

Chapter 21

Rights-of-Way

This chapter describes some of the key issues related to rights-of-way research projects. A **right-of-way**, or **easement**, is a legal right to access and use someone else's land. Roads, railways, utility (hydro-electric, telephone and telegraph) lines and pipelines are some of the more common rights-of-way that crisscross British Columbia. Rights-of-way are usually granted to governments, Crown corporations, private companies or individuals in exchange for compensation. The *Indian Act* sets out the terms under which Indian bands must be consulted and compensated before a right-of-way crosses Indian reserve land. In British Columbia, however, Order-in-Council (OIC) 1036 allows a certain percentage of reserve land to be taken for a public works right-of-way without compensation to the band.

While the basic research paths for all rights-of-way issues are similar, each type of project will lead you to investigate additional resources particular to the type of right-of-way in question. Regardless of specific details of your project, you will likely be dealing with a large volume of archival and active records. We suggest reviewing Chapter 2: Research Methods before you begin your research.

Historical Overview

In 1938, OIC 1036 formally transferred ownership of Indian reserves from the Province of British Columbia to Canada (with the exception of Railway Belt and Peace River Block lands, which had been conveyed in 1930). The Province retained ownership of all existing roads in BC, including those on Indian reserves. The Province also reserved the right to take up to five percent of reserve lands for public works without compensation to the band, as long as there were no buildings, fences or gardens present on the land taken. OIC 1036 also provided that the Province may take “any gravel, sand, stone, lime, timber or other material which may be required in the construction, maintenance, or repair of any roads, ferries, bridges, or other public works.”¹ See Chapter 4: Documents for more information about OIC 1036 and the Railway Belt/Peace River Block lands.

Researching Rights of Way

Researching right-of-way issues on-reserve usually requires looking at three questions:

1. Was the right-of-way acquired lawfully and fair compensation paid?
2. Were there any negative impacts as a result of the right-of-way and have these impacts been satisfactorily addressed?

3. Has the right-of-way continued to be used lawfully, only for purposes that were authorized at the time the right-of-way was taken?

These topics are discussed below. You may require legal input into the research plan when investigating these issues since the statutes, regulations, and case law governing the taking of reserve land for different right-of-way purposes will vary and can often be quite complex.

Acquisition of the Right-of-Way

A key research issue is whether or not the band gave its full and informed consent prior to the right-of-way taking. It is also important to determine whether the band's consent was obtained in the manner set out by relevant statutes, such as the *Indian Act*. If so, were the regulations properly followed?

If consent was given “conditionally,” whether through a **surrender** or a **band council resolution** (BCR), did the federal government, company and/or individual claiming rights to the right-of-way fulfill those conditions? Such conditions could have included compensation to be paid at a specified rate, compensation for specific community purposes, installation of safety features, or maintenance or use agreements.

Another key research issue is whether or not sufficient compensation was paid to the band collectively, as well as to individual band members for any improvements to reserve lands that were damaged or destroyed by right-of-way construction. If so, how were compensation payments calculated? Were they calculated according to a flat rate formula or was there an independent valuation of the specific right-of-way parcel?

Another important issue is whether or not the amount of land taken for the right-of-way was greater than that allowed by law. For example, the *British Columbia Railway Act, 1890* allows a maximum right-of-way width of 30 yards (90 feet) for expropriations, while the federal *Consolidated Railway Act, 1899* allows a maximum right-of-way width of 33 yards (99 feet) for such takings. The maximum width and length of expropriated railway station grounds were also prescribed by provincial and federal statute.

It is also important to note whether or not the location of the constructed right-of-way matched the preliminary and final survey plans approved by the Surveyor General of Canada, the Governor-in-Council and Indian Affairs. A related issue is whether or not a proper survey was undertaken before construction began and whether procedural requirements from Indian Affairs and the Surveyor General were met.

Negative Impacts as a Result of Rights-of-Way

This area of research may require you to investigate impacts at the time of right-of-way construction, such as damages to gardens or the destruction of sacred sites, or impacts over a longer period of time. Examples of long-term negative impacts include:

- Safety. Were satisfactory safety provisions carried out as mandated by any relevant statutes and/or as a condition of a surrender or band council resolution?
- Severance. Did the location of the right-of-way cut off one part of the reserve from the rest and make it difficult for band members to use the

parcels for economic or social purposes? Was the economic and social “value” of the parcels reduced as a direct result? If so, was the band compensated for losses resulting from severance? Were efforts made to reduce these losses?

