07-1564

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Chad Dennis Nord, Dennis Nord,
d/b/a Nord Trucking,

Plaintiffs-Appellees,

v.

Donald Kelly,
Red Lake Nation Tribal Court,

Defendants-Appellants.

On Appeal from the District Court
for the District of Minnesota

The Honorable Patrick J. Schiltz
District Judge

D.C. No. 05-CV-01135 PJS/RLE

APPELLANTS' OPENING BRIEF

Respectfully submitted,

THOMAS J. PECKHAM
ALAN R. TARADASH
DOREEN N. HOBSON
RODINA C. CAVE
JENNIFER J. DUMAS
Nordhaus Law Firm, LLP
405 Dr. Martin Luther King Jr. Ave. NE
Albuquerque, NM 87102
telephone: 505-245-4275
facsimile: 505-243-4464

Attorneys for Red Lake Nation Tribal Court

GARY M. HAZELTON
Hazelton Law Firm PLLC
677 Anne Street, Suite B
P.O. Box 1248
Bemdji MN 56619-1248
telephone: 218-444-4529
facsimile: 218-755-1747

Attorney for Donald Michael Kelly

SUMMARY OF THE CASE

Chad Nord, a non-Indian, was driving a semi-truck on Minnesota Highway 1 and 89 within the Red Lake Indian Reservation when he rear-ended Donald Kelly's car. Kelly, a Red Lake Nation member, suffered injuries and filed a personal-injury action in the Red Lake Nation Tribal Court. The Nords filed a motion to dismiss for lack of jurisdiction. The Nords also filed an action in the District Court requesting declaratory and injunctive relief and alleging that the Tribal Court did not have jurisdiction to hear the matter against the Nords. The Tribal Court determined that it had jurisdiction over the matter, and the Tribal Appellate Court affirmed. During the Tribal Court appellate process, the parties stipulated to stay the action in District Court until the Tribal Court appeal was resolved. The parties returned to the district court action when the stay ended. The District Court refused the Tribal Court's request for additional time to conduct discovery under Rule 56(f) and granted the Nords' motion for summary judgment. The District Court held that the Tribal Court did not have jurisdiction over the matter because the accident occurred on a validly granted right-of-way and that the right-of-way was the equivalent of non-Indian fee land. The Tribal Court requests thirty (30) minutes for oral argument because of the complexity of issues involved in this case and notes that oral argument in the district court took more than fifty-four (54) minutes.

CORPORATE DISCLOSURE STATEMENT

Neither the Red Lake Nation Tribal Court, a part of the government of the Red Lake Band of Chippewa Indians, a federally recognized Indian tribe, nor Donald Michael Kelly, an individual, must make such a disclosure.

TABLE OF CONTENTS

SUMMARY OF THE CASE 2

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES vi

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 6

SUMMARY OF ARGUMENT 7

ARGUMENT 10

I. THE DISTRICT COURT INCORRECTLY CONCLUDED THAT UNDER *STRATE,* ANY RIGHT-OF-WAY NECESSARILY DIVESTS A TRIBE OF ITS INHERENT AUTHORITY TO REGULATE NONMEMBER CONDUCT ON TRIBAL TRUST LANDS 10

A. Standard of Review 12

B. The Reasoning of the *Strate* Court Cannot Support a Categorical Interpretation of Its Holding 13

1. While *Strate* Does Contain Facially Categorical Language, Its Reasoning Supports a Fact-Based Analysis in Appropriate Cases 14

2. That the Supreme Court Foresaw Categorical Application of the *Strate* Rule In Some Instances Does Not Foreclose

Fact-Specific Application of the *Strate* Rule in Appropriate Cases 17

3. Other Courts Have Engaged in Fact-Specific Analysis Under *Strate* 18

C. Categorical Application of the Supreme Court's Decision in *Strate* Would Be Unjust 20

D. Categorical Application of the Supreme Court's Decision in *Strate* Would Impair Productive Government-to-Government Negotiations Between Tribes and States 22

E. The Nature of Any Right-of-Way Here Supports Tribal Court Jurisdiction in this Case 23

1. The Actions and Testimony of the State and the Band Indicate Clearly that Neither Believed that General Civil Governmental Authority was Transferred to the State by any Right-of-Way 24

2. Stipulation (e) to the State's Application Reserves Governmental Authority to the Band, and Its Tribal Court . . 32

3. The History and Course of Performance Make It Clear that the State Did Not Receive Any "Right-of-Way" Sufficient to Divest the Band of Jurisdiction over the Accident at Issue 34

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE NORDS BECAUSE THE TRIBAL COURT WAS ENTITLED TO ADDITIONAL DISCOVERY UNDER FED. R. CIV. R. 56(F) AND HAS NOT YET HAD THE OPPORTUNITY TO CONDUCT ADEQUATE DISCOVERY 35

A. Additional Discovery Would Have Led to Evidence Regarding the Course of Performance of the Parties with Respect to the Highway, and That There Was No Intent to Transfer Jurisdiction over Any Right-of-Way 42

B. Additional Discovery Would Have Led to Necessary Evidence Regarding Whether the Two *Montana* Exceptions Apply 43

1. The Tribal Court should have been afforded an opportunity to develop evidence regarding the consensual relationship between Nord Trucking and the Band 43

2. The Tribal Court Should Be Afforded an Opportunity to Develop Evidence Regarding the Threat That Nord Trucking's Conduct Poses to the Tribe's Political Integrity, Economic Security, and Health or Welfare 45

III. THE DISTRICT COURT INCORRECTLY HELD THAT A VALID RIGHT-OF-WAY IS IN FORCE FOR THE STRETCH OF HIGHWAY ON WHICH THE ACCIDENT OCCURRED AND THAT THE RIGHT-OF-WAY CANNOT BE CHALLENGED IN THIS PROCEEDING 46

A. The Purported Right-of-Way is Void for Failure of Lawful Approval Pursuant to the Governing Regulations 46

1. The State's Application for the Right-of-Way, and the BIA's approval were defective, and did not create a lawful right-of-way 48

2. The District Court Incorrectly and Without Authority Held That the Right-of-Way Drafting Requirements as Set out by the Applicable Regulations Were Unimportant, and That the Incomplete Application Satisfied All of the Requirements 50

3. The Right-of-Way is Void Because the State's Interest in the Right-of-Way Did Not Vest Without Valid Federal Approval 54

B. The Purported Right-of-Way Was Void Ab Initio and Thus Never Existed 57

1. It is absurd to expect the Tribe to challenge an interest in property that is void 57

2. Any State Reliance or Past Compensation on the Purported Right-of-Way Does Not Create Something That Did Not Exist in the First Place 58

CONCLUSION 60

TABLE OF AUTHORITIES

CASES

Allan Block Corp. v. County Materials Corp., 239 FRD 523 (W.D.Wisc. 2006) 50

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 37

Applied Companies. v. Harvey, 456 F.3d 1380 (Fed. Cir. 2006) 47

Bass v. SBC Communications, Inc., 418 F.3d 870 (8th Cir. 2005) 12

Boxx v. Long Warrior, 265 F.3d 771 (9th Cir. 2001), *cert. denied* 535 U.S. 1034 (2002) 19

Brecht v. Abrahamson, 507 U.S. 619 (1993) 15

Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390 (Minn. 1998) 50

Bunch v. Cole, 263 U.S. 250 (1923) 59

Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999) 19

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 36

Comm'r of Taxation v. Brun, 174 N.W.2d 120 (Minn. 1970) 28, 45

Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004) 15

County of Beltrami v. County of Hennepin, 119 N.W.2d 25 (1963) 29

Dep.'t of Trans. v. King, 191 F.3d 1108 (9th Cir. 1999) 19

Duncan Energy Co. v. Three Affiliated Tribes of the Ft. Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994) 1, 6

Gray v. Johnson, 395 F.2d 533 (10th Cir. 1968) 55, 56

Hwy. 7 Embers, Inc. v. NW Nat'l Bank, 256 N.W.2d 271 (Minn. 1977) 22

Iverson v. Johnson Gas Appliance Co., 172 F3d. 524 (8th Cir. 1999) 12, 37

Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550 (10th Cir. 1993) 37

Johnson v. Buckley, 356 F.3d 1067 (9th Cir. 2004) 47

Johnson v. McIntosh, 21 U.S. 543 (1823) 54

Kleinheider v. Phillips Pipe Line Co., 528 F.2d 837 (8th Cir. 1975) 16, 24

Lamb Eng'g & Const. v. Nebraska Pub. Power, 103 F.3d 1422 (8th Cir. 1997) 47

Lambert v. Rocky Mountain Reg'l Dir., 43 IBIA 121 (2006) 58

Leech Lake Tribal Council v. Washington Nat'l Ins. Co., 227 F.3d 1054 (8th Cir. 2000) 13

McDonald v. Means, 309 F.3d 530 (9th Cir. 2002) 19

Montana v. United States, 450 U.S. 544 (1981) 11, 12, 43

Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978) 40

Red Lake Band of Chippewa Indians v. Minnesota, 248 N.W.2d 722 (Minn. 1976) 30

Robinson v. Terex Corp., 439 F.3d 465 (8th Cir. 2006) 37

Sangre De Cristo Dev. Co., Inc. v. United States, 932 F.2d 891 (10th Cir. 1991) 54, 55

Scherger v. N. Natural Gas Co., 575 N.W.2d 578 (Minn. 1998) 22

Seneca-Cayuga Tribe v. Nat'l Indian Gaming Comm'n, 327 F.3d 1019 (10th Cir. 2003) 47

Sigana v. Bailey, 164 N.W.2d 886 (Minn. 1969) 4

Smith v. McCullough, 270 U.S. 456 (1926) 59

State v. Manypenny, 662 N.W.2d 183 (Minn. Ct. App. 2003) 21

State v. Waters, 971 P.2d 538 (Wash. Ct. App. 1999) 21

Strate v. A-1 Contractors, 520 U.S. 438 (1997) . . . . . *passim*

United States v. Basin Elec. Power Co-op, 248 F.3d 781 (8th Cir. 2001) 24

United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952) 15

United States v. Norris, ___ F.3d ___, 2007 WL 1174862 (8th Cir. Apr. 23, 2007) 15

