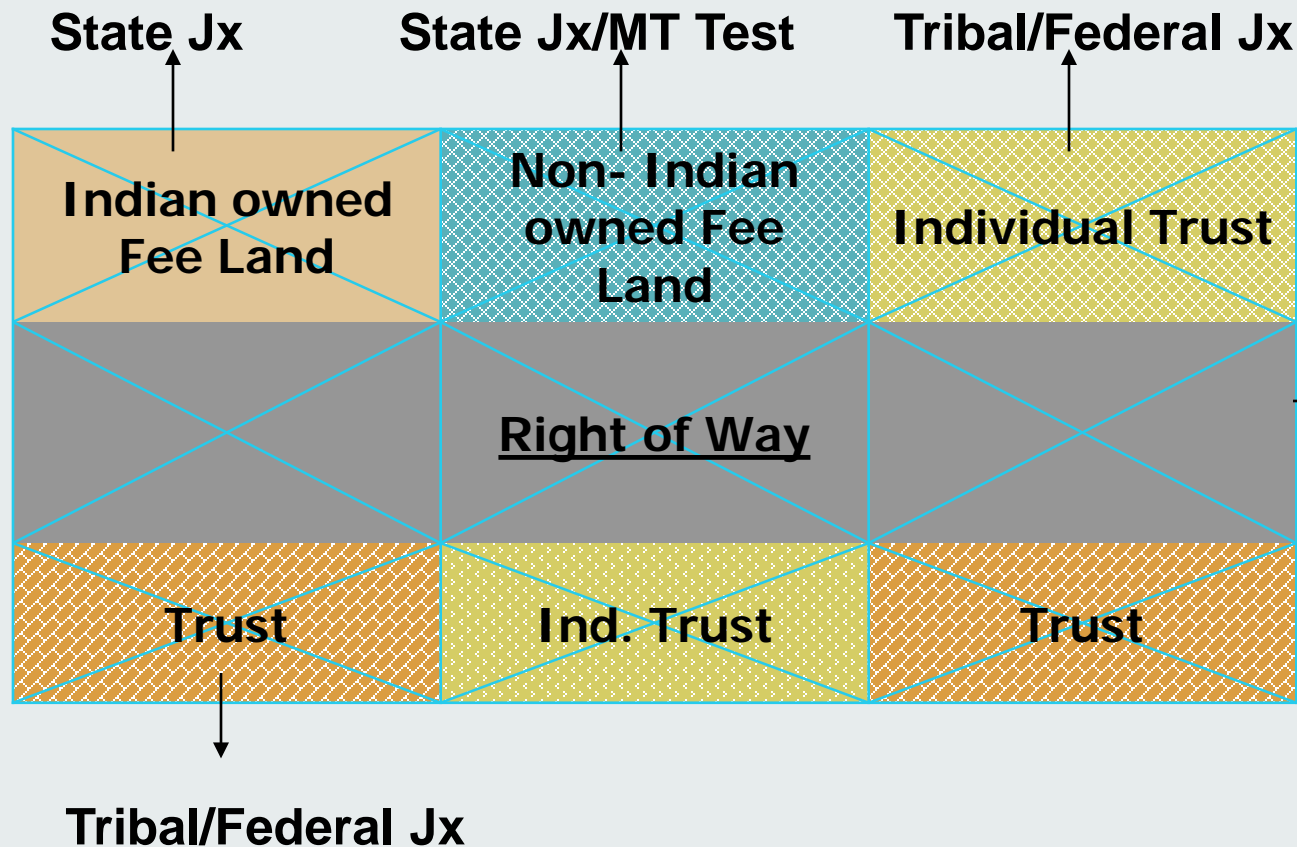


- General Allotment Act (1887 - 1934)

- Termination Plans (1953 - 1983)

Indian owned Fee Land	Non- Indian owned Fee Land	Individual Trust
<u>Right of Way</u>		
Trust	Ind. Trust	Trust

# Why Does Land Status Matter?



? - Depends on how the right of way was crafted, Jx, and the activity on the land

# Rights of Way

- 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?

## THE EASEMENT INQUIRY

## THE LANDOWNER'S GUIDE TO EASEMENTS AND RIGHT OF WAYS