- Access. Did the construction and/or location of the right-of-way deny band members access to important fishing sites, hunting grounds, sacred sites, berry-picking areas or other important sites? Were any sites actually destroyed by construction related to the right-of-way, such as construction of roads or railways? If so, was the band compensated for economic and social losses resulting from denial of access? Were efforts made to reduce losses?
- Environmental Impacts. Did construction of the right-of-way and/or any operations as a result of the right-of-way negatively impact fish, wildlife, water, air quality noise or vegetation? If so, what were the consequences to the band in terms of erosion or accretion of the land base, community health, traditional pursuits, economic activity, and quality of life? Were efforts made to lessen environmental impacts? Was the band compensated for losses?

Lawful Use of Rights-of-Way

Research into this issue looks at whether at some point a right-of-way on reserve ceased to be used exclusively for the purposes for which it was authorized. Try to document that after a certain date the right-of-way was no longer used for what it was intended. You will need to examine carefully all instruments that claim to authorize the right-of-way taking(s) in order to determine the explicit “purpose” for the transaction(s) at issue. These instruments can include surrenders, BCRs, OICs and **letters patent**.

The key research issue in determining whether the right-of-way has been “used lawfully” is the specific language in the authorizing instruments. Do they state that the right-of-way taking is for “public works purposes” or, more narrowly, that the taking is for an exclusive purpose, such as “railway purposes”? Note whether or not all the instruments are consistent in their stated purpose for the right-of-way.

Research Guidelines

When researching rights-of-way, begin by talking to members of the community. They can help you identify the location of the right-of-way and determine how it is being used. Community members and band employees can also help identify any outstanding concerns such as safety, access or environmental impacts. You may want to discuss the possibility of undertaking an oral history project to identify long-range impacts. In such cases, researchers will have to work backwards from the effects to try and establish linkages to particular aspects of right-of-way construction or use.

When beginning your documentary research, note the current location of the easement in question and its relationship to the current reserve boundaries. This can be done on site and also by looking at Registry Index Plans available at the Legal Surveys Division of Natural Resources Canada (NRCan) (available on site and on the NRCan website). They

can help you get an overview of what rights-of-way cross your reserve.

Next, it will be important to do some basic reserve research as outlined in Chapter 5. This will give you a good idea of your community's reserve land, and will provide details about where, when, and how existing rights-of-way were approved and constructed through your reserve. As you examine the early information about your reserve, the following tips may be useful depending on the nature of your project:

- The Joint/ Indian Reserve Commission (J/IRC) often mentioned the existence of trails and access routes in its correspondence and minutes of decision.
- The sketch maps accompanying the J/IRC minutes of decision may indicate the presence of village sites, trails, gravesites or "improved" areas such as gardens.
- Early surveys and field notes will often document the existence and location of trails, government or wagon roads, rail lines, gardens and gravesites.
- The Royal Commission (McKenna-McBride) Final Reports include supplementary tables ("Table A") at the end of each volume that document access routes across specific reserves. Archived Indian Affairs records (**RG 10**) also contain correspondence between the commissioners and Indian Agents about "facilities of access." The Royal Commission hearing transcripts may also contain testimony about existing rail lines, government roads, private roads used by industry, ferry crossings, trails, gardens and gravesites.
- Reserve schedules often list acreages taken from reserves for right-of-way purposes.

Record the existence of any instruments dealing with rights-of-way across your reserves. Instruments provide you with specific details about the taking of reserve land for each right-of-way or easement on your reserve, whether for roads, railways, canals or utility lines. The instruments you will be looking for can take different forms. They may be band council resolutions (BCRs) authorizing the right-of-way. They may be orders in council, which give legal effect to the right-of-way. Or if you are researching utility rights-of-way, you may be looking at permits granted under the *Indian Act* for rights to use reserve lands for defined periods of time. Relevant instruments will be listed in the Reserve General Abstract Reports. Electronic copies of instruments can be viewed and printed through the Indian Lands Registry System (ILRS) website, an INAC database of instruments relating to reserve lands. See Chapter 4: Documents for information on how to gain access to instruments and the ILRS database.

You should track the right-of-way transaction from the initial proposal and correspondence through to the signing of the appropriate instrument. This allows you to compare the expressed needs and wishes of your community with the requirements and conditions set out in the instruments. Much of this information will be found in RG 10 records and active Indian Affairs records ordered from INAC. You may find a lot of early correspondence or hardly any, depending on your community. Whatever you do find, always note any evidence of consultation and negotiation with the community. If there appears to be a lack of consultation, note this as well. Also note any changes in reserve acreage over time. There should always be an explanation for discrepancies in reserve acreage, missing instruments, or failure to consult or compensate the band. Record any evidence of negative

impacts as a result of the right-of-way or related construction. See Chapter 4: Documents for information on accessing these records.

