

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

ORDINANCE #01/16

RIGHT OF WAY ORDINANCE

Approved by Resolution #1317/16 of the Fond du Lac Reservation Business Committee on September 20, 2016.

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**CHAPTER 1
AUTHORITY; PURPOSE; SCOPE**

Section 101 Authority

This Ordinance is enacted by the Fond du Lac Reservation Business Committee pursuant to the inherent sovereign authority of the Fond du Lac Band of Lake Superior Chippewa, as reserved under the Treaty of LaPointe, 10 Stat. 1109, and as recognized under Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476; under Article VI of the Revised Constitution of the Minnesota Chippewa Tribe; under the Reservation Business Committee Bylaws, Fond du Lac Ordinance #01/64; and under the common law of the United States.

Section 102 Purpose

The purpose of this Ordinance is to establish a fair, practical, and transparent process for:

- a. requesting necessary consent for rights of way over Indian Land and Tribal Unrestricted Fee Land within the Reservation;
- b. reviewing and rendering decisions on such requests; and
- c. enforcing right-of-way trespasses.

Section 103 Scope

This Ordinance applies to all persons or entities:

- a. seeking rights of way over Indian Land or Tribal Unrestricted Fee Land within the Reservation;
- b. holding existing rights of way over Indian Land or Tribal Unrestricted Fee Land within the Reservation;
- c. or operating without a required right of way over Indian Lands or Tribal Unrestricted Fee Land within the Reservation.

Section 104 Reservation of Rights

The RBC reserves the right to amend or repeal all or any part of this Ordinance at any time. All the rights, privileges, and immunities conferred by this Ordinance or by acts done pursuant to this Ordinance shall exist subject to the powers of the Band. Nothing in this Ordinance shall be construed to constitute a waiver of the sovereign immunity of the Band or a consent to jurisdiction by any government or forum not expressly authorized to exercise jurisdiction under this Ordinance.

**CHAPTER 2
DEFINITIONS**

Section 201 Definitions

For the purposes of this Ordinance, the following definitions shall apply:

- a. **“BIA Land”** means any tract, or interest therein, in which the surface estate is owned and administered by the BIA, not including Indian land.
- b. **“Fond du Lac Band” or “Band”** means the Fond du Lac Band of Lake Superior Chippewa, a federally recognized Indian tribe.
- c. **“Indian Land”** means Individually Owned Indian Land and Tribal Land as defined herein. This term includes all types of land held in trust or other restricted status by the federal government on behalf of either individual Indians or a tribe.
- d. **“Individually Owned Indian Land”** means any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more individual Indians in trust or restricted status.
- e. **“Fond du Lac Reservation” or “Reservation”** means the historical land base of the Fond du Lac Band as set aside under Article 2 of the Treaty of LaPointe, 10 Stat. 1109, and any lands outside of those boundaries that were subsequently acquired in trust for the Band.
- f. **“Reservation Business Committee” or “RBC”** means the duly elected Reservation Business Committee of the Fond du Lac Band established pursuant to Article III, Section 2 of the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe and recognized by the Tribal Executive Committee of the Minnesota Chippewa Tribe as the lawful governing body of the Band.
- g. **“Right(s) of way”** means an easement or a legal right to go over or across Tribal Land, Individually Owned Indian Land, BIA Land, or Tribal Unrestricted Fee Land for a specific purpose, including but not limited to building and operating a line or road. This term may also refer to the land subject to the grant of right of way; however, in all cases, title to the land remains vested in the landowner. This term does not include service lines.
- h. **“Tribal Court”** means the Fond du Lac Band of Lake Superior Chippewa Tribal Court.

- i. **“Tribal Land”** means any tract in which the surface estate, or an undivided interest in the surface estate, is owned by the Band or by the Minnesota Chippewa Tribe in trust or restricted status. The term also includes the surface estate of lands held in trust for the Band but reserved for BIA administrative purposes and includes the surface estate of lands held in trust for an Indian corporation chartered under section 17 of the Indian Reorganization Act of 1934 (25 U.S.C. 477).

- j. **“Tribal Unrestricted Fee Land”** means any tract in which the surface estate or an interest in the surface estate is owned by the Band in fee simple absolute and located within the Reservation.

CHAPTER 3 CONSENT FOR RIGHTS OF WAY

Section 301 Tribal or Individual Indian Landowner Consent Required

Applicants seeking a right of way over Indian Land within the Reservation must obtain the necessary consent from the Band and/or individual landowners as required by 25 C.F.R. § 169.107 as a condition of obtaining such right of way. Applicants seeking a right of way over Tribal Unrestricted Fee Land within the Reservation must also obtain consent of the Band.

