LEECH LAKE BAND OF OJIBWE
IN THE TRIBAL COURT OF APPEALS

Gary Hazelton and Diane Hazelton, Tatsiana Aleksandrovich and Eugene Aleksandrovich,

Appellants,

OPINION

v.

Appellate Case No.: AP-24-04
Tribal Court Case No.: CV-20-75

Leech Lake Band of Ojibwe,

Respondent.

Judges Soule, Scheffler Blaeser, and Kebec.

This case involves a lawsuit by the Leech Lake Band of Ojibwe ("Leech Lake" or "the Band") against current owners, Tatsiana and Eugene Aleksandrovich, and former owners, Gary and Diane Hazelton, (together, "Appellants") of fee land on the Leech Lake Reservation. Leech Lake seeks a judicial declaration that the Band and its members can travel on Prince of Peace Lane ("the Lane"), which crosses Appellants' property (Lot 5) on the Leech Lake Reservation, to access Prince of Peace Cemetery ("the Cemetery").

The Tribal Court, the Honorable B.J. Jones ("Tribal Court"), granted summary judgment in favor of Leech Lake in its August 19, 2024 Findings of Fact and Conclusions of Law and Order Granting Summary Judgment ("Or."). Appellants filed a Notice of Appeal on September 9, 2024 and their Appellate Memorandum on October 8, 2024.[1] Leech Lake filed its Respondent's Memorandum of Law on

[1] In the last sentence of Defendant's [sic] Appellate Memorandum, they state "Appellants also incorporate their prior memorandums herein as all are part of the trial court record." We have carefully considered the points and authorities in Appellants' Memorandum but conclude that any other arguments in Appellants' prior memoranda not presented on appeal are waived. *See Meyers v. Stark*, 420 F.3d 738, 743 (8th Cir. 2005) ("To be reviewable, an issue must be presented in the brief with some specificity. Failure to do so can result in waiver."); *P&G v. Amway Corp.*, 376 F.3d 496, 499 (5th Cir. 2004) ("Failure adequately to brief an issue on appeal constitutes waiver of that argument.").

November 7, 2024. Appellants did not file a reply brief. Neither party has requested oral argument, so this Court will decide the appeal based on the parties' submissions to this Court and the record of the Tribal Court without oral argument. Leech Lake Band of Ojibwe Judicial Code, Rule 51.

Countless Leech Lake members and others have used the route now known as Prince of Peace Lane for two centuries. The route provided access to Prince of Peace Cemetery, in which Band members were buried even as early as 1820. Everyone connected to the Lane—land owners and possessors, the federal government, other governments, and the Band—has treated the Lane as a route open to the public. They have traveled on the Lane, mapped it, maintained it, and permitted others to travel on it. Even Appellants Hazelton—over whose property the Lane passed for the duration of their ownership—permitted the public to use the route for nearly 15 years. The first time anyone interfered with passage on the route was in July 2020, when Appellants Hazelton blocked the Lane. The question in this case is whether, under these circumstances, the law recognizes the Band's right to permit passage on the Lane.

Part I: The Tribal Court's Orders and the Decision Under Review

The Tribal Court issued two substantive orders on the parties' prior motions.

On May 27, 2021, the Tribal Court filed a (Corrected) Order Denying Motion to Dismiss and Denying Plaintiff's [the Band's] Motion for Summary Judgment in Part. Appellants moved to dismiss the Band's lawsuit on the ground that the Tribal Court lacked subject matter jurisdiction. The Tribal Court denied Appellants' motion to dismiss on the grounds that subject matter jurisdiction existed under *Montana v. U.S.*, 450 U.S. 544 (1981), because Appellants entered into a consensual transaction with Tribal members involving the road (first exception) and Appellants Hazeltons' actions in obstructing Prince of Peace Lane implicated the sovereign interest of the Band (second exception). The Tribal Court also denied the Band's motion for summary judgment, which sought a determination that the Band possessed an easement by custom or necessity, on the ground that there were disputed issues of material fact on the Band's claims.

Later, Appellants renewed their motion to dismiss for lack of subject matter jurisdiction. Appellants also sought dismissal on the ground that federal law precluded the Tribal Court from finding that an easement accrued over land held in trust by the United States without its express approval, and that, if the Lane was once necessary to access the Cemetery, the necessity terminated when an alternative path to the Cemetery was granted. In its June 9, 2022 Order Denying [Appellants'] Second Motion to Dismiss and/or for Summary Judgment/Dismissing Defendant Finn, the Tribal Court rejected Appellants' argument that it lacked subject matter jurisdiciton on the same grounds as in its May 2021 order. On the merits, the Tribal Court again found fact issues on the parties' claims and denied the motion for summary judgment.

As a threshold issue, we question the type of decision we are tasked with reviewing. The Tribal Court Order under review, dated August 19, 2024, is characterized as an order on the parties' motions for summary judgment. But the order makes findings of fact typically reserved for trial. Most of the facts were stipulated by the parties in their jointly filed Proposed Stipulations of Fact dated January 22, 2024. But the Tribal Court does, in its order, resolve some factual disputes.

On appeal, Appellants make no "traditional" summary judgment argument—that material facts are in dispute and should be reserved for trial rather than decided one way or another by the trial court. Instead, Appellants object to a few findings of fact and argues that the Tribal Court should have found contrary or different facts. Appellants do not ask that this Court remand to the Tribal Court for trial.

Additionally, it is relevant that in their January 22, 2024 Proposed Stipulations of Fact, the parties stated that they "continue to believe that this matter can be resolved by dispositive motion briefing based on stipulated facts and a narrowed scope of facts in dispute."

We conclude that the parties impliedly consented to a bench trial based on the record and briefing they put before the Tribal Court, and therefore construe the decision under review as a ruling on a bench trial.[2] Appellants waived any argument that the Tribal Court's decision is an improper grant of summary judgment by failing to make that argument on appeal, instead arguing that the Tribal Court simply should have decided the disputed facts in a different way.

A. Tribal Court's Findings of Fact

The Tribal Court made Findings of Fact,[3] which are summarized as follows:

The 1855 Treaty with the Chippewa established the Leech Lake Reservation and the 1867 Treaty with the Chippewa of the Mississippi brought the land on which the Lane passes into the Reservation. (Or. at FOF 1.) The 1855 Treaty provides that "All roads and highways, authorized by law, the lines of which shall be laid through any of the reservation provided for in this convention, shall have the right of way through the same; . . . ." (Or. at FOF 2.)

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[2] Construing the decision below as a ruling on a bench trial is not without legal precedent. In *Fla. Int'l Univ. Bd. of Trs. v. Fla. Nat'l Univ., Inc.*, counsel for both parties represented to the district court that there were enough undisputed facts that the court could effectively render a decision similar to a bench trial ruling. 830 F.3d 1242, 1253 (11th Cir. 2016). The district court scheduled a hearing for the parties to "sum up" their positions rather than scheduling a bench trial. *Id.* at 1250. At a later hearing, the parties represented that they saw no need for live testimony or additions to the record before the court. *Id.* The district court rendered decision, describing itself as the factfinder and noting that a trial would reveal no additional information. *Id.* at 1251. The district court resolved each claim in the lawsuit—as it would have done in a bench trial. *Id.* The appellate court reasoned that a district court may dispose of cross-motions for summary judgment under limited circumstances, considering factors such as: (1) whether the district court holds a hearing on the summary judgment motions to allow full factual development, (2) whether the parties stipulate to an agreed set of facts, (3) whether the record reflects that the parties effectively "submitted the case to the court for trial on an agreed statement of facts embodied in a limited written record, which would have enabled the district court to decide all issues and resolve all factual disputes." *Id.* at 1252 (quoting *Ga. State Conf. of NAACP v. Gayette Cty. Bd. Of Comm'rs*, 775 F.3d 1336, 1345-46 (11th Cir. 2015)). The appellate court concluded that the district court's decision was "better understood as a judgment entered after a bench trial." *Id.* at 1253.

The circumstances of this case are similar to those in *Fla. Int'l. Univ. Bd. of Trs.* The parties expressly stipulated to an agreed set of facts and, through numerous briefs including cross motions for summary judgment (each party's third such motion), submitted the case to the court on a record that enabled the court to "decide all issues and resolve all factual disputes." *Id.* (quoting *Ga. State Conf. of NAACP*, 775 F.3d at 1346). Additionally, the Tribal Court's decision here "reads far more like a judgment by a factfinder after a bench trial than a summary judgment ruling" insofar as it made findings of fact, drew inferences against the non-moving party, and addressed each of the parties' claims. *Id.* at 1254. Finally, construing the Tribal Court's decision as one issued after bench trial is consistent with the parties' arguments on appeal, as set out above. *See id.*

[3] There are two sets of numbered findings in the Tribal Court's order. The first set—Findings 1 through 14—is contained on pages 1-4. This first set of findings is noted above with an A preceding the finding number. The second set of findings—Findings 1 through 33—is on pages 4 through 11. The Tribal Court also made Conclusions of Law at paragraphs 34 through 48.

Between 1867 and 1916, Lot 5 was held in common by the Band for the benefit of its members. (Or. at FOF 3.) In 1916, a trust patent for Lot 5 was issued to Quay Ke Gah Bow. (*Id.*) On February 18, 1920, Lot 5 was taken out of trust and was in fee status for 4 ½ months, during which the United States held no interest in Lot 5. (*Id.*) Quay Ke Gah Bow's descendant Band members held Lot 5 in restricted status until 1975. (Or. at FOF 4.) Lot 5 was not placed in trust again until 1975.[4] (Or. at FOF 3.) In 1975, Harold "Skip" Finn, Jr. acquired Lot 5 in trust. When Finn owned Lot 5, he stated that the Lane was open for Cemetery users and never restricted access. (Or. at FOF 5.) Finn conveyed the 50-foot strip of Lot 5 adjoining the Cemetery, which had unmarked graves, to the Band.[5] (Or. at FOF 6.) The Appellants Hazelton purchased parts of Lot 5 from the Finns[6] in 2005[7] and 2018.[8] (Or. at FOF 7.) Both transactions were consensual, contractual transactions with a Band member. (*Id.*)

When this lawsuit started by the Band's Complaint filed on July 30, 2020, the Appellants Hazeltons owned Lot 5. (Or. at FOF A9.) In May 2022, when the case was pending, the Hazeltons sold Lot 5 to the Appellants Aleksandroviches. (Or. at FOF A10.) The Aleksandroviches knew about the litigation when they purchased Lot 5. (Or. at FOF A11.) Lot 5 is on the Leech Lake Reservation. (Or. at FOF A3.)

Prince of Peace Cemetery is on Lot 7, which is now owned by the Band. (Or. at FOF A6.) Lot 7 was unallotted land held in common by the Band until 1915. (Or. at FOF 8.) In 1915, Lot 7 was patented in

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[4] Lot 5 was sold to Ann Kipplin by restricted Indian deed on July 1, 1920. (Respondent's Addendum ("R.A.") at 202-208). That deed stated the purchaser could not sell or encumber Lot 5 without the consent of the Secretary of the Interior. (*Id.*) That deed also stated that the purchase included Lot 5 "together with all the improvements thereon and appurtenances thereunto belonging." (*Id.*) Individual Indian property may be "trust" allotments or "restricted" allotments. Nell Jessup Newton, and Kevin K. Washburn, *Cohen's Handbook of Federal Indian Law* 1146 (2024 ed.). The former type is owned by the United States in trust for an individual Indian, whereas the latter is owned by an individual Indian "subject to a restriction on alienation by the United States or its officials." *Id.* The Department of the Interior treats these forms "identically for virtually all purposes." *Id.* at 1147. The deeds by which the nine owners preceding the Finns conveyed Lot 5 to him state the nine prior owners were "heirs by Deed to Restricted Status." (R.A. at 115-132) Thus, it appears the nine prior owners took title in themselves but were restricted from selling or encumbering the land absent consent of the Secretary. The nine deeds go on to state that the nine owners are entering into a real property transaction with "the United States of America in trust for Harold R. Finn., Jr.," indicating that the land was being placed into trust again in 1975, after having been out of trust since February 18, 1920. (*Id.*) Thus, while the land was not held in trust from 1920 to 1975, it was held in restricted status, which has the same practical effect. Newton, et al., *supra*, at 1147.

[5] Mr. Finn conveyed his interest in this land to the Band on August 29, 1979. (Ex. 8 to App. Mem. in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction and Summary Judgment, dated January 19, 2021)

[6] Mr. Finn removed Lot 5 from trust status to fee status by quit claim deed to himself and Teri Finn on October 4, 2005. (R.A. at 227) The Bureau of Indian Affairs approved the removal of Lot 5 from trust status. (Ex. 12 to Plaintiff's Mem. in Support of Plaintiff's Motion for Summary Judgment dated January 25, 2021)

[7] The Finns entered into a contract for deed with Hazelton for the southern parcel of Lot 5, referred to by the Hazeltons as the 205 parcel, on December 8, 2005. (R.A. at 155); *see also* Fig. 1 and 2, *infra*. They executed a warranty deed to the Hazeltons on March 21, 2008. (R.A. at 161) The Hazeltons built their home on this parcel in 2007 and moved in in 2008. (Nov. 13, 2023 Dep. of G. Hazelton, at 38)

[8] Skip and Teri Finn entered into a purchase agreement with the Hazeltons for the northern parcel of Lot 5, referred to by the Hazeltons as the 203 parcel, on May 2, 2018. (Nov. 13, 2023 Dep. of G. Hazelton, at 21-22); *see also* Fig. 1 and 2, *infra*. Teri Finn conveyed the property to Hazelton by contract for deed on July 26, 2018. (R.A. at 195-201)

trust, with the United States as trustee, to Mah Je Aun E Quabe. (*Id.*) From the 1930s through 1950s, Lot 7 was held by Mah Je Aun Quabe's descendants. (*Id.*) The land remained in trust until 1960. (*Id.*) In 1960, Lot 7 was transferred to the Episcopal Dioceses of Duluth in fee. (Or. at FOF 8.) The transfer made clear that Lot 7 had a cemetery on it and was to be used for cemetery purposes. (Or. at FOF 9.) In 2015, the Diocese transferred Lot 7 to the Band. The Band now owns Lot 7 and operates the Cemetery. (*Id.*) Figures 1 and 2 below are aerial photographs showing the broader area around the Lane and properties at issue and a closer view of the properties.

