

## **The Public Nature of Indian Reservation Roads (some initial thoughts)**

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For those of you who live on, or work for a tribe that has a checkerboard reservation the problem of right-of-way access is common place and often insidious. It isn't 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 want to block access to certain areas and for good reason. Unfortunately, in these situations you will inevitably discover that there is no easily discernable record of the road beyond a few maps, and certainly no recorded easements either at the BIA Title Plant or the County.<sup>1</sup>

In my position as Deputy Attorney General for the Confederated Tribes of the Umatilla Indian Reservation I have been tasked with trying to develop a general policy for dealing with these, and other, right-of-way disputes. That task, no doubt, will prove to be long and arduous. In my quest to develop a policy, however, I have started to think about a workable analytic approach to handling these disputes. First and foremost in my preliminary analytic structure is to determine if the road in question is actually a public

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<sup>1</sup> Unless you are extremely blessed and only have to deal with access issues where the public record immediately resolves the issue. If you find yourself in this position, count your lucky stars.

road. That in turn, has lead to my thinking about the public nature of Indian Reservation Roads (IRR) and how they might play a role in helping resolve these disputes.

Before I delve further into a discussion of the public nature of IRR system roads, however, I want to make a few background comments about Indian law in general. The reason being that you may well find my comments to be significantly different from opinions you've heard expressed by the BIA or your Tribes' attorney. 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 because the history and context of its development has, from time to time, made those mergers seemingly incoherent. Add to this that, as a common saying goes, if you ask five attorneys the same question, you'll get five different answers. That is certainly true within the context of property law. As my property law professor William Stoebuck was always fond of saying, "there's more than one way to skin a cat." 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, you will inevitably 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.

With this understanding, I want to delve into analyzing the public nature of IRR system roads. In doing so, there are two propositions I want to discuss. The first proposition is that IRR system roads are public. The upshot of this proposition is that if you have an

IRR system road, then it must be treated as public. In short, if it's an IRR system road, it's public. There is a particular real life example that bears this out that I will discuss later. The second proposition is that a road can be public, and placed on the IRR inventory, without a recorded easement. This will be developed by looking at the history of reservations that lead to their checkerboard nature, the history of the IRR system, the definition of a "public road" under IRR laws, 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 isn't 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. PL 97-424. The primary upshot of this incorporation was to allow the IRR program to be funded by the Highway Trust Fund. 23 U.S.C. 204. But, for our purposes, the act had another important result: it amended the federal statutory definition of an IRR. PL 97-424, Sec. 126 (c)(2). The term Indian reservation roads, as it appeared in 23 U.S.C. 101(a) 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...

Buttressing this definition of an IRR system road as public is Congress' expressed reason for establishing the Federal Lands Highways program, which can be found at 23 U.S.C. 204 (a)(1) and reads:

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.

You may immediately object that even if an IRR is public by definition, because in order to qualify as an IRR it must be a public road, it doesn't mean a given road becomes public by putting it on an IRR inventory. This is true, but is addressed more specifically in an analysis of the second proposition. Let's set this objection aside for the moment and look at the consequence of a road's being on an IRR inventory in a real life situation.

### *1. Brendale and the Yakama Nation.<sup>2</sup>*

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

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<sup>2</sup> My 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 I present is based on the record contained in various court documents, which, as any attorney that has litigated cases through the court system knows, may not be remotely grounded in anything that a reasonable person would considered reality.

remain closed to the general public” in order to “protect the [Closed Area's] grazing, forest and wildlife resources.” To access his property, Mr. Brendale had to use a BIA road running through the closed area.

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. Instead, a non-member had to obtain a permit to use the road. 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 the restriction was reasonable. *United States v. Brendale*, No. C-74-197 (U.S.D.C. E.D. Wash., September 30, 1977).

Mr. Brendale didn't take the injunction sitting down. In 1978 he filed an action himself, claiming that he had an implied easement from necessity over Indian lands. This time, in an abysmal opinion<sup>3</sup>, 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 CFR 170.8(a). *Brendale v. Olney*, No. C-78-145 (U.S.D.C. E.D. Wash., March 3, 1981). Unfortunately, there was no discussion about whether or not the

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<sup>3</sup> I've written a very lengthy memo/draft article on why there are no implied easements on Indian lands, let alone federal lands, but that is a topic for another day.

road in question was public, thereby obviating the need to find an implied easement by necessity.

The story picks up again in the 1980s. The Yakima 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. While the matter was working its way up the system<sup>4</sup>, Mr. Brendale applied for a road use permit from the BIA to access various lands he had sold so the new owners could access their property.

In 1985 that request was denied by the BIA area agency on the basis that Mr. Brendale was not compliant with the Tribes' zoning laws. It 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. Mr. Brendale, consistent with his nature, appealed that decision to the Acting Assistant Secretary for the Bureau of Indian Affairs.<sup>5</sup>

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<sup>4</sup> The result of the process, of course, was the unfortunate United States Supreme Court decision in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 109 S.Ct. 2994 (1989).

<sup>5</sup> For those of you who may not already know, despite what the name may seem to imply, the Assistant Secretary for the Bureau of Indian Affairs is the head of the BIA.

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.

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. Unfortunately, this decision and analysis came seven years after a federal district court had already issued a memorandum order, wrongly, finding an implied easement from necessity over Indian lands. Granted, the federal statutes did not explicitly declare IRR and BIA roads to be 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 some circumstances a Tribe may desire to find 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 itself. 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, and begin treating it as a private right-of-way. After all, municipalities and Counties vacate public rights-of-way all the time.<sup>6</sup> There is little reason to assume a Tribe, through a process that removes it from a federal IRR and BIA system list, cannot do the same.<sup>7</sup> Consequently, despite cutting both ways, the IRR program can be used as a tool to both keep public access routes open when obstructed and close routes from public access when necessary.

