



CTER LAS VEGAS DECEMBER 2018

Rights of Ways
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TERO Involvement?

- the legal right, established by usage or grant, to pass along a specific route through grounds or property belonging to another.
- synonyms: [right of way](#)
- a path or thoroughfare subject to right of way.
- synonyms: [footpath](#) · [pathway](#) · [footway](#) · [pavement](#) · [track](#) · jogging track · [more]
- [trail](#) · [trackway](#) · [bridleway](#) · [bridle path](#) · [ride](#) · [riding](#) · [towpath](#) · [walk](#) · [walkway](#) · [promenade](#) · [esplanade](#) · [avenue](#) · [lane](#) · [alley](#) · [alleyway](#) · [passage](#) · [passageway](#) · [byway](#) · [sidetrack](#) · [berm](#) · [causeway](#) · [right of way](#) · cycle path · cycle track · cycleway · [sidewalk](#) · [bikeway](#) · [trace](#) · pavé
- the legal right of a pedestrian, vehicle, or ship to proceed with precedence over others in a particular situation or place.
- the right to build and operate a railroad line, road, or utility on land belonging to another.
- the land on which a railroad line, road, or utility is built.

Trust Relationship

- Coordination with Tribes, individual Indian land owners (Allottees) and the Federal Government



Allottee
Focus - aka

Have's vs. Have-Not's (?)

- Mineral owners vs. Surface Owners
- Right of Ways may provide a significant economic opportunity for the surface owner.
- What does that have to do with TERO?

Bidding Example

01

The lowest bidder was selected at a TERO opening bid.

02

The surface owner nixed the deal.

03

Complaints were filed – TERO needed to make a decision on the work.

04

Investigation found the lease/row allowed surface owner to control the work on his lands.

05

Worthy Discussion of future TERO policy to always allow surface owners that continual right? With or without the specific language in the lease or row?

Right of Ways – many different types

- Timber
- Coal
- Gas
- Pipelines
- Electrical
- Utilities in general

25 U.S.C. Sec. 323

- Empowers the Secretary of the Interior to authorize ROW's across Indian land for all purposes.
- 25 CFR 169 et. seq sets forth regulations governing ROW's authorized under the statute.
- These are the most common vehicles for ROW's.
- But.....DOI/BIA should only approve if
- **IT IS IN THE BEST INTERESTS OF THE INDIAN LANDOWNERS (ALLOTTEES).**

TERAs

- Tribal Energy Resource Agreements (TERAs) were authorized by Section 503 of the [Energy Policy Act of 2005](#) to promote tribal self-determination and autonomy over energy development on Tribal lands.
 - *Upon approval by the BIA, TERAs allow tribes to enter into leases, agreements, and rights-of-way for energy development on tribal lands without requiring BIA approval.*
 - *However, because of the ambiguity in the BIA implementing regulations, bureaucratic hurdles in the application process, concerns about the United States' waiver of its trust responsibility and liability, and mandatory tribal environmental review requirements, no Tribes have participated in the TERA program in the 13 years it's been around.*
 - *But there's still hope for this program*

Indian Tribal Energy Development and Self-Determination Act Amendments of 2017

- *On November 30, 2017, championed by Senator John Hoeven (R-ND), the Senate passed by unanimous voice vote the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (S. 245).*
- *These amendments would provide additional support and clarity to the TERA program by “granting authority to [a] tribe to review, approve, and manage leases, business agreements, and rights-of-way for energy development on tribal lands, without the approval of the Secretary of the Interior.”*
- *S. 245 streamlines the approval process for resource agreements by providing a “deemed approved” deadline on the Department of the Interior of 271 days, and specified limited circumstances when the Secretary can disapprove an application.*

Indian Tribal Energy Development and Self-Determination Act Amendments of 2017

Once a resource agreement is approved, the Tribe or Tribal organization can manage its energy resources without required DOI approval on every lease, right-of-way, or business agreements.

If the DOI disapproves a request, it needs to provide a “detailed explanation” for the disapproval, specific revisions that would address the concerns, and an opportunity for the tribe to resubmit.

It expands situations where a tribe or tribal organization can issue leases, rights-of-way, or business agreements to include electric generation, production or transmission from renewable resources, pooling unitizations, or communitization agreements.

Indian Tribal Energy Development and Self-Determination Act Amendments of 2017

- *Also introduces a new certification process for tribal energy development organizations. This includes a 90-day “deemed approved” provision. It requires approval when a tribe has had clean audits for the past 3 years under self-governance or a self-determination contract involving tribal management of lands, and when the organization is subject to certain requirements regarding tribal ownership interests and tribal jurisdictional control.*
- *The bill also changes the Tribal environmental review process. New language removes the requirement that Tribes evaluate all significant environmental effects and mandate mitigation measures, and instead requires tribes to provide an opportunity for public comment on significant environmental impacts and to respond to such comments before approving a lease, right-of-way, or business agreement.*

Indian Tribal Energy Development and Self-Determination Act Amendments of 2017

- *S. 245 also expands assistance opportunities for the Department of Energy to provide grants and open its loan guarantee program to tribes and tribal energy development organizations. It also mandates that the DOE make available the full array of technical and scientific resources of the DOE National Laboratories to Tribes and requires the Federal Energy Regulatory Commission to give tribes preference in the award or preliminary hydroelectric licenses; establishes a biomass demonstration project for tribal forest lands; and authorizes tribes or a certified third-party to conduct appraisals of the fair market value of tribal mineral resources in lieu of the DOI.*

Indian Tribal Energy Development and Self-Determination Act Amendments of 2017

Finally, the bill adds new language to reaffirm that the United States' trust responsibility remains intact, subject only to a few express exceptions. The bill also adds new language to specify that the US still has potential liability with regard to matters outside a tribe's "negotiated terms" in resource agreements, including "the failure of the Secretary to perform an obligation of the Secretary under this Section."



