

RIGHT-OF-WAY SOVEREIGNTY

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Introduction.....	225
I. Historical Summary of Laws Governing Rights-of-Way Through Indian Country	228
II. Rights-of-Way in Wisconsin Indian Country.....	231
III. Sovereignty Enhancement Under the 2016 Part 169 Regulations ..	235
Conclusion	237

INTRODUCTION

[T]he roads you propose, we do not wish to have them made through our country.

—Cherokee Response to United States Treaty
Commissioners, 1801¹

Private property enjoys high status in American law. The Fifth and Fourteenth Amendments forbid the federal and state governments, respectively, from depriving a citizen of their property without due process of law and mandate that just compensation be paid for property taken for a public purpose.² A right-of-way³ might be sought for any number of private or commercial purposes, but in most cases the landowner is free to refuse.⁴ Where a right-of-way serves a *public* purpose, however, state laws typically confer special powers on the entity, such as a utility, seeking a right-of-way, including the right to take the right-of-way against the will

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1. Extract from the Speech of the Commissioners of the United States to the Chiefs of the Cherokees, Assembled at Southwest Point (Sept. 4th, 1801), 7th Cong., 1st Sess., No. 95 (1801), *in* IV AMERICAN STATE PAPERS 657 (1832).

2. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

3. Merriam-Webster’s Collegiate Dictionary defines “right-of-way” to mean “a legal right of passage over another person’s ground.” *Right-of-way*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (3d ed. 2003). According to current federal regulations governing rights-of-way in Indian country,

Right-of-way means an easement or a legal right to go over or across tribal land, individually owned Indian land, or BIA land for a specific purpose, including but not limited to building and operating a line or road. This term may also refer to the land subject to the grant of right-of-way.

25 C.F.R. § 169.2 (2021).

4. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.1 (AM. L. INST. 2000) (outlining how servitudes can be created).

of the property owner through condemnation proceedings, provided the utility compensates the landowner.⁵

The United States frequently sought rights-of-way in treaties that it negotiated with Indian tribes. Rights-of-way were often for specific purposes, such as roads that migrants could safely use in crossing Indian country as they journeyed westward⁶ or railroads connecting one part of the country with another.⁷ Treaties defining the boundaries of newly created reservations sometimes gave the secretary of the interior (secretary) broad authority to grant right-of-way easements.⁸

Around the turn of the twentieth century, Congress began to pass laws vesting the secretary with blanket authority to grant different types of easements subject to different conditions. In 1948 Congress passed the Right of Way Act consolidating previous laws and delegating authority to the secretary to grant rights-of-way “for all purposes.”⁹ This Act, and the acts that preceded it, reflected the near-universal belief, which Congress shared, that rights-of-way in favor of transportation, energy transmission, and telecommunications utilities were in the public interest and should be facilitated.¹⁰ The secretary’s exercise of his broad authority through the Bureau of Indian Affairs (BIA)¹¹ and the regulations adopted under his

5. See, e.g., WIS. STAT. § 32.02 (2019–20).

6. Treaty with the Six Nations, art. V, Nov. 11, 1794, 7 Stat. 44; Treaty with the Choctaws, art. II, Dec. 17, 1801, 7 Stat. 66, 67; Treaty with the Chickasaws, art. I, Oct. 24, 1801, 7 Stat. 65, 65; Treaty with the Wyandots, etc., art. III, Aug. 3, 1795, 7 Stat. 49, 50–51; Treaty with the Chippewa, etc., art. II, Nov. 25, 1808, 7 Stat. 112, 112; Treaty with the Wyandots, etc., art., 14, Sept. 29, 1817, 7 Stat. 160, 165–66. These treaties and others *infra* are available in INDIAN AFFAIRS: LAWS AND TREATIES (Charles J. Kappler ed., 1904), <https://dc.library.okstate.edu/digital/collection/kapplers/id/29743/> [<https://perma.cc/E57G-4FBJ>].

7. Treaty with the Delawares, art. 12, May 6, 1854, 10 Stat. 1048, 1050–51; Treaty with the Shawnees, art. 13, May 10, 1854, 10 Stat. 1053, 1058; Treaty with the Ioways, art. 10, May 17, 1854, 10 Stat. 1069, 1071; Treaty with the Osage Indians, art. XI, Sept. 29, 1865, 14 Stat. 687, 689.

