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Federal Regulations: Right-of-Ways in Indian Country

25 CFR 169

Wisconsin InterTribal Transportation Conference

November 7, 2017

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Overview

- I. Legislative History and Overview of Indian Land
- II. Scope of the New Regulations
- III. Working with the New Regulations Going Forward



I. Legislative History: How did we get here?

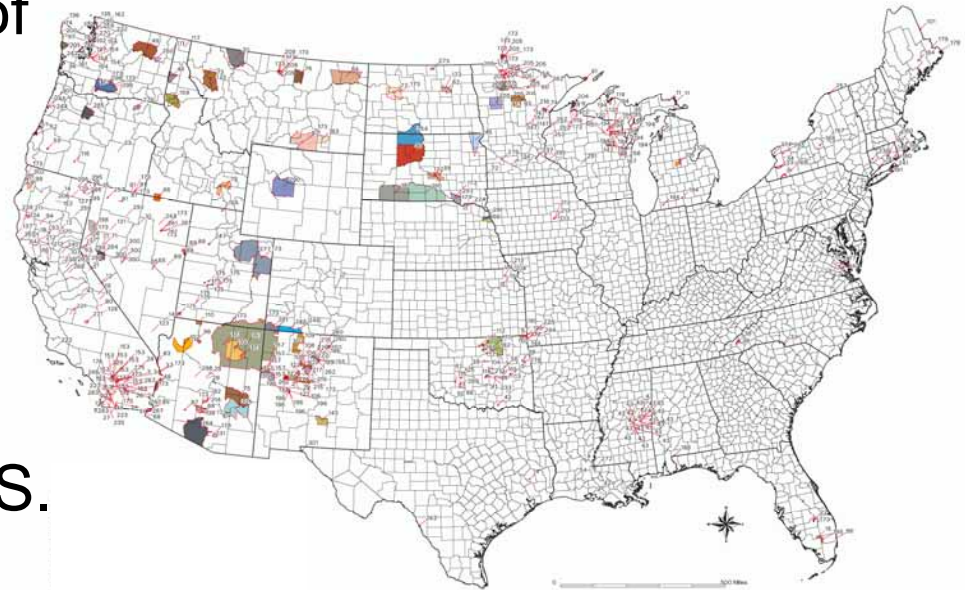


Legislative History

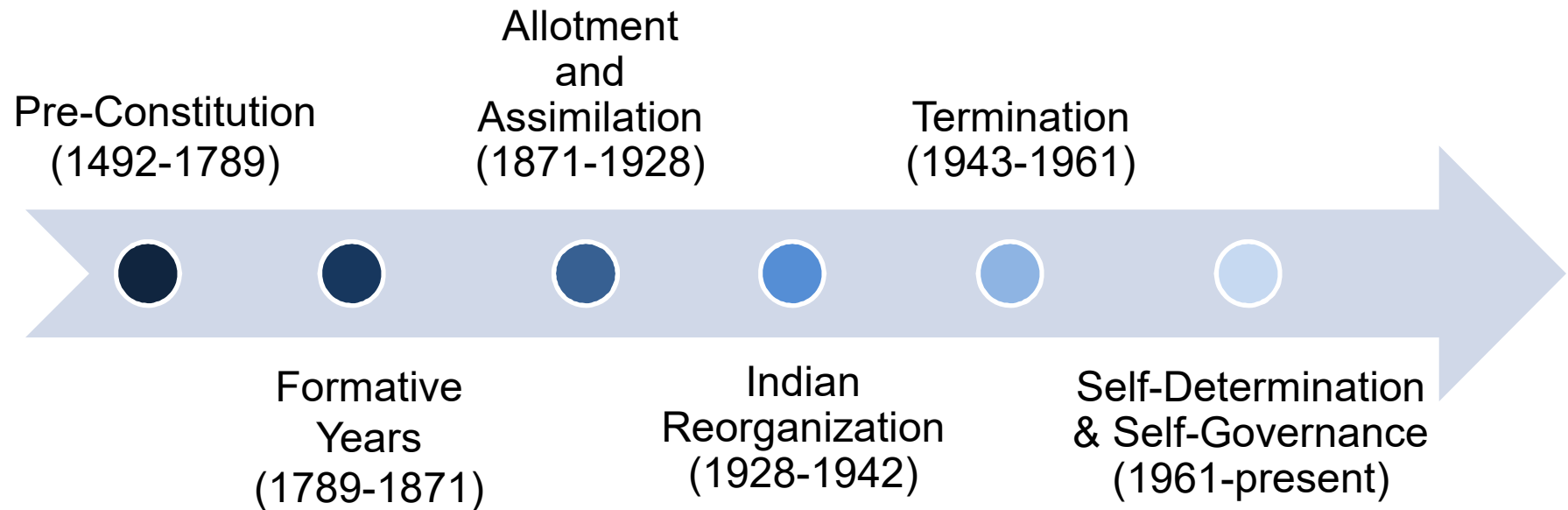
- ~ 56 million acres of land held in trust for tribes and tribal individuals
- Congress requires Department of Interior to approve of ROWs across such land
- 1948 General Rights-of-Way Act – general statutory authority
- Old rules severely outdated – originally published in 1968, no updates since 1980
- Effort to “Improve Trust Land Management”
- Proposed rule published June 17, 2014 (79 FR 34455)

