American Indian Law Journal

Volume 0
Issue 1 *Trial Issue*

Article 3

April 2017

The Public Nature of Indian Reservation Roads

M. Brent Leonard

The Public Nature of Indian Reservation Roads

M. Brent Leonhard
Attorney, Office of Legal Counsel, Confederated Tribes of the Umatilla Indian Reservation.

For those who live on, or work for a tribe that has, a checkerboard reservation[1] the problem of right-of-way access is common place and often insidious. It is not unusual for someone to throw up a gate and block road access to various lands claiming that they have not granted a right-of-way to others who regularly use that road. In addition to the actions of individuals, a tribe may have a good reason to block access to certain areas. Unfortunately, in these situations it is most likely that there is no easily discernable record of the road beyond a few maps, and there may be no recorded easement at the BIA Title Plant or with the county.[2]

The public nature of Indian Reservation Roads (IRR) can play a role in helping to resolve these kinds of right-of-way disputes on reservations. This article proposes a workable approach to that task.[3] In analyzing the public nature of IRR system roads, this article discusses two key propositions. The first proposition is that IRR system roads are public. The impact of this proposition is that if a given road is on the IRR system, then it is presumptively public.[4] The second proposition is that a road can be public, and placed on the IRR inventory, without a recorded easement. This proposition is developed by looking at the history of reservations that led to their checkerboard nature, the history of the IRR system, the definition of a "public road" under IRR laws,

---

[1] The term "checkerboard" refers to the subdivision of land that occurred on many reservations after various allotment acts were implemented in the late 1800s. *See e.g.,* The Indian General Allotment Act, 25 U.S.C. § 331 (1887) (repealed 1951). The result of this Act was a checkerboard pattern of Indian and non-Indian ownership of reservation lands. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 16.03, at 1039-1057 (2005 ed.).

[2] It is unusual to only have to deal with access issues where the public record immediately resolves the issue. Those who find themselves in this position can count their lucky stars.

[3] The Confederated Tribes of the Umatilla Indian Reservation have developed a general policy for dealing with these, and other, right-of-way disputes. Development of that policy took an analytical approach to the handling of these disputes. First and foremost in that structure is determining whether a road in question is public. The public nature of Indian Reservation Roads discussed in this article plays a key role in making that determination and, consequently, in resolving these disputes.
However, the reader should be aware that the comments in this article may be significantly different from opinions expressed by the BIA or the approach taken by other tribes. Indian law is notoriously difficult, not simply because of the merger of different areas of American common and statutory law within the context of a single subject matter, but also because the history and context of its development has, from time to time, made those mergers seemingly incoherent. Furthermore, when faced with unchartered territory and complex problems, it is not unusual for different attorneys to approach the same problem in different ways. This is especially true when applying property law analysis in Indian country. Combining the inevitable differences of opinion on how to tackle a given legal question with the seemingly inherent incoherence of Indian law, it is inevitable to get differences of opinion on a given topic—sometimes radically divergent differences. My discussion about IRR system roads may well be one of those radically divergent differences of opinion.

[4] It is possible for a road to erroneously be placed on the IRR system when it is actually a private road. This can occur when the underlying road in question was created with private, rather than public, money. Consequently, the public inference should be treated as a rebuttable presumption.

and the common law analysis of public vs. private rights-of-way. The conclusion one reaches from these two propositions, if true, is that Tribes can put roads on the IRR system, thereby requiring that they be treated as public, without a recorded easement. Nonetheless, having a recorded document showing the existence of a public easement is preferable—but it is not always necessary.

A. Indian Reservation Roads are public roads

There can be no doubt but that a road on the IRR system is public. In 1982 the Surface Transportation Assistance Act incorporated the IRR program into the Federal Lands Highway Program.[5] The primary consequence of this incorporation was to allow the IRR program to be funded by the Highway Trust Fund.[6] But, for purposes of this article, the Act had another important result: it amended the federal statutory definition of an IRR.[7] The term Indian reservation roads, as it appeared in 23 U.S.C. 101(a)(12) was amended by striking out, "' Indian reservation roads and bridges' means roads and bridges'' and inserting, "' Indian reservation roads' means public roads." An Indian reservation road is now defined as:

> [A] public road that is located within or provides access to an Indian reservation or Indian trust land or restricted Indian land.[8]

Buttressing this definition of an IRR system road as public is Congress' expressed reason for establishing the Federal Lands Highways program:

> Recognizing the need for all Federal roads which are public roads to be treated under the same uniform policies as roads which are on the Federal-aid systems, there is established a coordinated Federal lands highways program which shall consist of … Indian reservation roads as defined in section 101 of this title.[9]

It is possible to object that even if an IRR is public by definition—that in order to qualify as an IRR it must be a public road—it does not mean a given road becomes public by putting it on an IRR inventory. This is true, and is addressed more specifically in an analysis of the second proposition. Setting this objection aside for the moment, the next section looks at the consequence of a road being on an IRR inventory in a real life situation.