8. Treaty with the Chippewas, art. 3, Sept. 30, 1854, 10 Stat. 1109, 1110; Treaty with the Miami Indians, art. 10, June 5, 1854, 10 Stat. 1093, 1097; Treaty with the Willamette Indians, art. 8, Jan. 22, 1855, 10 Stat. 1143, 1146; Treaty with the Chippewas, art. VIII, Feb. 22, 1855, 10 Stat. 1165, 1169.

9. Act of Feb. 5, 1948, ch. 45, § 1, 62 Stat. 17, 17, 25 U.S.C. § 323.

10. See Errol E. Meidinger, *The “Public Uses” of Eminent Domain: History and Policy*, 11 ENV’T L. 1, 32–33 (1980) (discussing courts’ treatment of takings by utility companies under a broad public use doctrine in the context of economic development); see also *Rights-of-Way: Hearing on HR-2081 Before the Subcomm. on Nat’l Parks, Forests, and Lands of the H. Comm. on Res.*, 114th Cong. (1995). This belief is also reflected in the expansive condemnation rights of utilities under Wisconsin law. See WIS. STAT. § 32.02 (declaring a variety of utilities capable of condemning property for the purpose of delivering services or constructing facilities).

11. The designation “Bureau of Indian Affairs” was formally conferred in 1947. *Bureau of Indian Affairs (BIA)*, DEP’T OF THE INTERIOR: INDIAN AFFS., <https://www.bia.gov/bia> [<https://perma.cc/4B5H-QW72>] (last visited Feb. 11, 2022). The office was previously known by various names, including “the Indian office, the Indian

supervision—including the regulations adopted by the Department of Interior under the Acts of March 3, 1901,¹² and the subsequent regulations under the Right of Way Act of 1948¹³—reflected the same assumptions.¹⁴

Tribes' perspectives often were quite different from those of federal officials. Rights-of-way took additional land from what tribes considered to be an already depleted land base. Rights-of-way allowed private companies to operate within reservation boundaries free of any tribal regulation, often without providing any benefit to the tribal community.¹⁵ Rights-of-way, especially roads and railroads, increased interactions with whites, bringing about profound and sometimes unwelcome changes in the social and economic life of the tribal community.¹⁶

Effective April 21, 2016, the Department of the Interior adopted new right-of-way regulations at 25 C.F.R. Part 169 that fundamentally change the Department's historical approach.¹⁷ While the Right of Way Act still requires that the BIA approve rights-of-way, the new rules reflect a reinterpretation of the federal government's trust responsibility with respect to rights-of-way. Instead of the federal government continuing to retain virtually all regulatory authority and substituting its judgment for that of tribes, the rules explicitly support tribal decision-making and the exercise of tribal regulatory authority.¹⁸

This Essay briefly reviews the history of rights-of-way through Indian country, describes the new paradigm adopted under the 2016 regulations, and suggests how tribes can harness that paradigm to strengthen tribal sovereignty and generate revenue.¹⁹

bureau, the Indian department, and the Indian Service." *Id.* The cited article uses "BIA" to refer to the agency, including its previous incarnations. *See id.*

12. Act of Mar. 3, 1901, ch. 832, § 4, 31 Stat. 1084, 25 U.S.C. § 311.

13. Act of Feb. 5, 1948, ch. 45, 62 Stat. 17, 25 U.S.C. §§ 323–328.

14. *See* Shelley Ross Saxon, *The Aftermath of Takings*, 70 AM. U. L. REV. 589, 599 (2020) (noting a historical trend of courts upholding state delegation of eminent domain power to public utilities under the public use doctrine).

15. *See* Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 52–56 (2005) (discussing the often remediless taking of American Indian land).

16. *See id.* at 54–55; *Land Rights*, INDIAN L. RES. CTR., <https://indianlaw.org/issue/Land-Rights> [<https://perma.cc/29TF-2M4W>] (last visited Feb. 26, 2022).

