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' REPLY BRIEF

Respectfully submitted,

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I. ANY RIGHT-OF-WAY IN THIS CASE DID NOT RENDER THE HIGHWAY CORRIDOR THE EQUIVALENT OF NON-INDIAN LAND UNDER A PROPER READING OF *STRATE*.

The Nord's Answer Brief ("Response") fails to address the primary question in this appeal—should the Supreme Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) be categorically applied to prevent ***all*** tribal courts from exercising jurisdiction over traffic accidents involving nonmembers on ***all*** state rights-of-way over ***all*** Indian trust land. The answer has to be, and is, no. An Indian tribe, even more so than an individual property owner, has a right to define the contours of easements across its lands, even when state highways are constructed thereon. A categorical application of *Strate* would deprive Indian tribes of this essential right.

Here, the Red Lake Band ("Band") purportedly granted a limited easement to the State but did not transfer governmental control, which of necessity includes adjudicatory jurisdiction.[1] Since then, the Band has maintained fundamental control over the road, as a State official acknowledges. A18-23, JA0213-17.

[1] Again, at most points the Tribal Court will assume *arguendo*, without conceding, that a right-of-way was granted for purposes of parts I - III of this reply.

The Tribal Court has also demonstrated, to the extent possible before proper discovery, that neither the State nor the Band intended any right-of-way to transfer governmental authority from the Band to the State.

It is not reasonable to assume that the *Strate* Supreme Court, with only the facts before it, was presuming to adjudge all other factual situations that might arise, for the Supreme Court is consistently mindful of its constitutional role to adjudicate only the case before it:

> For the reasons stated by Chief Justice Marshall in *Cohens v. Virginia,* 6 Wheat. 264 (1821), we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated. See *id.*, 6 Wheat at 399-400 ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision").

Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, ___, 126 S.Ct. 990, 996 (2006).

In determining the proper scope of *Strate*, the following hypothetical right-of-way provision may be useful:[2]

> The Tribe expressly reserves, and the State expressly does not assume, any civil or regulatory jurisdiction that the Tribe would exercise were this right-of-way not granted. Should any court declare in a final nonappealable judgment that the Tribe, through its court, lacks such

[2] While the suggested language is hypothetical, similar provisions may already be in place and certainly will be soon as tribal governments work to overcome the perceived intrusion of *Strate*.

> jurisdiction, this right-of-way shall become void six months thereafter to allow the parties an opportunity to negotiate another instrument accomplishing this end.

With such express language, one cannot imagine that a court would decide that a tribal court lacks jurisdiction. While the language here is not as *express*, the evidence (both offered and proffered) in this case shows and will show that the parties did not intend to transfer jurisdiction. Under such circumstances, it is simply nonsensical to conclude that this right-of-way is sufficiently like the broad right-of-way addressed in *Strate* and is therefore the "equivalent" of alienated non-Indian fee land, which an Indian tribe has limited authority to regulate.

The Nords' dogmatic recitations from *Strate* and the District Court's opinion fail to help this Court assess how that case can and should be applied to the materially different set of facts present here.

A. The Supreme Court's Decision in *Strate* Does Not Limit the Facts to Be Examined in Reaching a Decision on the Land Status of a Right-of-Way.

The Nords acknowledge that the "*Montana* rule,"[3] as applied in *Strate*, is limited to alienated non-Indian fee land. *See* Response at 18-19. They further acknowledge that the reason the *Montana* rule applied in *Strate* was because a broad right-of-way rendered the trust land there the "equivalent" of alienated non-Indian fee

[3] *Montana v. United States*, 450 U.S. 544 (1981).

land. *Id.* They even go so far as to agree with the Tribal Court that not all rights-of-way are created equal, *id.* at 21, and under *Strate*, facts must be examined before determining whether a particular right-of-way is "equivalent" to non-Indian fee land. *See id.* The Nords part ways with the Tribal Court, however, when it comes to which facts may be examined, seemingly suggesting that only those facts considered in *Strate* are relevant to the jurisdictional analysis. *Id.* at 19-20.

Nowhere in the *Strate* opinion is it stated that the facts in that case are the *only* facts that may be considered. *Strate*, 520 U.S. at 454-56. Given the Court's reasoning (discussed at length in Appellants' opening brief), other facts, like those at issue here concerning the parties' intent, emergency response, maintenance procedures, and general course of conduct, are logically relevant.[4] *Id.* The Nords' reliance on *Strate* to limit the scope of facts to be considered in this case, therefore, is erroneous. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004).