United States v. S. Pac. Transp. Co., 543 F.2d 676 (9th Cir. 1976) 54, 57-59

W. Oil Field, Inc. v. Pennzoil United, Inc., 421 F.2d 387 (5th Cir. 1970) 50

Watkins v. Nat'l Transp. Safety Bd., 178 F.3d 959 (8th Cir. 1999) 12

Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997) 19

STATUTES

25 U.S.C. § 177 . . . . . 54, 59

25 U.S.C. § 324 . . . . . 20, 25

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

Minn. Stat. § 403.113, subd. 2(1) 28

Minn. Stat. § 97A.505, subd. 3b 28

Pub. L. No. 83-280, 67 Stat. 588 (codified in part at 28 U.S.C. § 1360) 29

OTHER AUTHORITIES

25 C.F.R. § 256.16 (1951) 48

25 C.F.R. § 256.3 (1951) 25

25 C.F.R. § 256.7 (1951) 32, 33, 50, 51

25 C.F.R. § 256.7 (1951) 48, 52, 53

Black's Law Dictionary (7th ed. 1999) 52

Cohen's Handbook of Federal Indian Law
(Nell Jessup Newton *et al*., eds.) (2005 ed.) 21, 54

Fed. R. Civ. P. 56(c) 12

Fed. R. Civ. P. 56(f) 2

Restatement (Second) of Contracts § 203 (1981) 50

Restatement (Third) of Property: Servitudes § 4.1 (2000) 16, 22

S. Rep. No. 83-699, *reprinted in* 1953 U.S.C.C.A.N. 2409 29

JURISDICTIONAL STATEMENT

This appeal is from the United States District Court for the District of Minnesota, which properly took jurisdiction under 28 U.S.C. § 1331 because a tribal court's determination of its own jurisdiction is a question of federal law. *Duncan Energy Co. v. Three Affiliated Tribes of the Ft. Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994). The District Court entered a final judgment on all claims on January 31, 2007. Addendum ("A##") 16-17. Defendant filed a timely notice of appeal on March 2, 2007. This Court therefore has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in its interpretation of *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), including the District Court's conclusion that "[i]f the federal government has granted any kind of a right-of-way over reservation land, the tribal court may not exercise jurisdiction over claims against nonmembers arising out of automobile accidents that occur on that land, unless one of the *Montana* exceptions applies," where evidence submitted to the court (and additional evidence that might have been submitted had the court permitted Rule 56(f) discovery) showed that history of any right-of-way was consistent with the exercise of civil jurisdiction by the Tribal Court over a nonmember in an action involving a member.

Strate v. A-1 Contractors, 520 U.S. 438 (1997)

Montana v. United States, 450 U.S. 544 (1981)

Kleinheider v. Phillips Pipe Line Co., 528 F.2d 837 (8th Cir. 1975)

2. Whether the District Court erred in denying Appellant Tribal Court's motion for discovery under Fed. R. Civ. P. 56(f), and instead granting Appellees' Motion for Summary Judgment, where the Tribal Court had not, under the unusual procedural circumstances of the interrelated tribal and federal cases. had an adequate opportunity to conduct discovery on the right-of-way at issue, the State's treatment of the Red Lake Reservation generally, the course of performance of the parties to that right-of-way since its alleged inception, the Appellees' use of that right-of-way, and related matters.

Fed. R. Civ. P. 56(f)

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)

Robinson v. Terex Corp., 439 F.3d 465 (8th Cir. 2006)

3. Whether the District Court erred in holding that a valid right-of-way is in force, and cannot be challenged, for the site on which the accident occurred where, among other inadequacies, the State of Minnesota failed to "expressly agree[]" to all five stipulations required by regulation for an Indian land right-of-way application.

United States v. S. Pac. Transp. Co., 543 F.2d 676 (9th Cir. 1976)

Sangre de Cristo Dev. Co. v. United States, 932 F.2d 891 (10th Cir. 1991)

Gray v. Johnson, 395 F.2d 533 (10th Cir. 1968)

25 C.F.R. Part 256 (1951)

STATEMENT OF THE CASE

On September 12, 2001, Defendant-Appellant, Donald Michael Kelly ("Kelly"), a Red Lake Nation Member, brought a personal injury action in Red Lake Tribal Court[1] against Chad Dennis Nord and Dennis Nord d/b/a Nord Trucking ("Nords") for injuries sustained when Chad Dennis Nord rear-ended his car with a semi-truck owned by Nord Trucking. Joint Appendix ("JA") 0238-40; A02-03. The Nords filed a motion to dismiss for lack of jurisdiction in the Tribal Court on October 30, 2003. *See* A03. The Nords conducted some discovery in the Tribal Court. *See* JA0133-40. Before the Tribal Court ruled, the Nords filed an action in the District Court for the District of Minnesota requesting a declaratory judgment that the Tribal Court did not have jurisdiction to hear the matter against the Nords. On September 28, 2005, the Tribal Court ruled that it has jurisdiction over Kelly's complaint because it resulted from an automobile accident on the Reservation. JA0100. The Tribal Court based its decision, in part, on its finding

[1] The Red Lake Nation, or Red Lake Band of Chippewa Indians, is referred to herein as the "Band" or "Tribe".

that the Nords failed to establish the existence of any grant of right-of-way divesting the Red Lake Band of jurisdiction over the portion of the highway at issue. JA0101 ¶¶ 8-9, 0107-08. As noted in the Tribal Court's Order, in making its determination, the Court carefully considered the evidence presented by the Nords but concluded that "[n]othing in these documents constitutes evidence that a right of way was in fact granted for the location at issue," JA0101, and contrasted that lack of an instrument granting a right-of-way with the grant of right-of-way in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

The Tribal Court also referred to a Minnesota Supreme Court case, *Sigana v. Bailey*, 164 N.W.2d 886, 888, 891 (Minn. 1969), that had previously considered the status of the same highway at issue here (although a different section) and found that there was "no evidence in the record that the [Minnesota] Department of Highways has ever acquired a right-of-way." JA0107-08.

The Nords appealed, and the parties stipulated on October 25, 2005 to stay the action in District Court until the Tribal Court appeal was resolved. On February 2, 2006, the Red Lake Court of Appeals affirmed the decision of the Tribal Court and adopted the Tribal Court's decision in its entirety. JA0116-17.

The stay in the District Court ended on February 6, 2006. On March 27, 2006, the Tribal Court filed a Motion to Dismiss with Prejudice or Alternative Motion to Limit Evidence to be Presented to the Federal court. JA0006. On

March 29, 2006, the Tribal Court moved to stay discovery pending resolution of its Motion to Dismiss, since that motion was premised on the principle that the District Court should not hear new evidence. On April 7, 2006, the Nords filed a Motion for Summary Judgment. JA0007. The Magistrate Judge conducted a telephonic hearing on April 13, 2006 and on April 17, 2006 granted "the Tribal Court's Motion to Stay Discovery until resolution of the dispositive Motions is granted, except as to the production of the transcripts of the proceedings before the Red Lake Court of Appeals."[2] JA0008-09.

The District Court continued, from May 22, 2006 to June 5, 2006, the hearing scheduled to consider all pending motions. Before that hearing was held but after all briefing was completed, Judge Schiltz was sworn in and was assigned this case on June 1, 2006. On July 28, 2006, the District Court heard oral argument on the Tribal Court's motions and the Nords' Motion for Summary Judgment. Transcript, JA0241-79.

On January 31, 2007, the District Court issued its decision denying the Tribal Court's motions and granting the Nords' Motion for Summary Judgment. A01-17. The judgment granting declaratory relief and injunctive relief for the

[2] From the Magistrate Judge's Minute Order, it is apparent that the Tribal Court did not successfully convey that it would need to conduct discovery if the District Court determined that new evidence would be considered, a central issue in the Tribal Court's motion pending at that time.

Nords against further proceedings in the Tribal Court followed on February 1, 2007. This timely appeal followed.

STATEMENT OF THE FACTS

On December 16, 2000, Chad Nord was driving a semi-truck on Minnesota Highway 1 and 89 within the Red Lake Indian Reservation when he rear-ended Defendant Donald Kelly's car. A02, JA0238; JA0100-01.[3] Kelly, a Red Lake Nation member, was preparing to make a left turn into the driveway of his friend on the Reservation, JA0103, when the Nords' truck struck him from behind. JA0134. Beltrami County dispatch informed the Red Lake Nation's Department of Public Safety (hereinafter "Tribal Police Department") about the accident, and the Tribal Police Department, Red Lake Nation Law Enforcement Services, and the Red Lake Ambulance Service responded to the reported accident. Neither County nor State of Minnesota officials responded. Kelly was transported to the Red Lake Hospital Emergency Room where he was treated. JA0128. Kelly thereafter filed a personal-injury action in the Tribal Court for "at least $250,000." JA0238-40.

[3] Facts contained in the District Court opinion and those that are undisputed do not contain references to the record. Where relevant, federal courts review a tribal court's determination of fact under a clearly erroneous standard. *See Duncan Energy Co.*, 27 F.3d at 1300 (8th Cir. 1994).

SUMMARY OF ARGUMENT

The District Court erred in concluding that all state highway rights-of-way across tribal trust lands are created equal for purposes of tribal court jurisdiction over an action brought by a tribal member against a nonmember arising out of an accident on such a right-of-way. The District Court read *Strate v. A-1 Contractors,* 520 U.S. 438 (1997), as creating a such a categorical rule.

The District Court's interpretation should be reversed for several reasons. First, it is inconsistent with the analysis of the *Strate* Court itself. The Supreme Court engaged in a detailed examination of the specific grant of right-of-way at issue in that case before concluding that the highway corridor was the equivalent of alienated Indian land subject to the rule in *Montana v. United States,* 450 U.S. 544 (1981). Under *Montana*, nonmembers are not subject to tribal court jurisdiction for activities on alienated lands on an Indian reservation unless one of two exceptions applies.

But the District Court ignored the *Strate* Court's detailed factual analysis, instead holding that ***any*** right-of-way that surrenders even a modicum of tribal control renders such land "alienated" and therefore subject to *Montana's* rule. Such a reading is not only contrary to the reasoning of *Strate,* but it is also belied by the fact that other courts since *Strate* have continued to look at the nature of rights-of-way across Indian lands before deciding whether the *Strate* rule applies.

Moreover, the District Court's interpretation deprives tribes of both governmental and property rights by creating a zero-sum game in which a tribe must give up its governmental rights *in toto* in order to grant a right-of-way to a state. This situation creates an untenable situation as a matter of policy. If tribes cannot negotiate the terms of rights-of-way, including jurisdictional provisions, it creates a tremendous disincentive for tribes to consent to new or renewed rights-of-way.

Finally, a categorical reading of *Strate* is inconsistent with the facts that were introduced (or would have been introduced were Rule 56(f) discovery allowed) regarding this right-of-way and the Red Lake Reservation. Perhaps most tellingly, the regional Land Management Engineer for Minnesota's Department of Transportation stated in his declaration that the State has never sought governmental interests, which would include the jurisdiction at issue here, on the Red Lake Reservation, in contrast to its practice elsewhere, because of the unique nature and history of the Reservation. Accordingly, the control exercised by the State on the highway at issue is extremely limited, to the point where the State requests permission before engaging in even routine maintenance of the highway. Congress, the State of Minnesota, and several courts similarly have noted that the main body of the Red Lake Reservation was never ceded and has never been allotted. These, and other factors, are more than sufficient to distinguish the right-of-way at issue in *Strate*. The District Court's categorical interpretation of that

case thus deprived the Band of the very analysis the *Strate* Court used to reach its result, and should be reversed.