17. *See* 25 C.F.R. § 169.1(a) (2021) (noting an intent "to support tribal self-determination and self-governance by acknowledging and incorporating tribal law and policies in processing a request for a right-of-way across tribal lands and [to] defer to the maximum extent possible to Indian landowner decisions regarding their Indian land").

18. *See id.* § 169.107 (noting consent requirements for rights-of-way); § 169.402(b) (noting a tribe's authority to investigate a party's compliance with a right-of-way consistent with its tribal law).

19. This Essay addresses the new right-of-way regulations as they relate to lands the United States owns in trust for tribes or tribe-owned lands subject to a restriction against alienation. This Essay does not address rights-of-way across allotted or title-restricted lands

I. HISTORICAL SUMMARY OF LAWS GOVERNING RIGHTS-OF-WAY
THROUGH INDIAN COUNTRY

In the Railroad Right of Way Act of March 3, 1875,²⁰ Congress prescribed the procedures by which railroads could generally obtain rights-of-way over “public lands of the United States” through a process administered by the secretary of the interior. The Act excluded Indian reservations “unless such right of way shall be provided for by treaty.”²¹ The 1875 Act, in turn, incorporated the compensation procedures of section 3 of the Pacific Railroad Act.²² These procedures provided for a right of condemnation upon payment of damages assessed by local, court-appointed, impartial commissioners and based on the difference in the value of the property with the right-of-way and without it.²³ The procedures prescribed under the Acts of 1864 and 1875 were available to the secretary in his exercise of *treaty*-conferred right-of-way authority.²⁴ Comparing the value of an unimproved, forty-acre forest tract containing a one-hundred-foot-wide telephone line with the value of the same tract unencumbered of course yields minimal compensation.

In 1899, Congress enacted a general law authorizing the secretary to grant rights-of-way through Indian country to railroads, without regard to treaties.²⁵ The 1899 Act did not expressly require tribal consent but required payment of “full compensation . . . determined and paid under the direction of the Secretary of the Interior.”²⁶ Allottees, but not tribes, were accorded rights to contest the compensation offered before an impartial commission, as under the 1864 Act.²⁷

owned by individual tribal members. The deference that the secretary accords tribal decision-making under the regulations does not apply to individually owned trust lands, nor do most tribes wish to take responsibility for those lands.

20. General Railroad Right-of-Way Act, ch. 152, § 1, 18 Stat. 482, 482 (1875) (codified as amended at 43 U.S.C. § 934).

21. *Id.* at § 5.

22. *Id.* at § 3 (incorporating Pacific Railway Act, ch. 216, § 3, 13 Stat. 356, 357–58 (1864)).

23. *Id.*; *cf.* WIS. STAT. § 32.09(6g) (2019–20) (“In the case of the taking of an easement, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the items of loss or damage to the property enumerated in sub. (6) (a) to (g) where shown to exist.”).

24. *See* General Railroad Right-of-Way Act § 5.

25. Act of Mar. 2, 1899, ch. 374, 30 Stat. 990 (codified as amended at 25 U.S.C. §§ 312–317).

26. *Id.* § 3.

27. *See* Pacific Railway Act, ch. 216, § 3, 13 Stat. 356, 357 (1864); General Railroad Right-of-Way Act § 3.

On February 15, 1901, Congress enacted a statute authorizing the secretary to permit the “use of rights of way”—but not a legal easement—through public lands, including Indian reservations, for electricity and telephone and telegraph lines and facilities, provided only that the permits be “not incompatible with the public interest.”²⁸ No maximum terms or compensation was mandated.²⁹

Several weeks later, on March 3, 1901, as part of the 1902 Appropriations Act, Congress authorized the secretary to grant easements specifically through Indian lands for telephone and telegraph facilities, with the compensation, as under the 1899 Act, to be “determined in such manner as the Secretary . . . may direct, and . . . subject to his final approval.”³⁰ Section 4 of the same chapter of the appropriations act authorized the secretary to grant permission, “upon compliance with such requirements as he may deem necessary,” to state and local authorities to open highways through tribal lands, including allottee lands, “in accordance with the laws of the State or Territory in which the lands are situated.”³¹