The Nords make much of the fact that in *Strate*, as in this case, the right-of-way was "maintained" by the State. Response at 18-19. But there is no discussion of what the Supreme Court meant by the term "maintained." Here, while the State does perform maintenance on this stretch of road, it requests permission from the Band

[4] In fact, the *Strate* Court thought other facts were worth mention, and noted that in that case the county courthouse was closer "by road" to the accident site than the tribal court. 520 U.S. at 445 n.4. Here the inverse is true by many miles.

before undertaking any significant project. A20-21, JA0215-16. On information and belief, when accidents occur, as in this case, tribal authorities respond. State authorities do not. JA0204. Whatever the *Strate* court meant when it referred to a highway "maintained" by the state, it cannot have meant to refer to the kind of right-of-way at issue here, over which the Band, not the State, assumes and exercises fundamental decisional control.[5]

Because the Supreme Court's decision in *Strate* concerns facts very different from those at issue here, it cannot dictate the outcome of this case.

The Nords acknowledge that consideration of specific facts is important but argue that the District Court fully considered such facts because "its holding specifically dealt with Minnesota State Highway 1 & 89, which, as was the road in *Strate*, a federally granted right-of-way for a state highway open to the public." Response at 21. The Nords' analysis ends there. Essentially, then, the only support for the Nords' argument is that the District Court correctly identified the right-of-way at issue. This is a far cry from the analysis necessary to determine whether a right-of-

[5] The Band also maintains a gatekeeping right, unlike the tribe in *Strate*. As acknowledged by Mr. McKinnon, the State lacks any right-of-way or other right of entry on "at least one length of State Highways 89 and 1, consisting of approximately four miles, within the Red Lake Indian Reservation." A19 ¶ 3, JA0214 ¶3 . Thus, the Band does maintain absolute control over a section, albeit not the accident site itself, that one must traverse to pass the accident site and through the Reservation.

way is "equivalent" to alienated non-Indian fee land within the meaning of *Strate*.

In any event, the Nords misrepresent the District Court's analysis. The District Court specifically stated that *Strate* applies categorically to ***any*** right-of-way over Indian land and prohibits the consideration of ***any*** distinguishing facts, such as those presented or offered by the Tribal Court here. Addendum to Opening Brief at A10.[6] ("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.") (emphasis added).

The District Court's failure to consider relevant facts presented (and sought to be developed) by the Tribal Court was error and should be reversed.

B. The *Montana* Exceptions Do Not Dictate the Scope of the Band's Sovereign Authority to Define the Contours of Easements Across its Lands.

In its opening brief, the Tribal Court argued that the District Court's decision infringed upon the Band's sovereign authority to define the scope of easements across its lands. Appellants' Br. at 21-22. The Tribal Court explained that this was especially true given that even individual property owners retain such authority. *Id.* The Nords' response is that the Band's sovereignty cannot have been affected because

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

the conduct at issue is not within the scope of the second *Montana* exception. Response at 22. The Nords appear to be arguing that as a general rule, the scope of an Indian tribe's sovereign authority is defined by the *Montana* exceptions. This is simply untrue.

The *Montana* exceptions define the scope of an Indian tribe's authority over *nonmember conduct* on alienated *non-Indian fee land*. *See generally, Montana,* 450 U.S. at 557-68. It is undisputed that the underlying car accident took place on *tribal trust land*. The question in this case is whether a right-of-way over that trust land is broad enough to render the trust land the equivalent, for nonmember governance purposes, of alienated non-Indian fee land. As announced in *Montana*, the *Montana* rule, and its exceptions, do not apply ***until the land status determination is first made***.[7] The Nords' reliance on those exceptions in the context of the fee-or-trust-land determination, therefore, must be rejected.

C. That the Band Did Not Intend to Convey Governmental Authority, Including Civil Jurisdiction, Is Relevant to this Case.

The Nord's next argue that the question of whether the Band intended to convey governmental authority here is irrelevant because no governmental authority was in

[7] Footnote 14 in *Strate* is consistent, since it only applies to lands covered by *"Montana's* main rule." 520 U.S. at 459 n.14. That rule in turn first requires resolution of the land status.

fact conveyed. Response at 23-24. They explain that both before and after the right-of-way, the state court had authority to hear cases against nonmembers and lacked authority to hear cases against members for actions arising out of automobile accidents on the Reservation. *Id.* at 24. What the Nords fail to recognize, however, is that the issue here is not the power of the state court to hear cases, but rather the asserted prohibition of tribal court jurisdiction over those same cases.