Right now, this bill is currently in the House of Representatives being reviewed by the Committee on Energy and Mineral Resources. The House expected to vote on it by the end of 2018 or early 2019.



If this passes, it may be beneficial in creating more autonomy and self-determination for tribes re ROWs, business agreements, and leases on Tribal lands.

United States Department of the Interior
Bureau of Indian Affairs
Fort Berthold Agency

CONSENT OF OWNER'S – GRANT OF RIGHT OF WAY

Legal Description: Township 147 North, Range 94 West, 5th P.M.
Section 12: NE/4NE/4

Dunn County, ND

The undersigned owner of an undivided 1.000 interest in the subject parcel, hereby consents and agrees to the following regarding the application submitted by ENERPLUS RESOURCES (USA) CORPORATION.

Description of Easement:

**Burrowing 147-94-13B-24H TF, SCREECH 147-94-13B-24H,
SNOWY 147-94-13A-24H, BARN 147-94-13A-24H,
PYGMY 147-93-18B-19H TF & HORNED 147-93-18B-19H**

Access across and a road, gathering lines and utilities right-of-way in the NE/4NE/4 of Section 12, T147N, R94W, the proposed right-of-way being 1,277.31 feet long and ranging from 50 to 125 feet wide comprising a total of 3.508 acres, more or less.

TOTAL DISTURBED AREA (right-of-way) 3.508 acres, more or less.

(Please initial ONE of the following):

I do give permission to BIA to grant a right-of-way as proposed, in return for receipt of the negotiated compensation of \$1,500.00 per acre for the road, gathering lines and utilities right-of-way (which is agreed to be 3.508 acres for a payment of \$5,262.00) for my proportionate share of the rights granted including severance damages; or the appraised Fair Market Value (as determined by the Secretary), whichever is greater.

KLB

I desire to negotiate for other terms; however, I do give permission to BIA to grant the right-of-way upon negotiation of the following terms: Double Cattle guards + cross Fence

I do give permission to BIA to grant a right-of-way as proposed and hereby waive any monetary payment. I realize that I am entitled to receive at least the Fair Market Value of the property, but waive compensation based on:

I do not consent to the granting of the proposed right-of-way, and I have been adequately counseled on the alternatives available to me, and the consequences (e.g., condemnation, or continuing trespass, etc.).

Evolution of a one page consent to a 3 page BIA ROW

SAID GRANTEE UNDERSTANDS AND EXPRESSLY AGREES TO THE FOLLOWING STIPULATIONS:

1. To construct and maintain the right-of-way in a workmanlike manner.
2. To pay all damages and compensation, in addition to the deposit made pursuant to 169.4, determined by the Secretary to be due the landowners and authorized users and occupants of the land due to the survey, granting, construction and maintenance of the right-of-way.
3. To indemnify the landowners and authorized users and occupants against any liability for loss of life, personal injury and property damage arising from the construction, maintenance, occupancy or use of the lands by the Grantee, his employees, contractors and their employees, or subcontractors and their employees.
4. To restore the lands as nearly as may be possible to their original condition upon the completion of construction, to the extent compatible with the purpose for which the right-of-way was granted.
5. To clear and keep clear the lands within the right-of-way to the extent compatible with the purpose of the right-of-way; and dispose of all vegetative and other material cut, uprooted or otherwise accumulated during construction and maintenance of the project.

**UNITED STATE OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
FORT BERTHOLD AGENCY**

ASSIGNMENT OF EASEMENT FOR RIGHT-OF-WAY

WHEREAS, the Secretary of the Interior or his authorized representative has heretofore approved an easement for a width of one hundred twenty-five to two hundred (125'-200') foot wide right-of-way dated effective March 6, 2014, located in the County of Dunn, in the State of North Dakota, entered into by and between the

FINAL EVOLUTION - ASSIGNMENT

Can they do that?

Oil and Gas Mining Lease states:

3 (h). Assignment of lease – [the lessee hereby agrees] Not to assign this lease or any interest therein by an operating agreement or otherwise nor to sublet any portion of that leased premises before restrictions are removed except with the approval of the secretary of state.

It's done all the time.....

- Halcon
- Whiting
- Tesoro
- QEP

Developing law....hopefully buyer's money is held in escrow, subject to pending litigation and claims.

Recent Examples

- Offer of \$60,000
- Rejected – Counter offer
- Rejected – claim that they didn't need Allottee Consent Proceeded anyway.
- Very bold & aggressive!
- Pothole – photos – Exclusive use?
- Lawsuit – damage
- What's under the ground?

What's under the Ground?

- Tesoro
- 5 years of Trespass

On September 18, 1953, the Superintendent, Fort Berthold Agency executed a Grant of Easement for Right-of-Way (ROW) to Service Pipeline Company for a period of 20-years commencing on June 18, 1953. On June 18, 1973, and again, on June 18, 1993 the Superintendent approved two separate pipeline ROW renewals for Amoco Pipeline Company (now Tesoro), each for a term of 20-years. The second ROW renewal expired on June 18, 2013.

**BIA, FED., TRIBAL COURT,
TERO?**