THE PUBLIC NATURE OF INDIAN RESERVATION ROADS

(some initial thoughts)
ACCESS ISSUES

- Checker Board Reservation
- Right-of-Way Access Problems:
  - Private gates
  - Tribes restricting access (for good reason)
- Where is the recorded easement?
- Trying to develop ROW policy
- Thinking about role IRR system roads play
INDAIN LAW

- Notoriously difficult
  - Merges many areas of American law in a context that doesn’t fit
  - Seemingly inherently contradictory
- Different answers from different attorneys
- This is one of those different opinions
Public Nature of IRR

1. IRR system roads are public
   - Consequence: IRR = public road
   - Example as useful tool to resolve problems

2. Don’t need a recorded easement to place on IRR inventory
   - History of Reservations
   - History of IRR system
   - Definition of “public road” under IRR
   - Common law and public vs. private road
Indian Reservation Roads are public!

- 1982 Surface Transportation Assistance Act:

  “The term “Indian reservation road” means a **PUBLIC ROAD** that is located within or provides access to an Indian reservation or Indian trust land or restricted Indian land…”

  (23 U.S.C. 101(a))
Indian Reservation Roads are public!

- Congress’ express reason:

“Recognizing the need for all Federal roads that are **public roads** to be treated under uniform policies similar to the policies that apply to Federal-aid highways, there is established a coordinated Federal lands highways program that shall apply to … **Indian reservation roads**…”

- Objection: Doesn’t mean a road becomes public by putting it on the IRR inventory
Example: Brendale

- Yakama closed reservation to protect grazing, wildlife, and natural resources (1954 ord.)
- Brendale (great aunt was member) inherits fee land in closed area
- 1972 BIA requires permits for all road travel (including BIA and IRR); No guns condition
- Brendale/BIA sues (he loses, then wins); court says implied easement (1978-81) – no discussion of public nature of IRR system roads
Example: Brendale

- **Zoning Dispute (1980s)**
- **Yakama Nation applies its ordinance to all Rez land**
- **Yakima County applies to fee land on Rez**
- **Brendale develops summer cabins through County (viol. Yakama Nation), then seeks road use permit from BIA for new purchasers**
- **BIA denies in 1985, basis is conflict with Nation’s zoning regulations**
Example: Brendale

- Brendale appeals denial of access permit to Acting Assistant Secretary of BIA
- 1988 letter decision: Despite Dist. Court order saying implied easement, this is a BIA road on IRR system. Therefore, it is public and BIA can’t deny access
- Finally, BIA gets it right! Brendale doesn’t need an easement or permit
- Seven years after implied easement finding
Yakama Nation had legit reasons to close roads

Can use IRR system to accomplish this:

- IRR system roads owned by tribe or BIA can be perm. closed w/agreement between tribe and Sec. of Interior (25 C.F.R. 170.813(c))
- After agreement, pass resolution vacating public right-of-way. Cities and Counties do it all the time. Why not tribes?
- Treat as private (Post private, put up gate, regulations, etc.)
IRR: No Recorded Easement Required

- Ideal to have one, but not reality
- Many Rez roads have no recorded easements
- Tribes don’t have $$ to buy them all to meet needs
- Shouldn’t prevent tribes from managing roads that already exist, are open for general use by public, and BIA (no doubt) built to provide access throughout Rez
IRR: No Recorded Easement Required (context)

- History of Reservations and checker board
- History of IRR system
- “open to public travel” under IRR system laws
- Common law analysis of public vs. private roads
Allotment Acts

- Pacific NW Treaties (1850s) created initial Rez boundaries
- US wants more land; General Allotment Act (1887)
- Open Rez to individual ownership (and occupation)
  - Members get small tracts in trust for 25 years – then fee
  - “Surplus” sold to settlers
- Massive land loss. 138 million acres in 1887, 48 million by 1934
  - Indian Reorganization Act ends it (1934)
  - Result = checker board
- Surely, roads built between 1887-1934 to provide access throughout Rez
IRR History

  “Appropriations are hereby authorized… for …the survey, improvement, construction, and maintenance of Indian reservation roads…”

- Public Money

- No requirement of documented public easements

- No doubt $ used to meet access needs throughout Rez (not just a given individual allottee)
IRR History

- BIA partners w/FHWA in 1930. Sec. of Ag. cooperates w/states and DOI in construction and maintenance of IRR system roads
- 1936, FHWA required to approve IRR system roads
- FHWA’s purpose is to ensure safety, efficiency, and economy of the public’s roads
- 1982 STAA makes IRR public by definition
- Reasonable to assume Congressional funding throughout is to meet a public need, not simply for individual trust allottees
A public road under IRR laws

- 23 U.S.C. 101(a) defines IRR as public roads, and further defines “public roads” as:
  “[A]ny road or street under the jurisdiction of and maintained by a public authority and open to public travel. “

- Elements:
  1. Jurisdiction of Public Authority (Tribe/BIA)
  2. Maintained by Public Authority
  3. Open to public travel

- No recorded easement requirement
A public road under IRR laws

- “open to public travel” defined by regulations; 23 C.F.R. 460.2(c) states:
  “Open to public travel means that the road section is available, except during scheduled periods, extreme weather or emergency conditions, passable by four-wheel standard passenger cars, and open to the general public for use without restrictive gates, prohibitive signs, or regulation...”

- Consequence: If a given road was built and maintained w/BIA or IRR funds and is open, passable, and there are no gates, signs, or regulations restricting access, it is public

- No recorded easement requirement
Common Law analysis of public vs. private roads

- Valenzuela v. Sellars (Alabama Supreme Ct. 1945):
  - Single owner subdivides and sells leaving alleyway, which gives access to two roads and lots
  - Defendant blocks alley access
  - Ct. holds it was dedicated to public despite no recorded document of dedication because used by public for past 20 years despite, limited use: character, not amount, of use is controlling factor
Common Law analysis of public vs. private roads

- **Town of South Hero v. Wood (Vermont Sup. Ct. 2006):**
  - Road on maps since 1819, which runs along bay; no recorded easement or formal process to create
  - Shoreline erosion requires moving it throughout the years; 160 ft from original place in 2000
  - Private owners complain on their property – issue: did they dedicate it to public by actions (what was their intent)
  - Ct. finds public dedication due to use of road and maintained w/public funds despite seasonal and sporadic use

- Good case for determining BIA’s intent in creating a road – used by public and maintained w/public funds bodes for public road
Common Law analysis of public vs. private roads

- **Lovvorn v. Salisbury (Colo. Ct. of Appeals):**
  "The ultimate distinction between a public road and private easement… is that a private easement … is… limited to specific individuals and/or specific uses while a public road is open to all members of the public for any uses…"

- **Hood v. Spruill (Georgia Ct. of Appeals):**
  "[U]se is the determinative factor in designating (a road) as ‘private’ or ‘public’"
Conclusion

- History of development of Indian lands and BIA’s involvement in building and maintaining roads bodes for a road being public so long as ev. suggests built and maintained by BIA and public access never restricted – no need for a recorded easement
- Can put on IRR inventory – must treat as public
- If want it private, remove from IRR inventory through agreement w/Sec. of Interior, pass resolution vacating public right-of-way, and treat as private (signs, regulations, gates, etc.) NOTE: will want a procedure for notice and comment on removal