The Act of March 3, 1901, infringed tribal sovereignty in several new ways. The Act authorized the secretary to tax facilities, for the benefit of the tribe, at an amount not to exceed five dollars per ten miles of line—but *only if* the lines were not subject to state taxes.³² The Act also explicitly provided that incorporated cities and towns had regulatory authority and that the Act should not be construed as to deny their right to tax the lines. Finally, the Act provided that “lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.”³³

The condemnation provision of the 1901 Act, codified at 25 U.S.C. § 357, remains in effect today. Significantly, the right of condemnation does not extend to *tribal* trust lands.³⁴ Regulations adopted by the secretary under the Act of March 3, 1901, included a number of provisions relating to the application process that were carried over into subsequent revisions, some of which survive in current regulations.³⁵

28. Act of Feb. 15, 1901, ch. 371, 31 Stat. 790, 791 (codified as amended at 43 U.S.C. § 959).

29. *Id.*

30. Act of Mar. 3, 1901, ch. 832, § 3, 31 Stat. 1058, 1083, 25 U.S.C. § 319.

31. *Id.* § 4.

32. *Id.* § 3.

33. *Id.*

34. *See* 25 U.S.C. § 357.

35. *See* OFF. OF INDIAN AFFS., DEP’T OF THE INTERIOR, *Annual Reports: Right of Way for Telegraph and Telephone Lines Through Indian Lands*, in ANNUAL REPORTS OF

In 1904, Congress authorized the secretary to grant easements through Indian country for oil and gas facilities.³⁶ Compensation was to be determined by the secretary and taxation allowed subject to the same conditions included in the Act of March 3, 1901.³⁷

The Appropriations Act of 1911 authorized the secretary to grant fifty-year easements across the public lands and reservations of the United States for transmission and distribution of electricity and telephone and telegraph lines.³⁸ No compensation was prescribed.

The Right of Way Act³⁹ authorizes the secretary to grant right-of-way easements “for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation.”⁴⁰ Tribal consent is required in the case of tribes organized under the Indian Reorganization Act.⁴¹ Consistent with previous acts, the 1948 Act provides,

No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.⁴²

The Right of Way Act simplified the issuance of rights-of-way in Indian country by consolidating the requirements for all rights-of-way in a single statute. The assumption underlying the secretary’s practices, however, did not change. The authority lay with the secretary, not the tribe.⁴³ That rights-of-way for purposes of transportation, energy, and telecommunications were desirable was assumed. Concepts of fair market value continued to be borrowed from state law. The right of state government units—but not tribal governments—to regulate was assumed.

As a practical matter, the tribal consent requirement was not meaningful for most of the twentieth century. The utility seeking a right-

THE DEPARTMENT OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1901, at 638, 638–40 (1902); 25 C.F.R. § 169 (2021).

36. Act of Mar. 11, 1904, ch. 505, § 1, 33 Stat. 65 (codified as amended at 25 U.S.C. § 321).

37. *Id.*; see also *supra* note 30 and accompanying text.

38. Act of Mar. 4, 1911, ch. 238, § 1, 36 Stat. 1235, 1253 (codified as amended at 43 U.S.C. § 961).

39. Act of Feb. 5, 1948, ch. 45, 62 Stat. 18 (codified as amended at 25 U.S.C. §§ 323–328).

40. 25 U.S.C. § 323.

41. See *id.* § 5123(e).

42. Act of Feb. 5, 1948, ch. 45, 62 Stat. 18, 25 U.S.C. § 325.

43. See *id.* § 1.

of-way was required to negotiate with the BIA, not the tribe; the BIA prescribed the process, the form of the easement, and the easement's terms, including the compensation, if any, that the tribe would receive.⁴⁴ Our review of numerous files from this era indicates that the BIA's practice was to complete the process and then send the final form of easement to the tribal council with a request that the council enact a resolution of consent. It made sense for the tribe, usually lacking the lawyers, surveyors, and appraisers available to the utility and BIA, to defer to its trustee and duly enact the requested resolution.⁴⁵

The federal laws authorizing the secretary to grant rights-of-way across Indian reservations and the state laws that confer condemnation powers on utilities reflect an assumption that rights-of-way for public purposes are a good thing. After all, without rights-of-way, the roads, railways, and telecommunications lines that connect our modern society would be impossible. The transportation of water, gas, oil, and electricity from their sources to end users would be nearly impossible. But what about Indian country?

