



Indian Land Tenure
FOUNDATION

Message Runner

Volume 3

RIGHTS OF WAY

Lessons of the past should inform the future

INDIAN PEOPLE have been granting rights of way and easements across their territories since time immemorial.

Originally, these permissions were granted to other friendly tribes for the purposes of accessing hunting or fishing areas, trading or seasonal travel. There were no written documents granting these permissions but there were clear agreements on the purpose and use of rights of way.

The coming of non-Indians to the continent led to continual pressure on tribes to grant many more rights of way and easements. At first, many were verbal agreements, but increasingly there were written documents that paralleled the coming of the European style of land ownership. As time went by and disagreements arose, Indians often found themselves being told that the document they had signed—written in a language they did not understand—prevailed over the understanding of those who had agreed to it. Often, trespass was blatantly occurring but was dismissed as insignificant or for the non-Indian public good. The repeated exploitation of Indian good will, resources and land was a lesson to be learned and not forgotten.

By the time the last reservations had been created, the written agreement for a right of way was the matter of course. Nevertheless, encroachment and trespass were common because many tribes were reluctant to relinquish any more of their diminished land areas to new rights of way. Many historians trace the reluctance of tribes to issue rights of way, particularly for the railroads, as the underlying purpose for the passage of the General Allotment Act of 1887. Not only did the Act open up considerable acres of reservation land for non-Indian settlement and development, it also transferred title of all reservation land to federal government ownership to be held in trust for the tribes and individual Indian people. The means were now in place for the federal

government, acting as trustee, to approve rights of way for utilities and services such as trails, roads, railroads and telegraph lines, across reservations of even the most resistant tribes.

In the intervening 120 years, literally thousands of rights of way have been granted across Indian land. The permissions granted by the rights of way are quite variable, ranging from perpetual easements for transportation or communication routes to the granting of short-duration rights of way for construction or servicing of sites. Some rights of way affect one allotment or parcel of tribal land while others cross hundreds of allotments and involve thousands of individual Indian land interest owners, including the tribe.

Today, tribes and individual Indian landowners are under pressure to issue new rights of way as well as to renew agreements for existing but expiring rights of way. Recent legislative attempts to allow the Secretary of Interior to sign off on rights of way for individual Indian people have been thwarted for the time being but will no doubt re-emerge as there are billions of dollars at stake for major industries.

It is now incumbent upon the tribes and Indian landowners to inform themselves about the geographic location of rights of way on their land and the values of both the rights of way and the lands they cross. Without knowledge of these basic issues, tribes will not be able to effectively develop

their reservation lands or preserve lands that are important to their cultures. Individual owners may find themselves in a similar situation and unable to use their land as they wish once a right of way is in place. At the same time, tribes and individual landowners must be vigilant that the conditions of the rights of way are being adhered to and that trespass is not occurring out of negligence or expediency to the detriment of their land.

Indian Land Tenure Foundation provides this issue of the *Message Runner* with the intent of assisting individual landowners and tribes in beginning the process of understanding rights of way. It is an important learning process for us all as we attempt to maximize the benefits derived from our lands for our families and the future of the tribe. It is equally important to remember that the process does not end with a right of way agreement that we understand. Continual monitoring for compliance by all parties is necessary. Our ancestors learned this lesson; we should not forget.

Cris Stainbrook, President
Indian Land Tenure Foundation



A Message from the Indian Land Tenure Foundation President



Glossary of Terms



Allotted Land

Land that was distributed to individual Indians by the federal government under the terms of the General Allotment Act of 1887 or other specific allotment acts. Generally, allotments were 40-, 80- or 160-acre parcels of reservation lands assigned to individual Indians.

Appraisal

Estimation of market value, investment value, insurable value or other property-defined value of a specific parcel at a given date.

Appraiser

A professional who makes appraisals of the value of property. For a federally related transaction, an appraiser must be licensed or certified by the state.

Checkerboarding

Since the General Allotment Act allowed for a significant amount of land to pass out of tribal or individual Indian hands, land within reservation boundaries may be owned by the tribe, individual Indians or non-Indians, and contain a mix of trust and fee lands. This pattern of mixed ownership resembles a checkerboard.

Condemnation

Process by which a governmental agency may take private property for public use under the right of eminent domain. Constitutionally, the owner must receive just compensation.

Easement

A legally binding agreement authorizing the right to use another person's land for a stated purpose. It may involve a general or specific portion of the property. An easement may be used to restrict the use of a property as in the case of historical easements that forbid changes to a property.

Eminent Domain

The power of federal, state and local governments to take private property for public use. A private entity may also exercise eminent domain, though it must be authorized by a governmental agency to do so. A variety of property rights are subject to eminent domain, such as air, water and land rights.

Fair Market Value

The price at which a property would change hands between a willing buyer and a willing seller, neither being compelled to buy or to sell and both having reasonable knowledge of relevant facts.

Fee Land

Land held in fee simple title, the broadest property interest allowed by law. Fee land is taxable by the state and is held by an individual landowner who holds title and control of the land.

Just Compensation

The fair payment to owners of private property taken for public use through condemnation under eminent domain. It is usually, though not always, the market value of the interest taken plus any damages or loss in value to the remaining property interests.

Land

The air above, the surface and sub-surface of the earth.