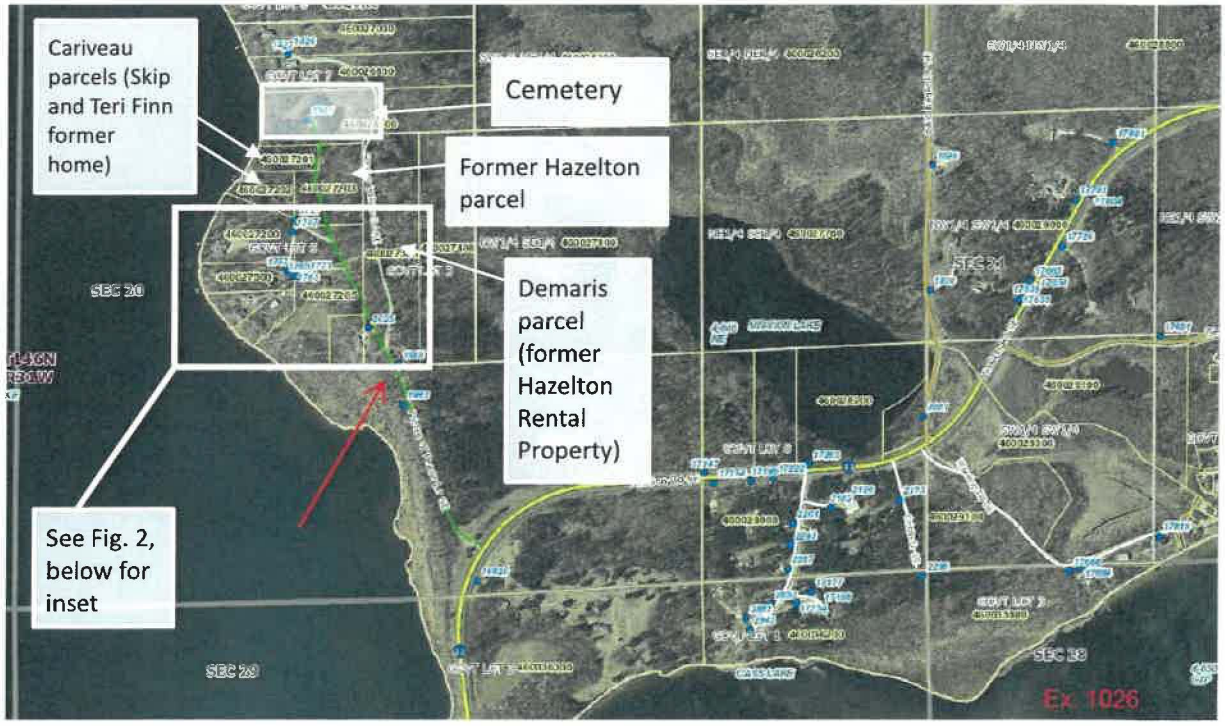


Fig. 1 (R.A. at 89): Aerial photograph of Prince of Peace Lane (in light green), Seven Lakes Road (running approximately parallel to the east of Prince of Peace Lane in yellow-cream), and the properties at issue in this case. Overlaying labels in white are this Court's. Labels in red, including red arrow pointing to where Seven Lakes Road and Prince of Peace Lane join, are the Band's.

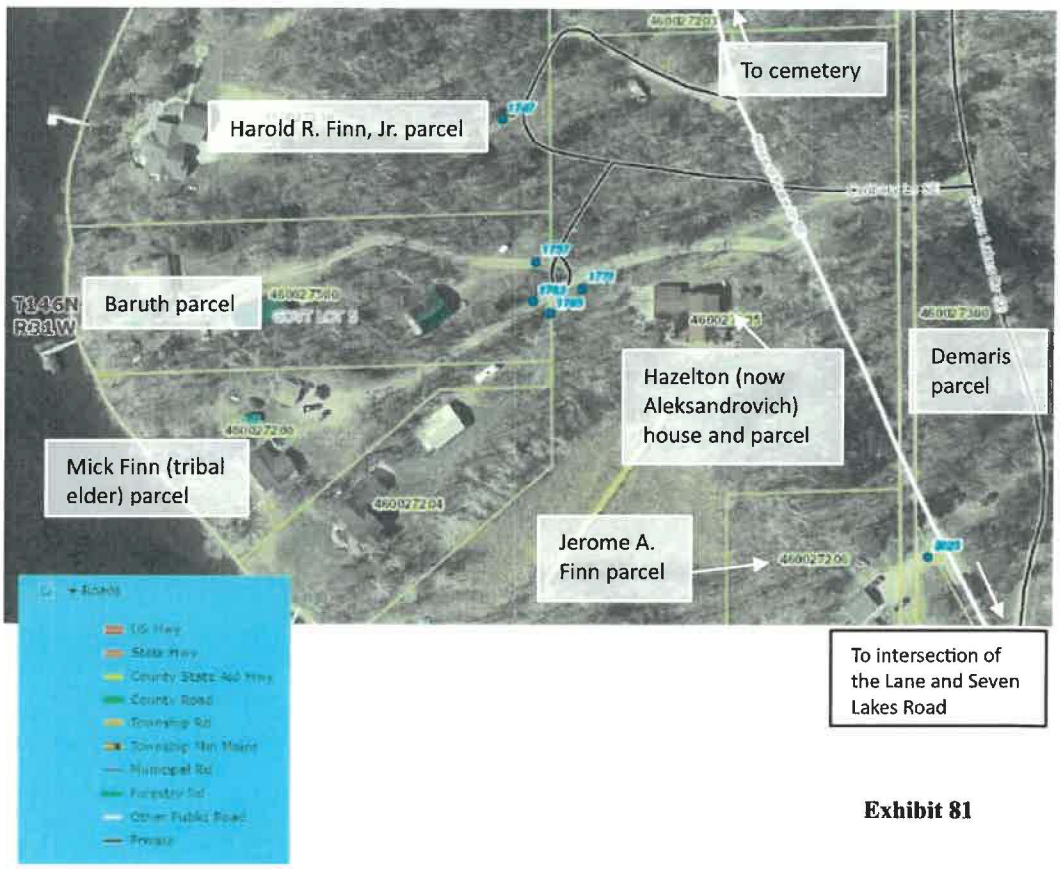


Fig. 2: Aerial photo of Lot 5 divided among several parcels. Prince of Peace Lane is shown in white. Seven Lakes Road is shown in black on the far right side of the photo. Cadbary Lane is also shown in black and is a shepherd's crook-shaped road towards the top of the photo. Additional labels are this Court's.

The Band has not conducted an investigation to determine whether there are Indian graves on Lot 7, but relies on oral history. (Or. at FOF A7.) The Cemetery was and is a sacred burial site for Band members, as early as 1820. (Or. at FOF 10, 14.) A 1932 United States survey noted that the Cemetery contained about 100 known graves and was called an Indian cemetery. (Or. at FOF 11.) The Cemetery is a place of cultural and historical significance for the Band. (Or. at FOF 14.) There are unmarked graves in the Cemetery particularly in the eastern portion. (Or. at FOF 15.) The Band took over operation and maintenance of the Cemetery. (Or. at FOF 13) Access to a sacred site is as culturally significant as the site itself if the site needs to be accessed for cultural or spiritual purposes. (Or. at FOF A7.)

Prince of Peace Lane is a road that connects County Road 33 and Prince of Peace Cemetery. (Or. at FOF A4.) The Lane crosses Lot 5 and two other privately-owned properties. (Or. at FOF 8.) The Lane is the single access point to the Cemetery, and its route does not disturb unmarked graves. (Or. at FOF 16.) The only other access to the Cemetery would be by foot and risks disturbing unmarked graves. (*Id.*)

The Lane is the only way to access the Cemetery, a path that has been used by the Ojibwe since time immemorial. (Or. at FOF 20.) The route was mapped as an Indian trail no later than 1875. (Or. at FOF 21.) See Fig. 3.

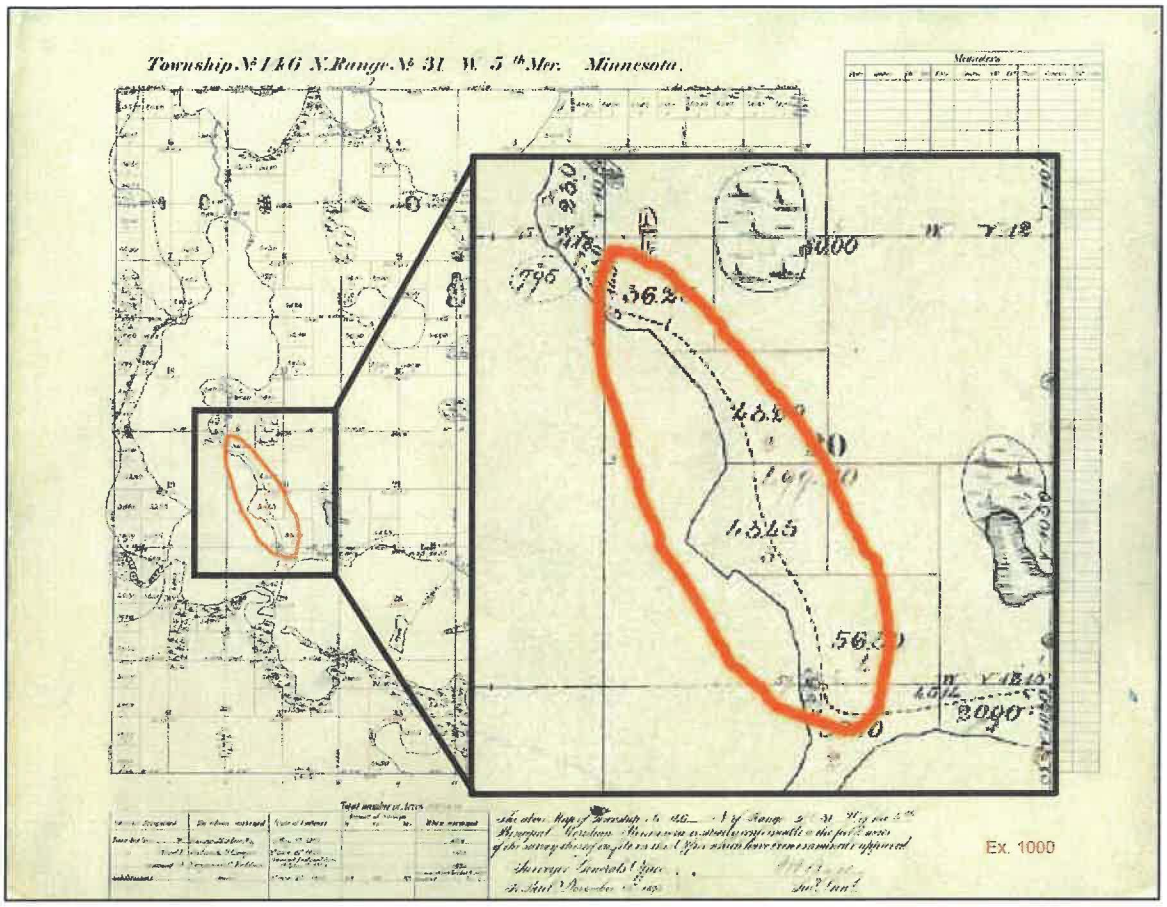


Fig. 3 (R.A. at 65): 1875 U.S. Survey depicting route approximating present day Prince of Peace Lane. Accompanying survey notes describe the route as an "Indian Trail." (R.A. at 67)

The Lane has been mapped on no fewer than 25 maps created by the federal government, state and local governments, and in private surveys. (*Id.*) The Lane's route has been marked on federal and local government maps as a "used road," "bituminous road," "Forest Trail 3633," "National Forest Road 3633," and "BIA Rural Route 16." (Or. at FOF 22.) The federal and local governments recognized the route and acquiesced to the public's use of it. (Or. at FOF 23.) The Bureau of Indian Affairs has recognized the Lane as a public road, designated as BIA Rural Route 16 or 1016. (Or. at FOF 28, 29.) The Lane has been on the Band's Indian Reservation Roads Inventory since at least 1993. (Or. at FOF 30.) BIA roads and roads on the Reservation Roads Inventory are public roads. (Or. at FOF 33.)

To provide context for the Tribal Court's findings, we include some of the maps collected by the parties in the record here. Figures 3 to 11 above and below depict the federal maps. Red circles and exhibit numbers in the figures were provided by the Band.

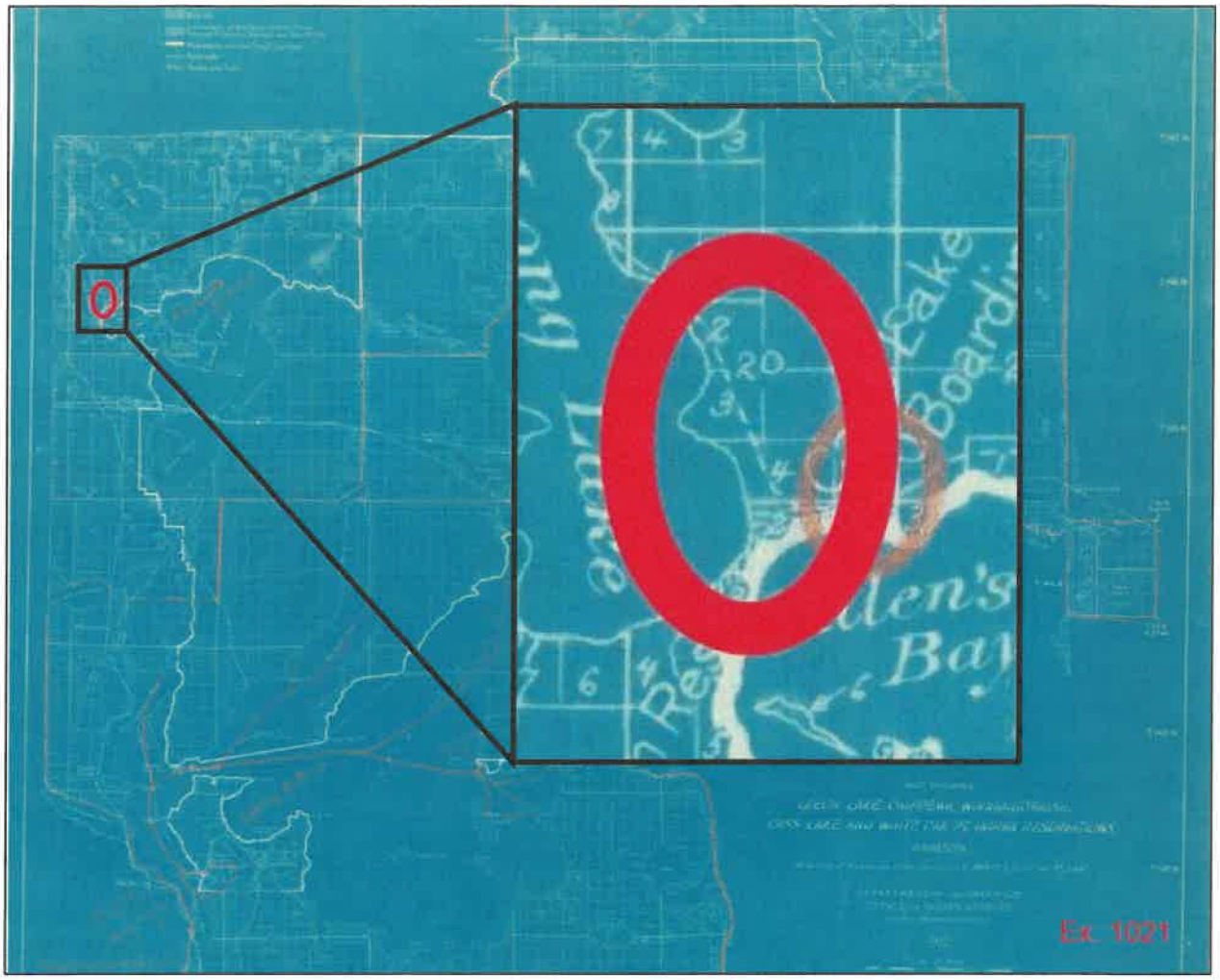


Fig. 4 (R.A. at 86): 1912 Department of the Interior Bureau of Indian Affairs Map showing Leech Lake, Chippewa, Winnibigoshish, Cass Lake and White Oak Point Indian Reservations, including a route along present day Prince of Peace Lane.