1. ***Brendale and the Yakama Nation.***[10]

Philip Brendale is a not a member of the Yakama Nation. However, his mother was.[11] Consequently, despite being a non-member, he inherited an interest in fee land

---

[5] Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2106.
[6] Federal Lands Highways Program, 23 U.S.C. § 204 (1972).
[7] Surface Transportation Assistance Act, *supra* note 5, at § 126 (c)(2).
[8] 23 U.S.C. § 101(a)(12).
[9] 23 U.S.C. § 204 (a)(1).
[10] Apologies to any member of the Yakama Nation, or anyone working for the Yakama Nation, if the story related in this article is inaccurate. The information presented is based on the record contained in various court documents, which, as any attorney that has litigated cases in court knows, may miss the mark compared to the facts and what actually occurred.

within the Yakama Nation reservation. His land lies within a "closed" portion of the reservation, the Nation having passed a resolution in 1954 declaring a large portion of the reservation "to remain closed to the general public" in order to "protect the [Closed Area's] grazing, forest and wildlife resources."[12] To access his property, Mr. Brendale had to use a BIA road running through the closed area.[13]

On May 3, 1972, the Yakama BIA Agency issued a public notice closing non-member public travel to most of the roads in the area where Mr. Brendale owned property.[14] Instead, a non-member had to obtain a permit to use the road.[15] Nonetheless, permits would be issued to property owners in the area, but those permits came with conditions. Among the conditions was an agreement not to carry firearms. Mr. Brendale refused to abide by that condition and the United States sued to enjoin him from using the BIA roads. The federal district court granted the injunction concluding that the restriction was reasonable.[16] Mr. Brendale didn't take the injunction sitting down. In 1978, he filed an action claiming that he had an implied easement by necessity over Indian lands. This time, in an abysmal opinion,[17] the court concluded that Mr. Brendale had an easement by implication and that he could use the BIA road so long as the use was consistent with reasonable use of his land and there were no other restrictions placed on the road as authorized by former 25 C.F.R. § 170.8(a).[18] Unfortunately, the court did not discuss whether the road in question was public, thereby obviating the need to find an implied easement by necessity.

The story picked up again in the 1980s. The Yakama Nation had its own comprehensive zoning ordinance that it applied to all lands within the Nation's boundaries. At the same time, Yakima County had a zoning ordinance that it deemed to apply to fee lands within the reservation. Mr. Brendale eventually sought to subdivide some of his land to build summer cabins through the county's process. The Yakama Nation opposed the request claiming that the county didn't have authority over lands within the reservation. The Nation prevailed at the district and appellate court levels.[19] While the matter was working its way up the system,[20] Mr. Brendale applied for a road

---

[11] Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 440 (1989).
[12] *Id.* at 438.
[13] *See* Brendale v. Olney, No. C-78-145 (E.D. Wash., March 3, 1981).
[14] *Id.* at Ex. A.
[15] *Id.*
[16] *Id.* at 2; *See also* United States v. Brendale, No. C-74-197 (E.D. Wash., September 30, 1977).
[17] For a detailed discussion of why there are no implied easements over trust lands, s*ee* M. Brent Leonhard, *There Are No Implied Easements Over Trust Lands*, 33 AM. INDIAN L. REV. 457 (2009).
[18] Brendale v. Olney, *supra* note 13.
[19] Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987) (affirmed in part, and overruled in part, *see generally* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, supra* note 11).
[20] The result of the process, of course, was the unfortunate United States Supreme Court decision, *supra* note 11. In that case the United States Supreme Court, in a highly fractured decision, held that tribes do not usually have authority to zone fee lands owned by non-members within Indian country, although the Yakama Nation had this authority with respect to Mr. Brendale because the land in question was in a closed area of the reservation. *Id.* at 409.

use permit from the BIA to access various lands he had sold so the new owners could access their property.[21]

In 1985, the request was denied by the BIA area agency on the basis that Mr. Brendale was not compliant with the Tribes' zoning laws.[22] The BIA reasoned that despite the 1981 federal district court decision, the implied easement was conditioned on reasonable use of his property—and violating zoning laws was not a reasonable use.[23] Mr. Brendale, consistent with his nature, appealed that decision to the Acting Assistant Secretary for the Bureau of Indian Affairs.