Land Ownership Rights

Authorize individuals to:

- Use the land in diverse ways such as constructing buildings, operating farms and businesses, extracting minerals from below the surface, grazing livestock and building roads.
- Convey part or all of their rights to others through deeds, sale contracts, wills, mortgages, leases, easements and permits.
- Offer their rights as collateral to guarantee repayment of loans or obligations.

Leverage

A positional advantage that one party has over another. Leverage can be very important in negotiating a right of way.

Personal Property Interests

A type of property that may include any asset other than real estate. The distinguishing factor between personal property and real estate is that personal property is movable. That is, the asset is not fixed permanently to one location as with real property such as land or buildings. Examples of personal property include vehicles, furniture and collectibles.

Real Property Interests

Land and all the things that are attached to it. This includes rights to the surface, rights to the space above and rights to the material below the surface—any of which can be owned by different individuals, separately or jointly. This also includes all “interests” in the

property such as the right to future ownership (remainder), the right to occupy for a period of time (tenancy or life estate), or an easement across another's property.

Right of Way

A right of way is an easement that gives someone the right to cross property owned by another person. Examples of rights of way are public and private roads, pipelines and power lines. A right of way for a road usually requires the purchase of property surface rights within the right of way.

Severance Damages

When the property condemned and taken by the government is a part of a larger parcel of property, in addition to compensation for the property being taken, the landowner is entitled to recover compensation called “severance damages,” for the damage, if any, to the remainder.

Trespass

Any unauthorized intrusion or invasion of private premises or land of another.

Trust Land

Indian-owned land, the title to which is held in trust and protected by the federal government. Indian people and tribes have use of the land, but ultimate ownership and control of the land remains with the federal government.

Tribal Trust Land Exemption from Third Party Condemnation

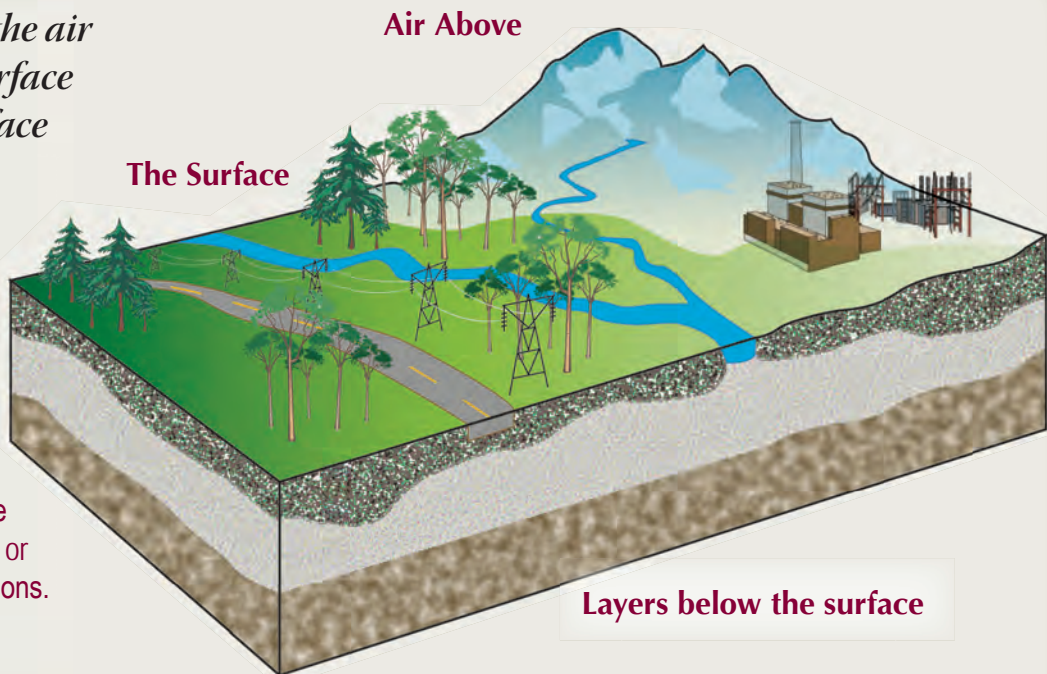
Tribal trust land cannot be condemned unless permitted by federal law. Allotted trust and fee lands can be condemned for public purposes.

Undivided Interest

A share of the ownership interest in a parcel of trust land. The number of interests grows with the division among heirs of these interests according to state or tribal probate laws. The income derived from the parcel is divided according to the percentage of the total interest held by an individual.

‘Land’ refers to the air above, land’s surface and its sub-surface

The rights to the air, surface and sub-surface may be held by different parties. These rights may be held by one person or shared by many. They may also be limited by public law or private restrictions.



Understanding

Right of way laws, as they relate to Indian lands, can be confusing. As tribes and individuals face either renewing an existing right of way or considering a proposal for a new one, they should know how the laws governing rights of way came to be and to understand the rights of individual landowners and tribes.

First of all, a landowner may be an individual, tribe or group of individuals who share interest in an allotment or parcel of land. When a right of way is given, landowners allow others the right to use or to pass over their land without transferring ownership of the land to the user.

Normally a right of way is sought for a public purpose by tribes, local government, and state or federal government for roads 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. Starting in 1899, railroad companies were granted easements—or “rights of way”—across Indian lands for their rail lines. Railroad rights of way were the first form of easements to cross Indian lands.

