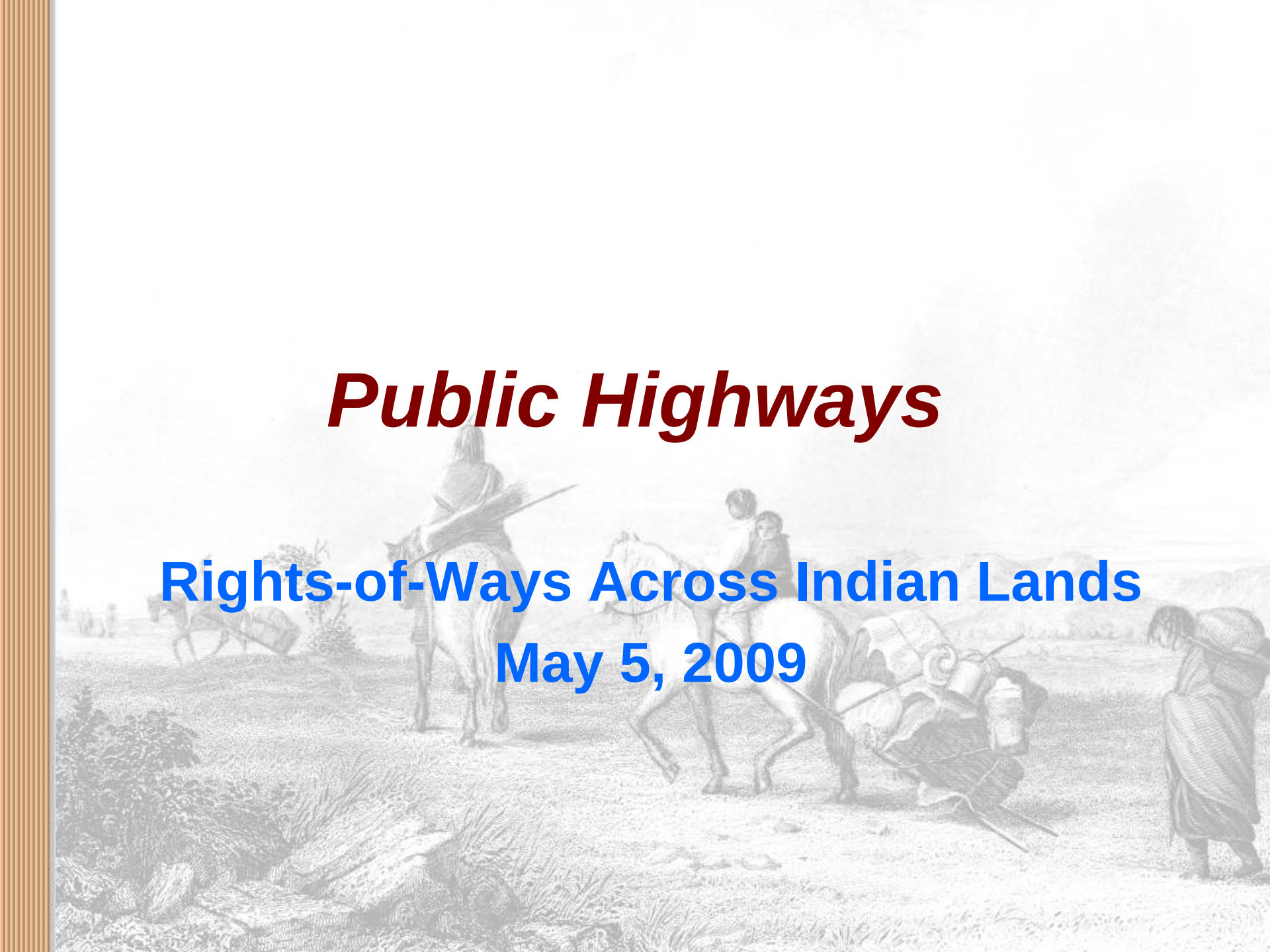


Public Highways

Rights-of-Ways Across Indian Lands

May 5, 2009

Major Highway Acts (ROW)

- **Act of March 3, 1901 (31 Stat. 1084; 25 U.S.C. 311)**
- **Nov. 9, 1921, ch. 119, 42 Stat. 212 (Federal Highway Act)**
- **Feb. 5, 1948, ch. 45, Sec. 1, 62 Stat. 17**

25 USC - INDIANS
CHAPTER 8 - RIGHTS-OF-WAY THROUGH INDIAN LANDS

Sec. 311. Opening highways

The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation.

-SOURCE- (Mar. 3, 1901, ch. 832, Sec. 4, 31 Stat. 1084.)

25 USC - INDIANS
CHAPTER 8 - RIGHTS-OF-WAY THROUGH INDIAN LANDS

Sec. 313. Width of rights-of-way

Such right of way shall not exceed fifty feet in width on each side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include grounds adjacent thereto for station buildings, depots, machine shops, sidetracks, turn- outs, and water stations, not to exceed two hundred feet in width by a length of three thousand feet, and not more than one station to be located within any one continuous length of ten miles of road.

-SOURCE- (Mar. 2, 1899, ch. 374, Sec. 2, 30 Stat. 990; June 21, 1906, ch. 3504, 34 Stat. 330.)

25 USC - INDIANS
CHAPTER 8 - RIGHTS-OF-WAY THROUGH INDIAN LANDS

Sec. 314. Survey; maps; compensation

“The line of route of said road may be surveyed and located through and across any of said lands at any time, upon permission therefor being obtained from the Secretary of the Interior; but before the grant of such right of way shall become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior, and the company must make payment to the Secretary of the Interior for the benefit of the tribe or nation, of full compensation for such right of way, including all damage to improvements and adjacent lands, which compensation shall be determined and paid under the direction of the Secretary of the Interior, in such manner as he may prescribe.”