At the heart of this case is the Nords' argument that, by consenting to the right-of-way through the Red Lake Reservation, the Band unintentionally but irrevocably surrendered the concurrent jurisdiction of its tribal courts to hear cases concerning nonmember automobile accidents on State rights-of-way within its Reservation. According to the Nords, the power to hear such cases, which used to be shared by the Tribal and State courts, is now exclusively within the State courts' jurisdiction. As in the hypothetical laid out above, it must be relevant to this case whether the Band intended to relinquish jurisdiction in connection with the right-of-way here, and the preliminary evidence shows very clearly that it did not.

The Nords assert that the Tribal Court's conclusion is inconsistent with Federal law because Tribes, as "domestic dependent nations," retain only those aspects of sovereignty necessary to protect tribal self-government or to control internal relations within the meaning of *Montana*. *See generally*, Response at 25-26. Again, the Nords

erroneously attempt to define the contours of an Indian tribe's sovereignty by the *Montana* exceptions. As explained above, these exceptions apply only, or at least primarily, to *conduct of non-Indians* on *alienated non-Indian fee land*.

While the Nords attempt to rely on *Nevada v. Hicks*, 533 U.S. 353 (2001), to support their argument that the *Montana* exceptions apply even on tribal trust land, they fail to recognize that *Hicks* was specifically limited to its facts. The Court stated: "Our holding in this case is limited to the question of tribal-court jurisdiction ***over state officers*** enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general." *Id.* at 358 n.2. And as Justice Ginsburg, the author of *Strate*, pointed out in concurrence, *Hicks* did not create a general rule regarding nonmember defendants. *Id.* at 386.

In *Hicks*, the majority expressly stated that its holding was not to be construed to eliminate the fee-land/trust-land distinction expressed in *Montana* and reaffirmed that the trust status of land could be "dispositive." *Id.* at 370-71. In practice, land status has been dispositive. For example, the Ninth Circuit confirmed tribal court jurisdiction on a tribal road. *McDonald v. Means*, 309 F.3d 530, 538-40 (9th Cir. 2002).

In addition, no court ruling can obviate the requirement of tribal consent in the underlying statute, 25 U.S.C. § 324. Tribes retain the sovereign (and property) right

to grant, or not grant, a right-of-way. A reading of *Strate* that diminishes tribes' ability to exercise their governmental authorities,[8] including civil jurisdiction, cannot help but have a dramatic impact on tribes' willingness to grant or modify rights-of-way.

The facts show that the Band did not intend to convey governmental authority, and its decision not to do so is consistent with well-developed principles of Indian law.

II. TRIBAL COURT JURISDICTION OVER THIS ACCIDENT IS CENTRAL TO THE BAND'S GOVERNMENTAL CONCERNS.

There is a consistent theme in the Nords' arguments: that under the Nords' interpretation of *Strate*, the Band and its Tribal Court have no sovereign interest in adjudicating civil suits involving nonmember defendants on a State highway (presumably unless there is a "directly" related consensual relationship under *Montana*). Such an interpretation of *Strate* assumes that tribes ***cannot*** negotiate jurisdictional agreements with states seeking rights-of-way across tribal lands and it essentially would read the second *Montana* exception out of existence.

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[8] Indian tribes retain a great deal of sovereign authority and Congress (at least for most of the last 70 years) has consistently encouraged and supported the exercise of that authority. *See generally, e.g.,* 25 U.S.C. §§ 450-458bbb-2 (declaring federal commitment to tribal self-governance); 25 U.S.C. §§ 461-494 (encouraging economic development and self-determination); 25 U.S.C. § 1301(2) (recognizing and affirming inherent tribal criminal jurisdiction over all Indians).

A. Congressional Policy Favors Development and Strengthening of Tribal Courts.

This interpretation is contrary to the Indian policy of Congress. Congress has exercised its plenary power over Indian affairs in many ways to support and encourage the growth of tribal courts, most comprehensively in the Indian Tribal Justice Act of 1993, 25 U.S.C. § 3631, which was amended and strengthened (after *Strate*) in 2000. *See* Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 (codified at 25 U.S.C. §§ 3651-3681). In the Act, Congress states:

> The Congress finds and declares that –
> . . .
>
> (2) Indian tribes are sovereign entities and are responsible for ***exercising governmental authority over Indian lands***;
> . . .
>
> (5) tribal justice systems are an essential part of tribal governments and serve as ***important forums for ensuring the health and safety*** and the political integrity of tribal governments;
>
> (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as ***the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands***;
>
> (7) enhancing tribal court systems and improving access to those systems ***serves the dual Federal goals of tribal political self-determination and economic self-sufficiency***.