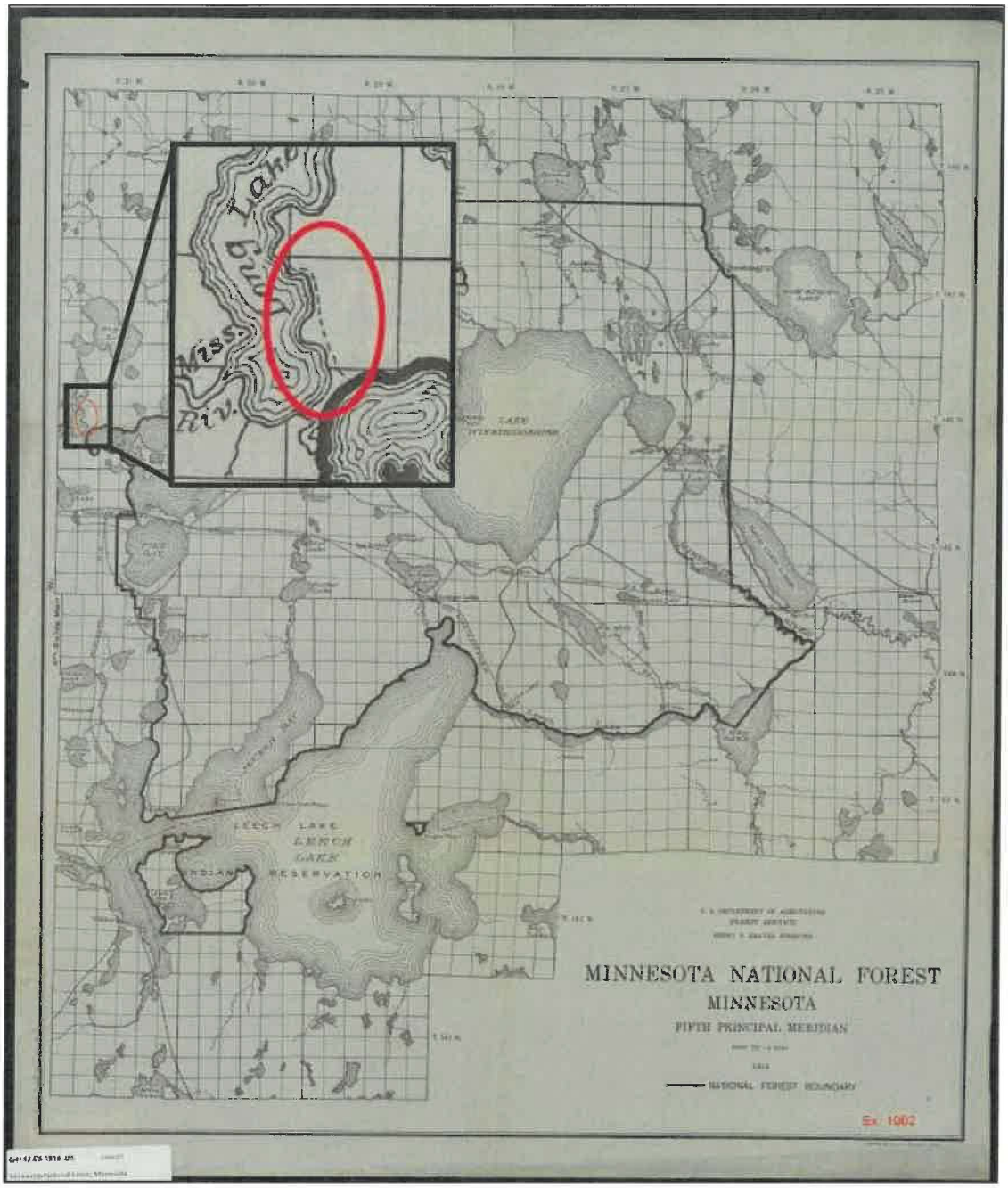
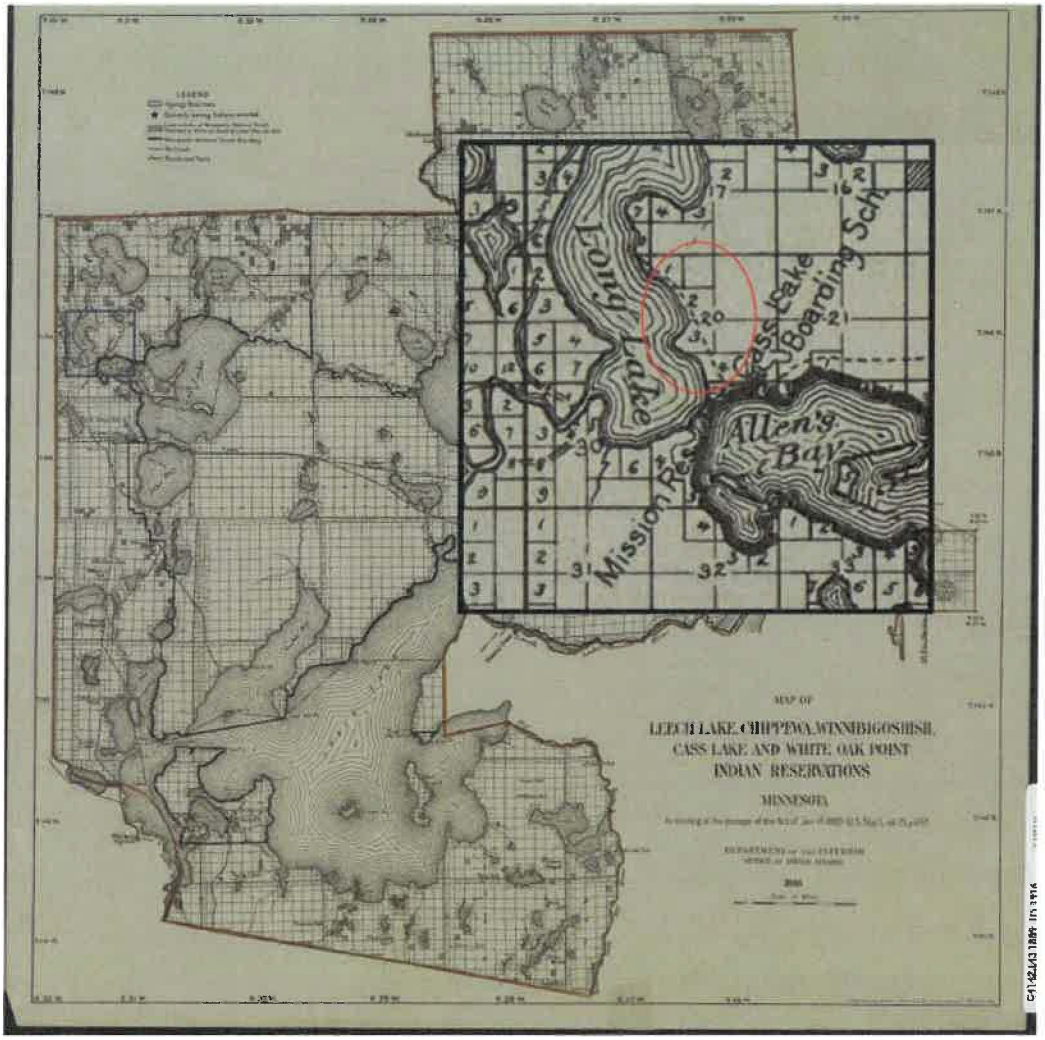


Fig. 5 (R.A. at 68): 1916 United States Department of Agriculture map of the Minnesota National Forest. A route along present day Prince of Peace Lane is marked despite its location on the periphery of the subject of this map.



Ex. 1003

Fig. 6 (R.A. at 69): 1916 Bureau of Indian Affairs Map of Leech Lake Chippewa, Winnibigoshish, Cass Lake, and White Oak Point Indian Reservations. The inset in this map is taken directly from the record.

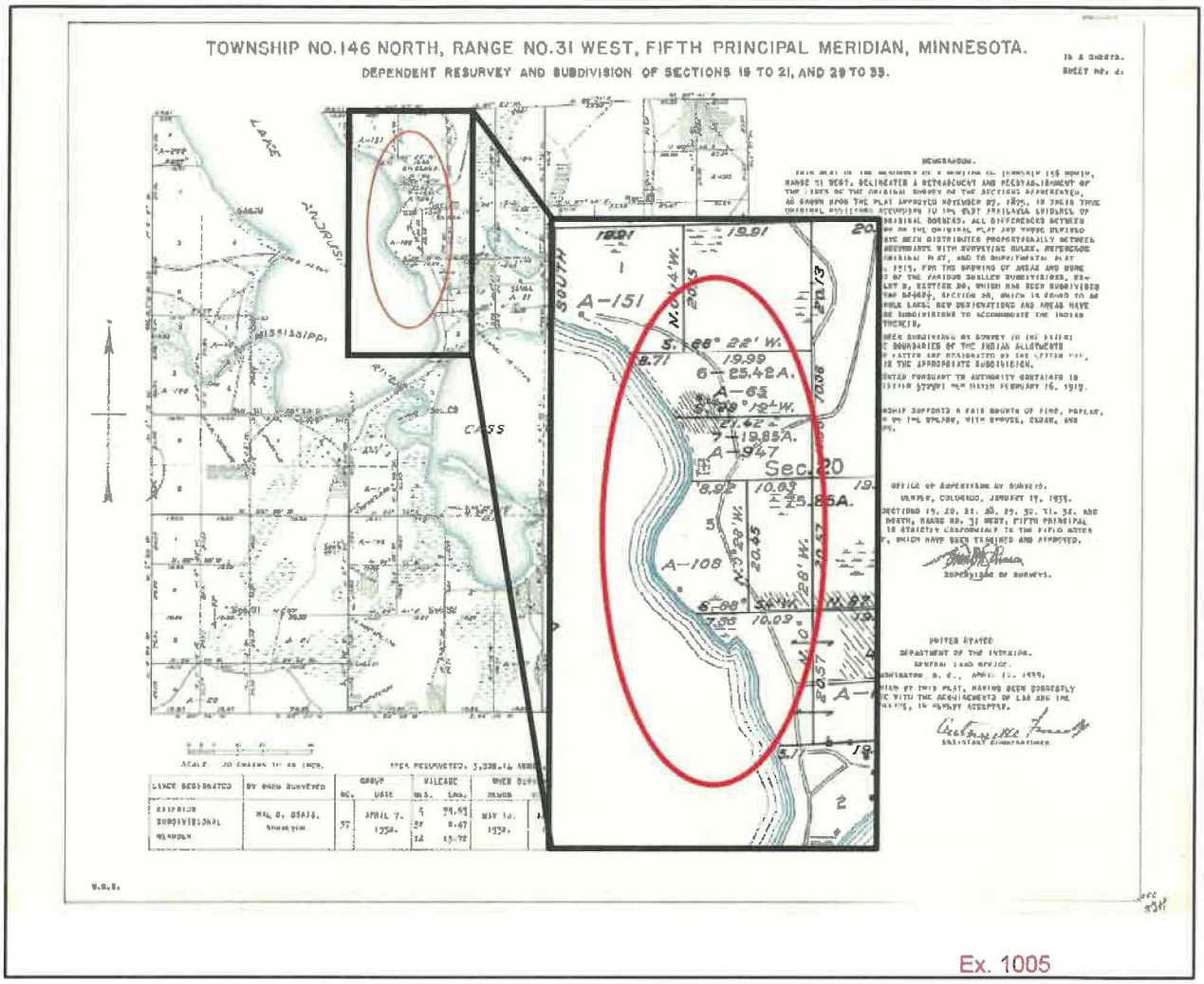


Fig. 7 (R.A. at 71): 1939 Department of the Interior General Land Office survey depicting route approximating present day Prince of Peace Lane. On the inset, the number 5 just to the left of the Lane denotes Lot 5. The number 7 in the parcel above Lot 5 denotes Lot 7. A box with a cross indicates the cemetery location in Lot 7.

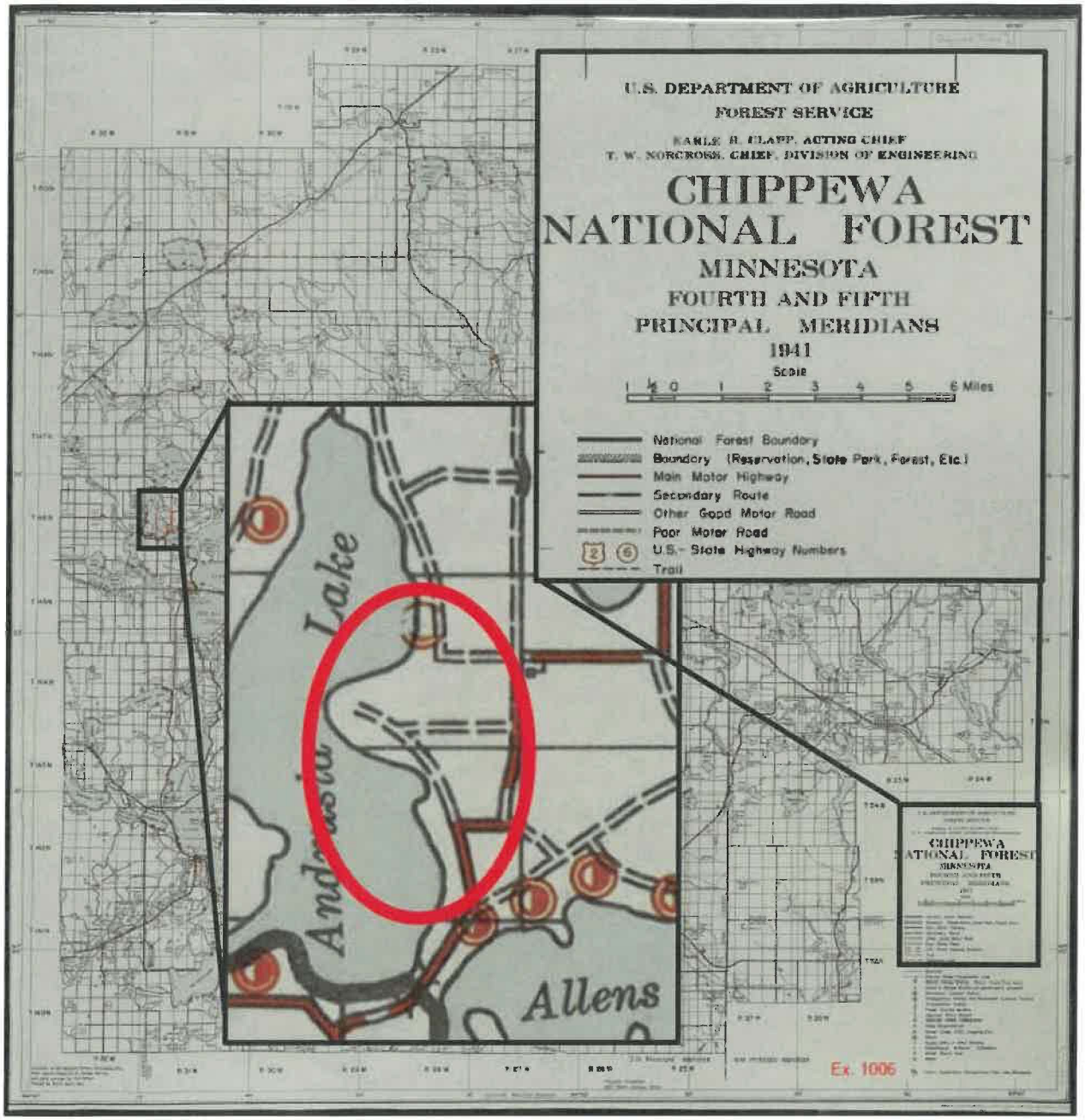


Fig. 8 (R.A. at 72): 1941 United States Department of Agriculture Forest Service map of Chippewa National Forest, including a route along present day Prince of Peace Lane. The legend describes the Lane in part as a "secondary route" and in part as a "poor motor road."