Granting and using rights of way is complex. Many laws and regulations governing the establishment of rights of way can be tied to century-old laws passed by the United States. Knowing the historical and legislative origins of these influential land-use arrangements is helpful to assess existing and future rights of way contracts in Indian Country.

PLENARY POWERS DOCTRINE

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. Negotiating directly with tribes was necessary as, up until the 1870s, the United States used the treaty making process to gain consent through treaties before passing laws that affected Indian nations. However, in 1871, an Act of Congress ended treaty making with tribes, ultimately leading to the Supreme Court’s “plenary powers doctrine.” This doctrine allowed Congress to make unilateral decisions affecting Indian nations by congressional act, or statute, rather than having to first gain acceptance of the tribe through a treaty negotiation process. Once freed of constitutional constraints, Congress began to impose laws and regulations for rights of way that proved disastrous for Indian people.

The implementation of the General Allotment Act of 1887 initiated a series of rights of way

statutes. As tribal lands were declared surplus and opened 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.

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.

The Indian Reorganization Act in 1934 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. These regulations were revised in 1948 and published in 1951 with a tribal consent stipulation.

The revised regulations of 1948 were significant in that a series of statutes to govern all rights of way on Indian lands were enacted. A Senate report claimed these laws were meant to “satisfy the need for simplification and uniformity in the administration of Indian law.” However, these laws were neither simple nor unified. 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.

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.

In 1971, the Bureau of Indian Affairs issued a manual for rights of way on Indian lands. These regulations give 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.

BE INFORMED. ASK QUESTIONS

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.

The complexity of right of way laws and regulations can be daunting. It is important for tribes and landowners to be informed and ask questions.

Now is the time to protect the land for future generations.



The complexity of right of way laws for Indian lands



HISTORY: Major right of way legislation



The following is a historical summary of major right of way legislation:

RAILROADS

In 1899, Congress passed the first laws governing rights of way for railroads and telegraph lines on Indian lands. It authorized the Secretary of the Interior to grant to railroad companies rights of way over reservation or off-reservation allotments for railroads, telegraph and telephone lines and town-site stations. Not only did these historic laws pave the way for the permanent alteration and division of a previously natural and open landscape, but the new services and utilities allowed for the growth of cities and the expansion of overall development, ultimately increasing the amount of conflict between the newcomers and Indian people who did not directly benefit from these changes.

ROADS AND HIGHWAYS

In 1901, Congress passed a law authorizing the Secretary of the Interior to grant rights of way through Indian reservations for public highways. That statute authorizes the Secretary of the Interior to grant permission “to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation.” In its emphasis on the “laws of the State,” this influential legislation allowed states to “piggyback” electric power lines within highway rights of way without providing additional compensation to the landowner or approval from the Department of the Interior, if the state law authorized such practices.

This stipulation resulted in many utilities being piggybacked on highway rights of way through Indian lands; neither the tribes nor the Department of the Interior has any record of these occurrences. However, tribal governments are discovering utility piggybacking when they review state department of transportation records. Although piggybacking may be allowed, according to the Fifth Amendment right to just compensation, the owners of Indian land should still receive compensation when other utilities piggyback on existing rights of way. Tribes have

been exploring this issue for opportunities to seek compensation from utilities that have piggybacked on Interior-approved rights of way.

The Supreme Court decided in 1997 case, *Strate v. A-1 Contractors*, that tribes generally lack the authority to regulate activities of non-Indians on state highways because these rights of way are the same as non-Indian fee lands. This ruling could put tribal governments at a distinct disadvantage when they start to plan the development of their own utilities and other infrastructure to meet the needs of their communities on their reservation.

TELEPHONE AND TELEGRAPH LINES

The Secretary of the Interior was authorized to grant rights of way over reservation or allotted lands for telegraph and telephone lines by the same act of 1899 that applied to railroads.

In 1901, the Court of Appeals for Indian Territory held that municipalities and states have no authority to grant telephone companies a franchise to operate on reservations. This was a power held exclusively by tribes. To address this decision, Congress passed another law in 1901 that separated rights of way laws for telegraph and telephone lines apart from those for railroads.

A year later, the Eighth Circuit Court of Appeals held that the 1901 law gave the Secretary of the Interior the exclusive power to grant franchises to telephone companies on Indian lands. That power was eventually shared with tribes through amendments to the rights of way laws passed in 1948. In a 1997 amendment to the 1996 Telecommunications Act, Congress conferred this power on the Federal Communications Commission (FCC). Unfortunately, the legal history of the rights of way laws for Indian Country has been ignored in the FCC’s implementation of the new telecommunications laws.

OIL AND GAS PIPELINES

In 1904, Congress passed legislation allowing the Secretary of the Interior to grant rights of way through reservations and allotted lands for 20-year periods for oil and gas pipelines. The Secretary was authorized to extend the right of way for another 20 years, “upon such terms and conditions as he may deem proper.” The current law remains more or less unchanged; as such, it

still authorizes the Secretary to make decisions regarding rights of way on reservations without first acquiring landowner consent.

