UTILITY RIGHTS ACROSS EASEMENTS

- ROADWAY EASEMENTS
- TRIBAL AUTHORITY ON RESERVATIONS
- RAILROADS
- FOREST SERVICE
ROADWAY EASEMENTS

- Easement v. Fee Ownership
- Jurisdiction over public road rights-of-way
- Purposes for which ROW may be used
- Utility purposes
- Montana Utility statutes
- MDT Utility Agreements & Permits
1) TITLE 7 – LOCAL GOVERNMENT
   -Chapter 13 – Utility Services
     -Part 22 – County Water and/or Sewer Districts
       -§7-13-2219 Power to Construct Works Across Roads
       -§7-13-2220 Right-of-Way Across State Lands

2) TITLE 35 – CORPORATIONS, PARTNERSHIPS AND ASSOCIATIONS
   -Chapter 18 – Rural Cooperative Utilities
     -Part 1 – General
       -§35-18-106 Powers of cooperatives

3) TITLE 60 – HIGHWAYS AND TRANSPORTATION
   -Chapter 4 - Acquisition and Disposition of Property
     -Part 4 - Relocation of Utilities
   -Chapter 6 - Highway Encroachments
     -Part 1 - Removal of Encroachments by State Authorities
4) TITLE 69 – PUBLIC UTILITIES AND CARRIERS
-Chapter 3 – Regulation of Utilities
  -Part 1 – Role of Commission and Power of Eminent Domain
    -§69-3-101 Meaning of term “public utility”
-Chapter 13 – Pipeline Carriers
  -Part 1 – General Provisions
    -§69-13-101 Common carrier pipeline – definition

5) TITLE 75 – ENVIRONMENTAL PROTECTION
-Chapter 6 – Public Water Supplies, Distribution, and Treatment
  -Part 3 – Regional Water and Wastewater Authority Act
    -§75-6-302 Purpose
    -§75-6-305 Joint exercise of powers by certain public agencies
60-4-401. Occupancy and relocation -- definitions. For the purposes of this part, unless otherwise indicated, terms are defined as follows:

1. (a) "Cost of relocation" means the amount paid by the utility for material, labor, and equipment properly attributable to the relocation after deducting any increase in the value of the new facility and any salvage value derived from the old facility.

(b) "Cost of relocation" does not mean engineering costs for designing, locating, staking, inspecting, or any other incidental costs of engineering.

2. "Facility" means a utility's tracks, pipes, mains, conduits, cables, wires, towers, poles, and other equipment and appliances impacted by a project on a federal-aid system or state highway.

3. "Federal-aid systems" includes the following, as defined in 60-2-125:
   (a) national highway system;
   (b) primary highway system;
   (c) secondary highway system; and
   (d) urban highway system.

4. "State highway" means that term as defined in 60-2-125.

5. "Utility" includes publicly, privately, and cooperatively owned utilities, including water and sewer facilities.

History: En. Sec. 4-116, Ch. 197, L. 1965; R.C.M. 1947, 32-2416; amd. Sec. 22, Ch. 23, L. 1979; amd. Sec. 1, Ch. 231, L. 1995; amd. Sec. 1, Ch. 324, L. 1997; amd. Sec. 1, Ch. 203, L. 2017.
Montana Code Annotated 2017
TITLE 60. HIGHWAYS AND TRANSPORTATION
CHAPTER 4. ACQUISITION AND DISPOSITION OF PROPERTY
Part 4. Relocation of Utilities
Occupancy And Relocation Of Utility Facilities -- Rules
60-4-402. Occupancy and relocation of utility facilities -- rules.
The department shall adopt reasonable rules governing right-of-way occupancy by a utility and, except as provided in 60-4-403(2) and (3), for the reimbursement to a utility for the costs of installation, construction, maintenance, repair, renewal, or relocation of facilities. The rules must provide for right-of-way occupancy and relocation of publicly owned water and sewer facilities. The rules must ensure that the nonhighway use of the right-of-way does not affect the department’s ability to maintain and operate the highway in a safe manner.
History: En. Sec. 4-114, Ch. 197, L. 1965; amd. Sec. 82, Ch. 316, L. 1974; R.C.M. 1947, 32-2414; amd. Sec. 2, Ch. 324, L. 1997; amd. Sec. 2, Ch. 203, L. 2017.
18.7.202  DEFINITIONS

• (3) "Utility" means:
  • (a) All public utilities as defined by 69-3-101, MCA.
  • (b) All common carrier pipelines as defined by 69-13-101, MCA, and
  • (c) All rural cooperative, non-profit membership corporations organized under the Rural Electric and Telephone Cooperative Act, as set forth in 35-18-101 through 35-18-503, MCA.
69-3-101. Meaning of term "public utility".