On April 8, 1988, the Acting Assistant Secretary issued a letter decision in the matter. After referring to the federal district court decision, the opinion stated:

> The Court, however, did not address the fact that the BIA regulations mandate "free public use" of BIA roads. 25 CFR § 170.8(a). After the court ruled, Congress provided in 1983 that federally-funded Indian reservation roads must be public roads. 23 U.S.C. § 101(a). If a road is a public road a traveler (sic) need not have an easement in order to use it. *See Grosz v. Andrus,* 556 F.2d 972 (9th Cir. 1977); *United States v. 10.0 Acres,* 533 F.2d 1092 (9th Cir. 1976); *United States v. City of Tacoma,* 330 F.2d 153 (9th Cir. 1964).
>
> The only reasons for which the BIA may close a public road or restrict access to it are set out in 25 CFR § 170(a).
>
> Significantly, the only federal court cases of which we are aware in which the court upheld a BIA closure of a public road involved closures for one of the purposes listed in § 170.8(a). In *Superior Oil Co. v. United States,* the public road was closed to prevent damage to an unstable roadbed. In *United States v. Brendale,* No. C-74-197 (U.S.D.C. E.D. Wash., September 30, 1977), persons who were not authorized to hunt game were prohibited from carrying firearms on BIA roads.
>
> Because the enforcement of tribal zoning laws is not among the permissible reasons for the BIA to restrict access to a public road listed in § 170.8(a), the decisions of the Area Director and the Superintendent to prohibit your clients from using BIA roads to gain access to their property are reversed. This decision is final for the Department.[24]

Finally, the BIA got it right. The road was a BIA road and on the IRR system. As such, it must be public. People do not need recorded easements to use public roads. Furthermore, IRR system roads can only be closed for specifically enumerated reasons set out in the Code of Federal Regulations (CFR). Unfortunately, this decision and analysis came seven years after a federal district court had already issued a memorandum order finding, wrongly, an implied easement by necessity over Indian lands. Granted, the federal statutes did not explicitly declare IRR and BIA roads to be

---

[21] *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, supra* note 11. *See also* Letter from James S. Bergmann, Acting Assistant Secretary, Indian Affairs, April 8, 1988, reprinted in Appellate Brief.
[22] *See* Letter from James S. Bergmann, *supra* note 21.
[23] *Id.*
[24] *Id.*

public until 1982, after the district court had issued its opinion. However, the Assistant Secretary opinion letter shows the importance of initially analyzing whether or not a given disputed right-of-way is public. Furthermore, since the opinion letter has been issued and the federal statutes amended to declare IRR system roads public, resolution of the public nature of the road could be as simple as determining if it is on the IRR inventory. So long as it remains on the list, it should be treated as public, and the BIA has no authority to restrict access.

This conclusion cuts both ways in that a tribe may generally desire public access, but not always. In some circumstances a Tribe may want a road open to public access in order to ensure the free flow of traffic throughout portions of a reservation. On the other hand, as in *Brendale*, there may be very legitimate reasons why a Tribe may want to restrict access. One way a Tribe might accomplish this, and certainly ought to if closure of a road is being challenged on the basis that it is public, is by working with the BIA to remove the road from the IRR inventory and BIA road system via a resolution vacating the public right-of-way. The Tribe could then begin treating the road as a private right-of-way. After all, municipalities and counties vacate public rights-of-way all the time.[25] There is little reason to assume a Tribe, through a process that removes a road from a federal IRR and BIA system list, cannot do the same.[26] Consequently, despite cutting both ways, the IRR program can be used as a tool to both keep public access routes open when obstructed and to close routes from public access when necessary.

B. A road can be public and placed on the IRR inventory without a recorded easement

When dealing with right-of-way access issues it is always ideal to have a recorded easement. However, the reality is that there are many reservation roads throughout the United States that have no recorded easements.[27] Furthermore, no Tribe has money to buy up easements throughout its reservation. But these things should not preclude a Tribe from managing the roads that already exist, have been opened for general use by the public (both members and non-members), and no doubt were built by the BIA or otherwise built with public money to provide access throughout a reservation.