II. RIGHTS-OF-WAY IN WISCONSIN INDIAN COUNTRY

The BIA's approach to rights-of-way in Indian country historically reflected both the assumption that rights-of-way are a good thing and state law mechanisms for determining just compensation were appropriate. For reasons that seem obvious, tribes did not always share the government's perspective. The history of rights-of-way in Wisconsin provides salient

44. See generally 25 C.F.R. § 256.1–256.12 (1949); 25 C.F.R. § 161.1–161.19 (1957); 25 C.F.R. § 161.1–161.18 (1970); 25 C.F.R. § 256.76–256.82 (1938) (detailing the BIA's role in determining compensation); 25 C.F.R. § 161.14 (1957) (same); 25 C.F.R. § 161.12–161.14 (1970) (same).

45. Until they were amended by the Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, 114 Stat. 46, 25 U.S.C. § 71, both the Act of May 21, 1872, 17 Stat. 136, 25 U.S.C. § 81, and section 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476, barred tribes from hiring attorneys without secretarial approval on the assumption that “Indians, either individually or collectively, were incapable of protecting themselves from fraud in the conduct of their economic affairs.” S. REP. NO. 106-150, at 2 (1999), *accompanying* Indian Tribal Economic Development and Contract Encouragement Act of 2000. Indian gaming, which became widespread following enactment of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701–2721, has provided some tribes with sufficient revenues to fund in-house attorneys, but tribes with marginal gaming enterprises remain underrepresented and some, including in Wisconsin, still have no in-house attorneys. The Act of July 26, 1892, 27 Stat. 272–73 (codified as amended at 25 U.S.C. §§ 4–7) made the commissioner of Indian affairs the custodian of all official records relating to Indian lands. See also 25 C.F.R. § 150.10 (2021). The official records of the Wisconsin tribes are housed in the regional Land Titles and Records Office in Ashland, Wisconsin. *Division of Land Titles and Records*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFS., <https://www.bia.gov/bia/ots/dltr> [<https://perma.cc/GQA9-6HA5>] (last visited Apr. 5, 2022).

examples. The 1854 Treaty with the Chippewa, Article 3, provided that “[a]ll necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.”⁴⁶

The treaty created four reservations in Wisconsin: Lac du Flambeau, Lac Courte Oreilles, Red Cliff, and Bad River.⁴⁷ Thirty years later, the railroads had slowly crept north to extract the white pine abundant in northern Wisconsin and had reached within thirty miles of the Lac du Flambeau reservation.⁴⁸ The government agent at La Pointe, W. R. Durfee, reported in 1884 that at Lac du Flambeau, there was no school and no government employees and that “[t]hese Indians support themselves principally by hunting, fishing, and labor in the lumber camps upon the Flambeau River.”⁴⁹ The railroad would soon change this.

In 1888 a new agent at La Pointe, J. T. Gregory, reported that the Bad River, Bois Forte, and Lac du Flambeau tribes had all refused to consent to rights-of-way for railroads through their reservations, commenting that “[t]he Indians are not much in favor of having railroads pass through their lands, as hey [sic] set fire to their timber and kill their horses and cattle without giving them just compensation therefor.”⁵⁰ Just a year later, however, another agent, M. A. Leahy, reported that the Milwaukee, Lake Shore and Western Railway had been graded across the Lac du Flambeau reservation and the compensation “determined.”⁵¹ Leahy recommended that the payments be invested “in flour and pork, to be issued to the Indians as they may need it.”⁵²

46. Treaty with the Chippewas, *supra* note 8, at 649.

47. *See id.* at 648–49; *see also* *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Evers*, 533 F. Supp. 3d 701, 706 (W.D. Wis. 2021) (describing the reservations created by the treaty).

48. ANTHONY GODFREY, BUREAU OF INDIAN AFFS., U.S. DEP’T OF THE INTERIOR, A FORESTRY HISTORY OF TEN WISCONSIN INDIAN RESERVATIONS UNDER THE GREAT LAKES AGENCY: PRECONTACT TO THE PRESENT 57, 73 (1996).

