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# Dealing With Expired Rights-Of-Way In Indian Country

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While recent revisions to the Bureau of Indian Affairs' regulations governing the granting of new rights-of-way across tribal lands have garnered significant attention, it is critically important that Native American landowners and their legal counsel keep a sharp eye on existing rights-of-way as well.


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As a number of recent lawsuits and settlements indicate, the holders of older, expiring or expired rights-of-way in Indian country often fail to take steps to renew their rights-of-way as required by 25 CFR Part 169.[1] In many cases, holders of expired rights of way continue to use tribal or allotted land; they simply do so without a valid right-of-way and without appropriately compensating Native American landowners. As both common sense and the new right-of-way regulations indicate, doing so constitutes an unlawful trespass.[2] There are a number of steps that Native American landowners can take to prevent these situations from arising and to ensure that holdover grantees pay appropriate compensation.

**Do Your Homework**

Experience has shown that Native American landowners cannot rely on grantees or the Bureau of Indian Affairs to keep track of the status of all rights-of-way over tribal lands and to take appropriate steps when a right of way is about to expire. Accordingly, to prevent grantees of expired rights-of-way from engaging in holdover trespassing, or to at least become aware of it if it is already happening on their land, Native American landowners should carefully review the documentation for easements and rights-of-way across their lands.

When reviewing documentation, there are a number of things to which landowners should pay close attention. When was the right-of-way granted? What was its term? When did or will it expire? What was the statutory or regulatory authority for the right of way? Did the landowners' approval or the grant of easement limit the use of the right-of-way in any relevant way?

Ideally, Native American landowners will become aware of an expiring right-of-way ahead of time, so that they can approach the grantee about negotiating an extension — or, if the landowners no longer wishes to allow the right-of-way, about vacating the premises — in a timely and orderly fashion. But there will inevitably be cases where a problem is only discovered after a right-of-way has expired. If a right-of-way is expiring or has expired and the holder refuses to engage in good faith negotiations with the Native American landowner about obtaining a new right-of-way and providing additional compensation for any trespass, the landowner will have to consider bringing a trespass action.

**Practical Tips for Assessing a Potential Trespass Claim**

There are a number of factors that Native American landowners should consider when evaluating a potential trespass claim, as well as a handful of tips and tricks that can strengthen a landowner's position.

***1. Tribes have a stronger bargaining position than individual landowners.*** Does a tribe own any of the land subject to the expired right-of-way, even a partial interest? This is critically important, because a right-of-way grantee threatened with a trespass claim may attempt to institute a condemnation action. While this arguably could be an effective strategy against individual Native American landowners, it is settled that tribal land cannot be condemned without the consent of the tribal owner.[3] Courts have held that even a relatively small tribal interest protects trust land from condemnation.[4] It may be possible, and worthwhile, for an individual Native American landowner with a potentially significant trespass claim to consider transferring an interest in the land to a tribe to insulate it from condemnation.[5]

***2. Pay close attention to potential statute of limitations issues.*** This is important for a number of reasons. Most obviously, failure to bring a claim within an applicable limitations period can bar or substantially limit a landowner's ability to recover for a grantee's ongoing trespass.[6] But there may also be instances, depending on when the original right-of-way agreement took effect, where a statute of limitations that appears at first blush to bar or limit a claim actually does not apply.[7] Statute of limitations issues highlight both the need for landowners to be aware of the status of rights-of-way on their lands and the need to consult with experienced legal counsel when potential trespass claims arise.

***3. Be sure to fulfill administrative prerequisites.*** If the trespassing grantee is the United States or a federal agency, which often proves to be the case, be mindful of the need to exhaust administrative remedies. Generally speaking, both trespass and breach of contract claims must be administratively presented before a landowner can proceed with a lawsuit, and there are procedural and timing issues involved with the administrative claim filing. If an expired right-of-way affects a large number of tribal members, tribes may be able to assist their members by fulfilling these administrative claim requirements on behalf of all landowners in a parens patriae capacity.[8]

***4. Use the federal regulations to your advantage.*** The new version of 25 CFR part 169, which takes effect in March 2016, has useful provisions including an explicit requirement that a grantee restore land to its original convention upon the expiration or termination of the right-of-way[9] and the aforementioned clarification that grantees who remain in possession of Native American lands after the expiration of a right of way are considered trespassers.[10] Native American landowners can leverage these and other provisions to bring grantees of expiring or expired rights-of-way to the table and force them to engage in good faith renewal negotiations or face the high costs of relinquishing and restoring the right-of-way or fighting trespass claims in federal court.

—By Catherine F. Munson and Mark H. Reeves, Kilpatrick Townsend & Stockton LLP

***DISCLAIMER: Both Ms. Munson and Mr. Reeves have represented tribal and individual Native American clients in negotiations and litigation pertaining to rights-of-way across Native American lands, including in the Salt River Pima-Maricopa Native American Community and Davilla cases referenced in the endnotes to this article.***

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[1] See, e.g., Pub. Serv. Co. of N.M. v. Approx. 15.49 Acres of Land in McKinley Cnty., N.M., Case No. 1:15-cv-00501 (D.N.M.); Davilla v. Enable Midstream Partners, LP, Case No. 5:15-cv-01262 (W.D. Okla.); Salt River Pima-Maricopa Native American Cmty. v. W. Area. Power Admin., Case No. 2:08-cv-01005 (D. Ariz.).

[2] See 25 C.F.R. § 169.410 ("If a grantee remains in possession after the expiration, termination, or cancellation of a right-of-way … we may treat the unauthorized possession as a trespass under applicable law ….").

[3] See, e.g., United States v. Pend Oreille Pub. Util. Dist. No. 1, 28 F.3d 1544, 1552 (9th Cir. 1994); Neb. Pub. Power Dist. v. 100.95 Acres of Land in Thurston Cnty., 719 F.2d 956, 961-62 (8th Cir. 1983) ("NPPD"); Bear v. United States, 611 F. Supp. 589, 599 (D. Neb. 1985).

[4] See NPPD, 719 F.2d at 961-62 (tribe held only future interest in property); Pub. Serv. Co. of N.M. v. Approx. 15.49 Acres of Land in McKinley Cnty., N.M., --- F. Supp. 3d ----, 2015 WL 9598913 at *1 (D.N.M. Dec. 1, 2015) (allotments in which tribe held undivided 13.6% interest and undivided .14% interest not subject to condemnation).

[5] See Neb. Pub. Power, 719 F.2d at 961-62 (holding that land cannot be condemned pursuant to 25 U.S.C. § 357 if a tribe owns "any interest" in it).

[6] Legal theories such as continuing trespass may prevent a claim from being completely time barred, but they often limit a landowner's recovery to a damages incurred during a very recent time period.

[7] See, e.g., Salt River Pima-Maricopa Native American Cmty. v. United States, 86 Fed. Cl. 607, 610-12 (2009).

[8] Salt River Pima-Maricopa Native American Cmty. v. United States, 266 F.R.D. 375, 377 (D. Ariz. 2010) (holding that a tribal president's administrative claim submitted on behalf of the tribe and individual Native American landowners satisfied the Federal Tort Claims Act's presentation requirement).

[9] 25 C.F.R. § 169.125(c)(5)(ix).

[10] 25 C.F.R § 169.410.