25 U.S.C. § 3651 (emphasis added).

On the floor, the Senate sponsor of the amendments explained the importance of tribal courts to tribal government and self-sufficiency:

> Together, tribal governments and [Indian legal service organizations] work to ensure that Native justice systems work and that Natives ***and non-Natives alike have confidence*** in tribal justice systems and institutions.

Cong. Rec. S10405 (daily ed. Aug. 5, 1999) (statement of Sen. Campbell).

This Court, like Congress, has recognized that "[t]ribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294, 1299 (8th Cir. 1994) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987)). Other courts agree. *See, e.g.*, *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) (stating "tribal courts will be critical to Indian self-governance.").

This is consistent with the rather obvious proposition that courts and their exercise of adjudicatory jurisdiction is important to governments of all shapes and sizes. Congress, exercising its constitutional authority, has developed courts for territories of the United States to aid in the governance of the territories and assist their possible transition to statehood. *See generally Glidden Co. v. Zdanok*, 370 U.S. 530, 544-47 (1962) (explaining the rationale behind territorial courts). Despite the fact that state courts vary widely in structure, the Supreme Court has

held that state courts are "presumptively" competent to interpret and apply federal law and should be the ultimate arbiter of state law questions. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.").

Any interpretation of *Strate's* scope should account for the part Congress intends tribal courts to play in the ongoing development of tribal government, including building the confidence of "Natives and non-Natives alike" in tribal courts.

B. Congressional Policy Should Also Be Reflected in Interpretation of the Second *Montana* Exception.

If this Court were to conclude that the purported right-of-way did render the highway corridor the equivalent of alienated, non-Indian land, congressional policy should also guide the continuing development of the application of the second *Montana* exception, which involves those issues affecting tribal self-government. The Nords argue that the Supreme Court foreclosed application of the second exception in automobile accident cases, but under all the circumstances here, the second exception should be satisfied.

Several courts have applied the second exception in cases with an obvious nexus to tribal health and safety. *See Confederated Salish and Kootenai Tribes v.*

Namen, 665 F.2d 951 (9th Cir. 1982) (holding that a tribe's assertion of regulatory authority over nonmember activity that could pollute tribal waters "falls squarely" within the second exception); *see also Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982) (finding that a nonmember's operation of business in a dangerous and unsanitary condition met second exception). Specifically, courts have found the second exception to apply where nonmember conduct implicates the tribe's interest in "protecting their homeland from exploitation," *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900, 903 (10th Cir. 1982), and "to keep reservation peace and protect the health and safety of tribal members," *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 593 (9th Cir. 1983).

Since *Strate*, courts continue to apply the second exception. For example, the Ninth Circuit very recently withdrew an earlier opinion to allow the tribal court in the first instance to consider its jurisdiction over a products liability action against a nonmember corporation arising out of an auto accident that resulted in the death of a tribal police officer. *Ford Motor Co. v. Todecheene*, __ F.3d __, 2007 WL 1584616 (9th Cir. Jun. 4, 2007) (withdrawing its earlier opinion, 394 F.3d 1170 (9th Cir. 2005)). In its original opinion, the court held that second exception did not apply because the parties could not demonstrate that "the death of [a] tribal police officer in a rollover accident in any way prevented the Tribe from enacting

or being governed by its laws." 394 F.3d at 1183. On rehearing, however, the Ninth Circuit withdrew that opinion and held that the "tribal court did not 'plainly' lack jurisdiction under the second exception." __ F.3d __, 2007 WL 1584616 (9th Cir. Jun. 4, 2007).

The present case involves a combination of factors that ***together*** satisfy the second exception even if the Court concludes that the highway corridor is the equivalent of alienated non-Indian land. The plaintiff is a member of the Band. The road at issue is literally the main street for the largest communities on the Reservation. The Band provides the vast majority of law enforcement and emergency response services on the road. The Band approves major maintenance on the road. The Reservation is a closed reservation. *See generally*, *Brendale v. Confederated Tribes and Bands of the Yakama Indian Nation*, 492 U.S. 408 (1997) (Plurality held that the Yakima Nation retained authority to zone fee land in the closed area of the reservation). While one might read *Strate* as limiting the ability of each of these factors *alone* to satisfy the second exception of *Montana*,[9] taken together they create a compelling case that an auto accident on this highway

[9] While the *Strate* Court, in dealing with an auto accident to which the tribe was a "stranger," was concerned that the second exception could swallow the rule, 520 U.S. at 458, the inverse is also a concern–that the rule will swallow the exception.

involving a tribal member is anything but the "run-of-the-mill" accident at issue in *Strate,* to which that tribe was a stranger.[10]

III. IT WAS AN ABUSE OF DISCRETION TO DENY DISCOVERY UNDER FED. R. CIV. R. 56(f).

The Nords' assert that the Tribal Court had an "adequate" opportunity for discovery, and thus that the District Court properly denied Rule 56(f) discovery. The inverse, in fact, is true.