-SOURCE- (Mar. 2, 1899, ch. 374, Sec. 3, 30 Stat. 991; Feb. 28, 1902, ch. 134, Sec. 23, 32 Stat. 50.)

25 USC - INDIANS
CHAPTER 8 - RIGHTS-OF-WAY THROUGH INDIAN LANDS

Sec. 315. Time for completion of road; forfeiture

If any such company shall fail to construct and put in operation one-tenth of its entire line in one year, or to complete its road within three years after the approval of its map of location by the Secretary of the Interior, the right of way granted shall be deemed forfeited and abandoned ipso facto as to that portion of the road not then constructed and in operation: Provided, That the Secretary may, when he deems proper, extend, for a period not exceeding two years, the time for the completion of any road for which right of way has been granted and a part of which shall have been built.

-SOURCE- (Mar. 2, 1899, ch. 374, Sec. 4, 30 Stat. 991.)

25 USC - INDIANS
CHAPTER 8 - RIGHTS-OF-WAY THROUGH INDIAN LANDS

Sec. 318a. Roads on Indian reservations; appropriation

Appropriations are hereby authorized out of any money in the Treasury not otherwise appropriated for material, equipment, supervision and engineering, and the employment of Indian labor in the survey, improvement, construction, and maintenance of Indian reservation roads not eligible to Government aid under the Federal Highway Act and for which no other appropriation is available, under such rules and regulations as may be prescribed by the Secretary of the Interior.

-***SOURCE- (May 26, 1928, ch. 756, 45 Stat. 750.)***

25 USC - INDIANS
CHAPTER 8 - RIGHTS-OF-WAY THROUGH INDIAN LANDS

Sec. 323. Rights-of-way for all purposes across any Indian lands

The Secretary of the Interior be, and he is empowered to grant rights-of-way 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, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

-SOURCE- (Feb. 5, 1948, ch. 45, Sec. 1, 62 Stat. 17.)

25 USC - INDIANS
CHAPTER 8 - RIGHTS-OF-WAY THROUGH INDIAN LANDS

Sec. 324. Consent of certain tribes; consent of individual Indians

No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended [25 U.S.C. 461 et seq.]; the Act of May 1, 1936 (49 Stat. 1250) [25 U.S.C. 473a, 496]; or the Act of June 26, 1936 (49 Stat. 1967) [25 U.S.C. 501 et seq.], shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

-SOURCE- (Feb. 5, 1948, ch. 45, Sec. 2, 62 Stat. 18.)

Condemnation of Indian Land

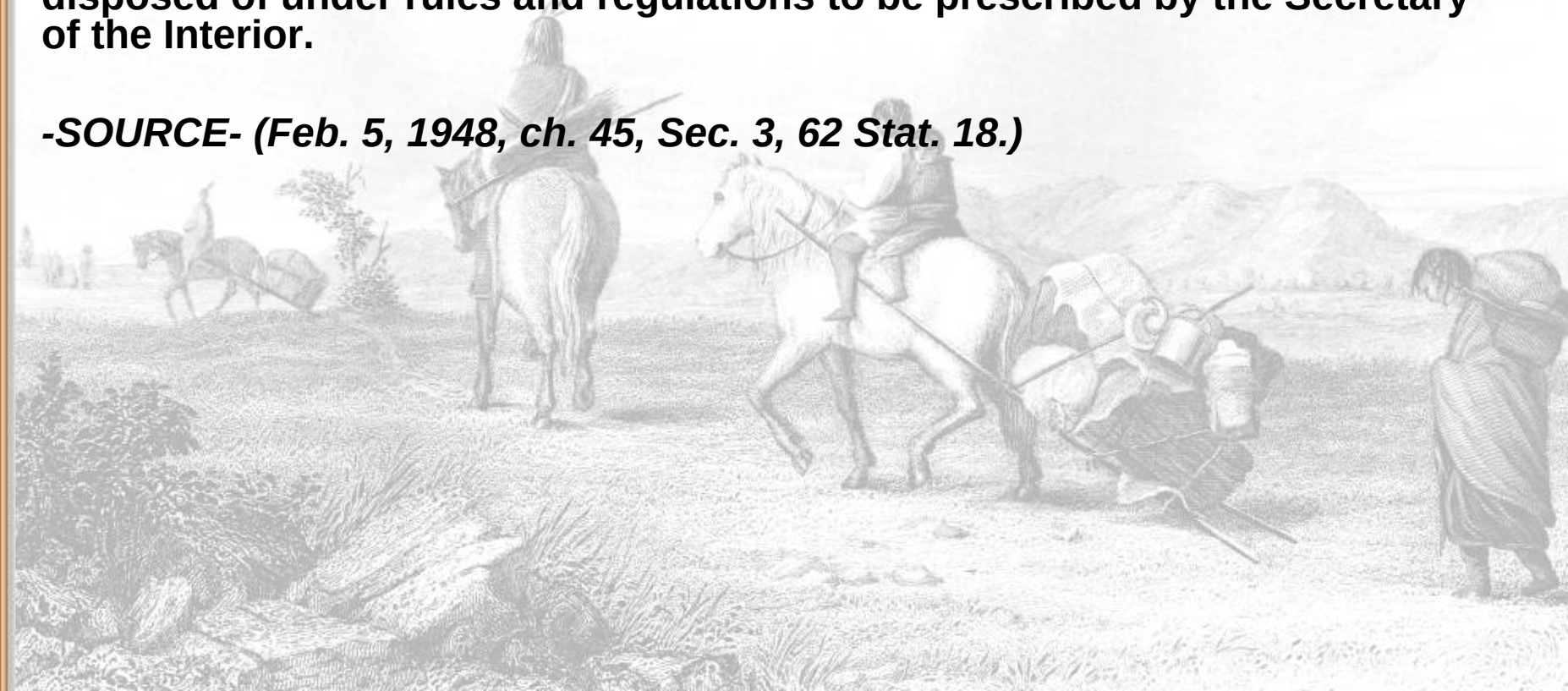
Allotted land can generally be condemned in federal court under a provision in the 1901 act which is codified at 25 U.S.C. § 357. However, to the best of our knowledge, this rule has not been extended to federal takings, meaning that irrigation facilities constructed under a false assumption that the necessary right-of-way had been reserved under the 1890 act (or BIA roads constructed without proper right-of-way documentation) may arguably be viewed as being "supported" by an easement acquired via inverse condemnation, at the time of construction. The just compensation due for any such taking could be viewed as being the land value at the time of construction, plus interest. It should be noted that damage claims against the United States would be subject to six years statute of limitations and "possessory" claims would be subject to a twelve-year statute of limitations; by contrast, damages claims against third parties are subject to six-year, ninety-day statute of limitations (unless extended indefinitely by publication in the Federal Register under 28 U.S.C. § 2415), and there is no statute of limitations on "possessory" claims against third parties.