A recorded easement is not necessary for a road to be public or to place it on the IRR inventory. When venturing into the realm that is federal Indian law, it often helps to consider the history of the development of Indian law to distinguish it from what one might expect to encounter off reservation. To this end, the next section will briefly discuss the history of reservations that led to their checkerboard nature, as well as the

[25] Googling "petition to vacate public right-of-way" will result in over 1 million hits and many examples of such petitions.

[26] 25 C.F.R. § 170.813(c) states, "[c]ertain IRR transportation facilities owned by the tribes or BIA may be permanently closed when the tribal government and the Secretary agree. Once this agreement is reached, BIA must remove the facility from the IRR System."

[27] I dare to venture a guess that there aren't just "many" roads without recorded easements, but that most roads on reservations do not have recorded easements.

history of the IRR system. With this context established, the discussion then turns to how the federal law defines the phrase, "open to the public" and looks at various factors courts consider when determining if a given road is public or private off-reservation. In traversing this trail, it will become clear why a recorded easement is not necessary for a road to be either public or placed on the IRR inventory.

1. ***Where the checkerboard comes from***

From its inception until 1871, the United States negotiated agreements with tribal nations through the use of nation-to-nation treaties.[28] In the Pacific Northwest, many of those treaties came into existence in the 1850s.[29] Through the treaties, Tribes gave up certain rights and retained whatever rights they did not give up.[30] For the purposes of this article, the key right that Tribes gave up was a right to large portions of land. Tribes ceded massive amounts of land to the United States and received certain assurances in return. A consequence of cession was the creation of initial reservation boundaries.

Not long after entering into these treaties, the United States decided to take more land from the Tribes. One of the primary vehicles for doing so was the enactment of various Allotment Acts. The General Allotment Act itself was passed in 1887—thirty to forty years after reservations were initially established by treaty in the Pacific Northwest.[31] These acts opened parts of treaty reservations to further settlement by non-Indians. The government set aside small portions of land for individual ownership by tribal members, but it kept them in trust for a certain number of years under the guise of assimilating the members into the White culture. After the period of time set aside for holding the land in trust ran, the land was to pass to tribal members in fee.[32] After the government parceled out land to tribal members, the "surplus" was often either sold to settlers in fee or the reservation boundaries were diminished.[33] The reality was that these laws were designed to effectively take all land away from Tribes and put the land in fee status like any other non-public lands throughout the United States.

The result of these laws was the massive loss of land to both Tribes as governmental entities and as individual tribal members. It was an abysmal failure—

---

[28] *See e.g.* Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13; Treaty with the Wyandot, Etc., Jan. 21, 1785, 7 Stat. 16; Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putatwatimes, Miamis, Eel-river, Weeas, Kickapoos, Piankashaws, and Kaskaskias, Aug. 3, 1795, 7 Stat. 49; Act of Mar. 3, 1871, c. 120 §1, 16 Stat. 566.

[29] *See* Puyallup Tribe v. Washington Game Dept., 433 U.S. 165, 179 (1977) (Brennan, J., dissenting in part).

[30] United States v. Winans, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of right from them, a reservation of those not granted.").

[31] *Id*.

[32] For a description of this process, *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 16.03 [2][b], at 1041-1042 (2005 ed.).

[33] *See e.g.* Solem v. Bartlett, 465 U.S. 463 (1988) (surplus); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) (reservation diminishment).

Indian lands were slashed from 138 million acres in 1887 to 48 million in 1934.[34] In 1934, Congress passed the Indian Reorganization Act and put a stop to the Allotment Acts.[35] Land still in trust would remain in trust; land not sold would be transferred to tribal governments and held in trust. Consequently, the geographic makeup of reservations became a mixture of fee lands, individually allotted trust lands, and tribal trust lands—in short, a checkerboard. This wholesale theft of tribal government lands has led to inevitable access disputes. In the meantime, roads were created by the BIA to provide access throughout reservations, with little or no records being kept.[36]

2. History of Indian reservation roads.

On May 26, 1928, Congress gave birth to the IRR system when it enacted what is now 25 U.S.C. § 318(a). That statute reads:

> Appropriations are hereby authorized out of any money in the Treasury . . . for . . . improvement, construction, and maintenance of Indian reservation roads not eligible to (sic) Government aid under the Federal Highway Act.

