Case No. 07-1564

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

Plaintiffs - Appellees.

vs.

Donald Michael 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 Court File No.: 05-CV-01135 PJS/RLE

APPELLEE'S BRIEF

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SUMMARY OF THE CASE

This matter arises out of an automobile accident on a federally-granted public right-of-way passing through the Reservation of the Red Lake Band of Chippewa Indians. The accident involved Red Lake Member Donald Kelly, and non-member Chad Nord. Mr. Kelly brought suit in Red Lake Nation Tribal Court against Chad Nord and his father, Dennis Nord (vehicle owner). The Nords filed a motion to dismiss based on lack of jurisdiction. After waiting a year for a decision on their motion, the Nords filed suit in federal court requesting declaratory and injunctive relief that the Tribal Court lacked jurisdiction over the Nords. The Tribal Court subsequently denied the Nords' motion, and they appealed to the Tribal Appellate Court. The parties stayed the federal action until after receiving the tribal appellate opinion, as that decision could have mooted the federal action. The Tribal Appellate Court affirmed, and the federal stay ended. The Tribal Court moved to stay discovery in the federal action, which the Nords opposed. The parties then made cross-motions for judgment. The Tribal Court alternatively requested additional discovery time under Rule 56(f). On hearing, the Federal District Court found that the Tribal Court lacked jurisdiction over the nonmember Nords based on federal law including Strate v. A-1 Contractors, Inc., 520 U.S. 438, 448 (1997). The Nords request 30 minutes for oral argument based on the issued raised, and note that oral argument in the District Court took 54 minutes.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, Appellee Nord Trucking hereby discloses it has no parent corporations and no publicly held stock.

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STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court, by applying and following Strate v. A-1 Contractors, 520 U.S. 438 (1997), erred in holding that the Tribal Court lacked jurisdiction over the nonmember Nords for the automobile accident that occurred on a federally-granted state highway open to the public and maintained by the State.

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

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

2. Whether the District Court abused its discretion in denying the Tribal Court's Rule 56(f) Motion for additional discovery time where the Tribal Court had an opportunity to conduct discovery, had previously moved to stop discovery, and where no additional facts would change the Court's analysis.

   Nat'l Bank of Commerce of El Dorado, Arkansas v. Dow Chemical Co., 165 F.3d 602, 606 (8th Cir. 1999).

   Ingle ex rel. Estate of Ingle v. Yelton, 439 F.3d 191 (4th Cir. 2006).

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

3. Whether the District Court erred in finding that the accident occurred on a federally-granted, public right-of-way.

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

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

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STATEMENT OF THE FACTS

This matter arises out of an automobile accident that occurred on or about December 16, 2000. (Joint Appendix ("JA") 0238.) On that date, Chad Nord was driving a semi tractor west on Minnesota State Highways 1 & 89 heading towards the Beltrami County line when he was involved in a collision with a vehicle being driven by Defendant Donald Michael Kelly. (JA 0238; 0025.) The accident occurred West of the junction of State Highways 1 & 89. (JA 0141-0142.) This stretch of highway in question traverses the Reservation of the Red Lake Band of Chippewa Indians (the "Tribe"). (JA 0238.)

The State of Minnesota possesses a federally granted right-of-way across the Red Lake Reservation for the stretch of highway on which the accident occurred, spanning from the Beltrami County line to the junction of Highways 1 & 89. (JA 0029-0031; 0141-0166.) The highway is maintained by the State of Minnesota and is open to the public for travel. (JA 0029-0031.) Minnesota Department of Transportation show that the State applied for a right-of-way for this roadway in 1955, pursuant to federal law (JA 0030; 0055; 0141-0166).

Federal regulations under then- 25 C.F.R. § 256 (1951)[1] set forth the procedure for grant of right-of-ways over tribal lands. (JA 0066-0083.) The regulations describe the application process, which included requirements that the tribal counsel consent to the right-of-way (25 C.F.R. §256.3), and that a formal application be filed with the local Superintendent with a map of the proposed right-of-way. (25 C.F.R §§256.7-256.8; JA 0067-0071.) The regulations also provided that when the process was complied with, the Superintendent approved the right-of-way grant application by endorsing the map, after which the grantee was free and clear to "proceed with the construction." (25 C.F.R. §256.14; JA 0072.) Rights-of-way for public highways granted under these regulations "shall be without limitation as to term of years." (25 C.F.R. §256.1; JA 0073.)

