

**BUREAU OF INDIAN AFFAIRS
REGULATIONS GOVERNING RIGHTS-OF-
WAY ON INDIAN LANDS:
WHAT YOU NEED TO KNOW**



MODRALL SPERLING

Stan N. Harris

Telephone: (505) 848-1806
stan.harris@modrall.com

Deana M. Bennett

Telephone: (505) 848-1834
deana.bennett@modrall.com

OVERVIEW OF PRESENTATION

- Basics of “Indian country”
- Discussion of significant changes to Bureau of Indian Affairs Right-of-Way Regulations and recent developments.



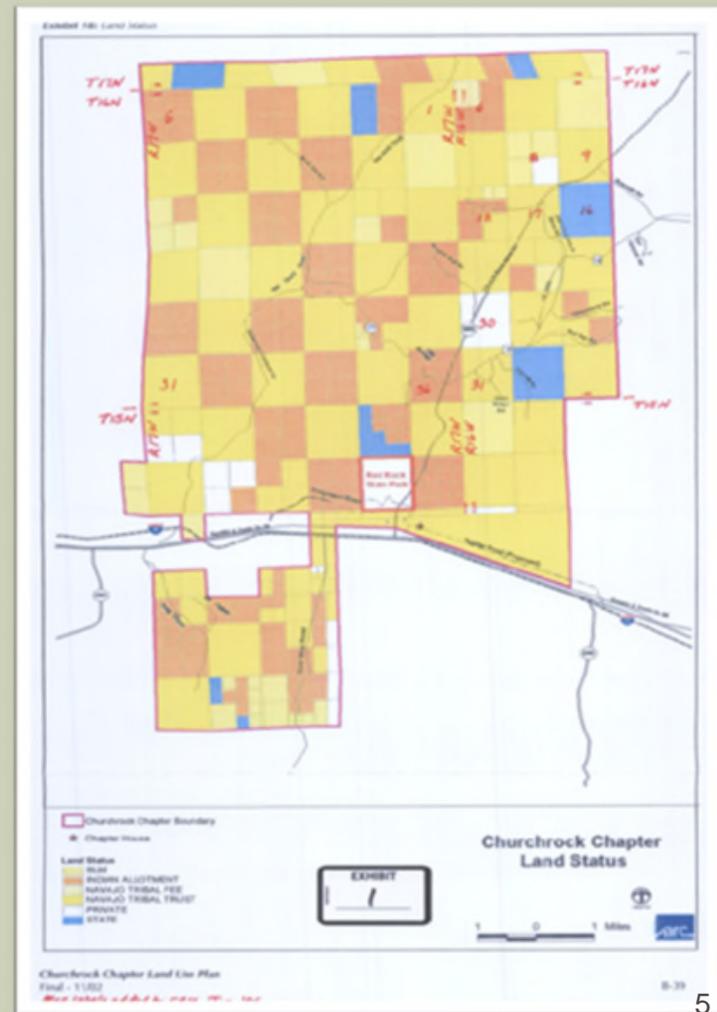
“INDIAN COUNTRY”

- **18 U.S.C. § 1151 defines as:**
 - Reservations
 - Allotments
 - Dependent Indian Communities



ALLOTMENTS

- Beneficial title in individual Indians
- Subject to federal supervision
- Often 160 acre parcels
- Resulted in checkerboarding
- And fractionalization



DEPENDENT INDIAN COMMUNITIES

- Lands:
 - Set aside by the Federal Government for the use of Indians as Indian land; and
 - Under federal superintendence.
- *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998)
- Include Pueblo land grants, which technically are owned in fee by the Pueblos, subject to federal restrictions on alienation, and are treated as “reservations.”



KEY REQUIREMENTS TO INITIATE AND DEVELOP A SUCCESSFUL PROJECT

- Understand Federal requirements and acquire necessary agreements.
- Understand Tribal requirements.
- Develop relationship with agencies and Tribal partners.