While the Act clearly authorized appropriation of federal public monies for Indian reservation roads, there was no requirement that the improvement, construction, or maintenance of those roads be documented. Furthermore, it wasn't until 1948 that Congress even required the BIA to obtain consent from beneficial trust owners before granting rights-of-way to *others*.[37] It comes as no wonder then that the BIA may have expended public funds constructing roads throughout reservations to meet tribal access needs, but it never kept a record of its activities or recorded a public easement to document the creation of those roads.

After passage of the 1928 Act, the BIA partnered with the Federal Highway Administration (FHWA) in 1930 when the Secretary of Agriculture was allowed to cooperate with State highway departments and the Department of Interior in the construction and maintenance of IRR system roads.[38] Moreover, the Federal-Aid Highway Act of 1936 required the FHWA to approve IRR system roads.[39] This involvement of the FHWA in construction and maintenance of roads by the BIA is telling

---

[34] *See e.g.* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 138 (1982 ed.); LEONHARD, *supra* note 17, at 488.

[35] Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (2006)).

[36] I suspect there was no BIA Title Plant system to keep records for some time. Furthermore, the BIA acting as trustee for Tribes and having control over trust lands did not necessarily have to keep records—it was the public authority with both jurisdiction and maintenance responsibility. In addition, anyone wanting to build a road on trust lands with private funds would have to seek BIA permission to do it—which, one would assume, would create a paper trail (consequently, if there is no paper trail, there is further reason to believe a given road is public rather than private).

[37] 25 U.S.C. § 324.

[38] Statement of Robert Baracker, Director, Southwest Regional Office, Bureau of Indian Affairs, before the Senate Committee on Indian Affairs Oversight Hearing on Indian Reservation Roads and the Transportation Equity Act in the 21st Century (TEA-21) (October 20, 1999), *available at* http://www.doi.gov/ocl/tea.htm.

[39] *Id.*; *see also* Federal-aid Highway Act of 1936, Pub. L. No. 686 §6.

with regard to the public nature of such roads, as that agency focused on the development of the nation's public roadways.

The FHWA is an agency within the federal Department of Transportation. It is responsible for ensuring the safety, efficiency, and economy of the *Nation's* highway transportation system. It does this through two programs: the Federal-Aid Highway Program and the Federal Lands Highway Program, of which the IRR system is now a part. The whole point of these programs is to provide adequate public transportation systems. Congress' intent in passing the Federal Lands Highway Program was quoted above, and under the Federal-Aid Highway Program Congress has declared, "that it is in the national interest to accelerate the construction of Federal-aid highway systems . . . because many of the highways (or portions of the highways) are inadequate to meet the needs of local and interstate commerce for the national and civil defense."[40] Clearly, involvement of the FHWA with the BIA in construction and maintenance of reservation roads was for the purpose of providing adequate roadways to meet the *public's* needs.

In 1958, the laws relating to highways throughout the United States were reenacted as Title 23 of the United States Code.[41] The original definition of Indian reservation roads came from this enactment, and Congress has since amended the Title to make it explicit that these roads are public.

Between 1928 and 1982, IRR funds were appropriated through the Department of Interior's appropriation acts, and these funds were consequently funneled to the BIA.[42] Despite being BIA appropriations, given the history of the development of the IRR program up to that point and in particular the involvement of the FHWA, it is reasonable to assume Congress' purpose in appropriating the public funds was to meet a public need.

In 1982, Congress passed the Surface Transportation Assistance Act of 1982. This Act incorporated the IRR program into the Federal Lands Highway Program thereby providing funding from the Highway Trust Fund.[43] The Act also explicitly made IRR system roads public by definition.[44] Since 1982, there have been various enactments affecting the IRR program, but none of them have curbed the public nature of roads in the IRR system.

3. The definition of a "public road" under the IRR system

Nothing in the statutory or regulatory body of IRR system laws explicitly requires that a road have a recorded public easement before being placed on the IRR system.

---

[40] 23 U.S.C. § 101(b)(1).
[41] Pub. L. No. 85-767.
[42] Baracker SCIA Testimony, *supra* note 38.
[43] *Id.*
[44] 23 U.S.C. § 101(a).

An IRR system road is a "public road" by definition,[45] but the question remains as to what exactly a "public road" is, and if it requires a recorded easement. After all, it is possible for a Tribe or the federal government to mistakenly place a road on the IRR inventory that is not actually a "public road". This section examines this issue a bit more closely.