The Nords' curmudgeonly suggest that Rule 56(f) should be construed narrowly. This is contrary to the rule that 56(f) is to be construed "liberally," *Jensen v. Redevelopment Agency of Sandy City*, 998 F.2d 1550, 1554 (10th Cir. 1993), and ignores the Supreme Court's concern that parties will be "railroaded" if an opportunity for full discovery is not provided. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

The District Court apparently concluded that Rule 56(f) discovery was irrelevant given its categorical interpretation of *Strate* that ***any*** loss of control by a tribe through a right-of-way is dispositive. *See* A04-05. But, if the Tribal Court is correct that *Strate* cannot and should not be taken so far, then the District Court's

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[10] In its *Strate* en banc decision, this Court considered the non-Indian status of the parties, and concluded that no tribal interests were involved because both parties were non-Indian. Thus, the dispute was "distinctively non-tribal in nature." *A-1 Contractors v. Strate*, 76 F.3d 930, 940 (8th Cir. 1996), aff'd, 520 U.S. 438.

basis for denying 56(f) discovery evaporates.[11] *See, e.g.*, Summ. J. Hr'g Tr. 33:17-23, JA0273. Discovery is essential here to"prevent 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).

This action was filed in June 2005. The Tribal Court's first substantive filing was a Rule 12 Motion to Dismiss Without Prejudice or in the Alternative to Stay Pending Exhaustion of Tribal Remedies. Docket No. 19, Aug. 8, 2005. Before that motion was resolved, the parties stipulated to a stay until the Tribal Court appeal was resolved, Docket No. 41, Oct. 25, 2005, and a stay was entered the next day. Docket No. 43, Oct. 26, 2005. That stay, which ran through February 6, 2006, extended all discovery by the length of the stay. Through that date, the Tribal Court had not had an opportunity to conduct discovery–the action was stayed.

[11] Even if this Court, too, reads *Strate* as being categorical, Rule 56(f) discovery should have been allowed. Such a reading assumes that the Supreme Court extrapolated from a right-of-way containing no relevant reservations of authority by the tribe, on a road cut off from the main portion of the reservation, and an accident not involving a tribal member to conclude that ***no*** facts could be sufficient to establish tribal court jurisdiction. The Tribal Court respectfully suggests that, should the Supreme Court be asked to consider the scope of *Strate* through this case, both justice and judicial economy would be served by its doing so on a fully developed record.

Given the February 28, 2006 cutoff for discovery in the first pretrial order, issued August 29, 2005, the stipulated extension of 103 days ran until June 12, 2006. In the meantime, moreover, the Tribal Court filed a renewed Rule 12 Motion to Dismiss with Prejudice or Alternative Motion to Limit Evidence to Be Presented to the Federal Court. Docket No. 48, Mar. 27, 2006. The underlying premise of the alternative motion was that it is unclear under federal Indian law whether a federal district court reviewing a tribal court's jurisdiction sits: (1) as an appellate body, in which case ***no*** new evidence, and therefore no discovery, would be permitted; or (2) as a trial court, in which event full discovery on the jurisdictional question should be allowed. Two days later, the Tribal Court filed a motion seeking to stay discovery until the district court had ruled on the foundational question regarding "appellate" or "trial" review. A week later, the Nords filed their own dispositive motion, a motion for summary judgment which included new evidence.

The Tribal Court's response to the Nords' motion for summary judgment was filed on May 5, 2006, less than a month after the motion was filed, and over a month ***before*** discovery was scheduled to close. Implicit in the Nords' argument that the Tribal Court had "adequate" time for discovery therefore are the following propositions: (1) the Tribal Court should have been conducting discovery during

the stay and while it was engaged in a good faith effort to get guidance from the District Court on what evidence should and would be permitted, (2) once the Nords' motion for summary judgment was filed (with new evidence), the Tribal Court should have conducted all of its discovery in the four weeks it had to file its response to the Nords' motion, and (3) the Tribal Court should have completed its discovery more than five weeks before the discovery deadline presumptively applicable under the parties' stipulation.