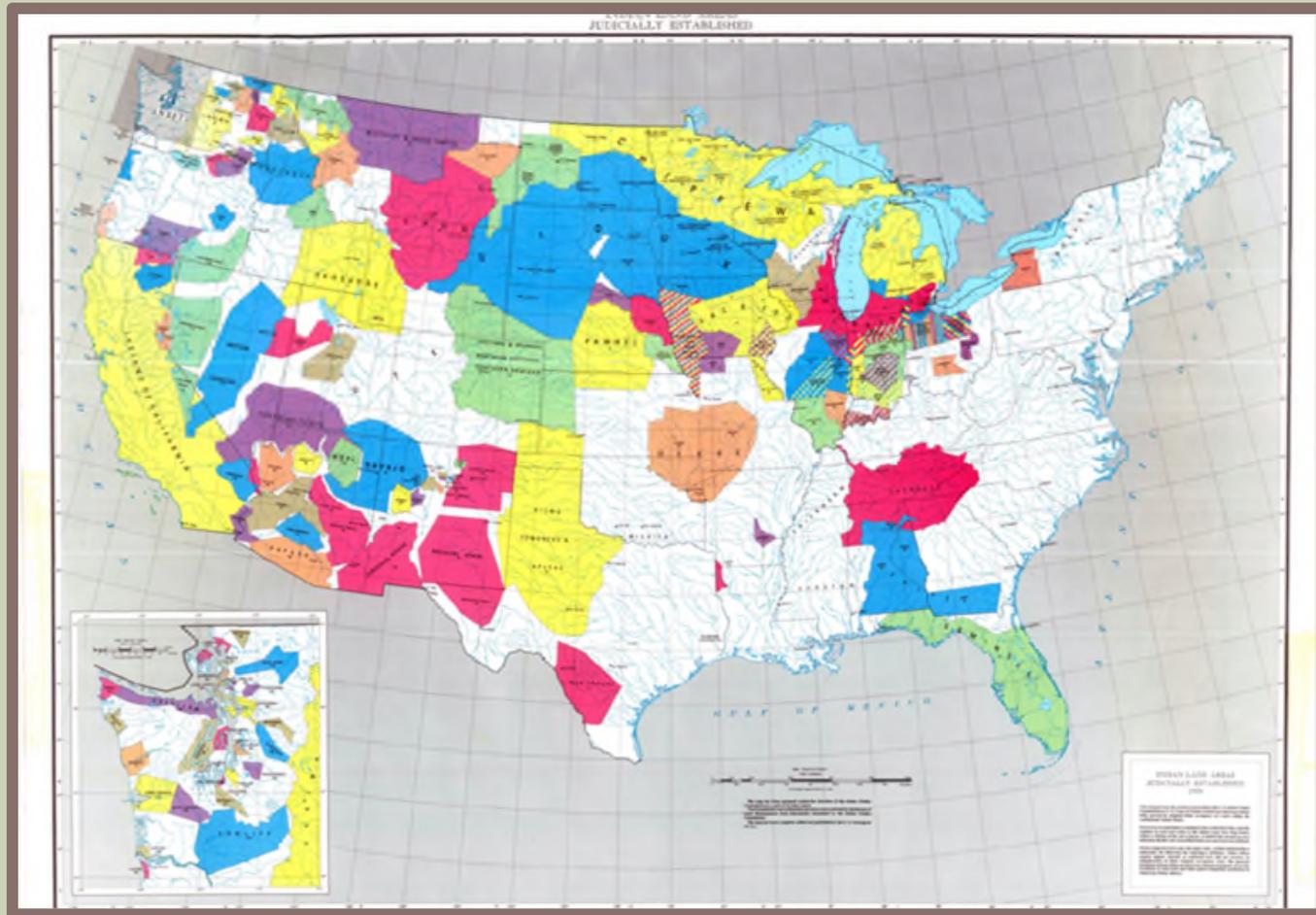


STATUTES APPLICABLE TO SITING PIPELINE PROJECTS ON INDIAN LAND

- **Indian Non-Intercourse Act: 25 U.S.C. § 177:**
 - Tribes cannot grant interests in trust lands without Congress' consent.
- **Congressional Consent:**
 - Primarily General Right-of-Way Act, 25 U.S.C. § § 323-328
 - Other right-of-way statutes exist on the books for specific industries but BIA usually relies on General Right-of-Way Act.
- **Other federal laws triggered by federal action, i.e., BIA grant of right-of-way:**
 - National Environmental Policy Act (“NEPA”)
 - Section 106 Consultation under National Historic Preservation Act (“NHPA”)
 - ESA Section 7 consultation
 - Among others....



ABORIGINAL AREAS (1978)



GENERAL RIGHT-OF-WAY ACT: 25 U.S.C. §§ 323-328 AND REGULATIONS

- Generally, Secretary (BIA) is the grantor.
- For rights-of-way across tribal lands, requires consent of Tribe.
- For rights-of-way across allotted lands:
 - Right-of-Way Act: grant with < 100% consent (majority consent requirement)
 - Subject to condemnation. See 25 U.S.C. § 357.
- Regulations at 25 C.F.R. Part 169.
- Final rule signed November 3, 2015 and published in the Federal Register on November 19, 2015.
- Effective April 22, 2016.



OVERVIEW OF PROVISIONS OF CONCERN

- Applicability
- Retroactive Application
 - Assignments/Mortgages/Renewals
- Tribal Jurisdiction
- Tribal Taxation
- Compensation
- Consent
- Duration
- Trespass
- Terms that will be included in new grants



APPLICABILITY OF REVISED REGULATIONS

- BIA will review applications submitted prior to the Final Rule's effective date under the regulations in effect at the time the application was submitted. 25 CFR § 169.7.
- Applicants who submitted applications but BIA did not approve before April 21, 2016 may withdraw and resubmit their applications.



RETROACTIVE APPLICATION

- “Non-procedural” versus “procedural” provisions.