If this Court agrees that *Strate* cannot foreclose an analysis of the nature of a particular right-of-way, then it follows that the District Court also erred in not allowing the Tribal Court to conduct discovery under Rule 56(f). Because of the complicated procedural histories of the interlocking tribal and federal cases here, various stays, and the sequence of filings, the Tribal Court never had an adequate opportunity to conduct discovery necessary to the resolution of this matter under a proper interpretation of *Strate*. Thus, while intimately related to its categorical reading of *Strate*, the District Court's denial of Rule 56(f) discovery is an independent abuse of discretion that must be reversed.

Finally, assuming the District Court's interpretation of *Strate* were correct, the Tribal Court has no alternative but to raise the fact that the alleged right-of-way is void *ab initio* as a matter of law. The relevant regulations regarding rights-of-way across Indian lands require that a state "expressly" stipulate to five conditions. The State's Commissioner of Highways expressly agreed to only three of those five conditions. Those omissions are consistent with Mr. McKinnon's statements regarding the State's concerns about assuming liability and governmental interests on the Red Lake Reservation, but they are not consistent with the regulations. The right-of-way was therefore void *ab initio*.

At a minimum and contrary to the District Court's conclusion, the omitted stipulations create an ambiguity as to both the validity and the meaning of the stipulation that precluded summary judgment without further development of the record.

Accordingly, the Tribal Court respectfully suggests that the judgment of the District Court must be reversed on each of these grounds and the matter either remanded for dismissal or to allow appropriate discovery.

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY CONCLUDED THAT UNDER *STRATE,* ANY RIGHT-OF-WAY NECESSARILY DIVESTS A TRIBE OF ITS INHERENT AUTHORITY TO REGULATE NONMEMBER CONDUCT ON TRIBAL TRUST LANDS.

The District Court incorrectly concluded that this case is on "all fours" with *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Mem. Op. and Order, A06.[4] While the court below expressed "some sympathy" for the Tribal Court's argument that all rights-of-way cannot be treated categorically for purposes of tribal court jurisdiction, A10, the court concluded that it was obliged to apply *Strate* as it "*was* decided" under its interpretation, holding:

> If the federal government has granted ***any*** kind of a right-of-way over reservation land, the tribal court may not exercise jurisdiction over claims against nonmembers arising out of automobile accidents that occur on that land, unless one of the *Montana* exceptions applies.

[4] Later citations to the District Court's opinion are just to the Addendum page.

Id. (Emphasis added.) This categorical interpretation of *Strate* is inconsistent with the wide variety of rights-of-way that exist in Indian Country (including the one at issue here), with the nature of the underlying property and governmental rights of tribes, and with the manner in which other courts have applied *Strate*. Moreover, a categorical interpretation of *Strate* creates a zero-sum game in which it likely will be very difficult for states and tribes to agree on the terms of future rights-of-way that fulfill the needs of both governments. Accordingly, the judgment of the District Court must be reversed and, if necessary, discovery allowed to develop the factual basis necessary to apply *Strate* in a sound manner.

It is a basic tenet of Indian law that Indian nations retain all aspects of their inherent sovereign authority except those that have been expressly ceded or divested, and those that are inconsistent with tribes' status in the federal system. In accordance with this rule, the Supreme Court has recognized that Tribes retain sovereign authority to regulate and adjudicate nonmember conduct on tribal trust lands within their reservations. *See Montana v. United States,* 450 U.S. 544, 557 (1981). In general, however, Tribes lack authority to regulate conduct of ***nonmembers*** on ***non-Indian*** land within reservation boundaries. *Id.* at 565. This proposition and its exceptions, first stated by the Supreme Court in *Montana,* has come to be known as the "*Montana* Rule." *See Strate,* 520 U.S. at 446.

In *Strate*, the Supreme Court applied the *Montana* Rule to an accident occurring on a state's right-of-way over tribal trust land. 520 U.S. 438. The Court explained that even though the case involved tribal trust land, the *Montana* rule would apply because the Tribe had relinquished its control over the right-of-way. *Id.* at 455-56. For this reason, the Court concluded, the right-of-way was the equivalent of non-Indian fee land for jurisdictional purposes. *Id.* The District Court's interpretation of that holding–that all rights-of-way are the equivalent of non-Indian land–was incorrect. Correspondingly, its grant of summary judgement was inappropriate.

A. Standard of Review

This Court reviews a district court's grant of summary judgment de novo. *See Bass v. SBC Communications, Inc.*, 418 F.3d 870, 872 (8th Cir. 2005). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "As a general rule, summary judgment is proper only after the nonmovant has had adequate time for discovery." *Iverson v. Johnson Gas Appliance Co.*, 172 F3d. 524, 530 (8th Cir. 1999) (internal quotation marks and citations omitted). More generally, this Court reviews questions of law de novo. *Watkins v. Nat'l Transp. Safety Bd.*, 178 F.3d

959, 961 (8th Cir. 1999); *Leech Lake Tribal Council v. Washington Nat'l Ins. Co.*, 227 F.3d 1054, 1056 (8th Cir. 2000).

B. The Reasoning of the *Strate* Court Cannot Support a Categorical Interpretation of Its Holding.

In this case, the District Court relied exclusively on *Strate* to justify its conclusion that the Tribal Court lacked jurisdiction. *See* A13. It refused to consider whether the right-of-way here, if one exists, is different from the right-of-way in *Strate*. Instead, it concluded that ***any*** right-of-way is sufficient to divest an Indian tribe of its inherent authority to regulate conduct on tribal trust land. *Id.* Any differences between the two rights-of-way, it reasoned, were therefore irrelevant. Accordingly, the District Court refused the Tribal Court's request to stay summary judgment pending discovery that would illuminate the differences between this right-of-way and that at issue in *Strate*.

The District Court provided three arguments in support of this interpretation: (1) the language of *Strate* is categorical; (2) the Supreme Court anticipated that *Strate* would be applied categorically; and (3) other courts have applied *Strate* in a categorical manner. A10-13. As discussed in more detail below, none of these arguments survives close scrutiny.

1. While *Strate* Does Contain Facially Categorical Language, Its Reasoning Supports a Fact-Based Analysis in Appropriate Cases.

The District Court correctly notes that the holding in *Strate* appears to be stated categorically: "[T]ribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question." 520 U.S. at 442. This does not mean, however, that *Strate* should be blindly applied to all cases involving rights-of-way over tribal trust land because the reasoning in the Court's opinion cannot support such an interpretation.

The *Strate* Court engaged in a detailed analysis of: (1) the granting instrument itself, specifically noting that the grant contained only one limited reservation to the Indian landowners—a right to construct and use crossings of the right-of-way; (2) that "the right-of-way [wa]s open to the public;" (3) that traffic on the right-of-way was "subject to the State's control;" and (4) that the tribes "consented to, and received payment for, the State's use of the . . . highway." *Id.* at 455-56. Such an analysis is entirely superfluous if the mere grant of *any* right-of-way is sufficient to divest a tribe of adjudicatory jurisdiction. Moreover, after that analysis the Court stated: "We therefore align ***the*** right-of-way, for the purpose at hand, with land alienated to non-Indians." *Id.* at 456 (emphasis added). Thus, a key piece of the Court's logical analysis–that the *Montana* rule regarding alienated

Indian lands applied to ***the*** right-of-way–was dependent on the specifics of that right-of-way and the facts of that case.

It is well established that cases are not authority for propositions not considered, *see United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952), and the propositions at issue here were not considered in *Strate***.** "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004). Even where a prior case addresses an issue in dictum, or an otherwise indirect manner, a subsequent court should not consider it binding precedent. *See United States v. Norris*, ___ F.3d ___, 2007 WL 1174862, at *7 (8th Cir. Apr. 23, 2007) (Colloton, J., concurring) ("I would not read the opinion implicitly to make a definitive statement on an issue that was not raised."); *see Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (holding that *stare decisis* does not apply unless the issue was "squarely addressed" in prior decision).

In *Strate*, the Court addressed whether a tribe retained jurisdiction to adjudicate claims associated with a particular right-of-way over which that particular tribe retained very little authority. It did not consider whether a more

limited right-of-way, like that allegedly at issue here,[5] would have the same effect. It certainly did not contemplate the possibility that a tribe could (and perhaps has) in the plainest language reserved civil adjudicatory jurisdiction in a grant of right-of-way. If a right is reserved expressly or implicitly, that reservation cannot be ignored, as a matter of law, justice, or the reasoning of *Strate*. And yet, the District Court concluded that *any* surrender of control by a tribe, no matter how de minimis, leads inexorably under *Strate* to a loss of adjudicatory jurisdiction.

All rights-of-way are not created equal, and a ruling concerning one right-of-way is not determinative with regard to a different right-of-way. A right-of-way is an interest in real property and a contractual right, *see Kleinheider v. Phillips Pipe Line Co.*, 528 F.2d 837, 840 (8th Cir. 1975), the precise scope of which is determined by the granting instrument. Restatement (Third) of Property: Servitudes § 4.1 (2000) ("A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument."). Some are extremely broad; and others are quite narrow. Because *Strate* concerned a broad right-of-way very different from the narrow right-of-way at issue here, *Strate* does not, and should not be read to, dictate the outcome of this case.

---

[5] For purposes of Sections I and II of this brief, appellants' assume *arguendo* that a valid right-of-way exists for the portion of the highway where the accident occurred. Section III presents the appellants' argument that, if *Strate* is read as categorical, the right-of-way is void *ab initio*.

2. That the Supreme Court Foresaw Categorical Application of the *Strate* Rule In Some Instances Does Not Foreclose Fact-Specific Application of the *Strate* Rule in Appropriate Cases.

In this case, the District Court categorically applied *Strate* because the lower court concluded that the Supreme Court intended the case to be applied in that manner. A10-11. Specifically, the District Court noted that in *Strate*, the Supreme Court created in footnote 14 an exception to the normally applicable tribal exhaustion doctrine. *Id.* The District Court contended that if the right-of-way inquiry were fact-specific, the Supreme Court would have required exhaustion. *Id.* While this reasoning has some surface appeal, the Court's footnote cannot support the weight the District Court would have it bear.

Footnote 14 in *Strate* states:

> When, ***as in this case,*** it is plain that no federal grant provides for tribal governance of nonmembers' conduct ***on land covered by Montana 's main rule***, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. Therefore, when tribal-court jurisdiction over an action ***such as this one*** is challenged in federal court, the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.