1. The term "public utility", within the meaning of this chapter, includes every corporation, both public and private, company, individual, association of individuals, and their lessees, trustees, or receivers appointed by any court, that own, operate, or control any plant or equipment, any part of a plant or equipment, or any water right within the state for the production, delivery, or furnishing for or to other persons, firms, associations, or corporations, private or municipal:
   a. heat;
   b. street-railway service;
   c. light;
   d. power in any form or by any agency;
   e. except as provided in chapter 7, water for business, manufacturing, household use, or sewerage service, whether within the limits of municipalities or towns or elsewhere;
   f. regulated telecommunications services.

2. The term does not include:
   a. privately owned and operated water, sewer, or water and sewer systems that do not serve the public;
   b. county or consolidated city and county water or sewer districts as defined in Title 7, chapter 13, parts 22 and 23;
   c. except as provided in chapter 7, municipal sewer or water systems and municipal water supply systems established by the governing body of a municipality pursuant to Title 7, chapter 13, parts 42, 43, and 44, or a person exempted from regulation as a public utility as provided in 69-3-111.
UTILITY OCCUPANCY AGREEMENTS AND PERMITS

- Utility Encroachment permits
- Utility Occupancy Agreements
- Common Use Agreement
TRIBAL LANDS

- Easements on Indian lands
- Sovereign powers
- Common Law Understanding of Easements
- Application of Statutes and Property Law
BIG HORN COUNTY ELEC. COOP V. ADAMS

- Crow Tribe imposed taxes on electrical coop
- ROW on reservation were equivalent to fee land
- Tax exceed Tribe’s sovereign authority
§ 311 Opening Highways. The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severally to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation.

March 3, 1901, ch. 832, §4, 31 Stat. 1084
US V. MOUNTAIN STATES TEL. & TEL. CO.

- Could Company run telephone line through tribal lands without the consent of the Secretary of the Interior and the tribe.
- Cable buried in public highway
- Tribe refused to grant an easement
- Court held a road opened and established pursuance to 25 USC 311 was governed by state law
§69-4-101. Use of public right-of-way for utility lines and facilities. A telegraph, telephone, electric light, or electric power line corporation or public body or any other person owning or operating such is hereby authorized to install its respective plants and appliances necessary for service and to supply and distribute electricity for lighting, heating, power, and other purposes and to that end, to construct such telegraph, telephone, electric light, or electric power lines, from point to point, along and upon any of the public roads, streets, and highways in the state, by the erection of necessary fixtures, including posts, piers, and abutments necessary for the wires. The same shall be so constructed as not to incommode or endanger the public in the use of said roads, streets, or highways; and nothing herein shall be so construed as to restrict the powers of city or town councils.

History: En. Sec. 1000, Civ. C. 1895; amd. Sec. 1, Ch. 55, L. 1905; amd. Sec. 1, Ch. 192, L. 1907; re-en. Sec. 4400, Rev. C. 1907; re-en. Sec. 6645, R.C.M. 1921; re-en. Sec. 6645, R.C.M. 1935; amd. Sec. 1, Ch. 59, L. 1945; R.C.M. 1947, 70-301.
• **SECTION 107**

• **LEGAL RELATIONS AND RESPONSIBILITIES TO THE PUBLIC**

• **107.01 LAWS, RULES AND REGULATIONS TO BE OBSERVED**

• Observe and comply with all of the following:

  • **A.** Federal and state laws and regulations;
  
  • **B.** Local laws and ordinances; and
  
  • **C.** Regulations, orders and decrees of bodies or Tribal ordinances having any jurisdiction or authority.
G. Tribal Permits. Work within reservations may require additional permits and submittals to tribal authorities. Coordinate with the Department to determine requirements and receive assistance in obtaining permits.

- The Aquatic Lands Protection Ordinance (ALPO) #90-A provides regulation of all waters and aquatic lands on the Blackfeet Reservation in order to prevent or minimize their degradation. Obtain an ALPO permit for any project within or near aquatic resources.

- The Shoreline Protection Office of the Confederated Salish and Kootenai Tribes (CSKT) Tribal Council administers the following Tribal Ordinances:
  1. Shoreline Protection Ordinance 64A, which deals with any work along the shorelines of Flathead Lake.
  2. Aquatic Lands Conservation Ordinance (ALCO) 87A, which is required for the alteration of aquatic lands, wetlands, or Flathead Reservation waters from activities such as dredging, filling, irrigation diversions and returns, drainage ditches, and maintenance repairs of these resources.