- Final Rule’s “procedural” provisions apply to ROW grant issued prior to the Final Rule’s effective date when the existing grant is silent or unless explicit conflict exists. 25 C.F.R. § 169.7(b).
- Examples of “non-procedural” or “substantive” provisions: Review and adjustment requirements because affect compensation, “a core term of the grant....”
- Examples of “procedural” provisions: consent and approval process for assignments, mortgages, and renewals.



ASSIGNMENT

- **Prior Regulations:** Freely assignable unless expressly restricted.
- **New Regulations:** In a significant change, under 25 C.F.R. § 169.207, a grantee may assign without new landowner(s) consent and BIA approval only if the original grant expressly allowed for assignment without landowner(s) consent and BIA approval and documentation provided to BIA within 30 days.
- If grant is binding on “successors and assigns,” then BIA considers that consent.
- And assignments that are the result of corporate merger, acquisition, or transfer by operation of law do not require consent and approval. 25 C.F.R. § 169.207(c).
- Contemplates an “assignment fee.” 80 Fed. Reg. at 72526.



MORTGAGE

- **Prior Regulations:** Freely mortgageable unless expressly restricted.
- **New Regulations:** In another significant change, under 25 C.F.R. § 169.210, a grantee must meet the landowner(s) consent requirement unless the grant specifically allows for mortgaging without consent.
 - Grantee must obtain BIA approval.
 - BIA has 30 days to approve or disapprove the mortgage.



RENEWAL

- 25 C.F.R. § 169.202 allows for renewal only when, among other things:
 - The initial term and the renewal term together do not exceed the maximum determined reasonable term;
 - The existing grant explicitly authorized an automatic renewal or an option to renew; and
 - Specifies compensation owed or how compensation will be determined; and
 - The grantee provides confirmation of landowner consent, unless consent is not required by the original grant, in which case the grantee must provide notice to the landowners of the renewal.