ELECTRIC POWER AND COMMUNICATION LINES

The annual appropriation act for the U.S. Department of Agriculture authorized rights of way for electric power and communication lines and poles over Indian reservations in 1911. It provided, “that the head of the department having jurisdiction over the lands be . . . authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way . . . upon the public lands, national forests and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power” A later provision explained that “reservation” meant “any national park, national forest, military, Indian, or any other reservation.” The law set the term of the right of way up to 50 years. Today, this law is applied to cellular towers on reservations.

HYDROELECTRIC PROJECTS AND TRANSMISSION LINES

Under the Federal Power Act (FPA) of 1920, Congress delegated the authority to grant rights of way for hydroelectric projects to the Federal Power Commission (FPC), now the Federal Energy Regulatory Commission (FERC) in the Department of Energy. The FPA requires FERC to take measures to protect Indian reservations when licensing hydroelectric projects located within those reservations. The licenses can be for a period of up to 50 years. Section 10(e) of the FPA requires that annual charges for the use of a tribe’s lands under any FERC license shall be subject to the approval of the tribe.

Recently, there have been legislative attempts to challenge tribes’ ultimate authority to grant rights of way on their lands. However, in its final form, the Energy Policy Act of 2005 ultimately reaffirmed tribes’ control over rights of way on reservation lands. As a result of the Act, FERC can now grant permission for rights of way projects in some areas of “national interest.” However, according to section 1221(e)(1) of the Act, the eminent domain authority given to FERC for certain transmission projects does not extend to rights of way on tribal lands.

Appraising a right of way

What is an appraisal? Who conducts an appraisal? Why should an appraisal be done? It is important for landowners to know what an appraisal is and why they should have one prepared. Knowing the value of their land will help landowners to negotiate fair and just compensation before agreeing to a right of way.

WHAT IS AN APPRAISAL?

An appraisal is an opinion of value, usually conducted by a professional appraiser. Rights of way appraisals are prepared for property owners and acquiring agencies (agencies seek-

loss from the taking of all or part of the property rights.

In determining the value of the right of way, the landowner must consider the terms (limited or perpetual) and conditions (loss of use by the owner) in the right of way agreement document. In determining the value of the severance damages, the landowner would consider how the facilities will impact the original legal purpose of reservation land (a permanent homeland for a particular tribe) and the customary purposes of land (such as hunting, gathering cultural plants and gathering of wood).

Usually, a right of way provides significant economic benefit to the acquiring party. Some examples are trunk lines for oil and gas and electric power lines. In these cases, the acquiring agency may negotiate compensations that are greater than the loss to the property owner. When the landowner is able to negotiate a gain that is more than the appraised value of the right of way, the just compensation becomes a market derived value that is measured by the rate per linear rod or foot of the right of way.

DOES THE FEDERAL GOVERNMENT HAVE A TRUST RESPONSIBILITY TO THE LANDOWNER?

In the case of reservation-based land that is held in trust for the tribe or individual Indian landowner, the Bureau of Indian Affairs (BIA), as trustee of the land, must approve all real estate transactions.

The approved appraisal report is the government's documentation to support the decision to approve or reject the acquiring party's offer of just compensation.

CAN APPRAISALS BE CHALLENGED?

Appraisal reports that do not meet the three tests of an appraisal should be challenged by the landowner.

First of all, landowners should read the appraisal report carefully. They should check the factual data in the report, such as acres, land use, building inventory, easements, water rights and utilities. If factual errors are found in the report, it should be challenged.

Secondly, landowners should make sure that the appraisal was conducted by a certi-

fied appraiser and that it is consistent with the industry's professional standards. (See the list of web resources on the back page for links to sites that explain these standards in detail.)

Finally, landowners should determine if the appraisal report makes logical sense. There should be nothing so complicated in an appraisal that it cannot be understood. At the same time, landowners should read appraisals carefully in order to fully understand all of their contents and implications.

In most cases, appraisals are accurate and relevant; however, if a landowner is not satisfied with the appraisal, the individual or tribe can seek another appraisal. In some cases, this might require going to court to force another appraisal or accepting a second appraisal.

Should the tribe or Indian landowner determine there is a problem with an appraisal report from any acquiring party (federal agency, company or individual) seeking a right of way on trust land, the BIA should prepare an appraisal and be prepared to defend it in court. The tribe or Indian landowner should also report the appraiser to the State Appraisal Board.

In the event of a dispute, the appraisal is reviewed in court by judges and juries in order to determine just and reasonable compensation.

A word of caution: landowners should avoid forwarding appraisal challenges that are based on emotional reasoning or incomplete data.

When the tribe or Indian landowner does a more thorough job of research and data analysis than the appraiser, the challenge to the appraisal is sound and has a better chance of refuting the appraiser's opinion of value that is in question.



There should be nothing so complicated in an appraisal that it cannot be understood.

ing a right of way) to negotiate the comprehensive terms and conditions of the right of way. Appraisals on rights of way on Indian reservations must be prepared, in writing, by a state licensed or certified appraiser and the appraisal must comply with the Uniform Standards of Professional Appraisal Practice (USPAP).

WHO PAYS FOR THE APPRAISAL?

In most cases the party wanting to acquire the right of way pays for an appraisal (either a staff appraiser or a contract appraiser). If the property owner believes the appraisal is not accurate or is incomplete, it is up to the property owner to hire his or her own appraiser to refute the acquiring agency's appraisal.

