RIGHT-of-WAY
in
INDIAN COUNTRY

REALTY
and the
IRR PROGRAM
What is a Right-of-Way?

right of way also **right-of-way** (rtv-w) *n. pl. rights of way or right of ways*

1. a. The right to pass over property owned by another party.
   b. The path or thoroughfare on which such passage is made.

2. The strip of land over which facilities such as highways, railroads, or power lines are built.

3. The customary or legal right of a person, vessel, or vehicle to pass in front of another.
What is an Easement?

• Easement

n. the right to use the real property of another for a specific purpose. The easement is itself a real property interest, but legal title to the underlying land is retained by the original owner for all other purposes. Typical easements are for access to another property (often redundantly stated "access and egress," since entry and exit are over the same path).
DEFINITIONS

• Definitions of terms common to Indian Country
CHECKERBOARD

• Indian lands that were alienated as a result of the **General Allotment Act of 1887** were sold or transferred to non-Indian parties but remained within reservation boundaries. As a result, trust lands, fee lands, and lands owned by tribes, individual Indians and non-Indians are mixed together on the reservation.

• Lands within reservation boundaries may be in a variety of types of ownership—tribal, individual Indian, non-Indian, as well as a mix of **trust** and **fee** lands. The pattern of mixed ownership resembles a checkerboard.
• **Alienated Land**
  Land that has had its ownership transferred to another party.

• **Allotted Land**
  Reservation land the federal government distributed to individual Indians, generally in 40-, 80-, and 160-acre parcels.

• **Allottee**
  An individual who owns an **undivided interest** in a parcel of allotted land.
• **Beneficial Use**
  The right to benefit from (live on, use, profit from) a parcel of land, the legal title to which is held by the trustee. In the case of Indian land, the trustee is the federal government.

• **Chain of Title**
  A report of the ownership history from the government allotment or trust patent to the current owners.

• **Escheat**
  The reversion of the property of a deceased person to the government when there are no legal heirs.
• **Fee Simple (Fee Land)**
  Land ownership status in which the owner holds title to and control of the property. The owner may make decisions about land use or sell the land without government oversight.

• **Fee-to-Trust Conversion**
  When original allotted trust lands that were transferred to fee simple status are returned to trust status. Tribes or individual Indians can initiate the process on fee lands they already own or lands they acquire. In general, this conversion can take as much as two years.

• **Forced Fee Patents**
  A trust-to-fee conversion without the request, consent, or knowledge of the landowner. Forced fee patents led to the loss of many land parcels through tax foreclosure sales.
• **Fractionated Ownership (Fractionation)**

When a trust parcel is owned by more than one owner as **undivided interests**. Fractionated ownership results from ownership **interests** being divided again and again when an owner of the interest dies without a will providing for the distribution of the asset.

Trust parcels with fractionated ownership often have hundreds, sometimes thousands, of owners. By law, a majority of owners must agree to a particular use of the land, making it difficult for any one of the owners to use the land (i.e. for farming, building a home or starting a business).
• **Indian Land Tenure**
  The terms and conditions by which Indians hold land.

• **Indian Landowner**
  Any tribe or individual Indian who owns an interest in Indian land in trust or restricted status.

• **Interest**
  When used with respect to Indian land, an interest is an ownership right to the surface estate of Indian land that is unlimited or uncertain in duration.
• **Off-Reservation Trust Land**
  Land outside the boundaries of a reservation that is protected by the federal government for Indian use. For example, these pieces of land could be religious sites or pieces allotted to individuals out of the public domain.

• **Patents-in-Fee**
  The “patent” is the title deed by which the federal government conveys or transfers land to people. “In fee” refers to the **fee simple** ownership in land. The term “patent-in-fee” describes the title document issued by the U.S. Federal Government to terminate the trust created by the **trust patent** issued to the **allottee**.
• **Restricted Fee Land**
  The ownership is the same as [fee simple](#) land, but there are specific government-imposed restrictions on use and/or disposition.

• **Tenancy in Common**
  The most common form of ownership of rights to land held in trust for Native Americans. Tenants in common have unity of possession, which means that every owner has an equal right with their co-owners to the land as long as they live. A tenant in common has an [undivided interest](#) in the whole property as if they were the sole owner, and can transfer their [interest](#) by gift, sale or will. A tenant in common can also decide who will own their interest when they pass away.
• Title Status Report (TSR)
  Also referred to as an Interest Report Simple or Interest Report, a TSR takes the place of a title commitment for land that is held in trust. The TSR is a necessary precursor to issuing a mortgage for a property on trust land.

• Tribally-Owned Land
  Land that is owned by a group of Indians recognized by the federal government as an Indian tribe.
• Trust Land
Land owned either by an individual Indian or a tribe, the title to which is held in trust by the federal government. Most trust land is within reservation boundaries, but trust land can also be off-reservation, or outside the boundaries of an Indian reservation.