49. W. R. Durfee, *Reports of Agents in Wisconsin*, in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR FOR THE YEAR 1884, at 177, 180 (1884).

50. J. T. Gregory, *Reports of Agents in Wisconsin*, in FIFTY-SEVENTH ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 237, 241 (1888).

51. M. A. Leahy, *Reports of Agents in Wisconsin*, in FIFTY-EIGHTH ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 296, 305 (1889).

52. *Id.* In seeking tribal consent, Leahy may have been following general Interior Department practices under the Act of March 3, 1875, which prescribed the procedures by which railroads could obtain rights-of-way over “public lands of the United States” from the secretary of the interior. Act of Mar. 3, 1875, ch. 152, § 1, 18 Stat. 482. The Act explicitly excluded Indian reservations “unless such right of way shall be provided for by treaty,” a condition that the 1854 treaty satisfied. *Id.* § 5. The 1875 Act incorporated the compensation procedures of Section 3 of the Act of July 2, 1864, the “act to aid in the

The tribes' reluctance to consent to the railroads likely was based, at least in part, on the changes that the railroad would bring. Their concerns were well-founded. In 1890 the government employed a teacher, a farmer, and three policemen at Lac du Flambeau;⁵³ by 1893 the reservation had its own railway station, a lumber mill, and a hotel.⁵⁴ In 1895 the government opened the Lac du Flambeau boarding school, where, for the next forty years, the community's children were isolated from their parents under military-like discipline and deprived of their language, religion, and culture.⁵⁵ Once the timber was gone, by 1915, the railroad brought speculators and wealthy Chicagoans, who bought up the reservation's prime lakefront parcels for vacation homes.⁵⁶

The Lac du Flambeau experience was not unique. Tribes had long understood that roads and railways brought with them the agents of cultural, and possibly physical, destruction. When treaty commissioners in 1801 requested permission to build a road through the Cherokee territory for hostels and ferries, tribal leaders told them, "The roads you propose, we do not wish to have them made through our country."⁵⁷ The Lakota leader Red Cloud famously fought a war over a road through the Sioux Reservation, later removed under the Fort Laramie Treaty of 1868.⁵⁸

The reports of Wisconsin's La Pointe agent also reflect tribes' continuing dissatisfaction with rights-of-way and apparent lack of power over them. In his 1892 report, Agent Leahy reported that the Fond du Lac Chippewa "claim that they have never received any compensation for the right of way taken and used by this railroad corporation across their

construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes." *Id.* § 3.

53. M. A. Leahy, *Reports of Agents in Wisconsin*, in FIFTY-NINTH ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 234, 236, 238–39, 241 (1890).

54. W. A. Mercer, *Reports of Agents in Wisconsin*, in SIXTY-SECOND ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 341, 345–46, 348 (1893).

55. See PATTY LOEW, INDIAN NATIONS OF WISCONSIN: HISTORIES OF ENDURANCE AND RENEWAL 70, 75 (2d ed. 2013); see also Katie Phernetton, *Former Indigenous Boarding School Structure Still Stands in Lac du Flambeau*, WDIO (Oct. 12, 2021, 5:59 PM), <https://www.wdio.com/wisconsin-news/former-indigenous-boarding-school-structure-still-stands-in-lac-du-flambeau/6267662/> [<https://perma.cc/3SFJ-HCC7>].

56. See Ben Guthrie, *A Brief History of Lac du Flambeau*, LAC DU FLAMBEAU: CHAMBER OF COM., <https://lacduflambeauchamber.com/history/a-history-of-lac-du-flambeau-by-ben-guthrie/> [<https://perma.cc/PLM5-6NF4>] (last visited Feb. 14, 2022).

57. Extract from the Speech of the Commissioners of the United States to the Chiefs of the Cherokees, *supra* note 1, at 657.