Section 101(a) of Title 23 of the United States Code not only defines an Indian reservation road as public, but goes on to define the term "public road" as follows:

> The term "public road" means any road or street under the jurisdiction of and maintained by a public authority and open to public travel.[46]

Nothing in this definition requires the existence of a recorded easement. The three factors are simply that a given road be under the jurisdiction of a public authority, be maintained by that authority, and be open to public travel. Given the history of the creation of reservations, the role of the BIA as trustee for Tribes, and the origin and public nature of funds appropriated for the creation and maintenance of roads on reservations, there is good reason to believe many roads on reservations qualify as "public roads" for purposes of being listed on the IRR system despite the lack of a recorded public easement.

It goes without saying that the BIA is a public authority. It also is fairly uncontroversial that, in so far as trust lands are concerned, the BIA exercises jurisdiction over roads that cross those lands. The remaining issue to be addressed is whether a given road in question is "open to public travel."

If BIA funds were used to establish or maintain a given road, for the reasons mentioned above, it is reasonable to assume it was created and maintained for the public's needs using public funds. Private driveways may not have been created to serve the public, but certainly it is not far-fetched to assume that, absent explicit evidence to the contrary, the roads that were created by the BIA to serve multiple properties, or that connect multiple road systems together, were created to serve the general reservation population and not just an individual trust allottee—that is to say, they were open to public travel.

While the federal statutes use the phrase "open to public travel" in various places, they do not give an explicit definition of what it means for a road to be open to public travel. Despite statutory silence, however, federal regulations do define the phrase:

> Open to public travel means that the road section is available, . . . passable by four-wheel standard passenger cars, and open to the general public for use without restrictive gates, prohibitive signs, or regulation other than restrictions based on size, weight, or class of registration.[47]

---

[45] *Id.*
[46] 23 U.S.C. § 101(a)(27).
[47] 23 C.F.R. § 460.2(c).

Consequently, if a given reservation road that was created with BIA funds is open, passable by a four-wheel vehicle, and there are no gates, signs, or regulations in place restricting access by the general public, it qualifies as a public road for placement on the IRR inventory. There is no requirement for a recorded easement, nor should there be. As discussed below, these factors are consistent with those that courts use when determining whether or not a given non-reservation road is public or private.

Despite the fact that there is no requirement for a recorded easement, some roads that fit the regulatory definition may nonetheless be private.[48] If there is evidence that a given road was created with private money, maintained by private parties, or has been systematically closed to public travel by way of a locked gate, posted signs, or other regulation, then it is possible that the road is private. In that circumstance, depending on the weight of the evidence and absent any evidence showing that the road was created by the BIA or with federal funds, it would be advisable to remove the road from the IRR inventory and treat it as private. That is, the road should be removed from the IRR inventory unless the Tribe plans on purchasing a right-of-way to open it up to public travel.[49]

4. Common law analysis of public vs. private roads

Outside of Indian country, American courts have often addressed the issue of whether a given road or alley is public or private. In doing so, these courts have looked at various factors to determine the true nature of the road. The absence of a recorded easement is not among those factors. Typically, the critical factor is how the road in question was actually used.

The Supreme Court of Alabama, in *Valenzuela v. Sellers,*[50] considered a case involving an alleyway. Thirty years prior to the action there was a single owner of a large tract of land. She divided the land up into smaller parcels and in so doing created an alleyway between the lots. That alley not only provided access to several parcels, it also connected two streets. The court noted that, given these facts, it was clear that the alley was open to the public and recognized as such for more than twenty years.[51] In essence, the evidence showed the alley was dedicated to the public and to abutting property owners.

One of the owners erected a fence along part of the alley cutting off access, which resulted in a nuisance action. In defense, that owner argued the alley had been abandoned. The court noted that it was clear the alley had been open to use for more than twenty years, uninterrupted by the abutting property owners and the public at

---

[48] At common law, it may be that a road meeting these requirements would be considered public by some implied easement theory. However, that is not the case with respect to easements over trust lands. *See* LEONHARD, *supra* note 17.

[49] THE BUREAU OF INDIAN AFFAIRS MANUAL ON ROAD CONSTRUCTION § 1.3B(1) (1992). Section 1.3B(1) effectively states that roads the BIA plans to obtain a legal right-of-way over can be placed on the IRR inventory.

[50] *See* Valenzuela v. Sellers, 246 Ala. 329, 20 So. 2d 469 (1945).