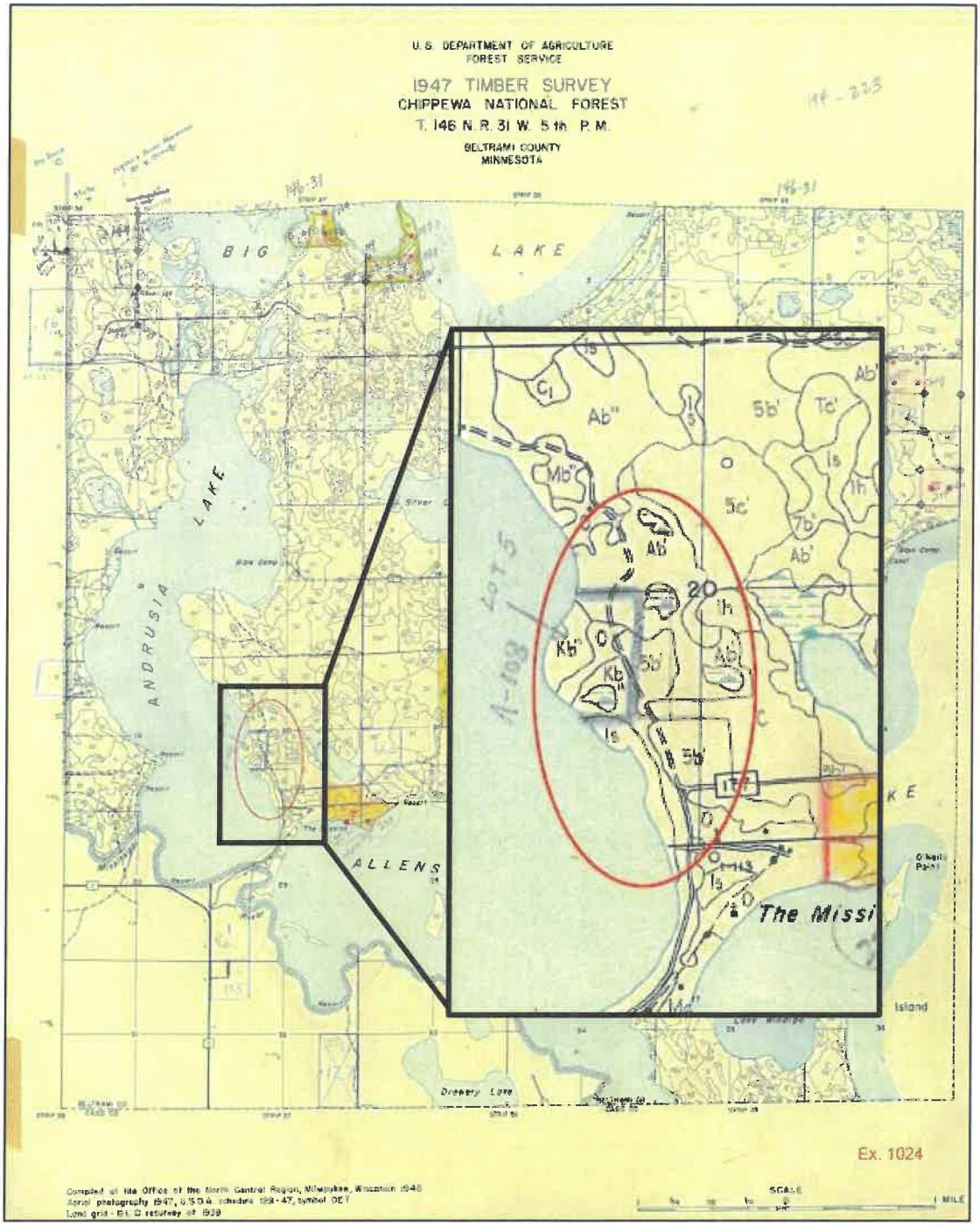


Fig. 9 (R.A. at 88): 1947 U.S. Department of Agriculture Forest Service Timber Survey including route along present-day Prince of Peace Lane.

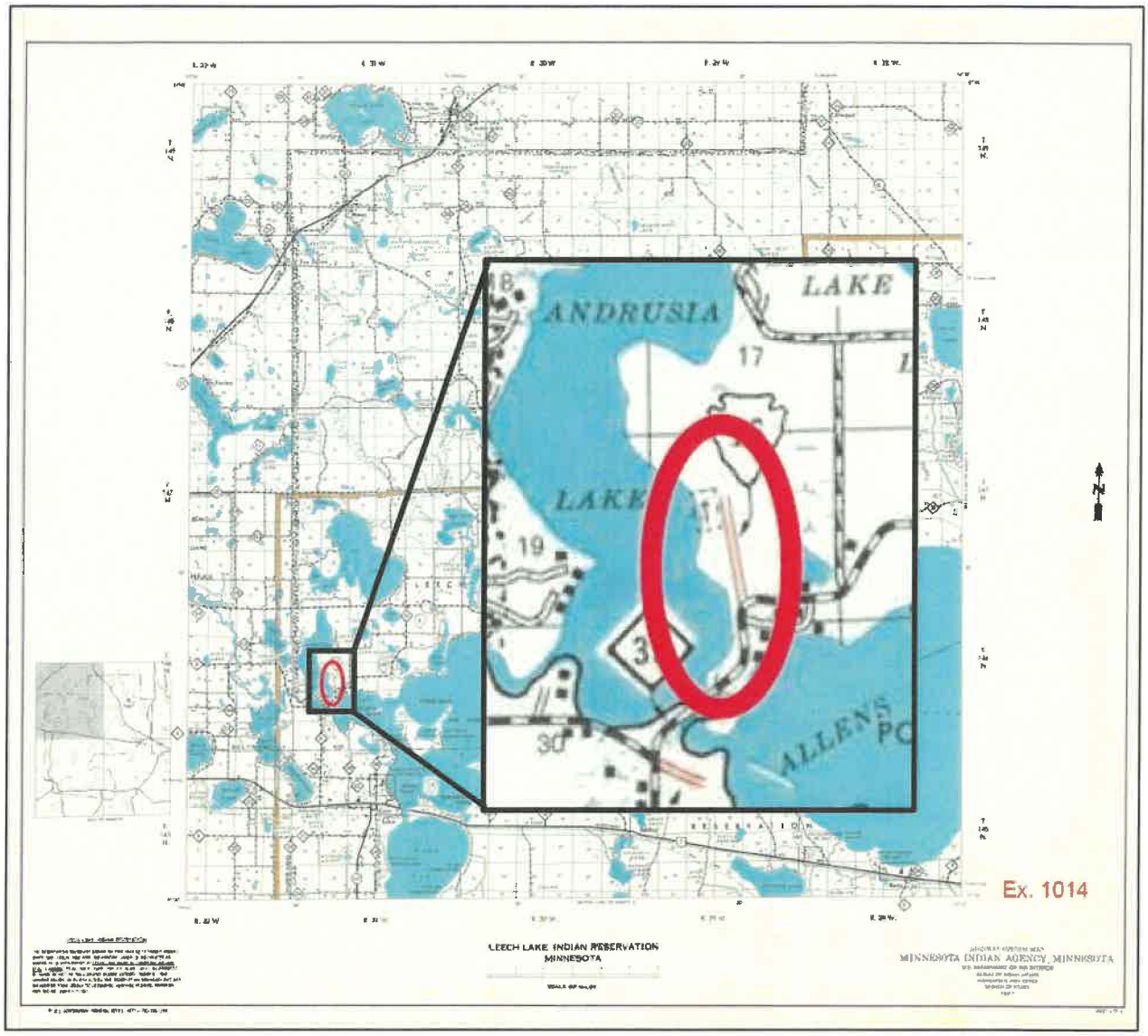


Fig. 10 (R.A. at 80): 1977 Bureau of Indian Affairs Highway System Map of the Leech Lake Indian Reservation depicting a route along Prince of Peace Lane, designated BIA Rural Route 16. The cross at the end of the red route denotes the approximate location of the Cemetery.

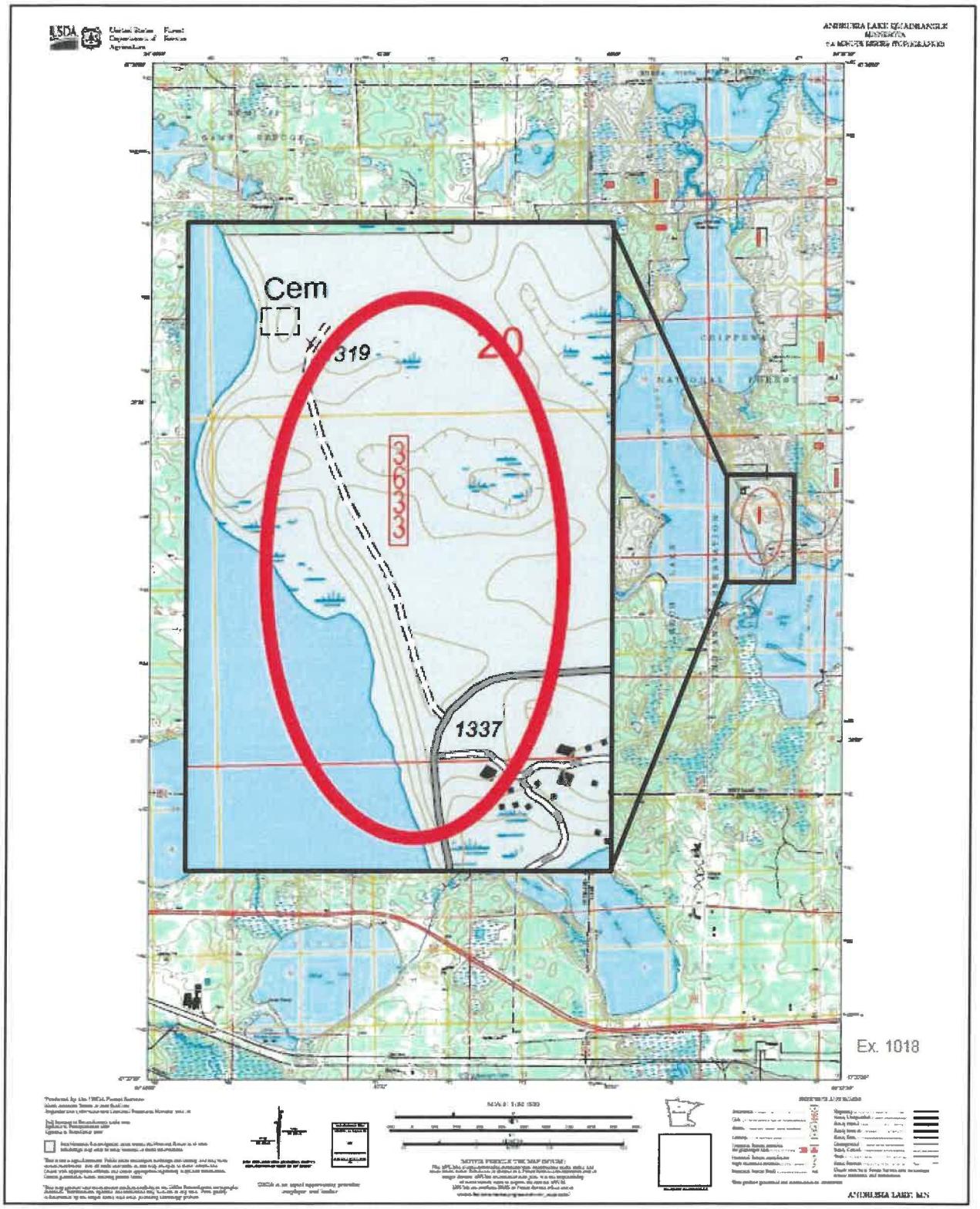


Fig. 11 (R.A. at 84): 1996 United States Department of Agriculture Forest Service Motor Vehicle Use Map including a route along present-day Prince of Peace Lane. The inset shows that the route is designated as National Forest Road No. 3633 and, according to the legend, is an unimproved road.

From 1916 to 2020, each owner of Lot 5 allowed the public's use of the route. (Or. at FOF 24.) Appellants Hazelton permitted the public to use the Lane for 14 ½ years until July 2020. (Or. at FOF 26.)

Prior to 1993, the federal government maintained the Lane. (Or. at FOF 31.) Since 1993, the Band has maintained the Lane, with federal assistance, including snow plowing, grading, filling in washouts, and picking up debris. (Or. at FOF 30, 32.) The Hazelton Appellants accepted the benefit of the Band's maintenance. (Or. at FOF 27.)

Constructing an alternative road to the Cemetery would be complicated and expensive. The process would involve federal agencies and the Tribal Historic Preservation Office. (Or. at FOF 17.) The Band would have to hire a firm to examine the area for unmarked graves with ground-penetrating radar. (Or. at FOF 19.) If there are unmarked graves near a new proposed entrance, the Band could not construct an alternative road. Even if there are no unmarked graves in the area of a new entrance, the Band would have to expend $2,000 to $3,000 per day for weeks to construct a road and supervise construction to avoid unmarked graves. (Or. at FOF 18.)

On March 18, 2020, Hazelton advised the Band that he intended to close the Lane as of June 15, 2020. (Or. at FOF A12.) On June 12, 2020, the Band advised Hazelton that the Band was claiming an easement along the Lane as it crossed Lot 5. (Or. at FOF A13.) On July 24, 2020, Hazelton shut down the Lane at the southern end of Lot 5. (Or. at FOF A13 – Fig. 12, below.) On July 27, 2020, the Band's Tribal Police removed the road closure. (Or. at FOF A14.) Appellants have allowed the Lane to remain open since then. (Or. at FOF 14.) The Band commenced this lawsuit on July 30, 2020. (Or. at FOF A14.)

Fig. 12 (R.A. at 98): Prince of Peace Lane (closed by Appellant Hazelton) where it splits with Seven Lakes Road. This photo is taken looking approximately north.

An express easement for the Lane has never been granted to the Band or to anyone else by the Department of Interior, while the lands were in trust. (Or. at FOF 5.)

B. Tribal Court's Conclusions of Law

Based on these findings of fact, the Tribal Court made the following conclusions of law:

- An easement by dedication has been established. (Or. at ¶¶ 37-40.)
- A right-of-way has been established pursuant to the 1855 Treaty, Article 8. (Or. at ¶¶ 41-42.)
- An easement by necessity exists. (Or. at ¶¶ 43-45.)
- An easement by prescription exists. (Or. at ¶ 46-48.)