Certified records from the Bureau of Indian Affairs- Land Titles & Records Office[2] also include the application and Stipulation for the public highway right-of-way, reference that the Tribe discussed and waived compensation for the right-of-way, and include a compensation schedule for the individual members. (JA 0051-0084.) Tribal records also show that the Tribe consented to the right-of-way. (JA 0026-0027, 0162-0166). Finally, there is a map for the right-of-way bearing the

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[1] All references to 25 C.F.R. §256, et seq. are to the 1951 Regulations, which were included in the Bureau of Indian Affairs –Land Titles & Records Office files for the Right-of-Way in question. (JA 0051-0084.)

Superintendent's endorsement, approving the federal grant. (JA 0086- 0094; 0147-0161).

Defendant Donald Kelly is a member of the Tribe. (JA 0014.) The Nords are not. (JA 0014; 0025.) Defendant Kelly instituted a personal injury action against the Nords in the Red Lake Nation Tribal Court (the "Tribal Court"). (JA 0238.) The Nords moved for dismissal on September 5, 2003, arguing that pursuant to Strate v. A-1 Contractors, the Tribal Court lacked jurisdiction to hear the matter as it occurred on a public right-of-way and the defendant was a nonmember. (JA 0100; 0118-0126). As part of their motion, the Nords supplied the Tribal Court with the granting documents including the application, stipulation, tribal consent, compensation schedule, and survey map bearing the Superintendent's endorsement. (JA 0141-0166.) The Nords also supplied evidence from the State that it maintains the roadway as a public highway. (JA 0141-0143.)

In his brief opposing the Nords' motion, Mr. Kelly conceded the validity of the right-of-way. (JA 0223.)

After waiting over a year for the Tribal Court to rule on their motion, the Nords filed the federal court action for a declaration that the Tribal Court has no jurisdiction over the Kelly personal injury matter against the nonmember Nords,

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[2] This office is "charged with the Federal responsibility to record, provide custody, and maintain records that affect titles to Indian land. 25 C.F.R. §150.3 (2005).

and requesting an injunction against further Tribal Court proceedings regarding same. (JA 0014-0018.)

In the meantime, over two years after hearing oral arguments the Tribal Court finally ruled on the Nords' motion to dismiss, denying same. (JA 0100-0112.) As part of its decision, notwithstanding the fact that it had been presented the executed granting documents from the BIA and State of Minnesota, the Tribal Court declared that "there has been no proof or evidence to show that a granting instrument was ever executed," while noting that the Strate Court had "cited directly from the granting instrument." (JA 0107.)

The Tribal Court also relied on a state court case, Sigana v. Bailey, 164 N.W.2d 888 (Minn. 1969), involving State jurisdiction over an Indian Defendant, and which involved analysis of a different right-of-way and section of the highway from the one at issue in the instant matter. (JA 0107-0108; 0181-0183.)

In its Memorandum, the Tribal Court also indicated that Strate was inapplicable because the Nords had a business relationship with the Tribe, because tribal law enforcement polices the highway, and because the Tribes' sovereignty was implicated to an extent not present in Strate because unlike Strate, the tribal court plaintiff was a member. (JA 0103; 0109.)

The Nords appealed. (JA 0113.)

Meanwhile, in federal court the Tribal Court moved for dismissal of the federal court action. (JA 0004- Docket No. ("DN") 19.) However, prior to hearing that motion, the Nords agreed as a courtesy to the Tribal Court to stay those proceedings so the Tribal Court could focus on the tribal court appeal, and also because the appeal could make the federal action moot if the appellate court reversed the trial court and found there was no jurisdiction. (JA 0006; DN 41, 43.)

The Tribe's Appellate Court subsequently affirmed its lower court's jurisdictional ruling. (JA 0116.) Stay of the federal action ended, and the Tribal Court withdrew its initial motion for dismissal. (JA 0006; DN 47.) The Tribal Court then brought a motion to stay or limit discovery, which the Nords opposed. (JA 0006; DN 51, 56.) The Federal Magistrate granted the Tribal Court's request. (JA 0008; DN 84.)

The Nords and the Tribal Court submitted cross-motions for judgment as a matter of law. (JA 0006; DN 48; and JA 0007; DN 59.) As part of the Nords' motion, they submitted to the District Court the same granting documents that it submitted in the Tribal Court including the endorsed map, the application, stipulation, tribal consent, and compensation schedule. (JA 0026-0027, 0057-0064, 0086-0094, and 0141-0167.) The Tribal Court also submitted these documents to the District Court for review, by submitting to the District Court the Tribal Court record of the case. (JA 0011; DN 120-131.) The Tribal Court also brought a Rule

56(f) motion for additional discovery time in the event the Nords were entitled to summary judgment. (JA 0009; DN 92.)

The District Court heard all motions and granted the Nords' motion, declaring that based on Strate v. A-1 Contractors, 520 U.S. 438 (1997), the Tribal Court lacked jurisdiction over the non-member Nords for Mr. Kelly's civil suit arising out of the accident occurring on a public state highway passing through the reservation. (Addendum to Appellant's Brief ("AD") 1-17.) The Court further denied the Tribal Court's Rule 56(f) Motion, as further discovery would serve no purpose other than to delay the inevitable. (AD 1-17.)