TRIBAL JURISDICTION

- 25 C.F.R. § 169.9(b) states that rights-of-way are subject to tribal law “except to the extent that those tribal laws are inconsistent with *applicable Federal law*.”
- The Preamble to the Final Rule:
 - Places an affirmative burden on non-members conducting business with tribes or tribal entities to understand tribal law. 80 Fed. Reg. at 72503.
 - And states that a grantee may be in violation of the terms of the grant if the grantee challenges the authority of the tribe to impose or enforce certain tribal laws. 80 Fed. Reg. at 72528.



TRIBAL JURISDICTION

- What is “applicable Federal law” for purposes of determining whether tribal law applies?
 - *Montana v. United States*, 450 U.S. 544, 565 (1981)
 - Tribes lack jurisdiction over nonmembers unless one of two exceptions applies:
 - Consensual relationship of the qualifying kind (*Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997));
 - “direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”
 - *Strate v. A-1 Contractors*, 520 U.S. 438, 451-52 (1997)
 - Congressionally authorized right-of-way across Indian lands is the equivalent of non-Indian fee land.



TRIBAL JURISDICTION

- Yet the regulations provide:
 - A Tribe's jurisdiction extends to the land subject to the ROW "and any person or activity within the right-of-way." 25 C.F.R. § 169.10.
 - A grant of a right-of-way does not diminish a Tribe's right to enforce tribal law; it's "as if there were no grant of right-of-way."
 - A grant of right-of-way does not diminish the Tribe's "inherent sovereign power to exercise civil jurisdiction over non-members on Indian land."



TRIBAL JURISDICTION

- According to BIA:
 - Not inconsistent with *Strate* because:
 - “In these regulations, as grantor, the United States is preserving the tribes’ jurisdictions in all right-of-way grants issued under these regulations and is requiring that such grants expressly reserve tribal jurisdiction. Therefore, grants of rights-of-way under these regulations, consistent with the Court’s reasoning in *Strate*, would not be equivalent to fee land, but would retain the jurisdictional status of the underlying land.” 80 Fed. Reg. at 72494.
 - And not inconsistent with *Montana* because:
 - *Montana*’s rule does not apply.
 - Even if it does, tribal consent to a right-of-way constitutes the requisite consent to satisfy the consensual relationship exception. 80 Fed. Reg. at 72504.



TRIBAL TAXATION

- A tribe's power to tax extends to land, improvements, or any person or activity within the ROW. 25 C.F.R. § 169.10.
- Good news: 25 C.F.R. § 169.11 provides that state taxes do not apply, BUT improvements, activities, and ROW interests may be subject to taxation by a tribe with jurisdiction.
- Federal law may limit tribal taxation: *Atkinson Trading v. Shirley*, 532 U.S. 645 (2001) (on-Reservation non-Indian fee lands).



COMPENSATION FOR ROWS CROSSING ALLOTTED LANDS

- Compensation for a ROW over or across individually owned lands may include:
 - throughput fees,
 - franchise fees,
 - avoidance value,
 - bonuses or other factors, and
 - in-kind consideration. 25 C.F.R. §§ 169.112; 169.118.
- “The final rule does not establish any ceiling on compensation; to do so would unduly restrict landowners’ ability to get the maximum compensation for their land interest.” 80 Fed. Reg. at 72492.



CONSENT

- **Consent of Life Tenant/Remainder Interests.** Requires the consent of the majority of remainder interests identifiable at the time of the application, as well as the consent of the life tenant. 25 C.F.R. § 169.109.
- **Tribal consent required for tribal fractional interest.** The DOI asserted that tribal consent is required for any tract in which the tribe owns an interest, and that “[r]equiring tribal consent restores a measure of tribal sovereignty over Indian lands and is consistent with principles of tribal self-governance that animate modern Federal Indian policy.” 80 Fed. Reg. at 72509.
- **When a tribe holds even a miniscule fractional interest, this interpretation gives a tribe a veto over a ROW desired by individual holders and presents BIA with a conflict between its trust duties to individual Indians and those to tribes.**