The Tribal Court respectfully submits that each of these propositions is contrary to the intent of Rule 56(f) that parties have adequate time to conduct discovery. The Tribal Court should have been allowed time to conduct 56(f) discovery in order to respond to the Nords' motion for summary judgment. The District Court's failure to provide that time was an abuse of discretion.

IV. EVEN IF THE COURT CONCLUDES THAT THE PURPORTED RIGHT-OF WAY WAS NOT VOID *AB INITIO,* THE INTENT OF THE PARTIES SHOULD BE ENFORCED LEAVING THE BAND AND THE TRIBAL COURT WITH JURISDICTION.

The Nords incorrectly assert that a valid right-of-way is in force for the stretch of highway on which the accident occurred, and that if the Band wanted to challenge any defect in the right-of-way it should have done so fifty years ago in an administrative appeal. The Nords also attempt to distinguish Appellants' cited

authority on the grounds that such authority is no longer good law, or that it does not stand for what Appellants' assert. The Nords' assertions are wrong.

In the event that this Court finds that the right-of-way is not void, it should interpret the right-of-way as the Band and State intended—as simply granting access to the State to locate, construct, and maintain a highway. Interpreting the right-of-way as the parties intended leaves the adjudicatory jurisdiction over this accident with the Tribal Court, and precludes application of *Strate*.

A. The Purported Right-of-Way is Void Ab Initio and the Tribal Court's Cited Authority Cannot be Distinguished as the Appellees' Assert.

Instruments that purport to convey interests in Indian property in violation of the governing statute or regulation do not vest and are deemed never to have existed. *See United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 697-98 (9th Cir. 1976) (citing 25 U.S.C. § 177). The Nords mistakenly assert that the *S. Pac*. case ***only*** stands for the principle that a railroad company cannot obtain a right-of-way ***directly*** from a tribe through a treaty, and therefore distinguishes it based on the alleged right-of-way in this case obtained from the United States pursuant to the 1948 right-of-way act. Response at 41. The *S. Pac*. case stands for more than that basic principle.

In *S. Pac.*, the railroad company asserted that it made an agreement with the tribe for a right-of-way through the reservation and then submitted the agreement and maps to the Secretary of the Interior for approval twice. *See id.* at 681. The Secretary approved the maps on both occasions, but the approvals were either deficient or the railroad company failed to complete the process prescribed by the relevant statute. *See id*. at 681-82. The railroad made multiple arguments that its purported right-of-way ***nearly*** complied with the relevant statutes and regulations and that the right-of-way would comply if the court would just construe the relevant statutes and regulations in certain ways favorable to the railroad company. *See id.* at 684-85, 687-694. The Ninth Circuit rejected the railroad's arguments because, at bottom, the railroad company did not comply with the proper requirements, and those requirements were put into place to protect Indian tribes. *See id.* at 699. "Although it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result. Southern Pacific does not have and has never had a valid right-of-way across lands within the original [reservation]." *Id.*

Accordingly, the *S. Pac*. case is proper authority that instruments purporting to convey interests in Indian property in violation of the governing statute or regulation do not vest and are deemed never to have existed.

The Nords next attempt to distinguish *Sangre de Cristo Dev. Co., Inc. v. United States*, 932 F.2d 891 (10th Cir. 1991) on the ground that it relied on a case that they assert is no longer good law. In *Sangre de Cristo*, the Tenth Circuit cited *Gray v. Johnson*, 395 F.2d 533 (10th Cir. 1968), for support that leases approved contrary to BIA regulations are without legal effect. 932 F.2d at 894. In *Gray*, the plaintiff Gray leased an Indian allottee's land through a BIA approved lease. *Gray*, 395 F.2d at 535. The Indian allottee later attempted to lease the allotment to another lessee. *Id.* The BIA Superintendent denied the second lease application because the land was already leased to Gray. *Id.* The Indian allottee appealed the decision to the Area Director and asked the BIA to cancel Gray's lease. The Area Director cancelled it. *Id.*

Gray appealed to the Commissioner of Indian Affairs who found the lease void because it violated applicable regulations. *Id.* The Assistant Secretary of the Interior affirmed, as did the Tenth Circuit, holding that Gray's lease was void because it did not comply with the regulations regarding the lease term. *Id.* at 536-37. It also held that the lease was not in the best interest of the Indian under 25

C.F.R. § 2.14, which gave the Indian a continuing right of appeal in the case of injustice to the Indian. *Id.* The *Gray* case was decided in 1968. There is no longer a continuing right to appeal for injustice to an Indian in 25 C.F.R. Part 2.