Section 302 Procedure for Acquisition of Tribal Consent for Rights of Way within Tribal Land

Applicants seeking a right of way across Tribal Land must obtain consent from the RBC or its designee, in the form of a written tribal authorization and written agreement, to a grant of right of way across Tribal Land. As a condition of obtaining such consent, all applicants seeking a right of way over Tribal Land shall use the following procedure:

- a. Before filing an application as discussed in subsection b, applicants must first contact the RBC or its designee to discuss the proposed application, disclose proposed project features and schedule, propose right-of-way terms, and request permission to perform any preliminary survey or other work that requires entry onto the Reservation.
- b. A duplicate application for right of way over Tribal Land as prescribed by Title 25, Part 169 of the Code of Federal Regulations shall be filed with the RBC or its designee, along with the proposed nature and amount of compensation to the Band. Such Application shall be accompanied by all necessary environmental and archaeological reports, surveys, and site assessments, as needed to facilitate compliance with applicable environmental and land use requirements of the Band.
- c. The RBC or its designee will review the application, and the amount and nature of proposed compensation, and will either deny the application if it fails to satisfy the requirements of Subparagraph a, make a request to the applicant that any additional information reasonably necessary for its review be submitted within a designated time period, or will inform the applicant that the application is adequate for consideration.
- d. Upon receipt of all requested information, the RBC or its designee will review the application and decide whether to accept the application under the terms proposed by the applicant, deny the application, or negotiate directly with the applicant.

- e. If the RBC or its designee accepts the application as submitted or after further negotiations with the applicant, the RBC or its designee shall provide its consent to the right of way to the United States Department of the Interior pursuant to federal regulations in the form of a written tribal authorization and agreement.

Section 303 Procedure for Acquisition of Tribal Consent for Rights of Way within Tribal Unrestricted Fee Land

Applicants seeking a right of way across Tribal Unrestricted Fee Land must obtain consent from the RBC or its designee, in the form of a written tribal authorization and written agreement, to a grant of right of way across Tribal Unrestricted Fee Land. As a condition of obtaining such consent, all applicants shall file with the RBC or its designee an application that includes the information set forth in 25 C.F.R. § 169.102(a), the proposed nature and amount of compensation to the Band, and any additional information the RBC or its designee may require in its discretion. The RBC will review the Application and decide whether to accept the Application under the terms proposed by the applicant, deny the Application, or take other appropriate action.

Section 304 Terms, Conditions, and Valuation of Rights of Way over Tribal Lands & Tribal Unrestricted Fee Lands

In its discretion, the RBC or its designee may negotiate:

- a. the nature and amount of compensation the Band shall require in exchange for its consent to a right of way over Tribal Land;
- b. a right-of-way term that is reasonable in the view of the Band; and
- c. any other restrictions or conditions as prerequisites to consent for a right of way, including the conditions listed in Chapter 5 of this Ordinance, with any such restrictions or conditions to automatically become part of the right-of-way grant if included in a consent document or tribal resolution authorizing consent.

Section 305 Notice of Intent to Seek Right of Way Over Individually Owned Indian Lands

A person or entity must provide advance notice to the RBC or its designee of its intent to submit an Application to the federal government for a right of way over Individually Owned Indian Land within the Reservation. The Band may also require applicants to submit such Applications in duplicate to the Band. The person or entity must also contact the RBC or its designee before entering the Reservation to perform any preliminary survey or other work that requires entry onto the Reservation. Individual Indian landowners (“allottees”) may in their discretion provide or withhold consent for a right-of-way grant unless the BIA determines that consent is not required. Upon request, the RBC or its designee in its discretion may

provide assistance to one or more allottees pertaining to a right of way sought over Individually Owned Indian Land.

Section 306 Delegation of RBC Duties

The RBC may delegate any of the duties set forth in this Ordinance to the Band's Land Use Committee or other body. The RBC may also promulgate regulations governing the scope, procedures, and limitations of such delegation.

CHAPTER 4
TRESPASS ENFORCEMENT

Section 401 Right-of-Way Trespass Defined

A right-of-way trespass occurs when:

- a. an individual or entity takes possession of, or uses, Indian Land or BIA Land within the Reservation without a right of way and a right of way is required under federal law;
- b. an individual or entity takes possession of, or uses Tribal Unrestricted Fee Land within the Reservation without a right of way;
- c. an individual or entity engages in unauthorized use within or action over an existing right of way; or
- d. an individual or entity engages in some other action defined as a trespass under federal regulations governing rights of way over Indian Lands.

Section 402 Trespass Enforcement Actions

In the event of a right-of-way trespass, the Band or individual landowner(s) holding an interest in the lands over which the trespass has occurred or is occurring may, without limitation:

- a. bring an action in Tribal Court to recover possession and/or damages, including through an eviction action, and may pursue any additional remedies available under Band law (except as otherwise prohibited by federal law);
- b. in the case of a trespass on Indian Lands, contact the BIA office with jurisdiction over the Indian Lands and request that the office take enforcement action on behalf of the Band or Indian landowners as consistent with 25 C.F.R. § 169.413;
- c. in the case of a trespass on Indian Lands, bring a trespass action in federal court as provided under federal law; and/or
- d. in the case of a trespass over Individually Owned Indian Lands, submit a request to the RBC or its designee that the Band initiate an action in Tribal Court on their behalf in lieu of bringing a trespass action in Tribal Court themselves. The RBC or its designee shall review such request and determine whether the Band should initiate such action on behalf of the landowner(s).