25 USC - INDIANS
CHAPTER 8 - RIGHTS-OF-WAY THROUGH INDIAN LANDS

Sec. 325. Payment and disposition of compensation

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.

-SOURCE- (Feb. 5, 1948, ch. 45, Sec. 3, 62 Stat. 18.)



Compensation

The BIA's regulations define just compensation as "fair market value of the rights granted, plus severance damages." The "federal rule" incorporated in the Uniform Appraisal Standards for Federal Land Acquisitions (the "Yellow Book") generally allows the entire amount of compensation due (i.e., severance damages and the value of the land taken) to be offset by the amount of any associated special benefits. The Yellow Book defines severance damages as any decrease in the value of the remaining parcel a result of a partial taking; at the same time, the Yellow Book characterizes general benefits as increases in the value of the remaining parcel "which arise from the fulfillment of the public object which justified the taking," and special benefits as those which arise from the "peculiar relation of the land in question to the public improvement.") While it could be argued that 25 CFR § 169.12 mandates a "taking plus damages" type of valuation, and thus precludes the application of either the "federal rule" or the otherwise-applicable "state rule," such an interpretation has been rejected by the Interior Board of Indian Appeals.1/ In a 1989 decision, the Board held that the "federal rule" did apply to a BIA road project across tribal land, based on its conclusion that the applicable federal law was found primarily in the Yellow Book.

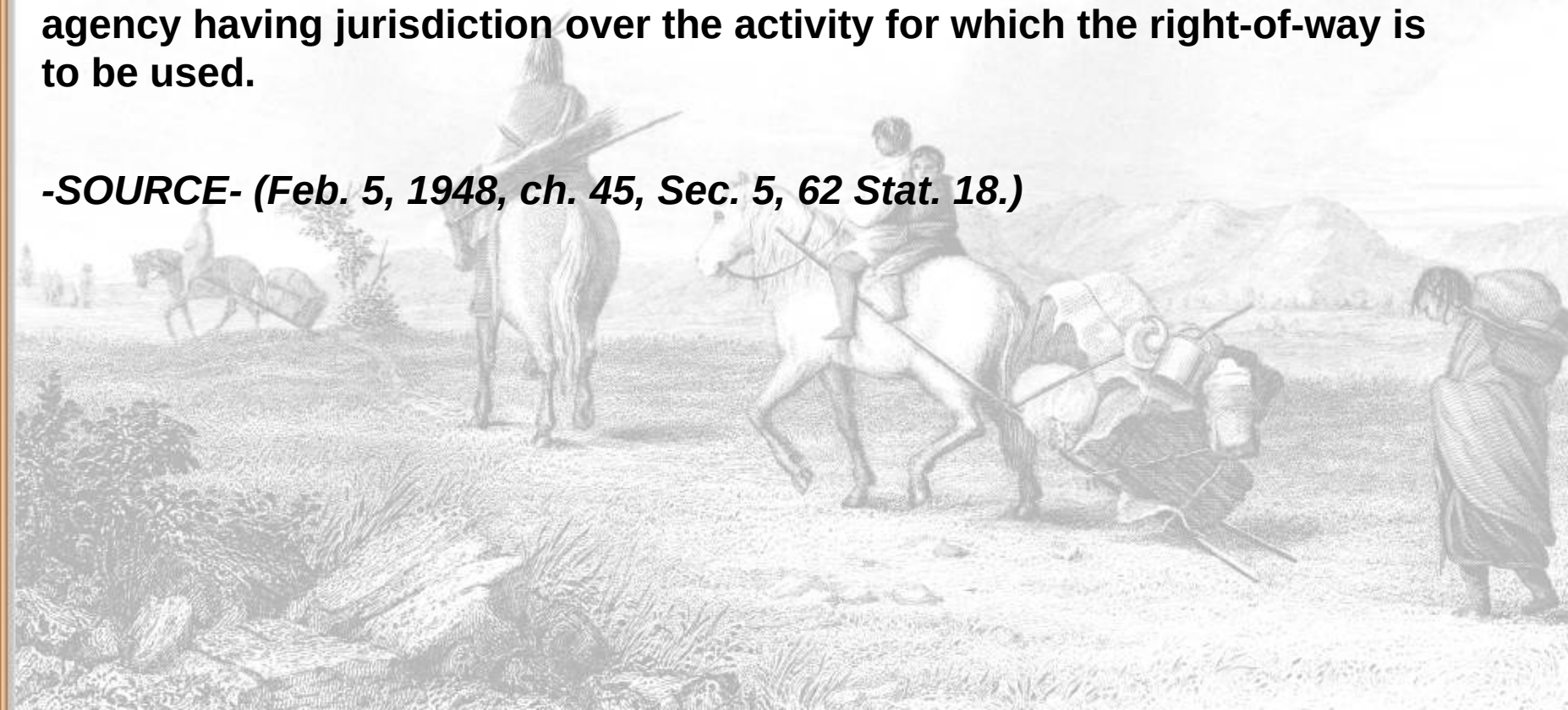
1/Utu Utu Gwaitu Paiute Tribe of the Benton Paiute v. Sacramento Area Director, 17 IBIA 78 (1989).