520 U.S. at 459 n.14 (citations omitted, emphasis added).

The plain language of this footnote addresses only "land covered by *Montana's* main rule." And the exception to the exhaustion rule applies to actions

"such as this one." Recall, however, that the *Strate* Court only concluded that the right-of-way in that case was the equivalent of alienated Indian land ***after*** examining the facts specific to that case. Footnote 14 does not foreclose factual analysis.

The most sensible reading of footnote 14 then is that it allows a nonmember to proceed directly to federal court for a preliminary review of any particular right-of-way and the surrounding circumstances. If it is a clearcut case, as in *Strate*, exhaustion would not be required. If it is not clear that a right-of-way is "land covered by Montana's main rule," the federal court should stay or dismiss an action until the tribal court has had a chance to determine its own jurisdiction, including development of a thorough record.[6]

3. Other Courts Have Engaged in Fact-Specific Analysis Under *Strate.*

Consistent with the Tribal Court's interpretation of *Strate*, including footnote 14, other courts have looked at the nature of a right-of-way before making rulings under Strate. That exercise would be wholly unnecessary were the District Court correct that ***any*** surrender of control by a tribe also surrenders jurisdiction.

---

[6] The proper procedure in tribal exhaustion cases, including whether the federal court acts in a trial or appellate capacity, is far from clear in the cases. Much of the briefing in the District Court addressed the ramifications of that lack of clarity.

Nevertheless, the District Court relied on decisions of other courts to support its refusal to consider facts presented by the Tribal Court. It explained that other "courts have reviewed publicly-available documents creating the right-of-way and publicly-available regulations existing at the time that the right-of-way was created. But none of these courts has engaged in the kind of wide-ranging, complex factual inquiry urged by the Tribal Court here." A12.

On the contrary, the courts in many of these cases did conduct a fact-specific analysis of the rights-of-way in question. For example, the Ninth Circuit has considered the level of public access to a right-of-way and whether the state controlled or maintained the right-of-way. *Dep.'t of Trans. v. King*, 191 F.3d 1108, 1113 & n.1 (9th Cir. 1999); *Wilson v. Marchington*, 127 F.3d 805, 813-14 (9th Cir. 1997).

For the present analysis, what is important about these cases is not their outcomes or the specific facts that led to those outcomes, but rather that they consider evidence at all. *See also, e.g.*, *McDonald v. Means*, 309 F.3d 530, 538-40 (9th Cir. 2002) (examining right-of-way and concluding that jurisdiction was retained); *Boxx v. Long Warrior*, 265 F.3d 771, 775 (9th Cir. 2001), *cert. denied* 535 U.S. 1034 (2002) (analyzing terms of a particular right-of-way and concluding that conveyance reserved no rights to tribe); *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1063 (9th Cir. 1999) (same).

Here, the Tribal Court has requested an opportunity to develop such facts. (Those facts are not necessarily simple. For example and on information and belief, the State does much of the maintenance, but it seeks permission from the Band before undertaking even simple maintenance activities. *See also* A20-21.) As discussed in the next section, the available and anticipated evidence demonstrates that any right-of-ways on the Red Lake Reservation are of a very different character, one that cannot be encompassed within the District Court's restrictive reading of *Strate*. As argued in Section II, the District Court's refusal to provide the Tribal Court that opportunity was error.

C. Categorical Application of the Supreme Court's Decision in *Strate* Would Be Unjust.

The District Court's categorical application of *Strate* is contrary to law and is also unjust because it fails to treat tribes as sovereign governments, relegating them to a status below that of even an individual property owner.

Unless Congress dictates to the contrary, tribes have the sovereign authority to share or refuse to share their governmental authority. In the case of rights-of-way, Congress has not removed tribal governmental authority and in fact requires tribal consent before a right-of-way can be granted. 25 U.S.C. § 324. A categorical interpretation of *Strate* is contrary to law because it (retroactively) removes any meaningful consent regarding jurisdictional issues.

A categorical reading of *Strate* is also unjust because it is contrary to general federal Indian policy giving tribes the right to self-government and the right to make choices regarding exercises of governmental authority. For instance, tribes may enter into cross-deputization agreements with the state whereby state officers may regulate conduct or issue citations pursuant to the tribe's governmental authority and tribal officers may do the same under the authority of the state. *See, e.g.*, *State v. Manypenny*, 662 N.W.2d 183 (Minn. Ct. App. 2003); *State v. Waters*, 971 P.2d 538 (Wash. Ct. App. 1999). They also have the authority to refuse to enter such an agreements. *See* Cohen's Handbook of Federal Indian Law § 6.05, p. 590 (Nell Jessup Newton *et al*., eds.) (2005 ed.) ("Tribes or states may not desire the [cross-deputization] agreements for a variety of reasons").

Rights-of-way can involve conveyance of these types of governmental authority but, as this case illustrates, need not do so. To conclude, as the District Court did here, that any right-of-way granted by a tribe to a state necessarily deprives the tribe of its regulatory and adjudicatory jurisdiction over that portion of its lands covered by the right-of-way is to deprive the tribe of its sovereign governmental authority.

The District Court's categorical reading of *Strate* also relegates tribes to a status below that of an individual property owner. An individual property owner has the power to convey to another a limited right to cross over his land. The

nature of such a "right-of-way" would be defined by the instrument creating it. Restatement (Third) of Property: Servitudes § 4.1; *see Scherger v. N. Natural Gas Co.*, 575 N.W.2d 578, 580 (Minn. 1998) ("The extent of an easement depends entirely upon the construction of the terms of the agreement granting the easement."). In creating a right-of-way, a landowner has the right to convey as much or as little as he desires. The holder of the right-of-way has no right to demand more than was conveyed. *See, e.g., Hwy. 7 Embers, Inc. v. NW Nat'l Bank*, 256 N.W.2d 271 (Minn. 1977) (limiting parties to express terms of easement).

But under the District Court's interpretation, even an absolutely clear and express reservation of tribal jurisdiction apparently would be declared a nullity. A categorical reading of *Strate* deprives tribes of this most basic right—the right of a landowner to convey certain aspects of his bundle of rights while retaining others. Treating sovereign Indian tribes as less than private property owners is both unjust and wholly inconsistent with tribes' governmental status and Congress' policy of promoting tribal government.

D. Categorical Application of the Supreme Court's Decision in *Strate* Would Impair Productive Government-to-Government Negotiations Between Tribes and States.

Under the District Court's reading of *Strate*, an Indian tribe would have to be willing to give up its sovereign regulatory and adjudicatory authority to regulate

conduct within its territorial jurisdiction in order to convey a right-of-way to a state government requesting access. This creates a major disincentive for tribes to consent to new or renewed rights-of-way. If a categorical reading of *Strate* were to prevail, states therefore would likely have a difficult time obtaining rights-of-way through reservations.[7]

E. The Nature of Any Right-of-Way Here Supports Tribal Court Jurisdiction in this Case.

The preceding sections have addressed why a categorical interpretation of *Strate* is not appropriate or wise in general. This section addresses the specific facts regarding the Red Lake Reservation and the purported right-of-way at issue, and demonstrates the profound and dispositive differences between that right-of-way and the one in *Strate*. The Supreme Court applied the *Montana* Rule to the right-of-way at issue in *Strate* because the tribe's relinquishment of control over the right-of-way rendered it the "equivalent, for nonmember governance purposes, to alienated, non-Indian land." 520 U.S. at 454. Unlike in *Strate*, a close analysis of the same factors illustrates that any right-of-way is *not* the equivalent of alienated non-Indian land. Additional facts that the Tribal Court should have been

[7] The Band and the State face such a situation now. The State concedes that it is lacking any valid grant for four miles of the 89/1 corridor. A19 ¶ 3. The Band is reluctant to consent to a right-of-way for that section because it is unclear how it can effectively retain its governmental authority in light of the District Court's opinion.

allowed to develop in discovery would underscore that conclusion–the right-of-way here retains its character as tribal trust land, and the Tribal Court retains jurisdiction.

1. The Actions and Testimony of the State and the Band Indicate Clearly that Neither Believed that General Civil Governmental Authority was Transferred to the State by any Right-of-Way.

A right-of-way is a contract. *See Kleinheider*, 528 F.2d at 840. The Tribal Court addresses below reasons that the granting documents underlying any right-of-way here are at a minimum ambiguous, if not fatally flawed. If the Court is uncertain whether the plain language of those documents was sufficient to reserve civil jurisdiction to the Band, then it is necessary to look at the course of performance of the parties to see what they understood was, and was not, conveyed in any right-of-way. *See United States v. Basin Elec. Power Co-op*, 248 F.3d 781, 809 (8th Cir. 2001).

Evidence currently available by declaration and exhibit shows clearly that neither the Band nor the State has interpreted any right-of-way on Highways 89 and 1 as conveying governmental authority from the Band to the State. A18-22; JA0213-19.

The Band's position was made clear early on. On July 3, 1955, shortly after the formation of any right-of-way here, the Red Lake Tribal Council discussed a rumor. Its minutes state:

> Peter Graves said that there are rumors that the State Highway Officers are to patrol the State Highways on the reservation. He said that the Red Lake Band has not relinquished the land, and we are not under State law.

Minutes of July 3, 1955, JA0219. Peter Graves was the Secretary of the Band at the time and signed the Tribal Council resolution consenting to a right-of-way. Tribal Council Resolution No. 2 (Apr. 21, 1955), JA0026. It is worth noting that there is no mention in that resolution of any assumption of jurisdiction by the State.[8] It is also clear from statute and the regulations that the BIA superintendent could not grant something that the Council had not consented to give. 25 U.S.C. § 324; 25 C.F.R. § 256.3 (1951), JA0067. To this day, the Band acts consistently with the interpretation that any grants of right-of-way over Highways 89 and 1 do not convey governmental authority or jurisdiction to the State.

---

[8] The Tribal Council included a number of conditions in the Resolution that were not incorporated into the application or the purported approval by the superintendent. That fact alone is an infirmity in the approval process, since the conditions were not incorporated into a federal document binding on the State, as they should have been were the State assuming control over the roadbed. Of course, another interpretation–one that is far more consistent with the course of performance–is that the conditions were not incorporated elsewhere because the State continued, and still continues, to recognize the Council's authority over lands underlying the "rights-of-way" on the Reservation.

Perhaps more importantly, the State also acts consistently with an interpretation that any right-of-way lawfully granted did not convey general governmental authority over the highway from the Band to the State.