HOW IS COMPENSATION DETERMINED?

In many cases, just compensation is the difference between the "market value of the property rights before the right of way" and the "market value of the remaining property rights after the right of way" plus severance damages.

Severance damages are the financial impacts to the remainder of the land across which the right of way is granted. This model provides a measure of the property owner's

Valid Appraisals

In addition to being conducted by a certified appraiser, an appraisal must meet all three tests to be valid and credible. It must be:

- Statistically and mathematically correct.
- Consistent with the uniform standards of professional appraisal practice.
- Logical.



The Right

STEP 1: APPLICATION

- ⑤ The right of way application must be in writing, submitted to the Secretary of Interior through Indian Affairs (BIA). An initial application must be made in order to survey the land, and a subsequent application must be made for the right of way itself.
- ⑤ Federal regulations dictate the application's required contents.
- ⑤ Because of its trust responsibility, the BIA must review all realty transactions involving reservation trust land.

STEP 3: APPRAISAL

- ⑤ The party who wants to acquire the right of way must hire a professional appraiser.
- ⑤ The owner is advised to accept the appraiser's valuation.
- ⑤ All appraisals must be done by a professional appraiser.
- ⑤ If the landowner disagrees with the appraiser's valuation, the landowning individual or tribe must agree to terms, resolve the issue, or file a lawsuit.
- ⑤ Just compensation that is not less than fair market value for a right of way.

Right of Way Process

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lands.

STEP 2: NOTIFICATION

- Landowners will be notified of an entity's interest in acquiring a right of way.
- Initial notification will seek a landowner's permission to enter land for survey and mapping purposes.
- Disputes regarding title should be taken up with the BIA realty office. If a tribe owns an interest in trust land, either partial or total, that entire parcel of land cannot be subject to eminent domain. Any right of way must be approved by the tribe.

STEP 3: APPRAISAL

ire the right of way pays for the appraisal.
company the appraiser during the inspection of the property.
by a state-licensed or certified appraiser.
with the appraisal amount, the appraisal can be contested. The
be can make a counteroffer in negotiations or, if the parties cannot
sue in court.
less than fair market value plus severance damages must be paid

STEP 4: NEGOTIATION

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

STEP 5: CLOSING

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



HOW TO:



Negotiate a right of way

Before power line companies negotiate with an individual landowner or tribe for a right of way, they prepare. They educate themselves on the status and value of the rights they seek. They learn about laws and regulatory requirements that apply. They know how much they are willing to pay and how much they think the other side will demand. Individuals and tribes **MUST** do the same.

Beware! Before the acquiring party submits their proposal for a right of way, they have conducted extensive research. One of the key tools in finding out about the tribe or individual landowners is communication with the Bureau of Indian Affairs, the tribal administration and all other landowners involved. Landowners should carefully consider what other entities may have already shared with the acquiring party before negotiations begin.

Gathering data is critical. Landowners and tribes must be fully prepared before they begin negotiations. Once negotiations begin, every communication, written or oral, with those who seek a right of way becomes part of the negotiation process. This information should be carefully recorded. Landowners and tribes should also undertake a comprehensive assessment of all existing rights of way on the current and historical use of the land and the current value of the land, and compile the results. Armed with information about existing rights of way before negotiations, the tribe or individual landowner will know with certainty whether companies are in trespass or if adequate compensation to use the land was previously given.

TRIBAL GOVERNMENT PREPARATION

Tribal governments should:

- Compile a list of all right of way documents on file with the BIA. These documents should be reviewed by the tribal attorney for compliance and completeness. An understanding of existing rights can be helpful for a tribe asserting regulatory authority over utilities.
- Visit the state department of transportation and obtain all right of way records for reservation roads. This will identify if piggybacking is allowed. (In the case of power lines, they might be piggybacked onto BIA rights of way for roads and highways without BIA approval.)
- Conduct a visual survey of the site where the right of way is being sought. It is important to conduct an on-the-ground survey to document the actual location of every right of way. Include photographs of poles and lines, determine the age of existing facilities, fix GPS locations, and match the photos with available aerial photos on file.
- Develop a customer survey, and survey everyone served by the utility. Unknown problems with utility service will reveal themselves through customer surveys. These surveys will give negotiators an understanding of what customers want in terms of service. If customer needs are understood, negotiation for improved services can be a condition of the right of way.

INDIVIDUAL LANDOWNER PREPARATION

Individual landowners should:

- Compile a list of all right of way documentation related to their lands.
- Obtain copies of current rates and agreements the utility has negotiated on this right of way with the tribe and other trust land owners.
- Be aware of the availability of third party condemnation for individual Indian-owned land.
- Gather information and data on the acquiring party: Who are they?

What do they want? How far will they be willing to go for the right of way?

- Share all information collected with other undivided interest holders of the land.
- Create a journal of every communication, writing down to whom they spoke, the subject of the discussion, and when the discussion took place. Whenever possible, they should include a third party in the discussions and record that person's name as well.