• Trust Patent
Individual Indian allottees were issued documents called “trust patents” to verify that their land was held in trust by the government.
Trust-to-Fee Conversion

- The conversion of lands held in trust by the U.S. Federal Government to fee simple status. With the passage of the Burke Act of 1906, Indian lands held in trust were converted to fee status if the Secretary of the Interior determined that the Indian landowner was competent. Today, trust lands can be converted to fee status in 30 days. Only individual Indian landowners can request a trust-to-fee conversion.
Why do we need a RW?

- ROW must be addressed for several aspects of managing a road system
Multiple Managers

- Tribes
- Local Units of Tribal Government
- Villages
- Chapters
- Districts
- Municipalities
- State
- City
- County
Multiple Uses

• Construction
• Maintenance
• Inventory
• Open range
• Utilities
• Vendors
• Tort Liability
• Utilities and other ROW inhabitants
• Enhancements
• Conservation Easements
FEDERAL INTEREST

1. A FEDERAL, STATE DOT, LOCAL PUBLIC AGENCY, OR OTHER ROAD MAINTAINING AGENCY REQUESTS A RIGHT OF WAY ACROSS TRIBAL PROPERTY INTERESTS, TRUST, OR ALLOTTED LAND, AS PART OF A FEDERAL AID PROJECT.

2. A TRIBE RECEIVES FEDERAL FUNDING AND RESPONSIBILITY FOR ACQUIRING RIGHT OF WAY FOR A FEDERAL LANDS PROGRAM OR PROJECT.
1. INTERSTATE SYSTEM
2. NATIONAL HIGHWAY SYSTEM
   • Federally assisted State program.
   • State receives federal funds.
   • State is responsible for program administration in partnership with SDOT.
   • FHWA provides oversight, stewardship and approvals.
FEDERAL LANDS HIGHWAY

23 U.S. CODE 204 CHAPTER 2

“… public roads are to be treated under uniform policies similar to the policies that apply to Federal-aid highways,… a coordinated… program that shall apply to public lands highways…… and Indian reservation roads (IRR) and bridges.”

• Funded by FLH; Jointly administered by FHWA and BIA
• Developed and constructed by FLH, BIA, Tribe or jointly.
• ISDEA – Tribal Self-Determination Policy and Law.
• Federal Trust Responsibility
IRR Definition

- (12) INDIAN RESERVATION ROAD.—... public road that is located within or provides access to an Indian reservation or Indian trust land or restricted Indian land that is not subject to fee title alienation without the approval of the Federal Government, or Indian and Alaska Native villages, groups, or communities in which Indians and Alaskan Natives reside, whom the Secretary of the Interior has determined are eligible for services generally available to Indians under Federal laws specifically applicable to Indians.
FEDERAL LANDS HIGHWAYS

- Indian Reservation Roads/ Bridge program is an integral part of the FLH Program
- FHWA has direct oversight and coordination responsibilities
- IRR is jointly administered by FHWA and BIA
- Federal roads treated under uniform policies similar to Federal Aid highways
- Federal Trust Responsibility balanced with Tribal/Allottee beneficial ownership
PROPERTY INTEREST FOR RIGHT OF WAY

TENURE OF RIGHT OF WAY
• All ROW shall be easements
• Term may be without limitation
• 25 CFR 169.18

ADEQUACY OF REAL PROPERTY INTEREST
• Acquire ROW adequate for the construction, operation and maintenance of a project and for the protection of both the facility and the traveling public.
• 23 CFR 1.23 23CFR 710.201
Request for Easement on Tribal Trust/Restricted Land

- BIA is sole authority to issue right of way easements across trust lands or otherwise restricted land, under BIA jurisdiction
- Tribe or allottee must consent to the easement
- FHWA Guidance Recognizes Unique BIA Role
- Each State has an FHWA approved ROW manual with instructions for acquiring right of way easements on tribal trust or restricted lands
Tribe or BIA Acquires Right of Way For a Federally Funded Project

- FHWA Programs; Federal Aid, Federal Lands Highway and Programs Run by other Federal Agencies
- Same Basic Requirements in each program; There may be additional requirements, exceptions or conditions in the Program Legislation
- Check with Program Agency for guidance
- Determine Agency with Jurisdictional Authority
EASEMENT AUTHORITY ON TRIBAL LAND

- Primary authority for granting ROW across trust and restricted land - 25 USC 323-328
- BIA regulations appear at 25 CFR 169
1. BIA Approves Appraisals
   • Allottee Ownership
     BIA/ State DOT Secures Consent from Property Owner
     Fractionated ownership of heirs

2. Tribal Ownership
   • Resolution or Consent to Acquire from Tribal Council
   • BIA Superintendent Approves Easement Grant
THANK YOU!

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