[51] *Id*. at 330.

large.[52] While the court noted the alley may not have been used by the public to any great extent, it was the character rather than the amount of use that was the controlling factor.[53]

In 2006, the Supreme Court of Vermont, in *Town of South Hero v. Wood,*[54] dealt with what essentially was an implied easement issue. While implied easements do not run against federal lands, and certainly not against Indian trust lands,[55] the case is interesting because of the factors the court looked to in determining the intent of various private land owners.

Since 1819, maps depicted that there was a road running along a bay in South Hero, Vermont. However, no doubt due in part to its age, there was no formal process used to lay out the road. Over the years the shoreline eroded and the road was moved further inland. In 2000, there was a need to move it yet again, this time about 160 feet further inland from its original location. Private owners objected, as it encroached on their property.

The town claimed the private land owners had essentially dedicated the right of way to public use long ago and that the adjustment was permissible. The issue became whether the landowners had intended to dedicate their lands for public use—i.e., dedicated their lands for the public usage of the meandering road in question. When addressing the issue of intent the court focused on the public use of the road, despite the fact that it was seasonal and only sporadically used due to weather, and on the fact that the road was maintained with public funds.[56] Based on these factors, the court found a public dedication had occurred.[57]

The Vermont court's use of the above factors to determine whether or not private individuals intended to dedicate their lands to public use for a roadway is useful for our purposes. Even though the BIA or individual beneficiary owners of trust lands cannot have their interests divested by mere implication, the question of intent is important in determining whether a given reservation road was actually created for public use in absence of formal documentation to that effect. The fact that a road was created by the BIA, serves multiple lots, connects various roads, is maintained by the BIA, and is used by the general public all bode strongly in favor of the road having been created as a public road—regardless of the existence of a recorded easement.

Ultimately, as with the factors mentioned in the code of federal regulations, the determining factor between a private or public road is the use to which it is actually put. The Colorado Court of Appeals stated, in *Lovvorn v. Salisbury*,[58] that;

---

[52] *Id*. at 331.
[53] *Id*.
[54] *See* Town of South Hero v. Wood, 179 Vt. 417, 898 A.2d 756 (2006).
[55] *See* LEONHARD, *supra* note 17.

[56] Town of South Hero v. Wood, *supra* note 54, at 422.
[57] *Id*. at 426.
[58] *See* Lovvorn v. Salisbury, 701 P.2d 142 (1985).

> [t]he ultimate distinction between a public road and a private easement, however acquired, is that the private easement can be, and is, limited to specific individuals and/or specific uses while a public road is open to all members of the public for *any* uses consistent with the dimensions, type of surface, and location of the roadway.[59]

The Georgia Court of Appeals, in *Hood v. Spruill*,[60] put it this way: "use is the determinative factor in designating (a road) as 'private' or 'public.'"[61]

Use is the ultimate factor. The existence of a recorded easement, while dispositive of the question, is not necessary. The real questions are who built the road, what funds were used, and whether it has been left open for use by the public. If all evidence suggests that a road was built and maintained by the BIA using public funds and the road has been left open for the public to use, then there is every reason to assume it is a public road.

C. Conclusion

Given the history of the development of Indian lands and the BIA's involvement in building and maintaining roads throughout reservation lands, there is good reason to believe a given reservation road is public so long as evidence suggests it was built and maintained by the BIA and public access has never been restricted. There is no need for a recorded easement dedicating it to the public. There are no federal statutes or regulations requiring a recorded easement. Consequently, such roads can be placed on a tribe's IRR inventory. Furthermore, any roads on the IRR inventory must be treated as public roads and the BIA has no authority to restrict access to those roads except as specifically enumerated in the Code of Federal Regulations. There may be times that a Tribe wants to close a public road, or allow private individuals to close an otherwise public road, and this can be accomplished by removing a road from the IRR and BIA system through an agreement with the Secretary of Interior[62] and a resolution explicitly vacating the public right-of-way.[63] Thereafter, the vacated road should be posted and otherwise treated as private.

---

[59] *Id*. at 144.
[60] *See* Hood v. Spruill, 242 Ga.App. 44, 528 S.E.2d 565 (2000).
[61] *Id*. at 566.
[62] 25 C.F.R. § 170.813(c).
[63] To this end, a tribe will want to develop a procedure for vacating a public right-of-way that ensures notice goes to all property owners whose interests may be affected and gives them an avenue to voice their opinion on the matter.