Individual negotiations may be complicated by fractionation or multiple owners who have undivided interests in the parcel where the right of way would be located. Another barrier is the inconsistent policies among agency offices of the BIA regarding negotiations between the landowner or interest holder and the acquiring party. Some agencies refuse to allow individual landowners or undivided interest holders to negotiate directly with the acquiring party, insisting BIA officials do the negotiating. The individual Indian landowners should assert themselves in the negotiation process. In those instances where the fractional ownership by an individual is a small interest, the BIA might request that a majority of the owners be in agreement before allowing landowners to participate in the negotiations.

EDUCATE THE OTHER SIDE

In many instances, the acquiring party for a right of way might not be aware of the unique character of reservation lands. Negotiations can go more smoothly when the tribe is able to successfully explain the concept of “permanent homelands.” When the acquiring party appreciates the permanent homeland concept, they will more likely understand why tribes and individual Indian rights must be protected whenever rights of way are created or renewed. For example, the acquiring party may not always appreciate the significance of burial grounds hundreds of years old until they realize they are negotiating with the descendants. This could be an opportunity to help them understand the significance of the legends and stories handed down through the generations. Educating rather than alienating potential right of way holders could result in improved services, in addition to increased cultural awareness.

For instance, utility companies that lack tribal representation on their governing boards generally have little concept of the tribal community's needs and existing tribal regulatory systems. Outside utility companies might be more willing to submit to a tribal regulatory system once they are educated by the tribal negotiators on the significance of those concerns to the tribe, community and individual tribal members.

Rights of way on tribal trust land and allotted lands are subject to tribal regulatory controls where these policies are in place. (The policies regarding the authority of tribal regulations on reservation fee lands are less clear, and compliance may be subject to the landowner's decision.) Establishment of tribal regulations and policies regarding land rights and land uses provides guidance both to the tribe and to those wanting to do business on tribal lands. The tribe might be concerned about protection of sacred sites, burial grounds or other areas of cultural significance. Tribal zoning regulations, for example, might help to encourage certain uses for some tribal lands and discourage undesirable uses for others. Tribes can effectively protect and regulate their lands by enacting and enforcing a tribal regulatory process that may be imposed as a condition for acquiring a right of way.

All of these strategies and tactics are important to a successful right of way negotiation process. When negotiations are approached with knowledge, preparation and optimism, the result is more likely to be a win-win.



LEVERAGE: A valuable negotiating tool

Leverage is a positional advantage that one party has over another and it can be very important in negotiating a right of way. For example, knowing the financial limitations and time constraints of the acquiring party gives an advantage to the landowner. The question is, how much will the acquiring party give up to get the right of way before deciding to seek an alternative route?

Trespass can be another important leverage point for the landowner. Research on this topic may identify that the current right of way holder is in trespass, or it may identify a renewal request that is pending. It is helpful to know how and when a right of way was obtained. It is easy to assume a previous right of way was handled properly, but that may not be the case. Landowners should investigate the land's legal history and find out the facts.

Remember, an acquiring agency may use any means available to ascertain a right of way at minimal cost. For example, an acquiring agent may identify and seek out those landowners with limited financial means and have them sign a right of way agreement based on a



promise of payment when all other landowners sign. This creates division among landowners seeking fair and equitable payment against those in financial need.

Undivided interest holders of an allotment may be particularly vulnerable to this tactic if they have lost a meaningful connection to their land. Additionally, heavily fractionated allotments make it very difficult to get information to and negotiate agreement with all interest holders.

These issues limit the landowners' leverage for negotiating the best price.

In these cases the amount offered for the right of way may be at appraised value with little consideration for severance damages.

Utility companies are subject to oversight by federal or state regulatory agencies. Before entering into right of way negotiations with a utility company, know what regulatory requirements and timelines apply. Knowing a utility company is out of compliance with applicable regulations provides tremendous leverage for the negotiator.

Offering to assist the utility company to come into compliance as part of the negotiations shows good faith and alerts the company that landowners are aware of them being out of compliance.

For example, offering to have the tribe write a letter of support could go a long way with regulators, and a utility might be willing to give up something significant in exchange for such a letter. Of course, this letter would only be forwarded after negotiations are complete, agreements signed and compensation paid.

In some cases, BIA regulations may also give the tribe and Indian landowners leverage in negotiating new or renewed rights of way. For example, not less than fair market value must be paid unless waived in writing. And, applicants for rights of way must pay landowners all damages resulting from surveys.

Finally, it is important to remember that the BIA may terminate a right of way for failure to comply with terms or applicable regulations.

In some cases, BIA regulations may give tribes and landowners leverage in negotiations.

HOW TO:



Manage a right of way

Sovereignty is strengthened when tribal governments are able to manage existing rights of way. However, in many cases tribes do not exert their sovereignty to the fullest extent. Increasingly, more tribes are exploring possibilities of protecting their homelands and are establishing regulations and processes regarding rights of way that provide guidance to companies and people wanting to do business with them. There are a number of ways tribal governments can establish effective management systems that strengthen their sovereignty.

COMPREHENSIVE LAND USE PLANNING AND POLICY

Tribes can establish comprehensive policies governing the development of reservation lands. These land-use plans set policy that can encourage or discourage third party uses of tribal lands for various purposes. Different parts of the reservation can be subject to different use policies, ultimately encouraging development in some areas and protecting other areas from unwanted intrusion.

Having sound tribal policies on negotiation and valuation of land rights can help bring services and infrastructure to various parts of the reservation. Without these policies in place, tribes may inadvertently insulate their lands, and in some cases their economies, from much needed infrastructure and economic development.