- Tribal Permits are required for construction activities within the project limits and may be required for temporary facilities outside the project limits. If required, coordinate with the Department and obtain tribal permits from the tribal office for additional activities and facilities not covered by tribal permits obtained by the Department.
COURT CASES

- Peasley v. Trosper 1936
- BNSF v. Assiniboine & Sioux Tribes of Fort Peck 2002
- Simpson v. Rocky Mountain Regional Director, BIA
RAILROAD PROPERTIES

- Railroad Easements
- Railroad as Fee owner
- Utility licenses
- Exclusivity
- Scope of Railroad easement
- Power to grant licenses
- Federal Preemption
• Railroad is accorded free use of its ROW
• Undisturbed by the claims of adjoining landowners to partial occupancy or use
• Easement granted to railroad is different from any other
• Nature of railway service requires exclusive occupancy
FOREST SERVICE LANDS
US V. GATES OF THE MOUNTAIN LAKESHORE HOMES INC. 1984

- Subdivision installed power line under road on national forest service property without US Forest Service approval
- Lewis and Clark County had issued a permit
- 1901 Road Grant
- 43 USC 932 excluded any borrowing of state law
- State law not applicable
43 USC § 1761

- Secretary is authorized to grant, issue or renew ROW through Forest Service lands
- For pipelines
- For transmission of electrical energy
- For transmission of radio, television, telephone, telegraph and other electronic signals
- For roads, trails, highways, railroads, canals, tunnels or other means of transportation
- For other such necessary transportation or other systems
SAMPLE UTILITY AGREEMENTS

PERMITEE
COMMERCIAL UTILITIES:
- Telecommunications
- Electric
- Cable
- Gas

CITY UTILITIES:
- Water (Raw and Distribution Lines)
- Wastewater (Grants, Forecast, Rates)
- Information Technology (Examples)
Terms and Conditions:

1. FEE. The process fee for issuance of this agreement is

2. STATE-WIDE NUMBERED PROBLEMS. As a condition of issuing this agreement, the APPLICANT, at maintenance or design, agrees to utilize the STATE’s system for the systematic tracking and recording of all work, and to notify the STATE of all work which the APPLICANT feels represents a significant problem or issue involving the road or highway. The STATE shall determine the initial and annual costs associated with the system. This system shall be used for tracking, reporting, and billing purposes. The APPLICANT agrees to follow all procedures established by the STATE. The APPLICANT further agrees to maintain and provide the necessary tools to facilitate the use of the system. The APPLICANT shall be required to comply with all rules and regulations established by the STATE.

3. PROTECTION OF WORK. The APPLICANT shall protect all work in progress with barriers, street signs, and other means of protecting the work. The APPLICANT shall ensure that the work is performed in a manner that will not cause damage to any public work or private property. When work is performed adjacent to public work, the APPLICANT shall ensure that the work is performed in a manner that will not cause damage to any public work or private property. When work is performed adjacent to public work, the APPLICANT shall ensure that the work is performed in a manner that will not cause damage to any public work or private property.

4. TEMPORARY ROADWAY MODIFICATION. The APPLICANT may modify the existing roadway in any way that is necessary for the construction of the project. The APPLICANT shall notify the STATE of any modifications made. The APPLICANT shall ensure that any modifications made do not interfere with traffic flow or cause damage to public works or private property.

5. MAINTENANCE AT COST OF APPLICANT. The APPLICANT shall maintain and repair, at its own expense, the installations and structures for which this agreement is in force, in a condition satisfactory to the STATE.

6. STATE TO BE INformed FOR REVISING Routes. Upon being so notified, the APPLICANT agrees to promptly report to the STATE any changes to the installation or operation of the facility or any other changes which would require revision of the agreement. The APPLICANT shall be required to comply with all rules and regulations established by the STATE.

7. The APPLICANT shall not engage in or cause discharge of any hazardous or solid waste by the installation or operation of the facility on its behalf.

8. The APPLICANT will perform various works within the designated work area for two (2) years.

9. In accordance with Title 49, Code Sec. 790.001(a), the APPLICANT shall not install, operate, or maintain any new or existing vehicle, equipment, or other device on or in connection with the highway for purposes of protecting the public. The APPLICANT shall not install, operate, or maintain any new or existing vehicle, equipment, or other device on or in connection with the highway for purposes of protecting the public.

10. Any condition of this agreement shall not be enforced without written approval of the appropriate District Administrator.

The above listed data is for the complete application. If work takes place on the projected work area, the APPLICANT shall be required to comply with all rules and regulations established by the STATE.
August 23, 2017

Subject: Utility Occupation and Location Agreement

[Redacted by redacted text]

1. Notify the Great Falls District Office 30 hours prior to operations upon our right-of-way (990-35-94-02).
2. Adequate traffic control will be provided for the duration of this occupation.
3. You or your agent shall subsequently permit the intruding public and any pedestrian traffic while working on our right of way by the use of signs, cones, barricades, flags, etc.
4. A reasonable Cautions Notice (Traffic Control) and Construction Signage shall be installed at the project work zone traffic control. Traffic control, as illustrated in these Brooks, right-of-way shall point in working or right of way.
5. The removal of this letter and signature constitutes the transfer of responsibility for this project to the utility at the time of this letter.

This agreement is subject to the conditions of use outlined in the Rules of the Road for our work zone.

[Signature]

Jessica D. Stott
Assistant Engineer
Great Falls District
MTD

[Signature]

Bob W. Dickson
Utility Engineer/Spokesman
Great Falls District
MTD

Cp.: D.O.

MTD 610-35-94-02

MTD 610-35-94-02