25 USC - INDIANS
CHAPTER 8 - RIGHTS-OF-WAY THROUGH INDIAN LANDS

Sec. 327. Application for grant by department or agency

Rights-of-way for the use of the United States may be granted under sections 323 to 328 of this title upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

-SOURCE- (Feb. 5, 1948, ch. 45, Sec. 5, 62 Stat. 18.)

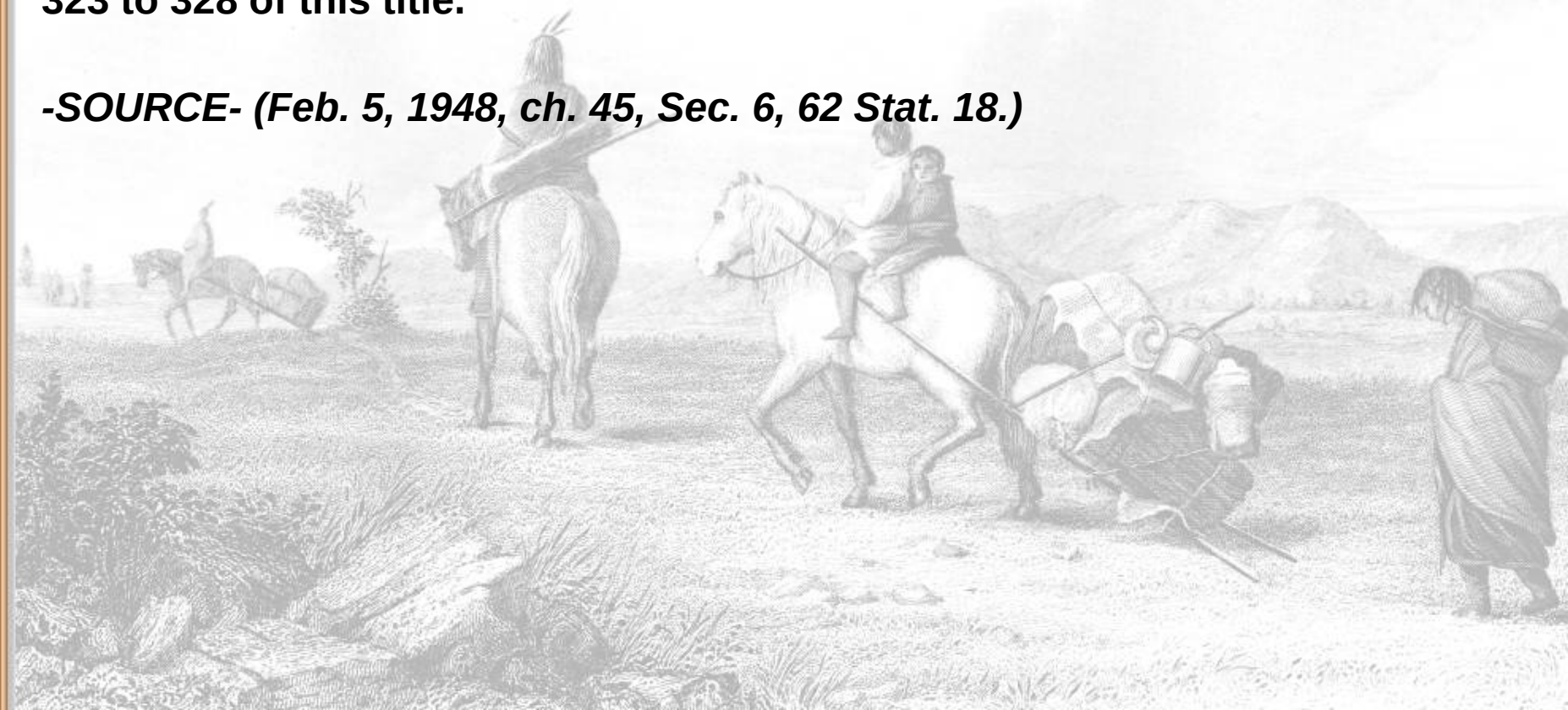


25 USC - INDIANS
CHAPTER 8 - RIGHTS-OF-WAY THROUGH INDIAN LANDS

Sec. 328. Rules and regulations

The Secretary of the Interior is authorized to prescribe any necessary regulations for the purpose of administering the provisions of sections 323 to 328 of this title.

-SOURCE- (Feb. 5, 1948, ch. 45, Sec. 6, 62 Stat. 18.)



Individual Consent Provisions in Part 169

The Secretary can grant an Easement or give Permission to survey on behalf of (25 CFR § 169.3(c)):

(1) Minors, Non Compos Mentis, and Undetermined Heirs/Devisees, so long as no Substantial Injury (that cannot be adequately compensated) will result

(2) Individuals whose Whereabouts are Unknown, so long as a "Majority Interest" of those Owners whose Whereabouts are known have consented

(3) All Owners in a Tract, so long as the Owners of an overall "Majority Interest“ have consented

(4) All Owners in a Tract, where they are so numerous that it would be impractical to obtain their Consent, so long as no Substantial Injury (that cannot be adequately compensated) will result

(Cont.) Additional Consent Authorities

25 CFR Part 162 includes a new Counterpart/Alternative to the "too numerous“ Authority in Part 169, which may be used to grant temporary surface access across individually-owned agricultural land when the Part 169 documentation requirements are too burdensome