58. See Treaty with the Sioux—Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee—and Arapaho art. XVI, Apr. 29, 1868, 15 Stat. 635.

lands.”⁵⁹ Leahy also reported that the Duluth, South Shore, and Atlantic railroads had been constructed across the Bad River Reservation five years previously, although the tribe had not agreed to compensation and the railway company had paid nothing.⁶⁰

These tribes may have resisted rights-of-way, but not for long. The agent controlled every aspect of community life.⁶¹ The agent’s powers to appoint police officers, withhold rations, and even incarcerate uncooperative Indians in the guardhouse⁶² made prolonged resistance nearly impossible. By the 1920s, tribes’ historical objections to rights-of-way based on concerns over the adverse impact of an influx of whites were moot: whether desired or not, the influx of outsiders, and the consequent cultural damage, was done.⁶³

In the modern era, tribes have chafed at their subordinate role in the granting of rights-of-way across their lands and at their lack of regulatory control. The BIA controlled the process from start to finish. The BIA’s Land Titles Records Office, not the tribes, holds the tribes’ land records.⁶⁴ The relevant expertise (e.g., surveyors, appraisers, attorneys, administrative capability, etc.) historically lay with the BIA and the utilities.⁶⁵ The principles that determined compensation were based on state law concepts of fair market value, normally comparing the difference in value of the property with and without the electric or other line.⁶⁶ These circumstances also made it difficult for tribes to protect culturally sensitive areas of their reservations or to refuse consent outright based on cultural or environmental values.⁶⁷

59. M. A. Leahy, *Reports of Agents in Wisconsin*, in SIXTY-FIRST ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 514, 520 (1892).

60. *Id.*

61. ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR FOR THE YEAR 1883, at xiv–xv (1883); *see also* OFF. OF INDIAN AFFS., DEP’T OF THE INTERIOR, RULES GOVERNING THE COURT OF INDIAN OFFENSES (1883), <http://robert-clinton.com/wp-content/uploads/2018/09/code-of-indian-offenses.pdf> [<https://perma.cc/5F4K-JCLL>].

62. *See* OFF. OF INDIAN AFFS., *supra* note 61.

63. LOEW, *supra* note 55, at 75.

64. 25 C.F.R. § 150 (2021).

65. *See* OFF. OF SPECIAL TRAINING FOR AM. INDIANS, BUREAU OF INDIAN AFFS., DIR.-BUREAU OF LAND MGMT., CERTIFIED FEDERAL SURVEYOR (CFEDS) PROGRAM HANDBOOK 1, 12–14 (2006).

66. *See* C.F.R. § 169.2, .110(b), .114 (2021).

67. In recent decades, gaming revenues and non-profit allies have enabled tribes to better resist rights-of-way that they believe may jeopardize tribal environmental values. A prominent example is opposition to renewal of rights-of-way for the Line 5 pipeline, which crosses the straits of Mackinac. *See* Mary Anette Pember, *Michigan Tribe Banishes Enbridge Line 5 Pipeline*, INDIAN COUNTRY TODAY (May 11, 2021), <https://indiancountrytoday.com/news/michigan-tribe-banishes-enbridge-line-5-pipeline> [<https://perma.cc/U9FC-FGXL>].

Our experience representing several Wisconsin tribes shows that the BIA lacks the human resources to respond in a timely manner to broad requests for right-of-way information relative to specific reservations. Information is normally filed by tract numbers assigned when reservations were allotted. Because each reservation has many tracts, title searches are labor-intensive. Records maintained by the county register of deeds may be helpful but cannot be regarded as authoritative, as these filings are merely informational.

We performed extensive research on the rights-of-way of a reservation belonging to one of the Chippewa tribes whose reservation was created under the above-discussed 1854 treaty. We also obtained all of the information available from the BIA relating to the Tribe. Our research revealed the following:

- A significant number of lines had never been authorized by a BIA-approved right-of-way easement.
- A significant number of lines were covered by BIA-approved right-of-way easements that had expired.
- Very few BIA-approved easements required payment of any kind, and any required payments were nominal.
- A significant number of lines were covered by BIA-approved right-of-way easements that were “perpetual.”

Like a number of other Wisconsin reservations, the tribe’s reservation was established by treaty and allotted during the period 1880 to 1920. Based on our more limited inquiries on behalf of other, similarly situated tribal clients, we believe that our findings relative to the tribe likely are widely shared.