Because there is no longer a continuing right of appeal in that context, the Nords argue that the ***entire*** *Gray* case is no longer good law, and that any case that relies on *Gray* is also no longer good law. They are wrong.

The *Gray* case held that the lease in question was void as not being in the best interest of the Indian ***and*** because it "violated a pertinent regulation." *Gray*, 395 F.2d at 537. The latter proposition is still good law. Moreover, *Sangre de Cristo* did not rely solely on the *Gray* case. It also cited *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384 (1947), which held that the government is not bound when its agent enters into an agreement that falls outside the agent's congressionally delegated authority, and *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972) which held that the BIA could not validly approve a lease before complying with NEPA. *Sangre de Cristo*, 932 F.2d at 894-95. The *Sangre de Cristo* court held that the lease in that case was void for lack of valid federal approval, *see id.*, ***not*** because it was not in the best interest of the Indians.

Accordingly, the Nords' arguments attempting to undermine or distinguish the holdings in *S. Pac.* and *Sangre de Cristo* fail, and a right-of-way granted contrary to regulation is void *ab initio*.

B. No Limitations Period Applies to Void Agreements.

The Nords assert that the time to challenge the validity of the purported right-of-way has passed because administrative review should have been sought within thirty (30) days after notice of the BIA Superintendent's decision to approve the right-of-way. The Nords incorrectly attempt to apply a limitations period to a void agreement. The Tribal Court is pointing out that the right-of-way ***never*** had any legal effect.

As explained above, interests in Indian land that do not comply with the relevant statutes or regulations do not vest and are void. *See S. Pac*., 543 F.2d at 699; *Gray*, 395 F.2d at 537; *Sangre De Cristo*, 932 F.2d at 894-95. A right-of-way is a contract, *see Kleinheider v. Phillips Pipe Line* Co., 528 F.2d 837, 840 (8th Cir. 1975), and a void contract binds no one; it is a mere nullity, *In re Donnay*, 184 B.R. 767, 784 (D. Minn. 1995); Restatement (Second) of Contracts § 7 (1981) (Voidable contracts) (defining void agreement); Williston on Contracts § 1:20 (4th ed.) (Void Bargains and Voidable Contracts).

"Thus, an action cannot be maintained on [a void] contract, nor can the contract later be validated." *In re Donnay*, 184 B.R. at 784. Accordingly, if a contract is void, no limitations period applies. *Id.* at 784-85.

Here, the District Court and the Nords incorrectly apply a 30-day limitations period to the void right-of-way agreement. The District Court and the Nords fail to recognize that because the right-of-way approval was void ab initio, the right-of-way never existed, and thus there was nothing to challenge and no limitation period to apply.

C. The Tribal Court is Not Required to Exhaust Administrative Remedies for this Court to Find that the Right-of-Way is Void.

The District Court incorrectly held that the Band should have raised its objection to the right-of-way to the BIA, and the Nords incorrectly assert that any challenge to the right-of-way is properly raised only in an administrative proceeding.

Successful challenges to void agreements regarding interests in Indian lands have been presented to the federal courts in a variety of ways, including without administrative exhaustion. In *Sangre de Cristo*, the Sangre de Cristo Development Company, Inc. negotiated with the Pueblo of Tesuque to lease 5,000 acres of Pueblo land for development. *See Sangre de Cristo*, 932 F.2d at 893. The Department of the Interior purportedly approved the lease as required by statute,

but neighboring landowners and environmental groups filed suit against the United States claiming that the Department's approval was invalid for failure to undertake the required environmental impact study under the National Environmental Policy Act ("NEPA"). *See id.* The Tenth Circuit remanded the case back to the district court with instructions to enjoin the United States from approving or acting in any way under the lease agreement until the NEPA process was completed. *Id.*

Over the next four years, Sangre de Cristo and federal agencies worked on the environmental impact study, but in 1976, the Pueblo of Tesuque requested that the Department void the lease. *Id.* The next year, the Department cancelled the lease. A bankruptcy trustee later brought an action in federal district court against the United States and argued that the lease rescission was a wrongful taking under the Fifth Amendment. *Id.* The court held that there was no taking of a vested interest because the lease was void *ab initio*. *See id.* at 894-95. The court did not refer to an administrative proceeding on the lease rescission. *See id.* at 893.

There was also no mention of an administrative proceeding in the *S. Pac*. case. In *S. Pac*., a tribe and individual allottees successfully sued the railroad company in federal district court, receiving a a declaration that the railroad's purported right-of-way was void. *See S. Pac*., 543 F.2d at 680. The court did not

require administrative exhaustion before determining that the right-of-way agreement was void. *See id.* at 684-85, 687-694.