DURATION

- 20-year “recommended” maximum term for oil and gas pipelines. 25 C.F.R. § 169.201(c).
- Renewals: “[G]uideline of 20 years as a maximum for a reasonable term for oil and gas pipelines to ensure a reexamination of the circumstances upon application for a new right-of-way at the end of that 20-year term, rather than an automatic renewal, to ensure protection of the landowner’s right to obtain value from the trust resource.” 80 Fed. Reg. at 72524.
- BIA will consider tribally negotiated duration when reviewing rights-of-way across individually owned lands. 25 C.F.R. § 169.201(c) (“We will consider durations different from these guidelines if . . .the tribe has negotiated for a different duration and the right-of-way crosses tribal land.”).



TRESPASS

- If a grantee remains in possession after the expiration, termination, or cancellation of a ROW, and the grantee is not accessing the land to perform reclamation or other grant obligations, the BIA may treat the unauthorized possession as a trespass. 25 C.F.R. § 169.410.
- Unless the *parties* have notified the BIA that they are engaged in good faith negotiations, the BIA may take action to recover possession and pursue additional remedies. 25 C.F.R. § 169.410.
- The Preamble states that “if a grant is ultimately renewed, *then BIA generally will not pursue trespass for the time of negotiations.*” 80 Fed. Reg. at 72531 (emphasis added).



PROVISIONS THAT MUST BE INCLUDED IN A GRANT

- A grant “will address” whether assignment/mortgaging is permitted, and if so, whether additional consent/compensation is required
- A grant will affirmatively state, among other things:
 - “The tribe maintains its existing jurisdiction over the land, activities, and persons within the right-of-way under § 169.010.”
 - The Tribe reserves the right “to reasonable access to the lands subject to the grant to determine grantee’s compliance with consent conditions or to protect public health and safety.” 25 C.F.R. § 169.125.



TIME LIMITS FOR BIA ACTION

- Application (25 C.F.R. § 169.123):
 - Within 60 days of receipt of complete application package, BIA will grant or deny, return for revision, or inform applicant that additional time is needed.
 - If need additional time, then will grant or deny within 30 days of sending letter.
- Amendment: 30 days unless need additional time to review, then 30 days from letter.
- Assignment (25 C.F.R. § 169.208): 30 days.
- Mortgage (25 C.F.R. § 169.211): 30 days.

TIME LIMITS FOR BIA ACTION

- If deadlines are not met, then up the chain of command (25 C.F.R. § 169.304):
 - If Superintendent does not meet deadlines, then parties may file a notice with Regional Director, who then has 15 days to grant or deny or order Superintendent to grant or deny within a specified time.
 - If the Regional Director does not meet deadlines or Superintendent does not act within specified time, then parties can file notice with BIA Director.
 - The BIA Director then has 15 days to grant or deny, or order the Regional Director or Superintendent to grant or deny within a specified time.
 - If the Regional Director or Superintendent fail to act within specified time, then the Director must issue a decision within 15 days.
 - Appeal to IBIA if BIA Director does not meet deadlines, but no appeal for inaction of other BIA officials.

RECENT DEVELOPMENTS

- **Cobell Land Buy Back Program:**
 - **According to the 2016 Status Report:**
 - 10.8 million acres of land that qualify (fractionated tracts with purchasable interests)
 - 98,000 fractionated tracts
 - **As of September 2016**
 - Tribal ownership of 1.8 million equivalent acres
 - Fractional interests acquired for Tribes: 485,253.

- **Pending Appeal in Tenth Circuit Court of Appeals**
 - District Court in New Mexico held that fractional tribal interest in allotment precludes condemnation under federal statute authorizing condemnation of “lands allotted in severalty.”
 - Oral argument held on January 17, 2017.



QUESTIONS? THANK YOU!

Stan N. Harris:
stan.harris@modrall.com
505-848-1806

Deana M. Bennett:
deana.bennett@modrall.com
505-848-1834

Or visit us at www.modrall.com