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<sup>6</sup> I encourage you to Google, “petition to vacate public right-of-way”.

<sup>7</sup> 25 CFR 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.”

## **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.<sup>8</sup> Furthermore, no Tribe has money to buy up easements throughout their reservation. But these things shouldn't 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.

You don't need a recorded easement 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 I will briefly discuss the history of reservations that led to their checkerboard nature, as well as the history of the IRR system. With this context established, I want to further talk about how the federal law defines the phrase, "open to the public", and look 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.

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<sup>8</sup> I dare to venture a guess that there aren't just "many" roads without recorded easements, but that most roads on reservations don't have recorded easements.

## *1. Where the checkerboard comes from*

Some time after the establishment of the United States of America treaties were negotiated with Tribes. In the Pacific Northwest, many of those treaties came into existence in the 1850s. Through the treaties Tribes gave up certain rights and retained whatever was not given. For our purposes, the key right given 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. 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. These acts opened parts of treaty reservations to further settlement by non-Indians. They set aside small portions of land for individual ownership by tribal members, but 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. After parceling out land to tribal members and for certain other purposes, the “surplus” was sold to settlers in fee. The reality was that these laws were designed to effectively take all land away from Tribes and put them 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 individual tribal members. It was an abysmal failure - Indian lands were slashed from 138 million acres in 1887 to 48 million in 1934. In 1934 Congress passed the Indian Reorganization Act and put a stop to the Allotment Acts. 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, no doubt, roads were being created by the BIA to provide access throughout reservations, with little or no records being kept.<sup>9</sup>

## ***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. 318a. 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

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<sup>9</sup> 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 didn't necessarily have to keep records – they were 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 their 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).

Congress even required the BIA to obtain consent from beneficial trust owners before granting rights-of-way to *others*.<sup>10</sup> It comes as no wonder then that the BIA may have expended public funds constructing roads throughout reservations to meet tribal access needs, but never kept a record of their 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. Moreover, the Federal-aid Highway Act of 1936 required the FHWA to approve IRR system roads. This involvement of the FHWA in construction and maintenance of roads by the BIA is telling.

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." 23 U.S.C.

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<sup>10</sup> 25 U.S.C. 324.

101(b)(1). 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. With enactment of the new Title came the original definition of Indian reservation roads mentioned above, which has since been amended 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 consequently funneled to the BIA. 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 the Surface Transportation Assistance Act of 1982 was passed. This Act incorporated the IRR program into the Federal Lands Highway Program thereby providing funding from the Highway Trust Fund. The Act also explicitly made IRR system roads public, by definition. 23 U.S.C. 101(a). 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.

We have already seen that an IRR system road must be a “public road” by definition.<sup>23</sup> U.S.C. 101(a). However, 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”. Let’s look at this 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”:

The term “public road” means any road or street under the jurisdiction of and maintained by a public authority and open to public travel.

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 every 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, there is good reason 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 isn’t far fetched to assume that absent explicit evidence to the contrary those roads that were created by the BIA to serve multiple properties, or which 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. 23 CFR

460.2(c) states:

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...

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.

There is a flip side to all of this, however. 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 there is reason to believe the road may actually be private. In that circumstance, depending on the weight of the evidence and absent any evidence showing the road was created by the BIA, or with federal funds, you would be well advised to remove the road from the IRR inventory and treat it as private. That is, unless the Tribe plans on purchasing a right-of-way to open it up to public travel.<sup>11</sup>

#### ***4. Common law analysis of public vs. private roads***

Outside of Indian country, American courts have often addressed the issue as to 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.

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<sup>11</sup> The Bureau of Indian Affairs Manual on Road Construction (57 BIAM) effectively states in section 1.3B(1) that roads the BIA plans to obtain a legal right-of-way over can be placed on the IRR inventory.

The Supreme Court of Alabama, in *Valenzuela v. Sellers*<sup>12</sup> 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 the alley was open to the public and recognized as such for more than twenty years. In essence, the evidence showed the alley was dedicated to the public and 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 that 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 large. 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.

In 2006 the Supreme Court of Vermont, in *Town of South Hero v. Wood*<sup>13</sup> dealt with what essentially was an implied easement issue. While implied easements do not run against federal lands, and certainly not Indian trust lands, 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 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

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<sup>12</sup> 246 Ala. 329, 20 So. 2d 469 (1945).

<sup>13</sup> 179 Vt. 417, 898 A. 2d 756 (2006).

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 the fact that it was maintained with public funds. Based on these factors, the court found a public dedication occurred.

The use of these 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 for 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*<sup>14</sup> that, “[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.” The Georgia Court of Appeals in *Hood v. Spruill*<sup>15</sup> put it this way, “use is the determinative factor in designating (a road) as ‘private’ or ‘public’.”

Use is the ultimate factor. The existence of a recorded easement, while dispositive of the question, is not necessary. The real question is who built it, with what funds, and if it has been left open to 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

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<sup>14</sup> 701 P.2d 142 at 144 (1985).

<sup>15</sup> 242 Ga. App. 44, 528 S.E.2d 565 at 566 (2000).

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. While there may be times that a tribe wants to close a public road, or allow private individuals to close an otherwise public road, this can be accomplished by removing a road from the IRR and BIA system through an agreement with the Secretary of Interior<sup>16</sup> and a resolution explicitly vacating the public right-of-way.<sup>17</sup> Thereafter, the vacated road should be posted and otherwise treated as private.

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<sup>16</sup> 25 CFR 170.813(c).

<sup>17</sup> 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.