Surveys and field notes are particularly important for researching right-of-way issues because they indicate exactly where on the reserve each right-of-way is located, the right-of-way dimensions and what lies around it. You will probably refer to survey plans quite often throughout your research, so keep them handy by downloading and saving electronic copies from the Legal Surveys Division of NRCan website or by ordering hard copies from their Vancouver office. Field books are also available in both formats. See Chapter 10: Maps and Surveys for more information about accessing these documents.

As you go through the basic reserve survey plans and field notes, again, look for any indication of village, fishing or burial sites, “Indian trails,” cultivated areas such as gardens, or Indian ditches, fences or buildings. It is important to note these sites in case they are destroyed or access to them is later blocked by a right-of-way. Also note the existence of other trails or roads, their names if they have them, their width and route as recorded by the mapmakers and surveyors. Remember to compare survey plans with one another. Note any changes to routes, alignments, dimensions of the right-of-way itself or lands that border the right-of-way. Note any instances of “piggy-backing” utility lines inside other rights-of-way (e.g. putting a hydro or telephone line within a right-of-way authorized for a public road). When looking at more recent survey plans, you may come across some notations and symbols that are hard to decipher. The NRCan website provides a glossary that explains the symbols. It can be found on their website by going to the Legal Surveys Division homepage and following the links for “Survey Instructions” and clicking on “Appendix E1.”

After searching RG 10 records, you may want to look at the following federal government records at LAC, particularly if your reserve is within the Railway Belt or the Peace River Block:

- Department of Public Works (RG 11)
- Department of Transport (RG 12)
- Department of the Interior (RG 15)
- Canadian National Railways (RG 30)
- Department of Railways and Canals (RG 43)

To find out whether your reserve is in the Railway Belt, check the 1892 List of Reserves within the Railway Belt and the 1930 reserve schedule. More information about these sources is listed at the end of this chapter.

Once you have searched the federal records, it may be worthwhile to look through provincial government records. The early Department of Public Works Annual Reports (and later Ministry of Highways Annual Reports) can provide you with information on expenditures on public projects such as road and ferry maintenance and construction, name changes to public roads over time and general reports about the status of larger public works projects. They are organized by provincial electoral district and run from 1873 onward. The reports can be found at the UBC Main Library and Special Collections as well as the BC Archives. The BC Archives also has the records of the following government departments:

- BC Department of Lands and Works
- BC Ministry of Transportation
- BC Department of Public Works
- BC Railway Department
- BC Public Utilities Commission

If you are researching road or waterway rights-of-way, it will be important to look at

the BC Ministry of Transportation (MOT) records. Here you will find early reports by public engineers, diagrams and maps, internal memos, and any correspondence between MOT and Indian Affairs. MOT will often have completed its own surveys and reports. It is important to cross-reference this material with the RG 10 documents and the active INAC records, as well as the Canada Lands Survey Records (official survey plans) at NRCan. Keep an eye out for anything that seems out of place and note any errors or oversights that may have occurred.

To access these materials, you will need to submit a written request under BC's *Freedom of Information Act* (see Chapter 3: Resource Institutions for more information). In your request you must identify your band, the easements in question, and the reserves relevant to your research. The Ministry charges fees for time spent searching for documents and for photocopying but they cannot charge you for time spent removing personal or privileged information from files. If the volume of material to be sent is large, MOT will forward it to you as files are copied. This can take six months or longer for a large group of files, so you may want to review the files as you receive them. MOT will notify you in writing when it has completed your request. The volume of material may seem overwhelming and it is important to be as organized as possible.

If researching a right-of-way granted to a Crown corporation or private company, you will also want to access any relevant records. In the case of Crown corporations, many older records may be stored at LAC or BC Archives.

Because the volume of material required for rights-of-way research is often large, identifying and labeling useful documents is especially important. You do not want to go through a thousand pages of material in search of that crucial letter you saw a week ago last Monday! It is a good idea to create a searchable database that will help you organize, locate and reference important documents. See Chapter 2: Research Methods for more information on document management. This will allow you to find documents easily as you work through your research project and it will help others locate the important documents that you cite in your research findings.

Researching Road Rights-of-Way

When conducting road rights-of-way research in BC you need to be aware of some issues unique to roads. First, the 1911 *Highway Reclamation Act* allowed the provincial government to take any land in BC, regardless of ownership, for road construction without notice, consent or compensation to the owner. The only lands exempt from "reclamation" were those that had been cultivated or built upon. The BC government then claimed ownership of all public roads in the province and declared them to be 66 feet wide. When Indian reserves were transferred to Canada under Order-in-Council (OIC) 1036, they became exempt from reclamation, though all existing public roads on reserves remained in the hands of the provincial government.