Therefore, the Tribal Court ordered that the Lane is a public road under the Band's jurisdiction, the Band and its members have the right to use the Lane as a public road, and Appellants may not interfere or obstruct the use of the Lane.

C. Appellants' Appeal

In their notice of appeal, Appellants challenged two findings of fact and 15 conclusions of law. Appellants' brief, however, focused on the following issues:

- The Tribal Court cannot "declare vested possessory interests in allotted or trust lands that occurred while the property was in trust even though it may now be held in fee status." (App. Mem. at 2.)

- The Tribal Court's conclusion that Article 8 of the 1855 Treaty with the Chippewa of the Mississippi "secured the Band's inherent authority over its Reservation to recognize a right-of-way for the route now known as Prince of Peace Lane" is erroneous. (App. Mem. at 8.)

- The Tribal Court's finding (Or. at FOF 7) that the Hazelton Appellants entered into a contract for deed with Skip and Terri Finn before Skip passed away for a parcel of Lot 5 is wrong because Mr. Finn died before the contract was made, and Teri Finn, a non-Indian, was the only landowner who signed the contract. Therefore, the Tribal Court cannot assert jurisdiction over this parcel, contrary to the Tribal Court's Conclusions of Law Nos. 34 and 36. (App. Mem. at 8-9, referring to Or. at FOF 7, ¶¶ 34, 36.)

- The Tribal Court's finding that Prince of Peace Lane "was, and is, the only way to access the cemetery" is erroneous, and therefore there should be no easement by necessity. (App. Mem. at 9-11, referring to Or. at FOF 20.)

- The Tribal Court's finding #33 that "BIA roads and roads on the Reservation Roads Inventory are public roads" does not support finding of an easement. (App. Mem. at 11-13, referring to Or. at FOF 33.)

- The Tribal Court's conclusion #37 that "An easement by dedication has been established because the Band dedicated the route now known as Prince of Peace Lane to the public before 1916 by establishing the route as an Indian trail and acquiescing to the public's use" is erroneous. (App. Mem. at 13-15, referring to Or. at ¶¶37-39, 40, 47, and 48.)

Part II: Conclusions of Law and Decision

We address each of Appellants' contentions, beginning with subject matter jurisdiction. However, we organize our analysis according to the types of easement the parties and Tribal Court address in this case. Accordingly, Appellants' arguments are addressed within that structure.

A. Subject Matter Jurisdiction

The Tribal Court held that it had subject matter jurisdiction over the parties' dispute because "the Hazelton [Appellants] engaged in a consensual relationship with the Band by purchasing [Lot 5] from Skip and Teri Finn, a parcel in which the Band asserts, and asserted at the time, a legally protected interest by virtue of Prince of Peace Lane crossing the property," (Or. at ¶ 34), and "the Aleksandrovich [Appellants] have consented to this Court's jurisdiction by buying property subject to Tribal Court litigation and requesting that this matter continue to be in litigation in Tribal Court." (Or. at ¶35). The Tribal Court also held that it had subject matter jurisdiction "because it has the power to adjudicate the Band's interest in land within its Reservation, especially when the possessory rights vested when the property was held in trust by the United States of America." (Or. at ¶36.)

1. The parties' contentions

As an initial matter, the Band contends that Appellants "fail[ed] to contest jurisdiction over the Aleksandroviches – the current owners of Lot 5 and the real parties of interest," and therefore the issue is waived. (Resp. Mem. at 11.) The Band argues that "for an issue to be reviewable on appeal, it 'must be presented in the brief with some specificity' otherwise the issue is waived." (*Id.* (citing *Meyers v. Starke*, 420 F.3d 738 (8th Cir. 2005) and other cases))

We agree that with most issues, a failure to brief the issue will preclude this Court from considering the issue on appeal. Subject matter jurisdiction, however, is different because it goes to the heart of the Tribal Court's authority to resolve disputed issues in a lawsuit. "[T]he adjudicatory authority of tribal courts is a threshold question that must be answered before a court may consider the merits of the underlying action." *MacArthur v. San Juan County*, 497 F.3d 1057, 1063 (10th Cir. 2007). In fact, a court may address subject matter jurisdiction even if the parties do not raise the issue. *Behrens v. JPMorgan Chase Bank, N.A.*, 96 F.4th 202, 206-207 (2d Cir. 2024) ("[F]ederal courts must ensure that they do not lack subject-matter jurisdiction, even if the parties fail to identify any jurisdictional defect."). In this case, even though Appellants' memorandum only briefly challenges subject matter jurisdiction, we will address it here.[9]

Appellants' principal challenge to the Tribal Court's subject matter jurisdiction is based on the assertion that part of Lot 5 was conveyed to the Hazeltons via a contract for deed only by Teri Finn, a non-Indian.[10]

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[9] Appellants asserted lack of subject matter jurisdiction in their answer. (*See* Joint Answer of Gary and Diane Hazelton and Yauheni and Tatsiana Aleksandrovich to Third Amended Complaint, ¶¶1-4)

[10] Appellants also contend that "the tribal court did not have subject matter jurisdiction to grant what amounts to a right-of-way interest, whether by condemnation or otherwise." (App. Mem. at 5) Appellants argue that federal law precludes the granting of an easement on land held in trust by the United States. We address those arguments later in this opinion.

Mr. Finn died before this contract was signed. Thus, Appellants contend, "the assertion of subject matter jurisdiction over approximately 2/3 of the part of Prince of Peace Lane involved in this litigation, cannot stand. This finding of fact [Or. at FOF 7] is, therefore, clearly erroneous and Conclusion of Law #34 & #36 under Jurisdiction are an error of law applicable to the succession of property held in joint-tenancy." (App. Mem. at 9.)

The Band contends that the Tribal Court correctly asserted subject matter jurisdiction because (1) the Aleksandrovich Appellants, the real parties in interest, agreed to Tribal Court jurisdiction, (2) the Hazeltons (to whose interests the Aleksandrovich Appellants succeeded) engaged in consensual relations with a Band member when they purchased the Lot 5 parcels, and (3) the transfer and use of Lot 5 implicates the Band's sovereign interests. The Band argues that Appellants' consensual relations give the Tribal Court jurisdiction under the first exception in *Montana* and the status and use of a right-of-way over Lot 5 affects the sovereign interests of the Band under *Montana*'s second exception.

2. *The Montana doctrine*

The authority of a Tribal Court to adjudicate the interests of a nonmember is summarized in *Minnesota Department of Natural Resources, et al., v. Manoomin, et al.*:

> The case law prescribing when a tribal court has authority to deal with nonmembers is called the *Montana* doctrine, named after the U.S. Supreme Court case that clarified this rule of law, *Montana v. United States*, 450 U.S. 544 (1981).
>
> The *Montana* Court acknowledged that, within a reservation, Tribes have "inherent sovereignty" to address "what is necessary to protect tribal self-government or to control international relations," and may "punish tribal offenders," "determine tribal membership, . . . regulate domestic relations among members, and . . . prescribe rules of inheritance for members." *Id.* at 564. The Court concluded, however, that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* The Court held that there were two situations in which a Tribe may exercise authority over a nonmember:
>
> > To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Citations omitted.] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.
>
> *Id.* at 565-66. The "consensual relationship" situation, justifying tribal jurisdiction, is often referred to as the "first *Montana* exception," and the "threaten . . . the political integrity . . ." situation is referred to as the "second *Montana* exception."

File No. AP21-0516, at 7, White Earth Band of Ojibwe Court of Appeals (March 10, 2022).

We conclude that Appellants engaged in "consensual relationships with the tribe or its members" and Appellants' activities with respect to Prince of Peace Lane "threaten[] or [have] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," supporting the Tribal Court's authority to exercise subject matter jurisdiction over this lawsuit under both *Montana* tests.

a. Consensual relationships

Several principles emerge from the caselaw to guide application of the first *Montana* exception. First, the consensual relationship must be of the type that indicates the nonmember "consents" to tribal regulation or jurisdiction. *See Salt River Project Agric. Improv. & Power Dist. v. Lee*, No. CV-08-08028-PCT-JAT, 2013 U.S. Dist. LEXIS 10952 (D. Az. Jan. 28, 2013). In *Montana*, the Supreme Court stated that such relationships include "commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. The Supreme Court later clarified that "other arrangements" are "private consensual relationships" that involve "private individuals who voluntarily submit[] themselves to tribal regulatory jurisdiction by the arrangements that they . . . enter[] into." *Fort Yates Pub. Sch. Dist. #4 v. Murphy*, 786 F.3d 662, 668 (8th Cir. 2015) (quoting *Nevada v. Hicks*, 533 U.S. at 359 n.3, 372). Courts have found consensual relationships between a nonmember and a tribe or individual tribal member when, for example, a company negotiated and entered into a permit agreement with tribes and signed a consent decree requiring it to obtain those permits, *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 933 (9th Cir. 2019), and when a nonmember employer agreed to participate in a tribal youth-training program and a tribal-member participant sued for abuse that occurred while he participated in the program at the employer's business, *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 173-77 (5th Cir. 2014).

Second, the regulation or jurisdiction asserted must relate to the consensual relationship. Stated differently, a consensual relationship in one area does not trigger tribal authority in areas beyond the subject matter of the relationship. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) (concluding that hotel-owner's status as "trader" did not operate to extend tribal jurisdiction to ability to tax hotel occupancy); *Nord v. Kelly*, 520 F.3d 848, 856 (8th Cir. 2008) (concluding that truck driver's commercial relationship with the tribe was not sufficient to give tribal court jurisdiction over run-of-the-mill vehicle accident between non-Indians on non-Indian highway within reservation); *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. McKee*, 32 F.4th 1003, 1009 (10th Cir. 2022) (concluding that tribal court could not assert jurisdiction over nonmember's misappropriation of water based on nonmember's agricultural leases with tribe and farming partnership with tribal member). In *FMC Corp.*, the tribe sought to enforce the permit that was the basis of the alleged consensual relationship; therefore, the regulation was related to the consensual relationship. 942 F.3d at 933.

Third, important tribal sovereign interests must justify the regulation or jurisdiction. *See Salt River Project*, 2013 U.S. Dist. LEXIS 10852 (stating that "the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations" (quoting *Plains Commerce Bank*, 554 U.S. at 336)); *C'Hair v. Dist. Court of the Ninth Judicial Dist.*, 357 P.3d 723 (Wy. 2015) (stating that courts must consider impact to a tribe's right of self-government when determining subject matter jurisdiction).

(1) Consensual relationships with Band members

We conclude that the Hazelton Appellants engaged in consensual relationships with a Band member when they purchased the parcels that constitute Lot 5 from a Band member, Mr. Finn, and his wife, a nonmember. Mr. Finn and his wife conveyed the first parcel to the Hazeltons by contract for deed in 2005.[11] (R.A. at 172 (Ex. 1047).) While sale of the second parcel was completed (by contract for deed) after Mr. Finn died, he was a party to the purchase agreement for the parcel. (R.A. at 214 (Ex. 1055).) The purchase agreement is signed by both Skip and Teri Finn. (*Id.*) By voluntarily agreeing to purchase property from a Band member, Appellants engaged in a consensual relationship with a Band member—the fact that the sale was completed after Mr. Finn's death does not change the context of the original engagement.

(2) Consensual relationship with the Band

We conclude that Appellants also entered into a consensual relationship with the Band when they negotiated the purchase of, purchased, and used the parcels comprising the portion of Lot 5 Finn was selling, namely parcels 203 (northern) and 205 (southern). *See* Fig. 1 and 2 and n.7&8, *supra*, pp. 5-6. In 2005, before purchasing either parcel, the Hazeltons drove on the Lane in order to view the properties. (Nov. 13, 2023 Dep. of G. Hazelton at 26.) The Lane was not a mere path through the woods; it was like a typical country road, constructed of packed dirt or gravel, leveled for traffic, and having no grass, trees, or brush obstructing it. (Nov. 13, 2023 Dep. of G. Hazelton at 115-16); *see also* Fig. 12 above. Before purchasing either parcel, the Hazeltons knew that the Lane crossed Lot 5, provided access to Lot 5, and provided access to other properties, including the Cemetery, which the Band managed. (Nov. 13, 2023 Dep. of G. Hazelton at 41-42, 122-24.) They were aware at purchase that the Cemetery was historic, sacred to the Band, and active. They knew the Band had an interest in the Lane when they entered negotiations with the Finns. Also, before purchasing either parcel, they discussed the future of the Lane with Mr. Finn and were aware of his dealings with the Band regarding the Lane. (Jan. 18, 2021 Aff. of G. Hazelton, R.A. at 92; Dec. 23, 2021 Email from G. Hazelton, R.A. at 221; Mar. 18, 2020 Ltr. of G. Hazelton to G. Elliot, R.A. at 228-30; G. Hazelton's Dec. 22, 2020 Response to Plaintiff's Interrogatory No. 28.)

In 2008, the Hazeltons moved into their home on the 205 parcel. *See* Fig. 2, *supra*, p. 6. By the time they purchased the 203 parcel in 2018, they had lived in the home for approximately ten years, witnessed neighbors use the Lane to access their homes, and witnessed people use the Lane to access the Cemetery, as much as several times per week. (Nov. 13, 2023 Dep. of G. Hazelton, at 46, 119-37.) Mr. Hazelton testified that he saw trash trucks, tribal police, school buses, and snow plows use the Lane. (*Id.*)

The Hazeltons purchased both parcels, knowing they were on the Leech Lake Reservation, subject to prior encumbrances—including the route that had been used by the public, including Band members, for centuries. For nearly 15 years, the Hazeltons used the Lane regularly to access their home. They were conscious of the 15-year period whereby users of the Lane could obtain an easement by prescription. (R.A. at 222) They permitted Band members and others to use the Lane to access the Cemetery and other dwellings. And the record shows that they did not view others' use of the Lane as an imposition. To the contrary, Mr. Hazelton once stated "I don't car[e] about Prince of Peace Lane because it does not run close to the house . . . ." (R.A. at 221). They did not maintain the Lane but instead relied upon the Band

[11] The conveyance was subject to "any prior reservations, restrictions, easements, rights of way and any zoning and use regulations."

and accepted the Band's services in providing snow plowing, grading, filling in washouts, and picking up debris. (Or. at FOF 30, 32.) Under these circumstances, it is reasonable for Appellants to expect that the parties' interests in the Lane could be adjudicated in the Band's courts.

