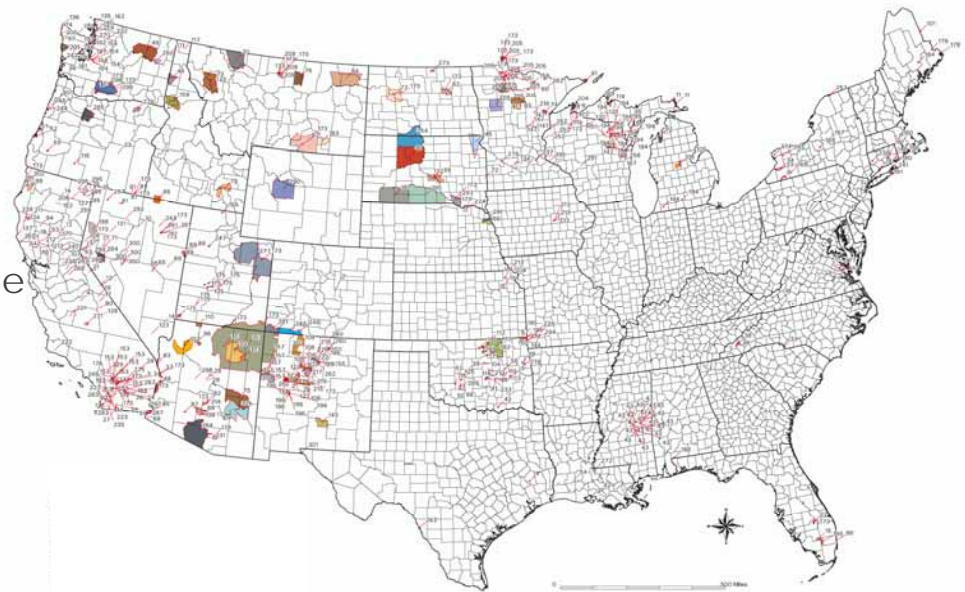

Easements and Rights of Ways in Indian Country

- ▶ Wisconsin tribal Transportation Conference
- ▶ November 6-7, 2018
- ▶ Potawatomi Hotel & Casino, Milwaukee, WI
- ▶ Samantha Skenandore, Attorney/of Counsel
- ▶ Quarles & Brady LLP

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





Federal Trust Responsibility

- ▶ Federal government's unique relationship with Indian tribes = the federal government "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes (Seminole Nation v. United States, 1942)
 - ▶ Evolved from treaties, statutes, and courts
 - ▶ Reaffirmed through legislation, invoked through administrative action, court decisions
-



Land and Land Status

- ▶ Social, Cultural, Religious importance
 - ▶ Economic importance
 - ▶ Resources
 - ▶ Economic development
 - ▶ Federal Trust
 - ▶ Trustee and beneficiary
 - ▶ Ownership in common
 - ▶ Trust land v. Fee land
 - ▶ Statutory restraints on alienation
-

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)





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).
-



Zoning Issues

- ▶ Tribal authority over property is extensive
 - ▶ Communal ownership of property
 - ▶ Tribe acts in proprietary capacity
 - ▶ Tribe acts as government
 - ▶ On-reservation non-Indian fee land may be subject to tribal zoning laws, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).
-



Cultural & Historic Resources

- ▶ Federal Law
 - ▶ Archeological Resources Protection Act
 - ▶ Permitting
 - ▶ Consultation
 - ▶ Native American Graves Repatriation Act
 - ▶ Repatriation
 - ▶ Federal lands and tribal lands
 - ▶ National Historic Preservation Act
 - ▶ Environmental review and consultation (§ 106)
 - ▶ Traditional Cultural Properties
-



Cultural & Historic Resources

- ▶ Tribal Law
 - ▶ Inherent authority to preserve lands and resources
 - ▶ Tribal Historic Preservation Law
 - ▶ Tribal Historic Preservation Officers
 - ▶ Wisconsin examples
-



Cultural & Historic Resources

- ▶ State Law
- ▶ Wisconsin
 - ▶ Consultation Mandate – Exec. Order #39
 - ▶ Programmatic Agreements

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U.S. Department of the Interior
Indian Affairs

Home / Assistant Secretary - Indian Affairs / Office of Regulatory Affairs and Collaborative Action / Rights-of-Way (25 CFR 169)

Rights-of-Way (25 CFR 169)

FINAL RULE

The effective date of the final rule is extended until April 21, 2016. The compliance date for submission of documentation of past assignments is extended until August 16, 2016.