The "too numerous" Authority in Part 169 should generally be used only where the Grant is limited in duration, no actual damages are anticipated, and the consideration is nominal (or negotiations are otherwise unnecessary)

Under a provision in the October 2004 ILCA Amendments that took effect in June 2006, a "highly fractionated" tract (defined as any tract with 100 or more owners, or a tract with 50 or more owners where none owns more than a 10% interest) may be sold upon Application, with owner consent ranging from none at all to "Majority" interest - Policy Guidance might be requested as to whether this definition could be used to support/standardize the use of the "too numerous" Grant Authority for Rights-of-Way

(Cont.) Additional Consent Authorities

It should be noted that 25 CFR Part 162 was modified to generally incorporate the "too numerous" authority in the 1948 Act for revocable permits (which, though more like easements than leases, have historically been governed by Part 162 rather than Part 169). Specifically, 25 CFR § 162.210(a) allows the BIA to grant permits on behalf of the individual Indian owners of agricultural land "*without prior notice, if it is impractical to provide notice to the owners and no substantial injury to the land will occur."* Both of these authorities in 25 CFR § 169.3(c)(5), may generally be used only where:

(1) time is of the essence and the period of use is limited;

(2) no actual damages to the land/resources will be incurred;

(3) consideration would be nominal or easily determined (e.g., by reference to a fee schedule), rendering negotiations with the owners unnecessary;

(4) there are more than twenty owners in each of the affected allotments. Even though Part 169 does not expressly allow for any further streamlining of the consent requirements for permission to survey (as opposed to a grant of easement) (25 CFR § 169.3(c)); and

(5) may be used in support of any properly documented application for permission to survey land with multiple individual Indian owners, based on the impracticality of combining the two consents, the preliminary nature of the authorized use, and the minimal risk to the owners

(Cont.) Additional Consent Authorities

Even if the ILCA authority was to be utilized, you should always obtain tribal consent when the tribe owns a fractional interest, in view of the fact that any tract in which a tribe owns an interest is generally exempt from condemnation under 25 U.S.C. § 357 (and thus better positioned in negotiations as to compensation), and the fact that tribes may also wish to negotiate "consent to tribal jurisdiction"[3/] provisions to potentially limit the effect of recent court decisions holding that certain rights-of way will not be treated as "Indian Country" for jurisdictional purposes.

3/ See, e.g., Strate v. A-I Contractors, 520 US. 438 (1997) and Burlington N.R.R. v. Red Wolf, 196 F.3d 1959 (9th Cir. 1999).

(Cont.) Additional Consent Requirements

While rights-of-way obtained under the 1948 Act are generally granted by BIA with the consent of the Indian owners, Section 219 of the Indian Land Consolidation Act, 25 U.S.C. § 2218 ("ILCA") - as enacted and made immediately effective on November 7,2000 - authorizes grants by the individual Indian owners, subject to BIA approval. The enactment of Section 219 has thus raised questions about:

(1)whether the majority consent provisions in the 1948 Act are still applicable; and, if so,

(2)how and when the two statutory authorities may now be utilized, either separately or in combination. (It should be noted that the heading of Section 219 indicates that the authority contained therein is intended to apply to right-of-way transactions, but the body of the section generally refers only to "leases and agreements"; for purposes of this memorandum we are assuming that right-of-way transactions are within the scope of Section 219, and then going beyond that assumption to consider how/when to apply its provisions.)

(Cont.) Additional Consent Authorities

The provisions found at 25 CFR § 169.3 track but expand on the 1948 Act, in part by extending the consent requirements to the preliminary permission to survey as well as the grant of right-of-way. It should also be noted that:

(1) while the tribal consent provisions in the 1948 Act apply on their face only to IRA tribes, a general tribal consent requirement has been incorporated in 25 CFR § 169.3(a); and

(2) 25 CFR § 169.3(c) includes an authorization for BIA to consent on behalf of minors and individuals lacking legal capacity, in addition to the authorities found in the 1948 Act.

(Cont.) Additional Consent Requirements

Subsections 219(a)-(b) of ILCA provide the Secretary with general authority to approve right-of-way transactions which have been negotiated or agreed to by the owners of a sliding percentage of the trust/restricted ownership of a given tract, so long as the transaction is expressly found to be in the owners' best interest. The minimum consent requirements for these transactions are:

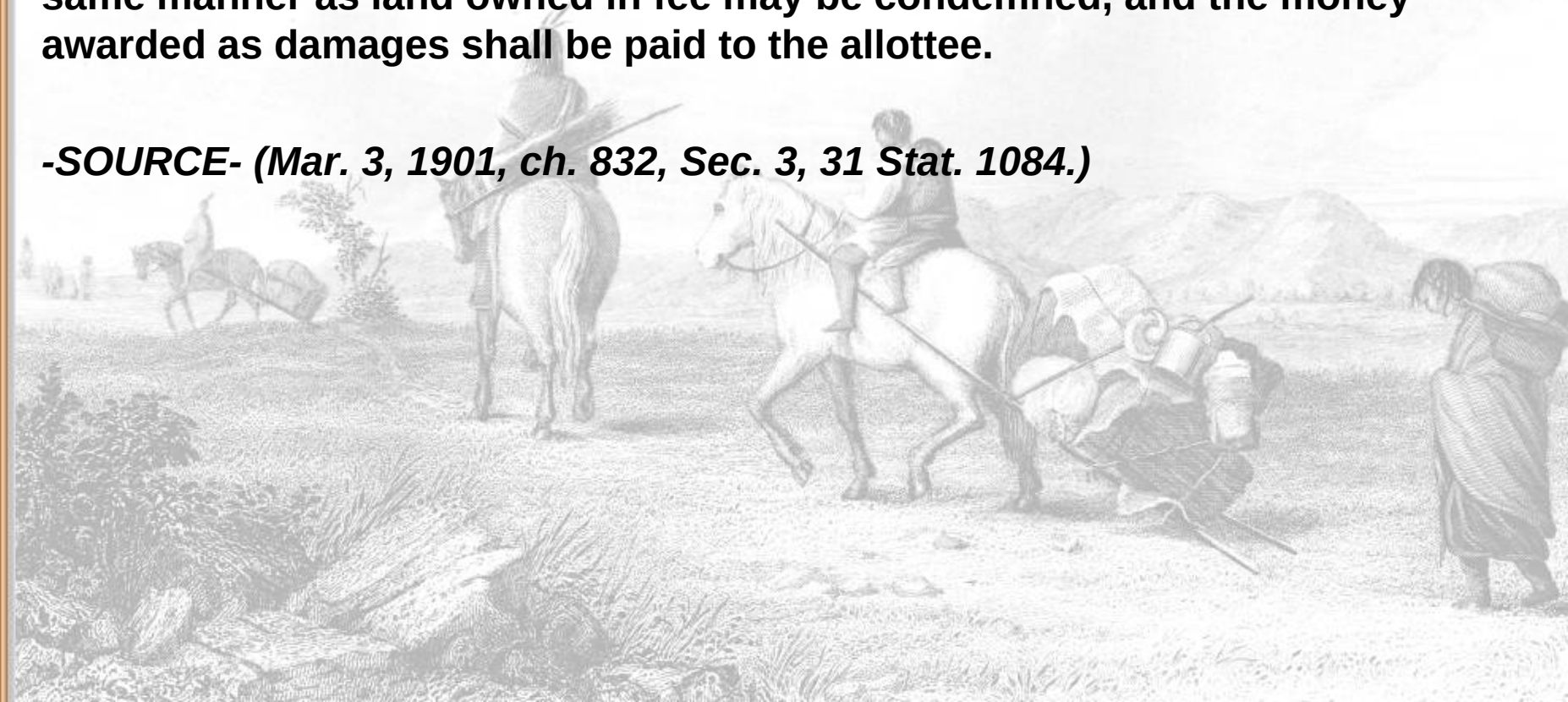
(1) 100%, if there are five or fewer owners;
(2) 80%, if there are between six and ten owners;
(3) 60%, if there are between eleven and nineteen owners; and
(4) a simple majority, if there are twenty or more owners.

For purposes of determining what percentage is needed to satisfy these consent requirements, Section 219(b)(2) indicates that the number of owners will be that which is reflected in the BIA's records as of the date on which all of the necessary transaction documents have been received. Under Section 219(c), the BIA may also consent on behalf of undetermined heirs/devisees and individuals whose whereabouts are unknown, and count those consents toward the percentage required for BIA approval. Finally, it should be noted that Section 219(d) allows the BIA to approve a right-of-way transaction without tribal consent (where the requisite minimum consent has been obtained, and the tribe owns a minority interest), ostensibly creating an exception to the absolute tribal consent requirement found in the 1948 Act and 25 CFR Part 169.

Sec. 357. Condemnation of lands under laws of States

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.

-SOURCE- (Mar. 3, 1901, ch. 832, Sec. 3, 31 Stat. 1084.)



Grant *of* Right-of-Way General Considerations

Express Grant of Easement is needed – ROW cannot generally be obtained by Prescription, Implication or Necessity, although Implied Rights of Access have been found to certain Parcels landlocked by Allotment or Partition

Tribal Trust Land cannot be condemned without a specific act of Congress

Individually-owned Trust Land can be condemned (under State Law, but in Federal Court) under a Section from the 1901 Public Highways Act that is codified at 25 U.S.C. § 357 - Although Allotted Land cannot be acquired by Inverse Condemnation under Supreme Court precedent involving a State/Local Road, BIA's Position re undocumented BIA Roads may be that Right-of-Way was acquired by Inverse Condemnation upon construction (leaving the owners with only a potential damages claim, which will generally be limited/barred by the applicable Statute of Limitations)

Individually-owned trust land cannot be condemned by a Tribe in Tribal Court unless the U.S. consents to the suit (as an indispensable party), but Tribes can presumably condemn such land for a public purpose in Federal Court under the 1901 Act

Grant *of* Right-of-Way Needed? - Utilities within Roadways

Utilities may be installed within a Road ROW without a new ROW for the utility line, if the Road ROW was granted under the 1901 Act (rather than the 1948 Act), and even if the Road ROW was limited to road purposes, so long as State Law (as incorporated in the 1901 Act) allows

Utilities may not be installed within a Road ROW granted under the 1948 Act without a new ROW, unless the Road ROW expressly allows, because the 1948 Act does not incorporate State Law

Even where the Road ROW allows, permission to install utilities within a BIA Road ROW should be denied unless the utility is tribally-owned or the service area is entirely within the Reservation

Even where installation of utilities would otherwise be permissible, "Non-Standard" transmission or telecommunication lines may be denied if they would go beyond the Grantor's original Intent and/or "overburden" the land

Compensation

With respect to the issue of compensation, Section 3 of the 1948 Act simply provides that "[n]o grant of right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just." The BIA's key regulation, 25 CFR § 169.12, provides as follows:

> ***"Except when waived in writing by the landowners or their representatives as defined in § 169.3 and approved by the Secretary, the consideration for any right-of-way granted or renewed under this Part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate. The Secretary shall obtain and advise the landowners of the appraisal information to assist them (the landowner or landowners) in negotiations for a right-of-way or renewal."***

Existing Compensation Rules

Just Compensation is required by (but not defined in) the 1948 Act, though Part 169 allows the owners and their (unspecified) “Representatives" to waive the right to such compensation

Under Part 169, "Appraisal Information" must be given to owners for negotiation purposes, presumably even where the Right-of-Way is "beneficial" and the owners wish to waive compensation