Overview of Indian Land = Indian Country

- All lands within the limits of any Indian reservation, including rights-of-way running through the reservation
- All dependent Indian communities within the U.S.
- All Indian allotments



History of Federal Indian Law Policy



Legal Challenges to Tribal Land Use

- Non-Intercourse Act. Prohibits sale, tax or encumbrance of tribal trust land.
- Undermined effectiveness of traditional real estate mortgage.
- *“The Agent who will be appointed by the United States will be your friend and protector. He will not be suffered to defraud you, or to assist in defrauding you of your lands, or of any other thing, as all his proceedings must be reported in writing, so as to be submitted to the President of the United States.”*
George Washington to the Seneca Nation, 1791.

Legal Challenges to Tribal Land Use

- Indian Long-Term Leasing Act of 1955
 - Allowed tribes to lease trust lands to tribal entity, tribal members, or nontribal party with BIA approval.
 - Allowed leasehold interests to be assigned, encumbered and used for collateral.
 - Permits leasehold mortgages.
 - BIA approval process lengthy and complex.
 - 99 year terms (with exceptions).

Land and Land Status

- Trust land
 - Tribe or individual Indian
- Fee land
 - Tribe or individual Indian
 - Non-Indian
- Fee to Trust
 - Indian Reorganization Act
 - Protecting and increasing Indian trust land base
 - Section 5 (25 U.S.C. § 465)



II. Overview of the New Regulations



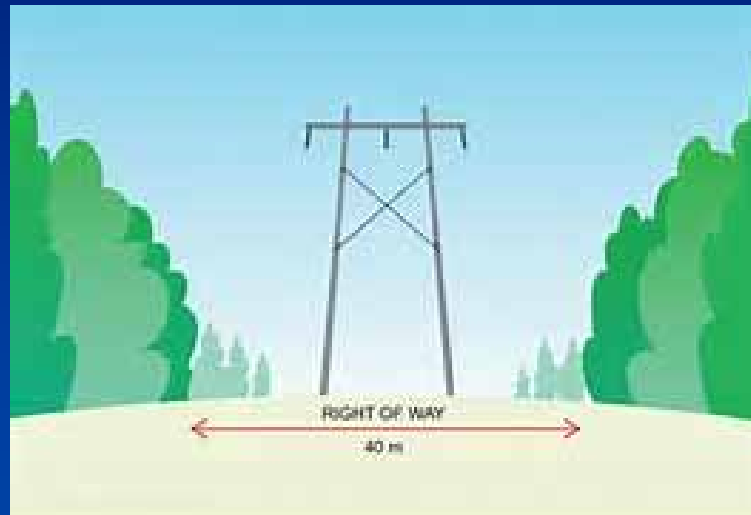
Scope of New Regulations

- General statutory authority for granting ROWs for all purposes
- Intent is to SIMPLIFY & STREAMLINE, i.e., eliminates specific provisions to certain ROWs, such as railroads
 - Establishes timelines for BIA review of ROW requests
 - Clarifies ROWs on tribal land are generally not subject to state law
 - Clarifies processes for BIA review of ROW documents
 - Allows BIA disapproval only if BIA states a compelling reason
 - Defers to tribes on compensation amount for tribal land
 - Clarifies that ROWs on tribal land not subject to state taxation

Scope of New Regulations

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

III. Working with the New Regulations Going Forward



Low Hanging Fruit – Need for Clarification

- Assignments, 25 C.F.R. § 169.007(d)
- Consent, 25 C.F.R. §169.107
- Piggybacking, 25 C.F.R. §169.127
- What else?

Providing Clarity

- Regional BIA Office
- Central Office
- Training (Internal)
- Training (External)
- Guidance Documents

Case Illustration: Hand Out

- What rule is implicated?
- What is the correct interpretation?
- Where do we go for guidance?



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Questions?

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