ACQUISITION ON TRIBAL LAND

Procedures for BIA approval of rights of way across tribal trust lands and allotted lands are found in 25 CFR 169. The BIA has internal rules governing approvals of rights of way.

Because land rights are subject to federal trust responsibility, the rules must be strictly followed. Under the regulations, BIA may approve a right of way only with tribal consent and for consideration equal to or greater than “fair market value.”

These provisions give tribes the opportunity to adopt regulations, ordinances, or procedures for tribal consent, for valuing tribal lands, and governing the terms and conditions of rights of way on their lands.

ACQUISITIONS ON ALLOTMENTS

Right of way acquisitions across allotments are problematic. Third parties seeking such rights must negotiate with numerous individuals, often for small sums of money. Allottees cannot create a cohesive negotiation plan or even hire experts who can speak for the allotment without approval of a majority of allottees. These policies leave protection of allottee interests to the BIA.

For tribes to extend protection to allottee lands, they could pass a regulation stating that tribal consent to rights of way will be withheld until the applicant shows that all similar allottee acquisitions have equal or better

terms and conditions than the negotiated tribal terms and conditions. This regulation is workable if there is an effective tribal negotiation process.

It is important to keep in mind that third parties may not condemn tribal trust lands unless federal law permits it. This is also true where the tribe is an undivided partial interest holder, even a small interest holder, in an allotment. This inability to condemn ensures that tribes have the last word on use of their lands.

MAINTENANCE

Managing rights of way on Indian lands has generally been left to the BIA. Tribes may wish to exercise care over the activities of third parties on their reservations by copying all BIA right of way documents and performing an analysis to determine the extent of third party rights. These documents will include the dates rights are granted, expiration dates of the rights, and whether the parties currently using tribal lands are those described in the documentation.

A site-based GPS review of facilities will assist in determining whether facilities on tribal lands are on the rights of way or are trespassing. Tribes can pass regulations governing trespassing facilities including financial penalties for trespass, removal of facilities and reclamation of lands.

Effective right of way documents must contain all the elements of a contract including: identification of the parties, types of interests transferred,

description of lands sufficient to identify the site, and length of term. Documents without these elements can be voided.

CONTRACT TERMS AND CONDITIONS

When negotiating new rights of way or reviewing existing documents, note specific terms describing:

- To whom the rights are granted and whether they are transferable.
- The specific actions authorized and the limitations of those actions.
- The specific description of the facilities authorized.
- The start and end dates of the rights.
- Other termination provisions and what happens to the facilities and lands upon termination.
- Exact location of the rights including length, width and height with maps and surveys attached.
- Rights of ingress and egress.
- Restriction on maintenance activities.
- Notices of entrance or other actions.

Before finalizing a right of way agreement, landowners should make sure that all of the terms are correct and acceptable.

It is also important to remember that tribal law will apply in interpreting these documents. Tribes can pass regulations stating that any document transferring an interest in tribal lands will be strictly construed in favor of the tribe. Third parties will generally request tribe and BIA approval to their standard form easement contract. Tribes should insist on using their particular language needed to describe the rights given and reserved. Due to recent court cases, tribes should also explicitly reserve their rights to tax, regulate and exercise dominion and control over lands within rights of way.

Rights of Way



Effective right of way documents must contain all the elements of a contract, including:

- Identification of the parties.
- Types of interests transferred.
- Description of lands sufficient to identify the site.
- Length of term.

“We have given ourselves a better understanding of our land base on the reservation. We now know what we have and what we need to work toward. It also keys us in on the fee land on our valley floor that will also enable us to buy back land.”

Portia Shields, executive secretary of the Yakama Nation Tribal Council



Yakama Nation realty project pays off

When Portia Shields drives down a Yakama Nation reservation road, she doesn't notice the gigantic evergreen trees, the golden wheat fields or the shimmering waters of a nearby river.

She looks at utility poles.

Shields' sightseeing habits changed when she and others became involved in what she calls the realty project, an ambitious undertaking to account for every parcel of land on this 1.3-million-acre reservation in central Washington, an area that covers 1,573 square miles in Klickitat and Yakima counties.

PROJECT STARTED SMALL AND GREW

The initial intention was to inventory power poles, but the work mushroomed into a seven-year project costing \$670,000. After surveying sections, redrawing boundary lines and mapping parcels, the Yakama Nation has a database for every piece of land and knows the location of all 1,800 power poles on its reservation.

“Now, we drive down the road and we're looking at power poles and what's attached to them,” said Shields, executive secretary of the Yakama Nation Tribal Council. “Never did I think I would be looking at power poles.”

Ray Wiseman, Yakama Nation's geographic information systems manager at the time, said the Tribe asked him in 1995 to account for every piece of property it owned. “I thought, ‘How hard could that be?’”

Almost immediately, the surveyors started finding problems. Property corners weren't lining up with property descriptions. Parcels of land were listed as trust, but records indicated they were fee. Roads were not in the right of way. They also discovered many agricultural trespasses.

Correcting the discrepancies involved gathering documents that in some cases dated back to the 1800s and involved trips to the National Archives in Washington, D.C.

After the third year of the project, Wiseman said data on the title status reports had to be verified because he had run into so many records that had incorrect facts.