Maintenance and Rights-of-Way

Mr. Joseph McKinnon is the Land Management Engineer for the Minnesota Department of Transportation in the region surrounding the Red Lake Reservation. His candid declaration makes it clear that the State has "never sought or acquired property, title, and governmental interests within" the Red Lake Reservation.[9] A19 ¶ 5, JA0214. Based upon his review of the "rights-of-way" on the Reservation, including the one at issue here, Mr. McKinnon concludes that they represent requests for "entry and temporary construction easements from the Tribe on a project specific basis." A20-21 ¶ 8, JA0215-16. Mr. McKinnon states that the "right-of-way" documents seek a perpetual interest only in doing "corridor maintenance". *Id.* Such a limited right is consistent with the Department's desire in negotiating these agreements to:

[9] When it became clear that the District Court was not going to consider the Tribal Court's motion to dismiss or motion for Rule 56(f) discovery prior to hearing the Nords' Motion for Summary Judgment, the Tribal Court acted to obtain declarations as quickly as possible. In the available time, two were obtained, including that of Mr. McKinnon, which is a frank discussion by a Minnesota official of its limits on the Red Lake Reservation. His declaration is included in the Addendum at A18-22.

> avoid any title, color of title or an appearance of a State governmental interest on the Red Lake Reservation that might be used to impose liability or suggest State indemnification. [The Department] has carefully practiced this position for its Highway 1 and 89 activities within the Red Lake Reservation to protect the State of Minnesota because Red Lake reservation is a separate jurisdiction within which the State lacks the access control necessary to limit liability.

A21 ¶ 9, JA0216. Mr. McKinnon therefore concludes:

> The Red Lake Reservation is the only closed reservation I deal with, and MnDot operations are different on that reservation. MnDot's practice has consistently been to approach the Red Lake Reservation and Tribal Government as a foreign jurisdiction. I cannot identify documents or MnDot practices concerning the Highway 1 and 89 corridors with the Red Lake Reservation that suggest MnDot has acquired title, demonstrated any governmental interest, or provided State liability indemnification that typically accompanies that interest within its boundaries.

A21-22 ¶ 11, JA0216-17.

From these statements of Mr. McKinnon, it is apparent that the Minnesota Department of Transportation does not seek a transfer of jurisdictional authority from the Band to the State when it seeks a so-called "right-of-way." Mr. McKinnon acknowledges that the Department has not been granted the access control at Red Lake it receives elsewhere in the State on full rights-of-way. This evidence alone distinguishes the right-of-way in *Strate* and should have, at the least, precluded summary judgment pending further discovery.

General Treatment by the State

The Red Lake Indian Reservation is acknowledged as being unique by the State. For example, commenting on the "unique" status of the Band and its lands, the Minnesota Supreme Court stated:

> [T]he Red Lake Band of Chippewa Indians still retains much of the autonomy originally referred to in *Worcester*, and the states may not interfere with this tribal self-government. The land of the Red Lake tribe has never been formally ceded to the United States.

Comm'r of Taxation v. Brun, 174 N.W.2d 120, 122 (Minn. 1970).

The recognition that the status of the Band and its lands is different has also been recognized by the Minnesota State Legislature. For example, 911 system funding is provided:

> to all qualified counties, and after October 1, 1997, to all qualified counties, existing ten public safety answering points operated by the Minnesota State Patrol, and each governmental entity operating the individual public safety answering points serving the Metropolitan Airports Commission, ***the Red Lake Indian Reservation***, and the University of Minnesota Police Department;

Minn. Stat. § 403.113, subd. 2(1) (emphasis added). And:

> Wild animals taken on Red Lake Reservation lands within the Northwest Angle. Wild animals taken and tagged in accordance with the ***Red Lake Band's Conservation Code on the Red Lake Reservation lands*** in Minnesota north of the 49th parallel shall be considered lawfully taken and possessed under State law.

Minn. Stat. § 97A.505, subd. 3b. (emphasis added).

Finally, the Band was one of only two tribes in the country, and the only tribe in Minnesota, exempted from the extension of state criminal and civil jurisdiction to claims involving Indians in the 1953 Act of Congress commonly called Public Law 280. Pub. L. No. 83-280, 67 Stat. 588 (codified in part at 28 U.S.C. § 1360). The Assistant Secretary of the Interior's letter included in the legislative history to that act explained that the exempted tribes had "a tribal law-and-order organization that functions in a reasonably satisfactory manner," and that "[t]he Red Lake Band of Chippewa Indians, in voting unanimously in opposition to the extension of State jurisdiction, observed that State law would not be of any benefit to tribal members." S. Rep. No. 83-699, *reprinted in* 1953 U.S.C.C.A.N. 2409, 2413. The Minnesota Supreme Court explained later: "It is unchallenged that the reason the Red Lake Band was excluded from the provisions of that act was their opposition to being included; the exclusion was in deference to their wishes." *County of Beltrami v. County of Hennepin,* 119 N.W.2d 25, 30 (1963).

The point of the cases, statutes, and historical record is that the Band has been staunchly opposed to any intrusion on its lands since it came into contact with the early Americans. And the State has recognized that the Band's status is unique. To imagine that the Band would consent to State jurisdiction over a right-of-way through its Reservation in 1955 when it had unanimously voted against any exercise of State jurisdiction in 1953 strains credibility. And, as the McKinnon

Declaration makes apparent, the State knows, and has known, not to ask. A19-22 ¶¶ 5,11, JA0214-17. Thus, the Minnesota Department of Transportation does not seek governmental authority on highways on the Red Lake Reservation, it only seeks the right of entry to construct and maintain the roadway. *Id.* ¶¶ 5,7-11, JA0214-17.

Law Enforcement

Although the Tribal Court has not yet been allowed to conduct discovery on this point, on information and belief it is apparent that the State and county law enforcement do not patrol within the Reservation. Hobson Aff., JA0204 ¶¶ 5h-5*l*. The Tribal Council minutes cited above allow for that conclusion, JA0219, as does the express statement of the Minnesota Supreme Court in 1976: "The State of Minnesota law enforcement personnel do not patrol the lands encompassing the Red Lake Indian Reservation. The Red Lake Band has its own law enforcement personnel and justice system to enforce its civil and criminal code." *Red Lake Band of Chippewa Indians v. Minnesota*, 248 N.W.2d 722, 728 (Minn. 1976) (noting that there are 65 miles of trunk highway within the Reservation). As stated in the Hobson Affidavit, JA0204 ¶¶ 5h-5*l*., attached to the Tribal Court's Rule 56(f) motion, the Tribal Court reasonably expects to be able to produce or discover evidence showing that county and State law enforcement still do not have a

presence on the Reservation and often do not respond even when requested to deal with a non-Indian criminal matter.

In concluding that the right-of-way in *Strate* was equivalent to non-Indian fee land, the *Strate* court expressly relied on the fact that "traffic on [the right-of-way] is subject to the State's control." 520 U.S. at 455-56. It then explained that tribal police would still have authority "to detain and turn over to state officers nonmembers stopped on the highway for conduct violating *state law*." *Id.* at 455-56, n. 11 (emphasis added). The Court did not conclude that exercise of tribal police authority is irrelevant to the jurisdictional analysis but simply explained that even when a right-of-way is equivalent to non-Indian fee land, tribal police may patrol that right-of-way on the state's behalf. Here, the Tribal Court expects to be able to show that the tribal police patrol the right-of-way not on behalf of the state, but on behalf of the Tribe and to the exclusion of the State.

Here, unlike in *Strate*, the Band consented at most to only a limited grant of right-of-way, the Band retained and has maintained its regulatory authority, and both the Band and the State of Minnesota have long respected this understanding. A19-21 ¶¶ 5, 9-11, JA0214-17. Under the facts of this case, the right-of-way here should be considered tribal land, not "alienated" non-Indian land within the meaning of *Strate*. In accordance with this conclusion, this Court should conclude that the Tribal Court has jurisdiction over the Nords regarding their conduct on

tribal land. At the very least, there are factual issues concerning the use and control of the right-of-way which should have precluded determination of the jurisdictional issue on summary judgment here, at least without further discovery.

2. Stipulation (e) to the State's Application Reserves Governmental Authority to the Band, and Its Tribal Court.

The fifth of fives stipulations required of the State with its application for a right-of-way[10] was that it would "not interfere with the use of the lands by or under the authority of the landowners for any purpose not inconsistent with the primary purpose for which the right-of-way was granted." 25 C.F.R. § 256.7 (1951), JA0069. By its plain language, this provision means that the Band retained its governmental authority over any right-of-way that was granted.

The stated purpose of the "Application for Public Highway" was:

> Trunk Highway No. 170, renumbered 1, is part of the trunk highway system as established by the Legislature of the State of Minnesota, pursuant to the provisions of the constitution and this [highway] improvement is necessary in carrying out the provisions of said constitution and law in regard to the final location, construction, and maintenance of trunk highways.

JA0059.

The purposes are limited to "location, construction, and maintenance" of the highway. *Id.* None of those purposes requires governmental control by the State

[10] The required stipulations, and the regulations requiring them, are discussed fully in Section III.

of Minnesota that would divest the Band of its recognized governmental authority over its own lands. "Location" is self-evident. The mere location of a right-of-way does not imply any governmental authority whatsoever. "Construction" does not include any governmental authority–it requires only a right of entry and a right to construct. Similarly, "maintenance" requires only a right of entry and a right to conduct maintenance activities. Such activities are not inherently governmental in nature. The very existence of private roads illustrates that the activities necessary to construct and maintain a road can be carried out by a party without any governmental authority whatsoever.

Therefore, the Band's exercise of governmental authority over any right-of-way, including civil jurisdiction over automobile accidents, is not (in the terms of § 256.7) "inconsistent" with the primary purpose of any right-of-way to locate, construct, and maintain a highway. If there is any doubt, reference to the interstate highway system makes it clear that one sovereign can retain civil jurisdiction even if another sovereign has a highway system that traverses the lands of the former. States exercise civil jurisdiction (both adjudicatory and regulatory) over federally funded interstate highways running through a state. Just because the federal government pays for maintenance of a road does not deprive the states of the ability to enforce and adjudicate their laws. The situation here is analogous.

Accordingly, under the terms of any right-of-way that may have been granted, the Band retained under stipulation (e) the governmental authority to exercise civil jurisdiction over the land at issue in this case.

3. The History and Course of Performance Make It Clear that the State Did Not Receive Any "Right-of-Way" Sufficient to Divest the Band of Jurisdiction over the Accident at Issue.