As defined in Part 169, just compensation includes consideration for the "Rights Granted" plus severance damages - This definition does not expressly allow for any offsetting of benefits, as the Right-of-Way and Roads Regulations in effect prior to the enactment of the 1948 Act did

Under Part 169, Right-of-Way compensation must be paid lump sum when the Right-of-Way Application is filed, in an amount equal to consideration and severance damages (plus estimated construction damages), as offset by any double (survey) damages amount deposited with an earlier Application to Survey

Appraisals

As a practical matter, the recommendations set forth above will require that our appraiser and realty specialists be able to distinguish (and explain to owners the difference between) special and general benefits, with the expectation being that:

(1) ***special benefits*** will rarely be found in right-of-way transactions involving unimproved properties; and

(2) ***general benefits*** may be quantified, and used to support a request for an informed waiver of all or part of the compensation due, but not considered in the calculation of such compensation. During the early 1980's, when certain categories of claims for damages against third parties (not including the United States) were being reviewed for possible litigation pursuant to 28 U.S.C. § 2415, the Solicitor's Office indicated that claims involving "beneficial" trespasses would be rejected for litigation. While that advice - which did not distinguish between special and general benefits - may be relevant to the negotiation of a "past use" settlement in support of a new grant of easement, we do not believe it is relevant to the calculation of just compensation with respect to the grant itself (to the extent it suggests that an offsetting of general benefits should be allowed or that the broader "federal rule" should be applied to non-federal projects).

Appraisal Policies - Offsetting of Benefits

Despite the fact that the "CFR Rule" appears to mandate a "Taking plus Damages" approach, and the fact that the Uniform Act Regulations and the "Yellow Book" both defer to otherwise applicable Federal Law, an IBIA Decision from 1989 allowed offsetting of benefits under the "Federal Rule" in a case involving a BIA Road across Tribal Land; In that case, DOI argued in favor of the "Federal Rule," while at the same time acknowledging historical inconsistencies in appraisal methods (even as to the Roads involved in the case)

The 1998 "Blue Book" issued by the BIA Appraisals Office (now Office of Appraisal Services (OAS)) appeared to adopt the less user oriented "State Rule" on offsetting of benefits in cases involving non-federal acquisitions, consistent with Procedural Rules that purportedly apply in Federal Court; The "Federal Rule“ allows the offsetting of special benefits against both severance damages and the value of the land taken, while the "State Rule" applicable in a majority of states only allows the offsetting of special benefits against severance damages

Generally, "Policies," suggest that the "Federal Rule" on offsetting of benefits should be applied to Federal Projects and in cases where a Tribe is acting in a governmental capacity, and that the otherwise-applicable "State Rule" should be applied in all other cases, including those where a Tribe is acting in a proprietary or business capacity; At the same time, it was noted that the "CFR Rule" would appear to be controlling on its face, and that the application of any other Rule requires that both Realty Specialists and Appraisers be able to distinguish (and explain to owners and applicants the difference between) special and general benefits, with special benefits rarely anticipated

Other Appraisal Policies

We require that the value of the land taken be determined through the Application of the "Before and After" method preferred under the "Yellow Book," rather than through some type of "Comparable Easement" or "Going Rate" method that might be less confusing as to any "After" values that include non-recognizable benefits, less reliant on sometimes-difficult "Larger Parcel" determinations, and generally less favorable for users (and thus more favorable for owners)

While BIA recognizes that certain types of Easements and renewals frequently run for limited terms, more specific guidance may be needed as to the method by which Annual or Lump-Sum Compensation will be determined in those cases; In that regard, it should be noted that jurisdictional concerns are prompting some Tribes to look at leases (with Annual or Lump-Sum Payments) as substitutes for Easements

Recommended Waiver Policies

Non-consenting owners' rights to compensation should not be waived directly by BIA acting on those owners' behalf, and BIA should not allow for such Waivers to be imputed from the majority consent of the co-owners

Specific Appraisal information should be made available to individual Indian Owners (but not necessarily Tribes, pending a much-needed Policy clarification), prior to the granting of any Waiver of the Right to Compensation; While an absolute Appraisal requirement is implicit in the 1980 Amendment to 25 CFR 169.12, a valuation in all cases is also mandated by an October 2000 BIA Policy Memo prepared by the Appraisal Office then within BIA

General and special benefits may always be used to support a request for an informed Waiver of all or part of any just compensation due for a new Right-of-Way, but may never be considered in the calculation of such compensation

Documentation Requirements

Part 169 provides for the filing of separate Applications for Permission to Survey and Grant of Easement, although combined applications have been accepted - The standard application and Grant Forms include some provisions which do not apply to the BIA as Grantee (e.g., Indemnity)

Any Right-of-Way document which authorizes new disturbance will need to be supported by an EA and FONSI, along with Archaeological Clearances and Evidence of Compliance with other Federal Environmental Laws

Part 169 contains very specific provisions defining the required Organizational and Survey Documents, with an Applicant's Certificate and Engineer's Affidavit being needed to support the Survey, and an Affidavit of Completion being required after construction, to certify that the Project (as constructed) conforms to the map

The Grant Document is recorded with the Survey Map and Application - The Grant Document must include certain standard provisions and should also expressly incorporate any conditions contained in the owner consents (e.g., restrictions on assignments, consent to Tribal jurisdiction, etc.)

