

# State–Tribal Collaboration: Tribal Right to Create Laws

**As sovereign nations that predate the United States government, Tribal Nations have inherent rights confirmed by the U.S. Supreme Court, laws, treaties, and executive orders. This includes the right to determine their own form of government, define citizenship, regulate property and land use, make and enforce laws, and establish and maintain their own police force and courts.**

Tribal governments take many forms depending on the history and culture of the Tribe. Often there is a Tribal Council with additional committees to oversee Tribal operations. These entities can enact a Tribal law that is enforceable on Tribal land. Common Tribal laws include:

- Taxes
- Employment
- Gaming
- Law and order
- Child welfare
- Land use
- Regulation of hunting, fishing, grazing, mineral development, and water use
- Franchise/Utility Codes.

As sovereign nations, Tribes can regulate all economic activity on Tribal lands, including utility services such as electricity, natural gas, water, and broadband. While utilities—particularly investor-owned utilities—are typically regulated by state public service commissions, Tribal Nations can regulate utilities operating on Tribal land through Tribal law, including franchise agreements, and a Tribal utility authority. When Tribes exercise their rights to regulate utilities, the state public service commission no longer has jurisdiction over Tribal-regulated activities on Tribal land, unless there are utility or state incentives involved.

Franchise codes or agreements establish rules for utility operation including construction, operations and maintenance, and rights of way. Tribes can require a franchise fee, which is paid by the energy provider, and the cost is passed on to customers. Franchise codes can also require customer protections, including disconnection moratoriums, low-income programs, and emergency response standards. These codes affirm Tribal jurisdiction and sovereignty, and ensure Tribal consent is embedded in all utility operations on Tribal lands.

Tribal law can also govern rights of way. There is a long history regarding access, easements, and rights of way on Tribal lands. The General Allotment Act of March 3, 1901 (31 Stat. 1058)<sup>1</sup>, contained a provision that allowed the U.S. Department of Interior to grant rights of way on Tribal land for telephone and telegraph lines and offices and allowed for the condemnation of allotted lands under state or territorial laws. It was not until the 1948 Comprehensive Rights of Way Laws (25 U.S.C. § 323–328) that Tribal consent was required before granting right of

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<sup>1</sup> <https://iltf.org/land-issues/history/>

way on Tribal lands. This law stated that only the Secretary of the Interior can grant right of way on Tribal lands but that the Tribe must consent, typically through an easement agreement.

Federal agencies still play a large role in rights of way on Tribal lands. The U.S. Bureau of Indian Affairs approves and provides oversight while Federal Energy Regulatory Commission has jurisdiction over transmission right of way. Additionally, Tribal Utilities that participate in RTOs and/or ISOs will have to adhere to that entities structure. A 2016 federal rule<sup>2</sup> clarified that a right of way is not a transfer of all the real property or jurisdiction. Thus, the Tribe retains jurisdiction over the lands involved and retains regulatory, cultural, and environmental authority over the rights of way. This rule also clarified all service line agreements stating that U.S. Bureau of Indian Affairs approval was not needed for these agreements and they should be used for the last mile connection on utility service.

Tribal law may also include trespass codes that establish clear rules for accessing Tribal property. These codes can cover recreational users, off-road vehicles, and unauthorized resource extraction as well as encroachment by utilities. They protect Tribal lands from unlawful use, reinforce the Tribe's jurisdiction, and provide a tool for asserting control in right-of-way disputes and may include fines, penalties, and injunctions enforced by Tribal court.

As described, Tribes have jurisdiction over creating laws to define their citizenship, regulate property and land use, make and enforce laws, and establish and maintain their own policy force and courts. States are encouraged to work directly with Tribes to understand the Tribes legal basis and to better collaborate together.

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<sup>2</sup> 23 CFR Parts 635, 710, and 810

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