Department of Transportation Land Management Engineer McKinnon states: " 'Right-of-Way', or similar terminology used in reference to State Highway corridors within the Red Lake Reservation, are a function of document form, not substance." A20 ¶ 6, JA0215. Those "rights-of-way," he states, are simply "temporary construction easements and maintenance corridor boundaries" but have not and do not contain a "Tribal grant of title or governmental authority or interest to the State." A20-22, JA0215-17

That Mr. McKinnon states that the "rights-of-way," including the one at issue here, are "rights-of-way" in name only is enough to distinguish the right-of-way in *Strate*. Mr. McKinnon's testimony demonstrates that the State does not even seek such an interest on the Red Lake Reservation, and his review of past "rights-of-way" has led him to the conclusion that the State has never sought governmental authority over Red Lake lands. *Id.* at ¶¶ 8, 11.

There is another reason to distinguish this road from that at issue in *Strate*. The road in *Strate* was a state highway "to facilitate public access to Lake

Sakakawea, a federal water resource project under the control of the Army Corps of Engineers." 520 U.S. at 455. The Supreme Court carefully noted that the purpose and nature of the land, as "open to the public," rendered the highway equivalent to "alienated, non-Indian land." *Id.* at 454-55. The road at issue here is a throughway in a remote part of the State, but it is also literally the main street for the Red Lake Reservation, as discovery would show. When the underlying accident occurred, the plaintiff, a member of the Band, was traveling to the home of a friend whose driveway is on the highway, not simply passing through for purpose of accessing a non-Indian destination within or without the Reservation. This road and the factual circumstances of this case, therefore, are much different than those at issue in *Strate.*

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE NORDS BECAUSE THE TRIBAL COURT WAS ENTITLED TO ADDITIONAL DISCOVERY UNDER FED. R. CIV. R. 56(F) AND HAS NOT YET HAD THE OPPORTUNITY TO CONDUCT ADEQUATE DISCOVERY.

Thus, not all rights-of-way are created equal, and the holding in *Strate* should not be applied categorically to all rights-of-way over tribal trust lands generally or to the one here specifically. The correct approach must allow for a fact-based analysis in appropriate cases to examine factors similar to those relied on by the *Strate* Court when it concluded that the right-of-way in that case was the equivalent of alienated, non-Indian land for jurisdictional purposes. Because the

District Court incorrectly concluded that under *Strate*, ***any*** right-of-way necessarily divests a tribe of its inherent authority to regulate nonmember conduct on tribal trust lands, the Court refused to allow the additional discovery necessary for the Tribal Court to show the differences between this right-of-way and the one at issue in *Strate*. The District Court should have stayed summary judgment pending discovery to give the Tribal Court the opportunity to gather evidence regarding the nature of any right-of-way, and to gather information regarding whether the two *Montana* exceptions apply.

Summary judgment is only proper where the moving party demonstrates that "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The United States Supreme Court has acknowledged that a litigant who had not yet been afforded full opportunity for discovery could be "railroaded" by such a motion, but explained that "[a]ny potential problem with such premature motions can be adequately dealt with under Rule 56(f)." *Id.* at 326.

Federal Rule of Civil Procedure 56(f) provides that:

> [s]hould it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be taken or discovery to be had or may make such other order as is just.

"[S]ummary judgment is proper only if the nonmovant has had adequate time for discovery." *Robinson v. Terex Corp.*, 439 F.3d 465, 467 (8th Cir. 2006). Rule 56(f), therefore, "prevent[s] a party from being unfairly thrown out of court by a premature motion for summary judgment," *Iverson v. Johnson Gas Appliance Co.*, 172 F.3d 524, 530 (8th Cir. 1999), by requiring that "summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986). To delay summary judgment under Rule 56(f), the nonmovant must "make a good faith showing that postponement of the ruling would enable it to discover additional evidence which might rebut the movant's showing of the absence of a genuine issue of material fact." *Robinson*, 439 F.3d at 467. "Unless dilatory or lacking in merit, [a Rule 56(f)] motion should be liberally treated." *Jensen v. Redevelopment Agency of Sandy City*, 998 F.2d 1550, 1554 (10th Cir. 1993) (internal quotation marks omitted). This Court reviews for abuse of discretion a trial court's determination that a claim is ripe for summary judgment. *Robinson*, 439 F.3d at 466-67.

Here, the Tribal Court submitted a Rule 56(f) motion requesting additional time to conduct the discovery necessary to defend against the Nords' Motion for Summary Judgment. *See* Def.'s Mem. in Supp. of Mot. for Scheduling Order, to

Continue Hr'g, and for Contingent Disc. on Pl.'s Mot. for Summ. J. (May 1, 2006) J0009. As part of that request, the Tribal Court submitted the Affidavit of Doreen N. Hobson, which outlined the areas for additional discovery. JA0201-07. The Hobson Affidavit outlined the evidence that the Tribal Court expected to present to dispute the Nords' assertion regarding the right-of-way. As stated in the Hobson Affidavit ¶ 5, the Tribal Court expected to present evidence showing:

> a. that the Band has consistently believed that it has not surrendered its regulatory and adjudicatory authority over the highway at issue, and that the Band, the state, and the county have consistently acted in a manner that confirms that, if a right-of-way was in fact lawfully granted to the state, the Band nevertheless retained governmental powers over the highway at issue and that the land remained Indian country for all purposes, including jurisdictional purposes;
>
> b. that in securing and using any rights-of-way on the Red Lake Reservation, the Minnesota Department of Transportation has not sought and does not seek to deprive the Band of any property or governmental interest, but instead seeks permission in a very technical manner to conduct specific road work within the Reservation boundaries;
>
> c. that in granting rights-of-way, the Band considers whether such right-of-way will benefit its tribal members and not be a detriment to the Band or its members;
>
> d. that the Band has a proud and established history of defending its sovereignty over its tribal homelands, including its closed Reservation;

e. that the Band has not and would not under any circumstances consent to any proposal that would limit its jurisdiction within its Reservation boundaries;

f. that there are two state highways running through the reservation, but at least a dozen different rights-of-way spanning almost seven decades for various sections of the two state highways running through the diminished Reservation, and that those rights-of-way are not uniform and support the Band's exercise of regulatory and adjudicatory jurisdiction throughout the diminished Reservation;

g. that the Minnesota Department of Transportation acknowledges that it does not have rights-of-way for the totality of the two state highways running through the Reservation and seeks to ensure that it has rights to maintain the entirety of the highway system;

h. that the Red Lake Band is the primary regulatory authority on the highway at issue;

i. that the County dispatch routinely notifies the Band's police department of calls it receives regarding traffic accidents on the Red Lake Reservation so that the tribal police and tribal emergency service providers can respond;

j. that the State and County law enforcement and emergency response providers do not respond to accidents or otherwise have any established presence on the Reservation;

k. that the State and County law enforcement notify the Band in advance if they need to be on the Reservation for a specific purpose;

l. that the State and County law enforcement providers often do not come to the Reservation even when the Band requests their presence for a specific purpose;[11]

m. that the Band, not the County or the State, undertakes certain routine (non-construction) maintenance on the highway at issue;

n. that before the Minnesota Department of Transportation undertakes any maintenance action relating to the highway at issue, it seeks permission from the Band to undertake the activity;

o. that the Band often requires the Minnesota Department of Transportation to comply with tribal employment laws for state road projects on the Reservation; and

p. that the Defendants had a consensual relationship with the Band, its members, or both.

JA0201-04.

The Hobson Affidavit makes the good faith showing required by the rule. If allowed to conduct its discovery, the Tribal Court expects to present evidence that would allow for summary judgment in the Tribal Court's favor or, at a minimum, create a genuine issue of material fact to defeat summary judgment.

[11] Under *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), the state, and not the Band, has jurisdiction over *criminal* conduct by non-Indians on the Reservation. Thus, the Tribal Court expects it would be able to show that the presence of the State Police or the County Sheriff is requested only when a non-Indian is detained for *criminal* conduct, even though they do not always respond when requested. In contrast, the Band expects to be able to show that tribal police officers routinely issue *civil* citations to non-Indians for traffic infractions on the highway at issue.

Unlike the parties to the Tribal Court Action, the Tribal Court effectively had ***no*** opportunity to develop evidence as a party. The Tribal Appeals Court issued its decision on February 2, 2006, JA0116-17, and on March 27, 2006, the Tribal Court filed a Motion to Dismiss, *see* Def. Red Lake Nation Tribal Court's Mot. to Dismiss with Prejudice or Alternative Mot. to Limit Evidence to be Presented to the Fed. Ct. JA0006. On April 7, 2006, the Nords filed their Motion for Summary Judgment, *see* Pl.'s Mot. for Summ. J. Against Defs. JA0007. This time line shows that the Tribal Court had no real opportunity to gather the evidence necessary to show that summary judgment is not proper. Further, it would be unreasonable to expect the Tribal Court to gather evidence while its motion to dismiss was still pending.

The rules anticipate the circumstances in which a party will need additional time for discovery to prevent injustice. The circumstances of this case fit squarely into the purpose of the rule. The District Court should have denied without prejudice, or delayed consideration of, the Nords' Motion for Summary Judgment to allow the Tribal Court discovery.

A. Additional Discovery Would Have Led to Evidence Regarding the Course of Performance of the Parties with Respect to the Highway, and That There Was No Intent to Transfer Jurisdiction over Any Right-of-Way.

As explained in Section I.E above, the course of performance between the State and the Band shows that the purported right-of-way over Highways 89 and 1 is not the same as the right-of-way in *Strate*. If allowed to conduct discovery, the Tribal Court expects to develop further evidence that neither the Band nor the State has interpreted any right-of-way on Highways 89 and 1 as conveying governmental authority from the Band to the State. The Tribal Court gathered and submitted to the District Court *some* compelling evidence–most particularly the McKinnon Declaration–regarding how the State's maintenance, general treatment, and lack of police patrol on the right-of-way show that the State does not treat the right-of-way as transferring jurisdiction from the Band to the State. This evidence, however, is not a full record that could properly allow this Court, or the Supreme Court, to review this matter fully.

Additional time should have been allowed, and should now be allowed, to develop evidence regarding the right-of-way, including the course of performance. Such evidence would be relevant both as extrinsic evidence of what the parties to a right-of-way intended, if a right-of-way was lawfully granted, and as evidence of the character of the highway regardless of the existence of a right-of-way.

B. Additional Discovery Would Have Led to Necessary Evidence Regarding Whether the Two *Montana* Exceptions Apply.

The Tribal Court also was denied the opportunity to conduct discovery that would show that one or both of the Montana exceptions apply to the Tribal Court's exercise of jurisdiction in this case. Under *Montana*, a tribe may exercise jurisdiction over nonmember conduct on non-Indian fee land if either: (1) the nonmember has entered a consensual relationship with the tribe, or (2) the nonmember's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-66. The District Court prematurely granted summary judgment to the Nords before giving the Tribal Court the opportunity to develop evidence on the *Montana* exceptions. If provided the chance to do so, however, the Tribal Court believes that it could establish that one or both of these exceptions applies here.