We conclude that the Hazeltons' consensual transaction to purchase and use Lot 5—which involved knowledge of and preserved the existence and existing uses of the Lane—demonstrates consent to regulation by the Tribe. The Tribal Court's assertion of jurisdiction over a dispute concerning the existence and use of an easement for the Lane is directly related to the consensual arrangements—for purchase, use, and maintenance of the Lane—in this case. And the parties' relationship and activities implicate the Band's sovereign interests, as explained further below.

b. Direct effect on health or welfare

Montana's second exception applies when nonmember conduct threatens or has a direct effect on "the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. Federal courts have stated that this second exception "grants Indian tribes nothing 'beyond what is necessary to protect tribal self-government or to control internal relations.'" *Atkinson Trading*, 532 U.S. at 658-59; *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019). Threats that are "limited in scope and duration" may not support a finding of jurisdiction under the second *Montana* exception. *See Otter Tail Power Co. v. Leech Lake Band of Ojibwe*, 2011 U.S. Dist. LEXIS 67377, at *15 (D. Minn. June 22, 2011) (concluding that effect of transmission line project on tribal hunting and fishing rights was limited and temporary). But threats that affect tribal cultural and religious interests may constitute threats to tribal self-governance, health, and welfare, thereby supporting jurisdiction. *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 935 (9th Cir. 2019) (concluding that storage of hazardous waste on reservation threatened tribal political integrity, economic security, health, or welfare to an extent that "imperil[ed] the subsistence or welfare" of the tribe (quoting *Montana*, 450 U.S. at 566)).

We conclude that Appellants' activities in shutting down the Lane have "a direct effect" on the "health or welfare of the tribe," supporting subject matter jurisdiction under the second *Montana* exception. Appellants' activities implicate the "tribe's sovereign interests" in maintaining roads on the Reservation, in providing access and services to tribal members, in providing access and services to dwellings located on the reservation, and in allowing school buses and emergency vehicles to access member and nonmember residents. The Band also has important sovereign interests in maintaining access to the Cemetery, a significant cultural and historic site for the Band.

A Leech Lake tribal elder, Donald "Mick" Finn, lives along the Lane. *See* Fig. 2, *supra*, p. 6. He has always accessed his property via the Lane. (Jan. 21, 2021 Aff. of Mick Finn.) As a tribal elder, he is entitled to garbage and plowing services from the Band. (*Id.*) He stated that when Hazelton closed the Lane, the garbage truck could not access his house. (Feb. 22, 2021 Aff. of Mick Finn.) Closure of the Lane implicates the Band's sovereign interest in continued services to tribal elders like Mr. Finn.

The Cemetery was and remains a sacred religious and cultural site on the Leech Lake Reservation. 300 to 340 Band members are buried at the Cemetery. (Jan. 18, 2024 Dep. of G. Lemon at 18.) Several Band members stated that they have attended burial ceremonies, memorial feasts and gatherings at the Cemetery for as long as they can remember. (Feb. 19, 2021 Aff. of J.L. Jones, Jr.; Nov. 12, 2021 Dep. of J. Jones, Sr., at 35-38; Dec. 3, 2021 Dep. of D. Headbird at 26, 30.) Band members visit the Cemetery frequently to pay respect to their fallen relatives, conduct ceremonies, and honor recently passed friends and family. (*Id.* at 41.) Memorial Day is a particularly busy day on the Lane and at the Cemetery. (Dec. 3,

2021 Dep. of J. Finn at 30-31.) The Leech Lake Honor Guard participates in Memorial Day ceremonies. (*See, e.g.*, Jan. 17, 2024 Dep. of K. Applebee at 12.) The Band provides assistance for burials at the Cemetery, contributes to the Leech Lake Honor Guard, and maintains the Cemetery, including by maintaining the grounds, digging and filling graves, and plowing the road and parking lot. (*Id.* at 9-10, 12-13; Jan. 18, 2024 Dep. of E. Devault at 42; Jan. 17, 2024 Dep. of K. Applebee at 13.) The Cemetery is, and has been, since time immemorial, an active place to honor the dead, in which the Band clearly maintains a strong sovereign interest.

Further, evidence in the record indicates that the route along the Lane itself is sacred. It is the route the community has always used to reach the Cemetery. One of the Band's tribal historic preservation officers testified that "our people had walked out there [referring to the Lane] plenty of times." (Jan. 18, 2024 Dep. of G. Lemon at 43.) The Lane is "the path that we've taken for decades." (*Id.*) And the Lane is "the way [members'] father or grandmother had taken, and they want to walk the same path." (*Id.* at 44.) Another Band member testified that "that road has been there for hundreds of years. It should stay like that." (Nov. 12, 2021 Dep. of J. Jones, Sr., at 52.) Similarly, "[t]he Lane has always been used by the community to reach the cemetery." (Feb. 19, 2021 Aff. of J.L. Jones, Jr.)

Finally, unlike the situation in *Otter Tail Power*, the threat to access here is not "limited in scope or duration." To the contrary, the effect on tribal access to Prince of Peace Cemetery would be long-term, and construction of another access route would not only be extremely costly but would also risk irreparable damage to marked and unmarked graves in and around the Cemetery. Because any closure of the Lane threatens Band members' access to both the route to the Cemetery and the Cemetery itself and threatens the Band's interests in maintaining on-Reservation roads and services, we conclude that the second *Montana* exception is met.

c. *The application of the* Montana *doctrine exceptions to the Aleksandrovich Appellants*

The Aleksandroviches purchased Lot 5 from the Hazeltons in 2022, while this lawsuit was pending. They visited the property before purchasing it; knew the Band was maintaining the Lane and relied on this maintenance; used the Lane to access the property; knew the public used the Lane; knew about the active Cemetery and use of the Lane to access it; and saw trash services use the Lane to access properties nearby. (Nov. 14, 2023 Dep. of Y. Aleksandrovich at 14, 32, 36-37.) The Aleksandroviches knew about the lawsuit when they purchased the property. (*Id.* at 18.) They agreed to join the lawsuit and that the Hazeltons would defend all defendants. The Aleksandroviches stand in the shoes of the Hazeltons in determining subject matter jurisdiction. *Accord Reibman v. Renesas Elecs. Am. Inc.*, 2014 U.S. Dist. LEXIS 1624, at *21 (N.D. Cal. Jan. 7, 2014) (noting that court may restore subject matter jurisdiction by substituting successor in interest for former party).[12]

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[12] The Band also contends that Appellants consented to the Tribal Court's jurisdiction by requesting affirmative relief in their answer. (Resp. Mem. at 11, n.7) In their Answer to Third Amended Complaint dated February 15, 2023, Appellants requested "an order of this court denying all relief requested by Plaintiff and declaring Plaintiff has no easement rights of any kind across that part of Prince of Peace Lane that crosses Defendants Lot 5 property. That should the court determine an easement exists, in the equitable power of the court the Defendants be granted the right to relocate the easement along Seven Lakes Road as describe by the express easement granted to Plaintiff in 2004."

The Band cites *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127 (9th Cir. 2006) (en banc), in support of its argument that Appellants consented to Tribal Court jurisdiction. In that case, Smith, a member of a different tribe, was the driver of a truck involved in an accident in which Smith and two passengers were injured. A passenger's estate filed a

Having concluded that the Tribal Court had subject matter jurisdiction, we next address each of Appellants' claims.

B. Easement or Right of Way by Dedication

The Tribal Court found that "an easement by dedication has been established" because (a) the Band dedicated the route known as Prince of Peace Lane to the public before 1916 "by establishing the route as an Indian trail and acquiescing to the public's use," (b) every Lot 5 owner from 1916 to 2020 dedicated the route by acquiescing to the public's use, (c) the federal and state governments "recognized and dedicated" the route to the public, and (d) maintenance of the Lane by the federal government and the Band for over six years dedicated the Lane to the public. (Or. at ¶¶37-40.)

1. Common-law dedication

Common-law dedication of a road is well-established under Minnesota law. The elements are described in *Wojahn v. Johnson*:

> The one seeking to prove a common-law dedication must show the landowner's intent, express or implied, to have his land appropriated and devoted to a public use, and an acceptance of that use by the public. Both intent and acceptance can be inferred from longstanding acquiescence in the right of the public to use the road and from acts of public maintenance.

297 N.W.2d 298, 306-307 (Minn. 1980) (citations omitted); *see also Dickinson v. Ruble*, 1 N.W.2d 373, 374 (Minn. 1941) ("[A]cquiescence, without objection, in the public use for a long time, is such conduct as proves and indicates to the public an intention to dedicate," citing *Klenk v. Town of Walnut Lake*, 53 N.W. 703, 704 (Minn. 1892)); *Barth v. Stenwick*, 761 N.W.2d 502 (Minn. Ct. App. 2009) (reversing grant of summary judgment against common law dedication claim). No specific time period is required in order to establish a common-law easement by dedication. *Id.* at 306, n.4.

In *Daugherty v. Sowers*, the Minnesota Supreme Court concluded that owners intended to dedicate a road to the public by acquiescing to its use for logging, access to rented pastureland, and visiting residents, and by accepting public maintenance and funding for maintenance of the road. 68 N.W.2d 866, 868-69 (Minn. 1955). Similarly, grading, graveling, and resurfacing of a road by the county supported the jury's verdict that the owner intended to dedicate an easement to the public. *Anderson v. Birkeland*, 28 N.W.2d 215, 219 (Minn. 1949). "The question of public dedication is one of fact, and a trial

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lawsuit in the tribal court against Smith and the tribal college where Smith and the passengers were students. Smith filed a cross-claim against the college, alleging that its truck was defective and caused the accident and Smith's injuries. Smith's claim against the college was tried to a jury, which returned a verdict for the college. Thereafter, unhappy with the jury verdict, Smith contested the tribal court's subject matter jurisdiction to decide his claims. The 9th Circuit Court of Appeals sustained jurisdiction, holding that "a nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a 'consensual relationship' with the tribe within the meaning of *Montana*." *Id.* at 1140.

Here, Appellants requested that the Tribal Court deny the Band's request for an easement. Because Appellants did not seek affirmative relief in their answer, we conclude that *Smith* is inapposite in sustaining Tribal Court jurisdiction in this case. Appellants did not consent by their pleadings to Tribal Court jurisdiction.

court's determination on the matter will not be reversed unless it is clearly erroneous." *Wojahn*, 297 N.W.2d at 307.

In Minnesota, a road may also be dedicated to the public under statutory law. Minn. Stat. § 160.05 provides:

> When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not.[13]

Creating an easement by dedication is not prescribed by Leech Lake Code, nor is it proscribed. The Tribal Court had the authority to recognize and apply Minnesota common law and statutes in these circumstances: "Where an issue arises in an action which is not addressed by written laws or custom or traditional law [of the Band], the court may apply the laws of any tribe, the federal government, or any state." Leech Lake Band of Ojibwe Judicial Code, Part VII, Section 6. We conclude that the Tribal Court properly recognized Minnesota law and applied it to grant an easement by dedication.

2. *Federal law restrictions*

Appellants contend that federal law placed restrictions on conveyance of Lot 5 so that the Band and land owners and possessors could not dedicate an easement to the public for the Lane.

First, Appellants cite the Act of 1948 as prohibiting owners of land in trust from dedicating an easement without express consent by the U.S. government. That Act, adopted in 1948, provides:

> The Secretary of the Interior be, and he is hereby, empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired, or set aside for the use and benefit of the Indians.

25 U.S.C. § 323; *see Houle v. Cent. Power Elec. Coop., Inc.*, 2011 U.S. Dist. LEXIS 41955, *66-67 (D.N.D. 2011) ("As pertains to this case, Congress has not enacted any law that authorizes tribes or tribal courts to grant rights-of-way across allotted lands held in trust for individual Indian persons. Rather, the

[13] Minn. Stat. § 160.05, subd. 1(a) also states: "If a road authority fails to give the notice required by paragraph (b), this subdivision does not apply." The notice referenced in Subd. 1(a) is described in 1(b): "Before a road authority may make any repairs or conduct any work on a private road as defined by section 169.011, subdivision 57, the road authority must notify the owner of the road of the intent to make repairs or conduct work on the private road." Minn. Stat. § 169.011, subd. 57, defines "Private road or driveway" as "every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner, but not by other persons." Because the owners herein permitted the public to use the Lane, it was not a "private road," and the notice specified in this section is not required.

opposite is true. By virtue of § 348 and the federal statutes that govern when grants of right-of-way across allotted lands can be made, i.e., 25 U.S.C. §§ 323-328, Congress has reserved the authority to make such conveyances to the Secretary of the Interior.").

Appellants also contend that federal "restraints on alienation" prohibit "a tribe's attempt to grant an easement across land allotted to an individual Indian." (App. Mem. at 4.) Another Act adopted in 1887 contains a so-called anti-alienation provision:

> Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void . . . .[14]

25 U.S.C. § 348; *see Fredericks v. Mandel*, 650 F.2d 144, 145-46 (8th Cir. 1981) (holding that a tribal court could not condemn or grant a right-of-way across lands held in trust by the United States for individual Indians) (stating 25 U.S.C. § 348 "does not distinguish between conveyances to Indians and non-Indians; by its plain terms the act of conveying is 'absolutely null and void,' irrespective of who is the conveyee"); *Fettig v. Fox*, 2020 U.S. Dist. LEXIS 255595, *38 (D.N.D. 2020) ("Congress enacted 25 U.S.C. § 348 to curb the many instances of Indian allottees losing their trust allotments through unwise and sometimes fraudulent transactions. Included within § 348 is its 'anti-alienation' provision that renders 'null and void' any conveyance of an allottee's interest as well as 'any contract touching upon the same.' The net effect of this provision is that it renders invalid any conveyance or other contract that diminishes an allottee's interest except as Congress has otherwise provided.").

Appellants' arguments fail to preclude the establishment of easements by dedication and by necessity for three reasons, as explained below. First, neither of these statutes apply retroactively. Thus, to the extent an easement was dedicated prior to the passage of either act, the acts do not restrict its establishment.

Second, neither of these statutes apply to lands held in fee, i.e., lands not in restricted or trust status. Thus, to the extent an easement was dedicated before the land came under restricted or trust status, or after the land came out of restricted or trust status, these statutes do not restrict its establishment.

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[14] 25 U.S.C. § 5102 (1934) extended the anti-alienation provision past 25 years: "The existing periods of trust place upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress."

Third, even if approval of the Secretary of Interior was required, we conclude that it was obtained. Before the time written approval was required,[15] the Secretary approved of and acquiesced to the route along which an easement by dedication arose. Appellants cite no authority, and we are aware of none, precluding implicit recognition by the Secretary of an easement under the particular circumstances of this case. Here, the record demonstrates that federal agencies mapped or approved maps that included Prince of Peace Lane as it crossed Lot 5 in at least nine publications across two departments, including at least four by the Department of Interior, between 1875 and 1996. The tribal court also found that the federal government maintained the route. By mapping and maintaining the route, the United States government and the Secretary, in particular, consented to its establishment.

We note that the circumstances here are, to our knowledge, unique. In most cases addressing rights-of-way across Indian lands, non-Indian individuals and entities seek a right-of-way. *See, e.g., United States v. Oklahoma Gas & Elec. Co.*, 318 U.S. 206 (1943) (utility company); *Houle v. Cent. Power Elec. Coop., Inc.*, No.4:09-cv-021, 2011 U.S. Dist. LEXIS 41955 (D.N.D. Mar. 24, 2011) (same). And in most cases, courts require those parties to fulfill the formalities set out in the Acts of 1887 or 1948, or other similar statutes as applicable, in accordance with federal policy of protecting Indians and Indian lands. *See, e.g., Oklahoma Gas & Elec.*, 328 U.S. at 207 (addressing act regarding rights of way for highways); *Houle*, 2011 U.S. Dist. LEXIS 41955 at *12-13 (applying 25 U.S.C. § 348). But here, it is a tribe itself seeking a right-of-way for its—and the public's—benefit, over land on its reservation previously held in trust. It would be incongruous to, as Appellants request, apply statutes intended to protect and work for the benefit of the Band, to the detriment of the Band.