- [Comparison Chart - comparing Current Rule to New Rule \(pdf\)](#)
- [Final Rule; Extension of Effective Date and Compliance Date \(pdf\)](#) (extension until April 21, 2016)
- [Final Rule; Extension of Effective Date and Compliance Date \(pdf\)](#) (extension until March 21, 2016)
- [Final Rights-of-Way \(ROW\) Rule \(pdf\)](#)
- [Frequently Asked Questions \(FAQs\) on the Final ROW Rule \(pdf\)](#) - Updated March 2016
- [Presentation: Training for Grantees, Potential Grantees, and Owners of Indian Land on the New ROW Rule](#), February 2016
- To view the 2/29/16 webinar on ROW, please go to the Office of Trust Services' [Division of Real Estate Services](#) website (and click the link to the webinar located there)

IMPLEMENTATION TOOLS

25 CFR 169 Federal Regulations ROWs



25 CFR 169 and Tribal Laws

- ▶ Tribal Law Considerations
 - ▶ Authority – Who are the players?
 - ▶ What is the application process?
 - ▶ What is required?
 - ▶ What other tribal laws are implicated?
 - ▶ Limits of the grant pursuant to law vs. what is negotiable?
 - ▶ How is trespass determined and remedied?
 - ▶ Permission to assign
 - ▶ Does a tribal tax apply?
-



25 CFR 169 and Tribal Laws

- ▶ Enforcement
 - ▶ Environmental Review
 - ▶ Public Comment Period
 - ▶ Trespass
 - ▶ Termination
 - ▶ Tribal Court
 - ▶ Sovereign Immunity
 - ▶ Tribal Court Rules
-

Tribal ROW Law - Examples

- ▶ <http://redcliff-nsn.gov/government/TribalChapters/Chapter25.pdf>

CHAPTER 25 – RIGHTS OF WAY, SERVICE LINES AND TRESPASS (12-19-17)

RIGHTS OF WAY AND SERVICE LINES

- 25.1** **SECTION 1: AUTHORITY AND PURPOSE**
- 25.1.1** **PURPOSE.** The purposes of this Ordinance are;
- (a) To take advantage of opportunities for greater self-determination presented by the BIA's 2016 revision of right-of-way regulations;
 - (b) To strengthen Tribal sovereignty and increase Tribal control over Tribal lands and resources; and
 - (c) To provide rules governing eligibility the issuance of rights-of-way and service line permits over Tribal Lands.
- 25.1.2** **AUTHORITY.** The Tribal Council enacts this Ordinance pursuant to its authority under Art. VI, Sections 1(c), (e), (g), (i) and (m) and Article VIII, Section 12 of the Tribe's Constitution.
- 25.1.3** **EFFECTIVE DATE.** This Ordinance shall take effect upon approval by the Tribal Council and shall have retroactive effect in accordance with its provisions.
- 25.1.4** **SCOPE.** This ordinance governs right-of-ways and service line agreements over Tribal Lands, relating to the transmission of electricity.
- 25.1.5** **APPLICABLE LAW.** This ordinance and other laws of the Tribe shall govern all matters arising under this ordinance to the extent not preempted by federal law. In the absence of applicable Tribal or federal law, the Court may apply common law principles in interpreting any matter arising under this ordinance.

Tribal ROW Law Examples

- ▶ Solar Project Example
- ▶ Design Build Agreement
- ▶ Access Agreement
- ▶ Tribal Resolution
- ▶ Waiver of Sovereign Immunity



Questions?

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