1. The Tribal Court should have been afforded an opportunity to develop evidence regarding the consensual relationship between Nord Trucking and the Band.

First, both the Tribal Court and the District Court found that at the time of the accident, Mr. Nord was driving a semi-truck owned by Nord Trucking and that Nord Trucking had established a consensual commercial relationship with the Band to haul and remove timber from the reservation. In an affidavit submitted herein, Defendant Nord has stated that at the time of the accident, he was "running

an errand to pick up hay for [his] family farm." JA0025. The Tribal Court has not had an opportunity to conduct necessary discovery to determine whether Mr. Nord worked under Nord Trucking's timber contract with the Band, what Mr. Nord's interest is in Nord Trucking, whether the semi-truck that Mr. Nord was driving at the time of the accident was used in connection with the timber-hauling contract, whether Mr. Nord was simultaneously picking up hay and hauling timber when the accident occurred, whether at the time of the accident Mr. Nord was on his way to or from a timber hauling site, and how extensive the timber hauling relationship between Nord Trucking and the Band in fact was. All of these facts may be relevant to determining whether the commercial relationship between Nord Trucking and the Band is sufficient under the first *Montana* exception to justify Tribal Court jurisdiction here.[12]

[12] The District Court incorrectly concluded that the Tribal Court's counsel conceded at oral argument that there is no need for discovery to address whether the Nords were acting pursuant to a consensual relationship within the second *Montana* exception. A14. What the Tribal Court's counsel said was that the Tribal Court is unlikely to "make hay with this [Supreme] Court on appeal" regarding *Montana's* consensual relationship exception. Summ. J. Hr'g Tr. 32:19-33:16, JA0272-73. An assessment of the strength of a legal argument is not a concession that the argument should not be made. The argument ***is*** necessary, and the District Court should have allowed the Tribal Court the time to gather evidence to support that argument.

2. The Tribal Court Should Be Afforded an Opportunity to Develop Evidence Regarding the Threat That Nord Trucking's Conduct Poses to the Tribe's Political Integrity, Economic Security, and Health or Welfare.

The District Court incorrectly granted the Nords' Motion for Summary Judgment without allowing the Tribal Court to conduct discovery regarding whether the Nords' conduct posed a threat to the Tribe's political integrity, economic security, and health or welfare. The Supreme Court of Minnesota has recognized that the Red Lake Band is unique among the State's Indian tribes. Indeed, the Supreme Court has recognized: "the land of the Red Lake tribe has never been formally ceded to the United States." *Brun*, 174 N.W.2d at 122. Requiring the Red Lake Band—which has never ceded any part of its diminished Reservation to non-Indian jurisdiction—to cede its regulatory authority over the right-of-way at issue here threatens the Band's unique political integrity. The Band's special status alone justifies application of the second *Montana* exception here. Moreover, the character of the Highway 89 and 1 corridor, which is the main street in the Reservation towns of Red Lake and Redby and near which most Band members live, is very different from the highway at issue in *Strate* and involves a much greater interest in the Band for public safety and the welfare of tribal members like Mr. Kelly.

In summary, there are a number of issues on which the Tribal Court should have been allowed to develop evidence. The Tribal Court satisfied the requirements of Rule 56(f) by making the good faith showing that postponement of the ruling on summary judgment would have allowed the Tribal Court to discover additional evidence that might rebut the Nords' showing of the absence of a genuine issue of material fact.[13] Therefore, the Tribal Court should be afforded the opportunity to develop that evidence. And, since no discovery took place in the federal court case, and the Nords proceeded straight to summary judgment, the Tribal Court was not dilatory in seeking such evidence under the circumstances.

III. THE DISTRICT COURT INCORRECTLY HELD THAT A VALID RIGHT-OF-WAY IS IN FORCE FOR THE STRETCH OF HIGHWAY ON WHICH THE ACCIDENT OCCURRED AND THAT THE RIGHT-OF-WAY CANNOT BE CHALLENGED IN THIS PROCEEDING.

A. The Purported Right-of-Way is Void for Failure of Lawful Approval Pursuant to the Governing Regulations.

As explained above, the Tribal Court asserts, and with discovery can gather more evidence to show, that the parties to the 1955 agreement between the State

[13] The need for discovery here intensifies if the District Court's holding can be interpreted to go beyond application to the Nords in this case. If the holding can be used in future cases regarding this right-of-way, then the Court must reverse and remand with instructions to allow the Tribal Court to conduct additional discovery. To hold otherwise is error, and contrary to the purpose of discovery.

and the Band believed that that agreement would confer only limited rights to the State. The Band and State have always understood that this right-of-way conferred nothing more to the State than the right to construct, use, and maintain the highway, and certainly never understood the "right-of-way" to confer any regulatory or adjudicatory authority over actions involving the Band or its members to the State. If this Court agrees with the District Court that all rights-of-way are created equal and that this right-of-way falls under the holding in *Strate*, then the Tribal Court is forced to take a similarly categorical position: The State of Minnesota and the Bureau of Indian Affairs ("BIA") failed to follow the regulations in place at the time. This right-of-way was therefore not lawfully granted and is void ab initio.

Interpretation of a contract presents questions of law to be reviewed de novo. *Lamb Eng'g & Const. v. Nebraska Pub. Power*, 103 F.3d 1422 (8th Cir. 1997). This Court reviews a district court's interpretation of federal statutes and regulations de novo. *See Seneca-Cayuga Tribe v. Nat'l Indian Gaming Comm'*n, 327 F.3d 1019 (10th Cir. 2003); *Applied Companies. v. Harvey*, 456 F.3d 1380, 1382 (Fed. Cir. 2006); *Johnson v. Buckley*, 356 F.3d 1067, 1074 (9th Cir. 2004).

1. The State's Application for the Right-of-Way, and the BIA's approval were defective, and did not create a lawful right-of-way.

The District Court incorrectly held that the right-of-way application and approval conformed to the requirements under 25 C.F.R. § 256.7 (1951). *See* A07-08. Section 256.7 required right-of-way applications to expressly stipulate to five conditions listed in the regulation. JA0069. The stipulation drafted by the Minnesota Commissioner of Highways expressly agreed to only three of the five conditions and contained a blanket agreement to conform to other regulations. A23.

Part 256 sets out detailed requirements for the grant of a right-of-way. JA0066-83. The superintendent of the local agency of the Bureau of Indian Affairs is authorized to approve an application only "[u]pon satisfactory compliance with the regulations in this part[.]" *Id.* § 256.16, JA0072. Section 256.7 requires:

> The application . . . shall be accompanied by a duly executed stipulation ***expressly agreeing*** to the following:
>
> > (a) To construct and maintain the right-of-way in a workmanlike manner.
> >
> > (b) To pay promptly all damages, in addition to the deposit made pursuant to § 256.5, determined by the Superintendent to be due the landowners on account of the construction and maintenance of the right-of-way.

> (c) To indemnify the landowners against any liability for damages to life or property arising from the occupancy or use of the lands by the applicant.
>
> (d) To restore the lands as nearly as may be possible to their original condition upon the completion of construction.
>
> (e) That the applicant will not interfere with the use of the lands by or under the authority of the landowners for any purpose not inconsistent with the primary purpose for which the right-of-way was granted.

JA0069 (emphasis added.)

But the stipulation submitted by the Commissioner of Highways did not satisfy the requirement that it "expressly agree[]" to the conditions under § 256.7. The stipulation states:

> Pursuant to the application by the undersigned, as Commissioner of Highways of the State of Minnesota, dated April 7, 1955, for a public highway right of way across a portion of the Red Lake Indian Reservation, the undersigned agrees to conform and abide by all pertinent rules and regulations of the Department of the Interior with special reference to Departmental Regulations 25 CFR 256.7 (a), (b), and (e) published in the Federal Register of August 21, 1951, pursuant to the Act of Feb. 5, 1948 (62 Stat. 17).

JA0062.[14] While the Commissioner expressly agreed to (a), (b), and (e), he omitted any direct reference to the remaining conditions (c) and (d). The omission

[14]The copy of the stipulation submitted by the Nords is not clear, and the District Court read the "e" as "c".

of these items renders the stipulation void as it does not satisfy the requirements of 25 C.F.R. § 256.7 (1951) JA0069.

2. The District Court Incorrectly and Without Authority Held That the Right-of-Way Drafting Requirements as Set out by the Applicable Regulations Were Unimportant, and That the Incomplete Application Satisfied All of the Requirements.

The Restatement (Second) of Contracts declares that "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect[.]" Restatement (Second) of Contracts § 203 (1981). No part of an agreement is superfluous and no interpretation should be employed that renders certain terms superfluous. *Id.* cmt. b; *see Allan Block Corp. v. County Materials Corp.*, 239 FRD 523, 530 (W.D.Wisc. 2006) ("the parties intended the language used by them to have some effect." (citations omitted)); *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998) ("we are to interpret a contract in such a way as to give meaning to all of its provisions"). Additionally, if an agreement uses both specific and general terms, which appear to conflict, "the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language." Restatement (Second) of Contracts § 203 cmt. e; *see W. Oil Field, Inc. v. Pennzoil United, Inc.*, 421 F.2d

387, 389 (5th Cir. 1970) ("It is well settled that a special or more particular clause . . . must prevail over a general clause").

Here, the District Court held that the stipulation's blanket language satisfied section 256.7. The District Court stated:

> The Commissioner clearly agreed to abide by 'all' applicable rules and regulations; clauses (d) and (e) were unquestionably applicable regulations; and thus the Commissioner unquestionably agreed to abide by clauses (d) and (e) (along with the rest of 25 C.F.R. § 256.7).

A08. In addition, although the District Court could not answer why the stipulation specified only three of the five conditions, it concluded that the omission of the remaining two conditions "is also not important." *Id.*

The District Court's analysis is limited and misguided. First, it wholly ignored the requirement that the stipulation "expressly agree[]" to the five conditions listed in 25 C.F.R. § 256.7. Agreeing to "all pertinent rules and regulations of the Department of Interior" does not constitute "expressly agreeing" to the conditions specified in section 256.7. Second, the District Court ignored the relevance of the stipulation's omission of two of the five required conditions. In expressly listing three out of the five conditions, the Commissioner intentionally left out the remaining two required conditions. The District Court found the omission to be superfluous, contrary to the express command of § 256.7.

Section 256.7 requires that the stipulation expressly agree to the conditions and not state a generic agreement to conform to "all pertinent rules and regulations." JA0069. Black's Law Dictionary defines "express" as "[c]learly and unmistakably communicated; directly stated." (7th ed. 1999). While "all pertinent rules and regulations" may cover 25 C.F.R. § 256.7, it does so indirectly and therefore fails to satisfy the conditions for a lawful right-of-way.