III. SOVEREIGNTY ENHANCEMENT UNDER THE 2016 PART 169 REGULATIONS

The new Part 169 Regulations represent a sea change in the secretary’s approach to rights-of-way. The regulations explicitly recognize that (1) tribal law, to the extent not inconsistent with federal law, provides the appropriate regulatory framework for utilities operating lines through the reservation,⁶⁸ (2) rights-of-way are “generally not subject to State law or the law of a political subdivision thereof,”⁶⁹ (3) the BIA will generally accept “any payment amount negotiated by the tribe,” untethered from “fair market” standards historically applied,⁷⁰ and (4) tribal consent to the

68. 25 C.F.R. § 169.9(b) (2021).

69. *Id.* § 169.9(c).

70. *Id.* § 169.110. This provision, together with the utilities’ lack of any condemnation option where tribal lands are concerned, gives them meaningful leverage.

right-of-way may be in the form of a written agreement between the tribe and the utility, which “may impose restrictions or conditions . . . that automatically become conditions and restrictions in the grant.”⁷¹

These features of the new regulations are radical departures from the historical framework. They present tribes with a valuable opportunity to assert territorial sovereignty, vindicate tribal cultural and environmental values, and generate revenue. Elements of a pro-sovereignty framework for rights-of-way should include legislative acts, such as those described below.

A *right-of-way* ordinance prescribes the process that utilities must follow in order to enter into a right-of-way agreement with the tribe, including a formal application, submission of historical documents, the environmental review process, and standards for determining compensation.⁷² The tribe’s environmental review will, of course, incorporate *tribal* cultural and environmental values heretofore often missing. The right-of-way ordinance can include application fees to defray tribal administrative costs and surcharges for facilities currently operating without a valid right-of-way or under an expired right-of-way.⁷³ In order not to impose duplicative burdens on applicants, the tribe can match its own requirements with minimum federal requirements so that each satisfies the other.⁷⁴

A *trespass* ordinance supplements a right-of-way ordinance by serving as an inducement for utilities operating without a current, valid right-of-way to come into compliance under the tribe’s right-of-way ordinance.⁷⁵ The trespass ordinance would provide for money damages that increase with each day of trespass and/or other penalties on non-compliant parties.⁷⁶

A *property tax* ordinance can potentially generate revenue by taxing facilities crossing tribal lands, regardless whether the facilities are covered by a valid right-of-way.⁷⁷ Because, from the tribe’s perspective, the objective of revenue production is served equally by an annual payment under the right-of-way agreement or an annual property tax payment, these items can be elastic where a utility does not have a current valid right-of-way and seeks to obtain one under the tribe’s right-of-way ordinance.

Our tribal clients’ experiences show that, under all three ordinances, it is prudent to calibrate the utilities’ potential financial obligations, taking

Individual allottees do not have similar leverage because, pursuant to 25 U.S.C. § 357, their lands are subject to condemnation in accordance with state law.

71. *Id.* § 169.107(a).

72. *Id.* § 169.101–169.105, 169.123–169.124.

73. *See id.* § 169.110, 169.112, 169.120, 169.410, 169.413.

74. *Id.* § 169.413.

75. *Id.* § 169.401, 169.407, 169.410, 169.413.

76. *Id.*

77. *Id.* § 169.10(b).

into account the profitability of the particular line and its value to the tribal community. A high-voltage transmission line that crosses the reservation on its way to serving a large off-reservation population may merit much different treatment from a distribution line that ends on the reservation, serves only the tribal community, and generates only modest revenues for the utility. Financial obligations that are disproportionate or unreasonable will likely result in resistance and costly legal challenges.

CONCLUSION

Rights-of-way are rarely the stuff of headlines, but the Department of Interior deserves credit for reimagining an important area of Indian law for the modern era. Taking advantage of the sovereignty-enhancement features of the Part 169 regulations imposes new administrative burdens, and tribes unwilling to assume them can continue in a passive role. This, however, would be a missed opportunity. Historically, the BIA drove the right-of-way approval process, and the tribe's consent was a mere formality. The new regulations, to the maximum extent possible under the 1948 Right of Way Act, allow tribes to switch roles with the BIA and thereby enhance both their sovereignty and their revenues.