The Tribe hired right of way specialist Hollyanna Pinkham to assist in the project. When Pinkham investigates a parcel of land, she gathers maps and surveys and enters them into a database to create a map layer. She also collects easements, lease agreements, rights of way and all other pertinent documents.

Then, using GPS and other mapping tools, she goes out into the field to find out everything about that parcel of land. At the site, she locates every piece of infrastructure on, under or above the land, including power and gas lines, roads, driveways, telephone lines, pipelines and entrances and exits on the property.

PUTTING A PUZZLE TOGETHER

After collecting all the information, Pinkham enters the data into the computer to create an updated map layer. She then assesses the data by comparing and contrasting the information she has gathered.

“Putting all these pieces together is like putting a puzzle together,” Pinkham said.

She makes sure that everything in the mapping data matches up with what she finds in the field. Assistance with this project came from college and high school students. Wiseman said they hired from the summer youth program and teamed high school students with college students to inventory power poles, do field work and scan documents.

Members of the tribal council talked to the

students before they went out into the field to impress upon them the importance of their work. Wiseman said the students felt that by participating in the realty project they were contributing to the solution. The Tribe has benefited from all the work in the realty project. Wiseman said that with the corrected records of the Tribe's land holdings, it received a rebate of \$450,000 in back taxes from the county.

“This project has paid for itself,” he said. “The Tribe has a fair assessment of its property ownership and it allows them to tackle their problems one at a time and when they are ready.”

The Tribe has found multiple uses for all the data it has collected. These uses provide for:

- A true inventory of land holdings.
- Ease in the mapping of rights of way.
- A comparison of written records and titles with actual uses and aerial photography.
- Planning of land use across multiple jurisdictions.
- The ability to link multiple databases together for a complete picture of a piece of property.

Shields said the Tribe was able to create an atlas of every township on the reservation from the land status data it collected. The 70-page color publication identifies all the roads, streams and other physical features of the reservation.

“We have given ourselves a better understanding of our land base on the reservation,” she explained. “We now know what we have and what we need to work toward. It also keys us in on the fee land on our valley floor that will also enable us to buy back land.”

Wiseman said the work of the realty project was a real eye-opener.

“I think it has definitely given the Tribe the ability to defend its membership and to assure that their assets are being properly looked after.”



Reasserting control over Indian homelands

The Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians in west-central Oregon face challenges regarding land issues that most treaty tribes in the U.S. do not.

Of the 109 tribes and bands whose federal recognition was terminated by the U.S. government in the Termination Act of 1954, 62 were from Oregon.

The Confederated Tribes, who were among those terminated, did not have their federal recognition restored until 1984.

Having lost their lands during termination, the existing 800 tribal members have had to slowly reacquire their land base.

They now control 320 acres consisting of small and widely scattered parcels of land that they have acquired mainly through donation or purchase.

The Confederated Tribes' highly dispersed tribal land base forces much more interaction and coordination with non-tribal landholders than might be faced on other reservations.

The challenges to resolve issues increase because non-tribal landholders are not familiar with how tribal government and tribal land issues work.

Currently, the Tribes are working with a non-tribal landowner who wants to construct apart-

ments and condominiums next to a nine-acre site where the Tribes' administration building sits. The Tribes purchased this site for their administrative building from the Elks Lodge who had previously sold an easement for a private right of way along the border of the nine-acre tract.

The non-tribal landowner wants to use the easement to provide access to the new housing development. The Tribes and the developers have been meeting to create a workable solution.

"We have told them they are subject to tribal jurisdiction," said Howard Crombie, Director of Natural Resources for the Confederated Tribes. "They said they are open to working with us. They understand the uses will be subject to tribal jurisdiction."

If the developers comply, they will have to follow the Tribes' expressed standards for the easement.

The standards include specific requirements for

road width, surfacing, sidewalks and landscaping, vegetative buffers, streetlights and storm drainage.

Crombie said he is not sure if the developers have experience with tribal jurisdiction.

"Currently," Crombie said, "the situation is not fully resolved but the Tribes and the developers will continue to meet in good faith and try to create a win-win outcome. We just have to work closely with the developers to make sure



they understand that they and the users of this easement must abide by all applicable tribal laws governing the standards of development and the use of the right of way."

Indian Land Tenure Foundation

151 East County Road B2
Little Canada, MN 55117-1523

Phone: 651-766-8999

Fax: 651-766-0012

info@iltf.org

www.iltf.org

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Cover photo by Pat Chase. The cover photo illustrates three types of right of way issues on Indian lands.

Web Resources



TO LEARN MORE ABOUT RIGHTS OF WAY

- Energy Policy Act of 2005, Section 1813, Indian Land Rights of Way Study
http://www.oe.energy.gov/DocumentsandMedia/EPAAct_1813_Final.pdf
- Bureau of Land Management, Rights of Way, Principles and Procedures
<http://www.blm.gov/nhp/news/regulatory/2800-Final/2800f.pdf>
- Uniform Appraisal Standards for Federal Land Acquisition
<http://www.usdoj.gov/enrd/land-ack/>
- The Appraisal Foundation
<http://www.appraisalfoundation.org>

You can also find other links to helpful resources concerning Indian land on the Indian Land Tenure Foundation's web site: www.iltf.org.