The District Court does not dispute that the stipulation failed to directly agree to the required conditions. Instead, the District Court retraces the Commissioner's logic in three steps: first, the District Court states that the "Commissioner clearly agreed to abide by 'all' applicable rules and regulations"; second, it declares that "clauses (d) and (e) were unquestionably applicable regulations"; and finally, it concludes that "the Commissioner unquestionably agreed to abide by clauses (d) and (e) (along with the rest of 25 C.F.R. § 256.7)." A08. While these steps may in fact be true, they also demonstrate that the stipulation failed to directly and expressly agree to the five conditions. Section 256.7 did not suggest that the stipulation contain language which impliedly agrees to the five conditions; rather, it required that the stipulation "expressly agree[]" to all five conditions.

The District Court also refused to acknowledge the Commissioner's omission of two of the five conditions for the application. The omissions cannot have been unintentional. The Commissioner obviously understood that the references were required, or he would not have "expressly" listed even three. At a minimum, the ambiguity created by the Commissioner's "special reference" to only three of the five required conditions allows the introduction of parol evidence, including the course of performance evidence discussed above.

The District Court erred by rendering the express terms of the stipulation meaningless. The stipulation expressly includes only three of the five conditions, thereby omitting the remaining two. Since all five conditions must be expressly stated, the stipulation failed to satisfy the requirements of 25 C.F.R. § 256.7. This is the only interpretation available under the express terms of the stipulation. The District Court instead rendered the only express terms of the agreement to be superfluous and, in the place of the express terms, utilizes the stipulation's generic language to satisfy the conditions under § 256.7. Accordingly, the District Court erred and the right-of-way must be void.

3. The Right-of-Way is Void Because the State's Interest in the Right-of-Way Did Not Vest Without Valid Federal Approval.

It is a fundamental principle of Indian law that interests in Indian trust lands do not vest without valid federal approval. *See United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 697-98 (9th Cir. 1976) (citing 25 U.S.C. § 177); *Johnson v. McIntosh*, 21 U.S. 543 (1823); *see also Cohen's Handbook* § 15.06[1]. While the Tribal Court could not find case law addressing specifically a failure to include these stipulations in a right-of-way, the cases make clear that interests in Indian property requiring approval by the Secretary of the Interior or her delegate do not vest where the approval is invalid. For example, in *Sangre De Cristo Dev. Co., Inc. v. United States*, 932 F.2d 891, 893 (10th Cir. 1991), a development company signed a lease with Tesuque Indian Pueblo ("Pueblo") to develop a residential community and golf course on Pueblo land. The Department of the Interior ("Department") approved the lease. *Id.* The next year, neighboring landowners and nonprofit environmental groups filed suit against the government to enjoin the development, asserting that the United States' approval of the lease was invalid

because no one conducted an Environmental Impact Study ("EIS"), as required by statute and regulation.[15] *Id.*

The Tenth Circuit held that the development company did not have a vested interest in the lease at the time the Department rescinded its approval because the lease was void. *Id.* at 894. In order to have legal effect, a lease must be validly approved according to relevant statutes and regulations. *Id.* at 894-95. The Department's cancellation of the lease "did not divest Sangre of a leasehold interest because Sangre's interest never vested in the first place." *Id.* at 895.

In an earlier case, that same court held that local agency actions that are contrary to the regulations and contrary to the best interests of the Indian do not create vested rights in the property interest. *Gray v. Johnson*, 395 F.2d 533, 536-537 (10th Cir. 1968).[16] "Agents of the government must act within the bounds of

---

[15] The District Court denied the injunction, and the Court of Appeals reversed and remanded with instructions to enjoin the United States from approving the lease agreement without the required EIS. *Id.* While the development company and the BIA worked on the EIS, the Pueblo reconsidered the lease and asked the Department to void it. *Id.* The Department then rescinded the prior lease approval citing environmental considerations and the Pueblo's opposition. *Id.* The trustee of the development company's bankruptcy estate brought suit asserting that the Department's recision of the lease constituted a taking under the Fifth Amendment. *Id.* at 893-94.

[16] There is no evidence in the record that suggests that it was in the best interest of the Band to omit the two stipulations. In fact, it is difficult to imagine how that (continued...)

their authority; and one who deals with them assumes the risk that they are so acting." *Id.*

Here, the relevant regulation provides that, among other things, the application for a right-of-way "shall be accompanied by a duly executed stipulation expressly agreeing" to five subsections, not three. Like the leases in *Sangre De Cristo* and *Gray*, Minnesota's purported right-of-way for this stretch of highway is void because the local BIA official did not follow requisite procedures in approving the property interest. The regulation required the State to file an express stipulation agreeing to all five subsections of § 256.7. Minnesota only expressly agreed to three subsections. The local official's approval of the right-of-way application does not make the right-of-way valid, because like the officials in *Sangre De Cristo* and *Gray*, the local official was acting outside of the bounds of his authority when he approved a right-of-way without the required stipulations. Thus, Minnesota does not have a valid right-of-way over that stretch of highway on the Red Lake Reservation, and never did. Since the Nords' Motion for Summary Judgment is predicated solely on the existence of a valid right-of-way, the District Court should have denied the motion for summary judgment adn

[16](...continued)
could be so.

granted the Tribal Court's motion to dismiss because there is no valid right-of-way.

B. The Purported Right-of-Way Was Void Ab Initio and Thus Never Existed.

1. It is absurd to expect the Tribe to challenge an interest in property that is void.

The District Court incorrectly concluded that the Tribal Court is somehow objecting to the purported right-of-way fifty years after it went into effect. *See* A08. Neither the Tribal Court nor the Band is challenging the purported right-of-way fifty years later. Rather, the Tribal Court is pointing out (under duress) that the right-of-way never existed in the first place and never had any legal effect.[17]

[17] As discussed above, the Band and State apparently had a meeting of the minds on something less than the right-of-way that the District Court held exists. Since the Band thought that it created a valid right-of-way that did not confer adjudicatory and regulatory jurisdiction to the State, there was no reason to raise have the right-of-way declared void. *See S. Pac. Transp. Co.*, 543 F.2d at 698 ("The Indians never objected because of an erroneous belief that the agreements were valid." (citations omitted)). ***That*** right-of-way would have been what they bargained for. However, because the District Court found that all rights-of-way are created equal and that any right-of-way confers adjudicatory jurisdiction over to the states, the Tribal Court has no alternative but to point out that the purported right-of-way is void.

2. Any State Reliance or Past Compensation on the Purported Right-of-Way Does Not Create Something That Did Not Exist in the First Place.

According to the District Court, the State of Minnesota built Highway 1 because it "[r]el[ied] on the validity of the right-of way . . . paid compensation to tribal members for the land on which Highway 1 was built, maintained Highway 1 for over half of a century, and continues to maintain Highway 1." A08. Such reliance and compensation do not create a valid right-of-way. Reliance and compensation do not even create a license to use the land.

Any State reliance upon the right-of-way's validity, payment to Indian landowners, and maintenance of the highway is immaterial to determine the validity of the right-of-way because a right-of-way is only valid when it is applied for and approved under the appropriate regulation. Instruments that purport to convey interests in Indian property in violation of the governing statute or regulations are void. *See S. Pac. Transp. Co.*, 543 F.2d at 697-99. It does not matter that the party with the purported interest in Indian land relied or paid compensation. *Id.* at 699; *see also Lambert v. Rocky Mountain Reg'l Dir.*, 43 IBIA 121, 125 (2006) (reliance does not make an invalid lease valid). In *S. Pac. Transp. Co.*, the Ninth Circuit Court of Appeals found that even though a railroad company had been using a strip of land for nearly 100 years, paid compensation to the tribe,

and occupied the strip of land under apparent acquiescence of the Indian owners, the railroad company did not have a valid right-of-way across Indian lands because it did not meet the requirements in the relevant statutes and regulations. *See id.* at 698-99 (applying reasoning from *Bunch v. Cole*, 263 U.S. 250, 254 (1923) and *Smith v. McCullough*, 270 U.S. 456, 463-65 (1926)). Even a *good-faith use* does not convey a valid right-of-way or even a license. *See id.* "To give effect to an invalid attempt to convey an interest in tribal lands in violation of the statute by holding that it creates a license would undermine [the] purpose [of 25 U.S.C. § 177]." *Id.* at 698. Even if the State relied on the right-of-way, and compensated the Indian landholders, these actions do not create a valid right-of-way where there is none. And, the District Court cited no authority when it bolstered the right-of-way's validity with the State's reliance and compensation to the landowners.

The Tribal Court assumes *arguendo* in Sections I and II that it conveyed to the State the right to build, maintain, and use a highway over a section of land in this case. However, the District Court found that no matter how little the Band conveyed in that agreement, the Court will interpret the right-of-way as conferring adjudicatory and regulatory jurisdiction over suits against nonmembers. The District Court used an all or nothing analysis to find that any federally approved right-of-way necessarily confers that type of jurisdiction to the State courts. If this

Court agrees with the District Court that all rights-of-way are created equal and that this right-of-way falls under the holding in *Strate*, then it necessarily follows that the creation of the right-of-way should also be an all or nothing analysis. And, under an all or nothing analysis, this right-of-way was not lawfully granted. State and federal authorities failed to comply with the requirements for creating a valid right-of-way, and anything that they did create was void from its inception, regardless of any reliance.

CONCLUSION

Accordingly, the Tribal Court respectfully suggests that the judgment of the District Court must be reversed on each of these grounds and the matter either remanded for dismissal or to allow appropriate discovery.

Respectfully submitted,

THOMAS J. PECKHAM
ALAN R. TARADASH
DOREEN N. HOBSON
RODINA C. CAVE
JENNIFER J. DUMAS
Nordhaus Law Firm, LLP
405 Dr. Martin Luther King Jr. Ave. NE
Albuquerque, NM 87102
telephone: 505-243-4275
facsimile: 505-243-4464

Attorneys for Defendants-Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,977 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(A)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in 14 point font Times New Roman type style.

ADDENDUM

Nord v. Kelly, et al., No. 05-1135, Mem. Op. and Order (DMN Jan. 1, 2007)

Stipulation, Dep't of Highways, State of Minnesota (n.d.)

Declaration of Joseph McKinnon (May 5, 2006)

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing **APPELLANTS' OPENING BRIEF** and one (1) copy of the **JOINT APPENDIX** was furnished by Overnight Mail to the following on this 3rd day of May, 2007.

Roger H. Gross
Timothy J. Crocker
GISLASON & HUNTER, LLP
701 Xenia Ave. S., Ste. 500
Minneapolis, MN 55416

_____