Tenure Issues

Rights-of-Way can be granted for unlimited (perpetual) terms under the 1948 Act, but shorter terms for other types of ROW

Even where a "limited term" Right-of-Way provides for renewal on specified terms or on the same terms as the original Grant, owner consent will be needed and such consent may be conditioned on other terms (including the payment of additional compensation)

Part 169 does not address assignability, but the standard Grant of Easement runs in favor of the Grantee's "assigns" and may be assigned without owner or BIA consent, so long as no change in use is planned and the Easement does not contain any restrictions on Assignability

Part 169 provides for the termination of Rights-of-Way upon 30 days written notice to the Grantee, based on a violation of any "Conditions" in the Grant, two years of non-use, or abandonment

Jurisdiction Issues

Notwithstanding a Statutory Definition of "Indian Country" that includes Rights-of-Way within the exterior boundaries of a Reservation, the Supreme Court held in the Strate Case (1997) that the Tribe lacked jurisdiction in an action arising from accident on a State Highway Right-of-Way

The Ninth Circuit has distinguished Strate and held that BIA Road Rights-of-Way are "Indian Country," while at the same time applying Strate (to prevent the Tribe from asserting jurisdiction) in a case involving an accident on a dirt road not covered by any Right-of-Way

While it is unclear whether a BIA Road assigned to a third party or a road assigned to BIA by a third party would be considered "Indian Country," it is clear that the jurisdictional status of all Reservation Roads has very significant Law Enforcement and other implications for BIA as well as Tribes

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Some BIA Offices have required "Consent to Tribal Jurisdiction" in all new Grants of Easement - While this should help in Pipeline Cases and others where the Tribe wishes to tax/regulate the Right-of-Way Grantee, it is unclear whether the Result would be any different in a Strate-type Fact Situation

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While it is unclear whether a BIA Road assigned to a third party or a road assigned to BIA by a third party would be considered "Indian Country," it is clear that the jurisdictional status of all Reservation Roads has very significant Law Enforcement and other implications for BIA as well as Tribes

Montana v. *United States,* 450 U. S. 544

•**This case involved tribal jurisdiction and specifically that absent express authorization by federal statute or treaty, tribal jurisdiction over nonmembers' conduct exists only in limited circumstances. There are two specific exceptions:**

1. The first exception to the *Montana* rule covers "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U. S., at 565.

2. The second exception to *Montana*'s general rule concerns conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U. S., at 566.

Montana's list of cases fitting within the first exception:

Williams v. Lee, 358 U. S. 217, 223 (1959) **(declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants);**

Morris v. Hitchcock, 194 U. S. 384 (1904) **(upholding tribal permit tax on nonmember owned livestock within boundaries of the Chickasaw Nation);**

Buster v. Wright, 135 F. 947, 950 (CA8 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its borders");

Colville, 447 U. S., at 152–154 (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status").

Montana's second exceptional category: Whether a State's exercise of authority would trench unduly on tribal self-government.

Fisher, 424 U. S., at 386; supra, at 452–453 **The Court referred first to the decision recognizing the exclusive competence of a tribal court over an adoption proceeding when all parties belonged to the Tribe and resided on its reservation.**

Williams*, 358 U. S., at *220 **The Court listed a decision holding a tribal court exclusively competent to adjudicate a claim by a non-Indian merchant seeking payment from tribe members for goods bought on credit at an on-reservation store.**

Key to its proper application, however, is the Court's preface:

"Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." **450 U. S., at 564.**

25 USC 1151
Definition of “Indian Country”

The term "Indian country", as used in this chapter, means:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Strate v. A-I Contractors, 520 US. 438 (1997)

In the granting instrument, the United States conveyed to North Dakota "an easement for a right-of-way for the realignment and improvement of North Dakota State Highway No. 8 over, across and upon [specified] lands." App. to Brief for Respondents 1. The grant provides that the State's "easement is subject to any valid existing right or adverse claim and is without limitation as to tenure, so long as said easement shall be actually used for the purpose . . . specified." The granting instrument details only one specific reservation to Indian landowners:

"The right is reserved to the Indian land owners, their lessees, successors, and assigns to construct crossings of the right-of-way at all points reasonably necessary to the undisturbed use and occupancy of the premises affected by the right-of-way; such crossings to be constructed and maintained by the owners or lawful occupants and users of said lands at their own risk and said occupants and users to assume full responsibility for avoiding, or repairing any damage to the right-of-way, which may be occasioned by such crossings."

Apart from this specification, the Three Affiliated Tribes expressly reserved no right to exercise dominion or control over the right-of-way.

Utility Corridors

With respect to the installation of utilities within a road right-of-way acquired under the above referenced 1901 act, such an action may be taken without landowner consent (and without the payment of further compensation to the owners) even if the original right-of-way is limited to road purposes, so long as permitted by state law. This interpretation is based on a long line of Solicitor's opinions and case precedents, which are, in turn, based on the express incorporation of state law in the 1901 Act. By contrast, the installation of utilities within a road right-of-way granted under the 1948 Act (which does not incorporate state law) should not generally be permitted without landowner consent unless the original right-of-way was expressly made for "road and utility" purposes. Where a BIA road has been granted under the 1948 Act for "road and utility" purposes, permission to install utilities should generally be given only where the utility line is tribally owned and operated or otherwise intended to primarily serve the reservation community; 2/ otherwise, such permission should be withheld by our Roads personnel until the consent of the Indian owners has been obtained.

2/ See, e.g., US. v. Oklahoma Gas and Electric Co., 318 US. 206 (1943) and US. v. Mountain States Telephone and Telegraph Co., 434 F. Supp. 625 (D. Mont. 1977).

(Cont.) Utility Corridors

It should be noted that even where the installation of utilities without owner consent is generally authorized - based either on state law or the scope of the underlying road easement – that authority may not extend to certain types of "non-standard" utility lines that "overburden" the land (with such a determination to be made on a case-by-case basis, with assistance from the Solicitor's Office). It should also be noted that while these positions on the "piggy-backing“ issue may be inconsistent with some previous Solicitor's opinions, they are consistent with positions taken in some BIA regions.

Finally, it must be emphasized that owner consents should always specify all of the uses to be authorized in the grant of easement to follow, and that the language in a grant must be read carefully in order to determine if a particular use may be permitted without the further consent of the owners. Ensure that the Rights-of-Way identify the specific Act to be used.