3. The Tribal Court properly found that landowners dedicated the Lane to the public.

We agree with the Band that landowners for 200 years dedicated use of the Lane route to the public, creating an easement by dedication, that followed the land and was recognized by successive landowners to the time of Appellants' closure of the Lane in 2020. The Tribal Court found that every landowner since establishment of the Cemetery dedicated the Lane route to the public. Appellants do not contest those findings.

a. Dedication by the Band before 1916

The Tribal Court concluded that the Band dedicated the Lane to the public before Lot 5 was allotted in trust to a Band member in 1916. (Or. at ¶37.) From the time of the 1867 Treaty until 1916, Lot 5 was held in common by the Band for the benefit of its members. (Or. at FOF 3.)

The Tribal Court further concluded that the federal government consented to the public's use of the Lane to access the Cemetery at all times, evidenced by its mapping of the route as an Indian trail, (Or. at FOF 21, 22), the Bureau of Indian Affairs' recognition of the Lane as a public road, (Or. at FOF 28, 29),

[15] Nothing in 25 U.S.C. § 323, et seq. or 25 U.S.C. § 348, et seq. require written consent by the Secretary (or the Indian or tribal owner). The 1968 regulations promulgated to enforce Section 323 required written consent only by the tribe or individual Indian owner—the regulations indicated mere "approval" by the Secretary was required. 25 C.F.R. § 161.3 (1968) (stating that no right-of-way will be granted over restricted lands without "prior written consent" of tribal counsel or owner, and "approval" of the Secretary). The requirement of written approval by the Secretary now appears in 25 C.F.R. § 169.124 (2015): "Our decision to grant or deny a right-of-way will be in writing." *See also* 25 C.F.R. § 169.204 (2015) (stating that Bureau of Indian Affairs determination whether to approve amendment to right of way will be in writing).

and the federal government's maintenance of the Lane prior to 1993, (Or. at FOF 31). Appellants do not contest these findings.

Instead, Appellants contend that the Band "did not even come into existence until after the Indian Reorganization Act in 1934" and that the Band could not have dedicated the Lane to public use "before allotment" because it "did not have fee title or approval of the Secretary." (App. Mem. at 7, 13.) We address these arguments in turn.

First, although not always recognized or organized as the "Leech Lake Band of Ojibwe," this group of Indians has existed—and was sovereign—in the region at issue since before written historical record was kept and since before the United States government recognized any tribes. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (stating that Indian tribes exercise "inherent sovereign authority"); *Michigan v. Bay Mills Indian Cmty*, 572 U.S. 782, 788 (2014) (stating that Indian tribes are "separate sovereigns pre-existing the constitution") (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)).[16] Tribal sovereignty did not begin with federal recognition. And as sovereign, the Band's predecessors had authority to create routes across their lands for the benefit of the tribe. Appellants' argument ignores these facts.

Appellants' argument also ignores that the common law as understood today did not apply to or have meaning to the Band's predecessors. Instead, they likely understood the land as "a table at which all could partake." Andrew P. Bissonnette, *An Overview of the Question of Access across Indian Lands*, 10 Land & Water Review 1, 109 n. 98 (1975); *see also id.* at 96 n. 9 (quoting *Ex parte Tiger*, 2 Indian Terr. 41, 47 S.W. 304, 305 (1898) as "stating that Indians are strangers to common law notions.")). Imposition of American common law did not change their impression or use of the land; however, when mapping American common law onto tribal intentions, it becomes clear that an easement by dedication has long existed.

Moreover, Prince of Peace Lane has been used in much the same manner by the Band and its predecessors since time immemorial: to access burial grounds, a public space. This is unlike the attempts by non-Indian landowners in several cases to establish easements in their favor for drastically different uses of long-established access roadways. *See id.* at 113-14 (describing private landowner's attempt to construct "dude ranch" and another's lease of land to an oil company for development, both of which would result in substantial increase in commercial, construction, and industrial traffic over alleged rights-of-way over Indian lands (citing *Dry Creek Lodge, Inc. v. United States*, No. C74-74 (D. Wyo. July 11, 1974) and *Superior Oil Co. v. United States*, 353 F.2d 34 (9th Cir. 1965))). No evidence in the record demonstrates that the public or the Band have abandoned their rights to use Prince of Peace Lane or so altered their use of it so as to require a new easement with broader scope.

Turning to Appellants' second argument that no easement could arise absent written approval of the Secretary of the Interior, we conclude that the absence of written approval of the route along Prince of Peace Lane by the federal government is no impediment to establishment of an easement by dedication. To the extent the route was in use prior to federal ownership in trust, no federal approval was necessary. And after federal trust-ownership began, the federal government implicitly consented to

[16] The federal government entered into treaties in 1855 and 1867 with the Band's predecessors: "the Chippewa" including the "Mississippi bands of Chippewa Indians" and the "Pillager and Lake Winnibigoshish bands of Chippewa Indians" and "the Chippewa of the Mississippi," whereby certain land was set aside for "said bands of Indians." (R.A. at 264, 396) The fact of these treaties also supports the Band's long-existing tribal sovereignty.

the route by mapping the Lane as early as 1875 and many times thereafter, and never objecting to, altering, or preventing its use by the Band and its predecessors.

Finally, once an easement is dedicated, it is perpetual unless affirmatively abandoned by the easement holder. *See, e.g.*, *Sackett v. Storm*, 480 N.W.2d 377, 380 (Minn. App. 1992) ("[D]edication is irrevocable after public acceptance unless the public consents to revocation. Thus, an owner's dedication binds his or her successors in interest." (internal citation omitted)); *Toledo, Peoria & W. Ry. Co. v. Illinois Dept. of Transp.*, 547 F. Supp. 140, 142 (C.D. Ill. 1982) (noting that dedicated easement is perpetual and not affected by mere non-use, but may be extinguished upon abandonment by state) (citing cases), overruled on other grounds, 744 F.2d 1296 (7th Cir. 1984); *Minerva Partners, Ltd. v. First Passage, LLC*, 731 N.W.2d 472, 477 (Mich. App. 2007) ("An easement cannot be abridged or taken away by the owner of the burdened land after it has been granted or otherwise established."). Here, no evidence suggests that the public or tribal members abandoned use of Prince of Peace Lane. The Band's tribal predecessor's dedication binds the U.S. government and all subsequent owners—whether in trust or in fee—so long as the easement was never abandoned.[17]

b. Dedication by landowners in fee from 2005 to 2020

Our analyses under part (a) above compels the same conclusion here: the long-standing easement by dedication binds all owners since its establishment, including the Finns, Hazeltons, and Aleksandroviches.

Nevertheless, we also conclude that an easement by dedication also arose between 2005 and 2020 independently of any pre-existing easement. Mr. Finn converted Lot 5 from trust status to fee simple status in October 2005. Mr. Finn and his wife sold part of Lot 5 to the Hazeltons later in 2005. Mr. Finn sold another Lot 5 parcel to the Hazeltons in 2018. Prince of Peace Lane passed over both parcels. From 2005 until July 2020, the Finns and Hazeltons allowed the public to use the Lane to access the Cemetery and surrounding lands. (Or. at FOF 26.) They never stopped anyone from using the Lane. And they accepted the benefit of the Band's maintenance of the Lane. (Or. at FOF 27.) This includes blading, snowplowing, and grading the Lane; mowing along the sides of the Lane; adding gravel; removing trees and debris; and generally ensuring the Lane is accessible. (2021 Aff. of P. Northbird; Jan. 12, 2021 Dep. of M. Connor at 18-19; Jan. 18, 2024 Dep. of E. Devault at 35.)

In sum, the Finns and Hazeltons devoted the Lane to the public, acquiesced in the Band's maintenance and use of the Lane, and the public accepted and used the path. Appellants do not contest the Tribal Court's findings in this regard, and they make no argument,[18] nor could they, that federal law interfered

[17] The parties also address whether an easement by dedication arose between 1920 and 1975. The evidence in the record shows that the Indian owners of Lot 5 consented to public passage along the Lane. And we conclude that the United States government consented to public passage along the Lane by mapping the Lane throughout this time period. Thus, we conclude that an easement by dedication existed continuously during this timeframe. Moreover, we concluded in section (a) that an easement by dedication was established by the Band's predecessors before the land was conveyed to the United States and that that easement binds the United States and subsequent landowners. And in section (b) below, we conclude that, to the extent no easement already existed, an easement by dedication was established after the land was taken out of trust in 2005. Thus, we need not rest our conclusion that an easement by dedication exists on establishment of an easement between 1920 and 1975.

[18] Appellants state that "LLBO has no authority to unilaterally grant itself or any 'third party' an easement across property, much less a possessory right . . . after the property has been alienated in fee to an Indian or non-Indian."

with the right of fee owners to dedicate this route to the public: the statutes upon which Appellants rely have no application to lands held in fee. These facts alone support the conclusion that an easement by common-law dedication existed on Lot 5. The statutory requirements for an easement by dedication are also met: because the route had been "used and kept in repair and worked for at least six years continuously as a public highway," the road may be dedicated to the public under Minn. Stat. § 160.05.[19]

C. Easement by Necessity

1. The Tribal Court's findings

The Tribal Court held that there is an easement by necessity for Prince of Peace Lane to the Cemetery. In so holding, the Tribal Court concluded that "there was unity of title between Lots 5 and 7 from 1867 to 1920," "the [Lane] was and is the only access point to Prince of Peace Cemetery," and an "easement by necessity exists because unity of title was severed and at the time of severance the route now known as Prince of Peace Lane was the only access point to Prince of Peace Cemetery." (Or. at ¶¶ 43-45.)

The Tribal Court made several Findings of Fact related to these Conclusions:

14. Prince of Peace Cemetery is a place of cultural and historical significance and an active cultural site for Band members. . . . Band members from various families are buried at Prince of Peace Cemetery. . . .

15. There are unmarked graves scattered throughout Prince of Peace Cemetery, particularly in the eastern portion of the Cemetery. . . .

16. Prince of Peace Lane is the single access point to Prince of Peace Cemetery and its current route does not disturb unmarked graves. . . . The only other access to the Prince of Peace Cemetery would be by foot, and even foot travel risks disturbing those unmarked graves. . . .

17. If the Band were to build an alternative entrance to Prince of Peace Cemetery, the entire process would involve various federal agencies and the Tribal Historic Preservation Office. . . .

18. To comply with the Band's laws and governmental policies in assessing the prospects for constructing a new entrance, the Band would have to expend $2,000-$3,000 per day for

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(App. Mem. at 7) Appellants cite no authority that would restrict a Tribal Court from declaring an easement on fee land (if the Tribal Court has subject matter jurisdiction).

[19] Respondents contend that the 1855 Treaty independently provides authority for establishment of an easement. We do not base our conclusion that an easement exists on this authority. Article 8 of the 1855 Treaty states "all roads and highways, authorized by law, the lines of which shall be laid through any of the reservations provided for in this convention, shall have the right of way through the same; the fair and just value of such right being paid to the Indians therefor; to be assessed and determined according to the laws in force for the appropriation of lands for such purposes." (R.A. at 400) A note in the margin states "roads may be constructed." *Id.* We do not read the treaty to confer a right-of-way or easement for existing roads, or to mean that any of the land transactions described in the treaty are subject to an existing right-of-way or easement. In sum, we do not base our conclusion that an easement exists on the 1855 Treaty language.

the duration of weeks and could only construct another entrance if there were no unmarked graves in the area. . . . If unmarked graves were located, construction could not be completed, or would need to be rerouted to provide a 75-foot buffer around the area of any graves. . . . Even if there were no graves located in the area, construction would need to be constantly supervised. . . . Failure to comply with the Historic Preservation Office's rules and regulations can result in fines to which the Band itself could be subject. . . .

19. Since elders have indicated that there are unmarked graves in Prince of Peace Cemetery and the surrounding area, if construction were to occur in or near Prince of Peace Cemetery, the Band would be required to undergo, and pay for the above-mentioned procedures, including hiring a firm to conduct an examination of the area with ground-penetrating radar. . . .

20. The path to Prince of Peace Cemetery that became Prince of Peace Lane was, and is, the only way to access the cemetery--it is a path that the Ojibwe have used to access Prince of Peace Cemetery since time immemorial. . . .

(Citations to trial court record omitted.)

2. *The parties' contentions*

Appellants do not dispute that Prince of Peace Lane was initially a necessary route to access the Cemetery. Instead, Appellants raise two arguments against the continuation of an easement by necessity. First, they contend that the necessity ended in 2004, when Finn granted an easement along Seven Lakes Road to the east of the Cemetery.[20] Appellants assert that this easement provided a right of access because the Band could "punch in" to the Cemetery from Seven Lakes Road. (Nov. 13, 2023 Dep. of G. Hazelton at 153.) Appellants contend that this alleged right of access eliminated the necessity of using Prince of Peace Lane to access the Cemetery, thus defeating the easement by necessity on Prince of Peace Lane. The "mere inconvenience of relocating the cemetery entrance does not equate to a necessity." (App. Mem. at 10.)

Second, appellants argue that, because the land was held in trust by the United States when it was severed, a common law easement by necessity cannot be created without approval by the United States. (App. Mem. at 9-10.)

The Band contends that all the conditions required to create an easement by necessity existed by 1920 "when the land was conveyed in fee." (Resp. Mem. at 21.) The Band argues that unity of title existed between Lots 5 and 7 in the Band from 1867-1889 and in the U.S. from 1889-1920, the U.S. created the necessity by conveying fee title of Lot 5 to an individual Indian in February 1920, and at the time the Lane was the only access point to "land-locked Lot 5." (*Id.* at 21-22.)

The Band also argues that "once an easement by necessity exists, it remains, whether the necessity continues or not." (Resp. Mem. at 28.) The Band argues in the alternative that the necessity continues to

[20] The Finns granted an easement to the Band on September 21, 2004, before Lot 5 was taken out of trust and before selling it to the Hazeltons.

exist, regardless of potential access to the Cemetery from Seven Lakes Road – the Lane "is the only road that leads to the entrance of" the Cemetery; Seven Lakes Road "runs parallel" to the Cemetery and the east side of the Cemetery "would have to be demolished to make room for a new entrance to the Cemetery"; a new entrance is not possible because "there are unmarked graves scattered in and near the Cemetery, particularly on the east side"; building an access from Seven Lakes Road would require approval by federal agencies and the Tribal Historic Preservation Office, may disturb unmarked graves, and would be costly. (*Id.* at 28-29.)

As to Appellants' argument that Section 323 precluded grant of an easement, the Band argues that the easement existed before enactment of the statute in 1948. The Band also argues that federal ownership of land cannot block an implied easement "where the easement across the land held in trust for the Band is also for the benefit of the Band." (*Id.* at 22.)

Here, we agree with the Tribal Court that an easement by necessity vested when the land constituting Lots 5 and 7 was severed. The route to the Cemetery across Lot 5 was necessary for Tribal members and others to access the Cemetery. We first address the law surrounding common law easements by necessity before addressing Appellants' two arguments.