D. Even If this Court Does Not Find That the Right-of-Way Is Void, the Right-of-Way Must Be Enforced as the State and Tribe Understand the Right-of-Way Agreement.

The Nords assert that the federal approval of the right-of-way was not deficient in any way, and that the regulations did not require the State Highway Commissioner to list singly each stipulated provision. As explained in the Tribal Court's opening brief, the regulations in effect at the time set out detailed requirements for the grant of a right-of-way. *See* Opening Br. at 47-49. The State was required to expressly agree to five (5) stipulations, 25 C.F.R. § 256.7 (1951), JA00069, and did not. It made "special reference" to three and left out two. JA00062.

While there is no requirement in the regulations that the provisions be listed singly in the Stipulation, the regulations require the applicant to "expressly agree[]" to all five stipulations. 25 C.F.R. § 256.7. Black's Law Dictionary defines "express" as "[c]learly and unmistakably communicated; directly stated." (7th ed. 1999). Applying the term "express" here, means that the Commissioner would have had to unmistakably communicate or directly state that Minnesota was agreeing to the required provisions. Listing three provisions singly, and leaving

out two, certainly does ***not*** meet the requirement. At a minimum, it renders ambiguous the state's statement in the Stipulation that it was agreeing to abide by "all pertinent" regulations, especially given that the meaning of that statement hinges on the Commissioner of Highways' understanding of which regulations were pertinent. The ambiguity is borne out by the McKinnon affidavit and warranting discovery.

As explained in Appellants' Opening Brief, *see* Opening Br. at 52-53, the omissions cannot have been unintentional. Expressly agreeing to only three provisions in the right-of-way application, however, is consistent with what the Land Management Engineer for the Minnesota Department of Transportation declares that the State was willing to agree to, and with what the Band was willing to give up.[12] As such, if the right-of-way is not void outright for failure to comply with regulations, it must be interpreted as the parties to the right-of-way agreement intended – as granting limited authority to construct and maintain the road, but not granting any governmental authority over the highway to the State.

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[12] It is notable that at oral argument, the District Court stated that the Stipulation was illegible as to whether the third stipulation was "c" or "e". July 28, 2006 Transcript at 26; A23. In its opinion, the District Court concluded it was a "c". A7. The McKinnon Declaration suggests strongly, however, that it must be an "e" given the State's concern about the indemnification on the Reservation required by stipulation c. Compare A19-20 with JA69.

In the event that this Court determines that the right-of-way is not void, it should interpret the right-of-way as it is, without the missing stipulations, and according to the State's and Band's understanding of the rights and obligations conveyed and reserved. Evidence presently available by declaration shows that neither the State nor the Band interpreted any right-of-way on Highways 89 and 1 as conveying governmental authority from the Band to the State. A18-22; JA0213-19; Opening Br. at 23-35. The State's avoidance of any appearance of a State governmental interest on the Red Lake Reservation that might be used to impose liability or suggest State indemnification, A21 ¶9, JA0216; recognition that the Red Lake Reservation is unique and a separate jurisdiction, A21 ¶¶9-11, JA0216; maintenance of the highway, *Id.*; lack of State law enforcement on Highways 89 and 1, JA0219, JA0204 ¶¶5h-5*l*; and the course of performance with the Band, A20-22, JA0215-17, demonstrate that the State understands that it did not receive the type of right-of-way sufficient to divest the Band of jurisdiction over this accident. The State received a right-of-way that allows the State to carry out its purposes as stated in its application for the right-of-way—to locate, construct, and maintain the highway. JA0059.

Under this interpretation, the agreement can be read to give effect to what the parties intended, which is no transfer of governmental authority, no appearance

of a State governmental interest on the Band's Reservation that could be used to impose State liability or suggest State indemnification, and no transfer of adjudicatory jurisdiction from the Band to the State.

The Band did not relinquish relevant control over the land where the accident occurred, and as such, the right-of-way retains its character as tribal trust land. *Strate* applies to rights-of-way where a tribe has given up control over the land such that it is the equivalent of non-Indian land. Since the Band has not given up that control, *Strate* does not apply here.

CONCLUSION

The Tribal Court respectfully suggests that the judgment of the District Court be reversed on each of the grounds stated herein and the matter either remanded for dismissal or to allow appropriate discovery.

Respectfully submitted,

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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 6,990 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.

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing **APPELLANTS' REPLY BRIEF** was furnished by overnight mail to the following on this 18th day of June, 2007.

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