Section 403 Trespass to Agricultural and Forest Lands

- a. The Tribal Court has jurisdiction over civil actions brought by the Band or the United States for trespass to agricultural land or forest land on the Reservation under Sections 301 and 401 of the Band's Agricultural and Forest Land Trespass Ordinance.

CHAPTER 5
ADDITIONAL DUTIES AND RESPONSIBILITIES

Section 501 Incorporation of Terms and Conditions into Right-of-Way Documents

In negotiating restrictions or conditions as prerequisites to consent for a right of way as provided under Section 304 of this Ordinance, the RBC or its designee may incorporate the restrictions and conditions listed in Sections 502-505 of this Ordinance as part of the right-of-way grant by including such conditions and restrictions, or any combination of them, in the consent document or tribal resolution authorizing consent.

Section 502 Compliance with Federal Laws and Regulations

All persons or entities must comply with federal statutes and regulations governing rights of way over Indian Lands on the Reservation where applicable. Nothing in this Ordinance shall be construed to alter or diminish a person or entity's obligation to comply with federal law and regulations governing rights of way over Indian Land.

Section 503 Utilities' Inventory of Real Property Rights and Rights of Way

At the request of the RBC, all Utilities operating on the Reservation shall file with the RBC or its designee an inventory of all real property rights the Utility owns, has an interest in, or purports to own or have an interest in on the Reservation, including a copy of the documents transferring the real property interests. This includes an inventory of all rights of way the Utility has obtained within the Reservation, where those rights of way are located, and maps identifying such locations.

The term Utilities ("Utility" or "Utilities") includes any person, corporation or other legal entity, its lessee, trustee, and receiver, now or hereafter located, operating or providing services within the Reservation, or maintaining or controlling within the Reservation equipment or facilities for furnishing of telecommunications services; pipelines/bulk storage utilities engaged in the transportation or distribution of gas, oil, coal, wind, solar, geo-thermal, waste water, minerals and water; electric utilities engaged in the generation and distribution of light, heat, or power; gas utilities engaged in the distribution of natural, synthetic, or artificial gas, whether by pipeline or bulk distribution to storage tanks; water companies for the storage and distribution of water for domestic or other beneficial use; heating utilities engaged in the distribution of heat; and all other utilities which operate, maintain, or control any equipment or facilities within the Reservation.

Any records filed with the RBC or its designee from any Utility which contain valuable commercial information, including trade secrets or confidential marketing, costs, or financial information, or customer-specific usage and network configuration and design information, shall not be subject to inspection or copying by the public if disclosure would result in private loss,

including an unfair competitive disadvantage. When providing information to the RBC or its designee, a person shall designate which records or portions of records contain valuable commercial information and provide an explanation for the request for confidentiality. Nothing in this Section shall prevent the use of reasonable non-disclosure agreements by the RBC or its designee governing disclosure of proprietary or confidential information.

Section 504 Notice of Maintenance or Repair

All holders of rights of way within the Reservation shall give notice to the RBC or its designee prior to entering the Reservation for significant maintenance or repair purposes, or as otherwise required under applicable Tribal law and agreements. Significant maintenance or repair includes non-emergency projects that have the potential to disrupt services or residents' peaceful enjoyment of their property, or damage the environment. Such notice shall include a description of the maintenance to be performed and the timeline for the procedures. In the case of an emergency, best efforts shall be made to provide such notice.

Section 505 Service Line Agreements.

Before accessing Indian Lands on the Reservation for the purposes of constructing a service line, persons or entities must execute a service line agreement with the interest holder(s), providing a copy to the RBC, and comply with all other legal requirements set forth in 25 C.F.R. Part 169, Subpart B. The RBC may in its discretion promulgate regulations governing a simplified application process for entering into service line agreements with the Band.

CHAPTER 6
EFFECTIVE DATE; AMENDMENTS; SEVERABILITY

Section 501 Effective Date

The provisions of this Ordinance shall become effective immediately upon adoption by the Reservation Business Committee.

Section 502 Amendment or Recission

The Reservation Business Committee may amend this Ordinance as it deems necessary to protect the public health, safety and welfare of the Fond du Lac Reservation. The provisions of this Ordinance may be amended by resolution of the Reservation Business Committee.

Section 503 Severability

If any section, provision, or portion of this Ordinance is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this Ordinance will not be affected thereby.

CERTIFICATION

We do hereby certify that the foregoing Ordinance #01/16 was duly presented and adopted by Resolution #1317/16 by a vote of 3 for, 0 against, 0 silent, with a quorum of 4 being present at a Special Meeting of the Fond du Lac Reservation Business Committee held on September 20, 2016, on the Fond du Lac Reservation.



Kevin R. Dupuis, Sr.
Chairwoman



Ferdinand Martineau, Jr.
Secretary/Treasurer

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