Since 1938, the BC government has used OIC 1036 and the *BC Highways Act* to claim ownership of all public roads on Indian reserves. Under OIC 1036, the province can claim ownership if the road existed before 1938, or if the road was built after 1938 but (combined with all other existing rights-of-way) takes up less than five percent of the reserve land. Any adjustments to the road as it existed in 1938, or granting of rights-of-way in excess of five

percent of the reserve's land base, require band consultation and compensation. Therefore, it is important in your research to establish whether a public road on reserve was built before or after 1938.

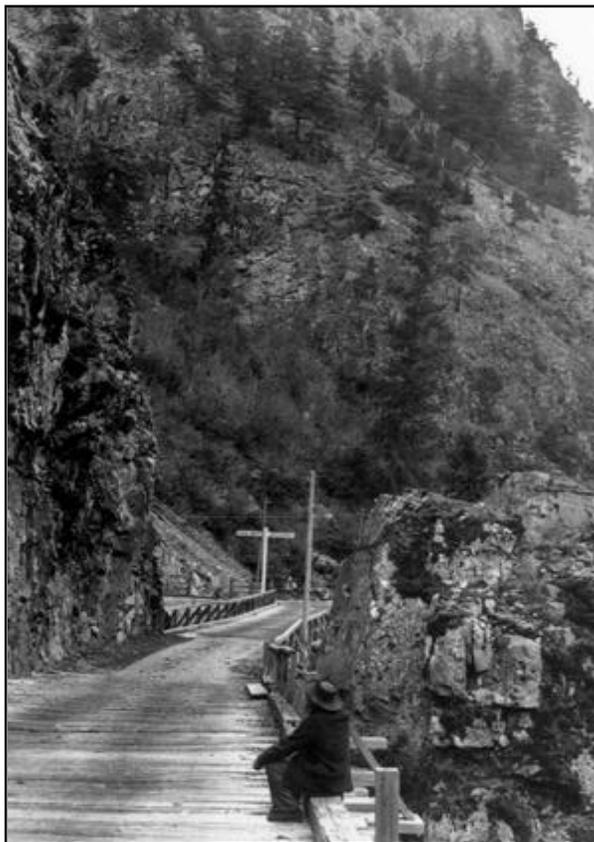
In addition to OIC 1036, the *BC Highways Act* allows the provincial government to claim ownership of all roads that they have regularly maintained and repaired. Keep in mind that regular maintenance and repair of a road does not necessarily mean it was constructed legally or appropriately. Nevertheless, investigating road maintenance records can be a crucial part of your road right-of-way research.

You should note in your research any claims the province may be asserting on the roads in question, and then you may wish to verify the validity of these claims. Your first step is to find out when the road was established. Be sure to check the reference plans at NRCAN that show the location of all known roads on Indian reserves in BC in 1938.

If the road was established before 1938, you should track any adjustments made since that date. Begin by comparing the width of the road as recorded in survey plans with the widths set out in BC Gazette notices, BCRs and orders in council. Also pay attention to the exact route of the road. Has it changed over time? If the road was widened or its route altered, see if the band was consulted and compensated before the work proceeded. Any acreage that was not included in the pre-1938 right-of-way should be treated as a "new" taking requiring band consultation and compensation.

If the entire road was built after 1938, you should find out whether the right-of-way exceeded five percent of the reserve. If so, note whether the band was consulted and compensated before the road was constructed. Again, if the road was widened or moved since the original construction, see if the band was consulted and compensated before this work proceeded.

If the provincial government claims the road through regular maintenance and repair, you can verify the claim by consulting Department of Public Works (and later Department/Ministry of Highways) annual reports. Again, these reports have detailed information regarding roadwork done in the province since 1873. Additional materials on provincial road maintenance are available through MOT and, occasionally, can be found in RG10 files. Once you have combined the MOT documents with your basic reserve research, you will be well prepared to present the full history of road rights-of-way across your reserves.



Wagon road along the Fraser River near Yale. (BC Archives D-04718)

Notes

British Columbia. Provincial Order-in-Council 1036. Victoria: Executive Council, Province of British Columbia. 1938 July 29.

Resources

Cail, Robert E. 1974. *Land, Man and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913*. Vancouver: UBC Press.

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Taylor, Geoffrey W. 1982. *Builders of British Columbia: An Industrial History*. Victoria: Morris Publishing.

Taylor, W.A. 1991. *Crown Land Grants: A History of the Esquimalt and Nanaimo Railway Land Grants, the Railway Belt and the Peace River Block*. Victoria: Ministry Of Environment, Lands And Parks.

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