3. *Common law easement by necessity*

"An easement implied by necessity is created when '(1) [there is] a separation of title; (2) the use of which gives rise to the easement shall have been so long continued and apparent as to show that it was intended to be permanent; and (3) that the easement is necessary to the beneficial enjoyment of the land granted.' . . . Except for the necessity requirement, these factors are only aids in determining whether an implied easement existed." *Magnuson v. Cossette*, 707 N.W.2d 738, 745 (Minn. Ct. App. 2006) (citations omitted).[21] The *Magnuson* court also discussed the nature of the necessity that may create an easement. "To be 'necessary,' an easement must be more than a mere convenience. . . . But 'the easement need not have been indispensable to be necessary; rather, a reasonable necessity at the time of severance is sufficient.' . . . Obstacles such as topography, houses, trees, zoning ordinances, or the need for extensive paving, may create conditions where an easement is necessary." *Id.* (citations omitted).

In *Magnuson*, respondent argued that a "haul road" from a marina through adjoining property was necessary to haul dredge spoils from the landlocked marina and therefore respondent had an easement by necessity across the haul road. Appellant argued that the marina could be accessed across other land or by water or ice, depending on the season. The landowner and respondent testified that "the haul road was reasonably necessary to conduct the dredging operations." *Id.* at 746. The court of appeals held that the district court "did not err in concluding that the easement was necessary." *Id.* The court of appeals noted that "the question is not whether there are hypothetical alternative routes available; it is whether the haul road was reasonably necessary." *Id.* at 746.

The Minnesota Court of Appeals has commented on proof necessary to find that a necessity exists, justifying this common law easement, in other cases. In *Holmes v. DeGrote*, No. CX-00-365, 2000 Minn. App. LEXIS 875, at *7 (Minn. Ct. App. Aug. 15, 2000), an easement of necessity was affirmed when

[21] The Tribal Court looks to Minnesota common law on easements. Leech Lake Band of Ojibwe Judicial Code, Part VII, Section 6.

"constructing an alternate driveway across the recorded easement would be impractical based on the placement of existing buildings and the presence of mature trees. Where prohibitively expensive construction of the felling of mature trees is necessary to build an alternative route, an easement for the existing route may remain reasonably necessary." An easement was granted when "[o]ther possible accesses [to a farm] were a ditch and a field. Access through the field would be virtually impossible in the winter and at times when the field is plowed or is muddy." *Storck v. Storck*, No. C9-98-1800, 1999 Minn. App. LEXIS 573, at *9 (Minn. Ct. App. May 25, 1999). When "steep terrain, fences, and buildings . . . prohibit safe ingress and egress," an easement was granted. *McCarthy v. Burke*, No. C8-95-1286, 1995 Minn. App. LEXIS 1420, *6 (Minn. Ct. App. Nov. 21, 1995). An easement was sustained when making alternative access would be "drastic and expensive." *Rosendahl v. Nelson*, 408 N.W.2d 609, 612 (Minn. Ct. App. 1987).

4. *Prince of Peace Lane was a necessary route to the Cemetery and the Band is entitled to an easement by necessity*

Appellants contend that the necessity of using Prince of Peace Lane to access the Cemetery ended in 2004, when Skip Finn granted the Band an easement along Seven Lakes Road on the east side of the Cemetery. Seven Lakes Road was another gravel road that connected to Prince of Peace Lane. *See* Fig. 1 and 2, *supra*, pp. 5-6. Seven Lakes Road allowed passage to properties north of the Cemetery. The record does not disclose when Seven Lakes Road was constructed. Appellants contend that the Band could construct an access from Seven Lakes Road to the Cemetery by clearing trees and "punching in" to the east side of the Cemetery from the Road.

We reject Appellants' argument that the necessity ended, thereby eliminating any existing easement by necessity, for two reasons. First, we agree with Minnesota law that "the use giving rise to an easement by implication of necessity [is considered] at the time of the severance." *Magnuson*, 707 N.W.2d at 746.[22] "A subsequent change of conditions after the severance cannot create or defeat an easement by implication." *Kleis v. Johnson*, 354 N.W.2d 609, 611 (Minn. Ct. App. 1984) (concluding that, because road over respondent's property was the only method of access at the time the parcel was severed, subsequent construction of a new road did not change appellant's entitlement to the easement). "[C]hanged conditions after severance will neither create nor defeat the easement." *Storck*, 1999 Minn. App. LEXIS 573 at *8. Thus, even if the granting of an easement in 2004 provided reasonable access to the Cemetery from Seven Lakes Road, that change in condition would not defeat the easement along Prince of Peace Lane established decades earlier.

Second, we conclude that even if the necessity must continue in order to sustain an easement by necessity, the Tribal Court's determination that "[t]he path to Prince of Peace Cemetery that became Prince of Peace Lane was, and is, the only way to access the cemetery"—and thus the necessity remained despite the possibility of access via Seven Lakes Road—is reasonably supported by the evidence and is not clearly erroneous. (Or. at FOF 20.)

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[22] Appellant cites one Minnesota case—*Bode v. Bode*, 494 N.W.2d 301 (Minn. Ct. App. 1992)—for the legal proposition that "an easement by necessity lasts only as long as the necessity." (App. Mem. at 10) *Bode* seems to be an outlier in light of several Minnesota court of appeals cases (cited above) that determine necessity at the time of severance and do not credit changed conditions to defeat an easement. The *Bode* language is also *dicta* in that, while the holder of the easement in the case received "offers to provide alternate access," the evidence did not establish any alternate routes and the court sustained the easement by necessity.

Minnesota courts have frequently compared a theoretical alternative route to the path over which an easement is sought to determine if the latter is "necessary." "To be 'necessary,' an easement must be more than a mere convenience. . . . But 'the easement need not have been indispensable to be necessary; rather, a reasonable necessity at the time of severance is sufficient.'" *Magnuson v. Cossette*, 707 N.W.2d 738, 745 (Minn. Ct. App. 2006) (citations omitted). Features such as "topography, houses, trees, zoning ordinances, or the need for extensive paving," *id.*, "the placement of existing buildings and the presence of mature trees," *Holmes*, 2000 Minn. App. LEXIS 875 at *7, "steep terrain, fences, and buildings," *McCarthy*, 1995 Minn. App. LEXIS 1420 at *6, and "drastic and expensive" construction, *Rosendahl*, 408 N.W.2d at 612, are cited by the courts as impediments to reasonable access by alternative routes making the easement route reasonable necessary.

The Tribal Court's findings relating to the infeasibility of the proposed alternative route via Seven Lakes Road are unchallenged by Appellant and supported by the evidence. These findings support the conclusion that Prince of Peace Lane remains "reasonably necessary" to access the Cemetery. In considering the alleged Seven Lakes Road access to the Cemetery, the Tribal Court found that "[t]here are unmarked graves . . . in the eastern portion of the Cemetery" near the proposed alternative access point, that "even foot travel risks disturbing those unmarked graves," that building an "alternative entrance to Prince of Peace Cemetery . . . would involve various federal agencies and the Tribal Historic Preservation Office," that studying whether alternative access was feasible would require "hiring a firm to conduct an examination of the area with ground-penetrating radar," that a feasibility study would cost "$2,000-$3,000 per day for the duration of weeks," that the Band "could only construct another entrance if there were no unmarked graves in the area, " and that any "construction would need to be constantly supervised." The Band would also have to remove trees on the east side of the Cemetery to access it from Seven Lakes Road. These impediments to Seven Lakes Road as an access point to the Cemetery support the conclusion that the Prince of Peace Lane route to the Cemetery remains reasonably necessary.

We next turn to Appellants' second argument, that an easement by necessity cannot be established while land is held in trust by the United States, absent its approval. We reject this argument for two alternative reasons. First, we conclude that Lots 5 and 7 were severed, and the necessity arose, in 1920 against Lot 5 when Lot 5 was conveyed *in fee* while Lot 7 was still held in trust. The United States had no interest or control over Lot 5, and its approval was not necessary. Lots 5 and 7 were held in trust for individual Indian allottees beginning in 1915 (Lot 7) and 1916 (Lot 5). But in 1920, Lot 5 was conveyed in fee to Quay Ke Gah Bow. Thus, as of 1920, Lot 5 was not subject to any restraints on alienation by the United States government. Because the portion of Prince of Peace Lane we are interested in here crossed fee land over which the United States government had no control or interest, statutory restraints on alienation have no application. No approval by the United States government was necessary. In 1920, an easement by necessity arose and was established against Quay Ke Gah Bow for the benefit of Mah Je Aun Quabe, the then-individual-allottee of Lot 7, on which the Cemetery sits. Absent its abandonment or extinguishment, subsequent owners took title to Lot 5 subject to that easement and it continued against subsequent owners.

Alternatively, even if Lots 5 and 7 were severed, and thus the necessity arose, in 1915 when Lot 7 was allotted in trust to Mah Je Aun Quabe, or in 1916, when Lot 5 was allotted in trust to Quay Ke Gah Bow, we are aware of no authority preventing an easement by necessity from arising against the United States and Quay Ke Gah Bow (Lot 5) in favor of Mah Je Aun Quabe (Lot 7). Appellants cite no statute or regulation that would prevent an easement by necessity from accruing against the United States under

the circumstances of this case. To the contrary, "[t]he doctrine of easement by necessity applies, generally, against the United States." *McFarland v. Kempthorne*, 545 F.3d 1106, 1111 (9th Cir. 2008).

Additionally, 25 U.S.C. § 323 and regulations related to it, and 48 U.S.C. § 1489, cited by Appellants to preclude vesting of an easement by necessity, were adopted decades after continuous use of the route by families and others to access the Cemetery and well after the land parcels were severed. *See Canadian St. Regis Band of Mohawk Indians v. New York*, No. 5:82-CV-0783 (Lead), 2013 U.S. Dist. LEXIS 94381, at *26 (N.D.N.Y. June 8, 2013) (concluding that 25 U.S.C. § 323 and another statute relating to rights-of-way for public highways across Indian lands were not applicable to a right-of-way for a public highway apparently acquired in 1818). They do not retroactively apply to an easement established years earlier.

Finally, although we reject the contention that federal approval was required to establish an easement by necessity, we have concluded elsewhere in this opinion that the United States implicitly approved of the route along Prince of Peace Lane by consistently mapping it, referring to it, using it, and maintaining it.[23]

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[23] The Tribal Court also concluded that "an easement by prescription exists because the Band and the public has [sic] openly, continuously, and notoriously used the route now known as Prince of Peace Lane for long over fifteen years." The Tribal Court excluded the period in which the route was used while the land was held in trust, but added together two non-contiguous periods of use while the land was held in fee status. Those periods – which exceed 15 years – were in 1920 ("4 months and 12 days") and from 2005 to 2020 ("14 years, 9 months and 20 days"). (Or. at ¶¶ 46-48.)

Appellants argue that periods of use while the land was held by the United States cannot be added to use against other owners. (App. Mem. at 14.) They also describe tacking of non-continuous periods as "odd," but do not otherwise strenuously challenge that aspect of the Tribal Court's analysis. (App. Mem. at 14.)

"A prescriptive easement grants a right to use the property of another based on prior continuous use by a party. To establish a prescriptive easement, the claimant must prove by clear and convincing evidence that the use of the property that is actual, open, continuous, exclusive, and hostile for the prescriptive period of 15 years. The 15-year period for prescriptive easements begins with the open, hostile, exclusive, and continuous use of another's property." *Magnuson v. Cossette*, 707 N.W.2d 738, 745 (Minn. Ct. App. 2006) (internal citations omitted).

It appears that a prescriptive period can run against different, subsequent landowners. *See, e.g., Zollinger v. Frank*, 175 P.2d 714, 718 (Utah Sup. Ct. 1946); *Durman v. Holland*, No. A-93-618, 1995 Neb. App. LEXIS 71, at *11-12 (Ct. App. Feb. 21, 1995) ("[T]he transfer of title from the previous titleholder to [the current owner] in 1977 did not interrupt or terminate the running of [the adverse possessor's] prescriptive period that commenced in 1975."); *Sevier v. Locher,* 222 Cal. App. 3d 1082, 272 Cal. Rptr. 287 (Cal. App. 1st Dist. 1990) (stating that subsequent purchaser acquired their grantors' title against which the prescriptive period was already running); *cf. Dozier v. Krmpotich*, 35 N.W.2d 696, 700 (Minn. 1949) (stating that granting of mortgage during prescriptive period does not interrupt use of adverse possessor).

However, we are aware of no authority allowing a prescriptive easement to vest against the United States or allowing the prescriptive period to run while land is held in trust by the United States. To the contrary, authority of which we are aware indicates that a prescriptive easement cannot vest, and the prescriptive period cannot run, while the land is held in trust by the United States. *Onieda Indian Nation v. Cty. of Oneida*, 434 F. Supp. 527, 542 (N.D.N.Y. 1977) ("Where the United States holds title to land in trust for Indians, adverse possession cannot run against the land.") (citing *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938)); *see also* 48 U.S.C. § 1489 ("[N]o prescription...shall run, or continue to run, against the title of the United States . . .; and no title to any such lands of the United States or any right therein shall be acquired by adverse possession or prescription .

Thus, we reject Appellants' arguments against an easement by necessity based on an alleged alternative feasible access to the Cemetery from Seven Lakes Road.

Conclusion

We conclude that the Band has established the existence of an easement by dedication and by necessity for use of Prince of Peace Lane across Appellants' properties. The Tribal Court's judgment is therefore affirmed.

Dated: August 15, 2025.

BY THE COURT:

George W. Soule

Lenor Scheffler Blaeser

Philomena Kebec

ATTEST:

Clerk of Court

8-18-2025
Date

. . ."). Under *Oneida*, because land held in trust is not alienable by the tribe or individual Indian beneficiaries, adverse possession, statutes of limitations, and laches defense do not run against them (or the government).434 F. Supp. at 542.

Additionally, we question whether non-contiguous time periods may be tacked together for purposes of establishing a prescriptive easement. "Successors-in-interest can tack together their periods of adverse possession to satisfy the statutory time limit [for adverse possession] if these periods are consecutive." *Wytaske v. Peterson*, No. C4-00-488, 2000 Minn. App. LEXIS 1186, at *7-8 (Minn. Ct. App. Nov. 28, 2000) (citing *Burns v. Plachecki*, 223 N.W.2d 133, 136 (Minn. 1974) (noting that prior alleged adverse possessor's use was not actually adverse, thus could not be tacked on)). In *Wytaske*, appellant's and a former owner's adverse possession were separated by a 14 year break during which the parcel's owner reasserted possession, thus the adverse possession was not continuous for the requisite 15 years. *Id.* at *9-10.

Finally, because we conclude elsewhere in this opinion that prior owners of Lot 5 and the United States government consented, albeit implicitly, to the route along Prince of Peace Lane, we question whether the "adversity" necessary to establish an easement by prescription exists. *See Hartman v. Blanding's, Inc.*, 181 N.W.2d 466, 469-470 (Minn. 1970) ("[W]here the user is permissive on the part of the owner, there can be no prescriptive right."). *But see Alstad v. Boyer*, 37 N.W.2d 372, 375-376 (Minn. 1949) (distinguishing acquiescence of servient owner from permission of servient owner for purposes of determining whether adversity necessary to establish easement by prescription exists). While we question the existence of an easement by prescription, we need not decide this issue because we conclude that an easement was created by dedication and by necessity.