The instant appeal followed.

SUMMARY OF ARGUMENT

The District Court below was faced with a legal question and arguments that have already been answered by the Supreme Court in Strate v. A-1 Contractors, 520 U.S. 438 (1997), under nearly identical facts. Under these circumstances, the District Court did not err in applying and following Supreme Court precedent, and its determination that the Tribal Court lacks jurisdiction over the nonmember Nords as a matter of law was proper.

The Tribal Court misleadingly argues that the District Court failed to examine the right-of-way as required under Strate, and also that the District Court

found that any right-of-way of any kind ever would trigger the application of Strate. This is not true; the District Court did in fact examine the right-of-way in question in arriving at its decision, and its holding clearly relates to the federally-granted right of way for the public state highway at issue in this case.

Similarly, it was proper for the District Court to deny the Tribal Court's Rule 56(f) Motion for more time. This is because the District Court's ruling was based on the same evidence presented to the Tribal Court, and the Tribal Court did in fact have an opportunity to conduct discovery but affirmatively acted to prevent discovery. Additionally, the new facts the Tribal Court proposed to research would have no bearing on the outcome of the case as per Strate, and therefore there was no abuse of discretion in denying the Tribal Court's Rule 56(f) motion.

Finally, despite the concrete law and documentary evidence to the contrary, the Tribal Court attempts to avoid Strate by challenging the validity of the federal grant of the right-of-way. The District Court properly held that their opportunity to challenge the Bureau of Indian Affair's approval had long passed, and that even if a challenge had been legally permissible, the grant itself is valid on examination.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT PURSUANT TO STRATE, THE TRIBAL COURT LACKED JURISDICTION OVER THE NONMEMBER NORDS FOR THE ACCIDENT OCCURRING ON THE STATE HIGHWAY AT ISSUE IN THIS CASE.

The District Court in this case correctly reviewed the facts and the law, and determined that the Tribal Court lacked jurisdiction over the nonmember Nords for the accident occurring on the portion of State Highway 1 & 89 at issue in this case pursuant to Strate v. A-1 Contractors, 520 U.S. 438, 448 (1997).

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986), quoting Fed.R.Civ.P. 1.

"Federal Courts have authority to determine, as a matter 'arising under' federal law... whether a tribal court has exceeded the limits of its jurisdiction." Strate v. A-1 Contractors, 520 U.S. 438, 448 (1997). "Tribal jurisdiction over non-Indians is a question of federal law reviewed de novo." U.S. ex rel. Morongo Band of Mission Indians v. Rose, 34 F.3d 901, 905 (9th Cir. 1990), citing FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990), cert. den'd at 499 U.S. 943 (1991).

A. The Strate Court Held That There is no Jurisdiction Over Nonmembers for Car Accidents on Federally Granted Public State Highways.

The first reason the District Court's decision should be upheld is because, under the facts of this case, it was the result called for by the clear precedent of the Supreme Court from Strate. As plainly set forth in the majority opinion:

> Specifically, we confront this question: When an accident occurs on a portion of a public highway maintained by the State under a federally granted right-of-way over Indian reservation land, may tribal courts entertain a civil action against an allegedly negligent driver and the driver's employer, neither of whom is a member of the tribe?
>
> Such cases, we hold, fall within state or federal regulatory and adjudicatory governance; **tribal 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.

Strate, 520 U.S. at 442 (emphasis added). This holding from Strate is plain; if by federal grant there is a public highway maintained by the State over reservation land, then tribal courts do not have jurisdiction over "claims against nonmembers" for accidents occurring on those highways. Id.

To reach that holding, the Strate Court began by explaining that "our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." Id. at 445. The Strate Court specifically cited the case of Montana v. United States, 450 U.S. 544 (1981), which also dealt with civil jurisdiction over nonmember defendants:

> Montana thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare.

Id. at 445.

Given Montana, the Supreme Court in Strate then examined the facts of the underlying dispute to determine whether tribal court jurisdiction over the nonmember defendant existed in that case. The Strate Court noted the following: That the right-of-way was obtained pursuant to federal law; that the federal granting laws required tribal consent and compensation; that consent was obtained and compensation paid; that under the granting documents and the law the right-of-way was an easement, "without limitation as to tenure;" and that the road was open to the public and maintained by North Dakota as part of its state highway system. Strate, 520 U.S. at 455-456. The Court did not examine the state's maintenance procedures for the highway, nor the subsequent history of interaction between the state and the tribe regarding the highway. Id.

Based on its examination of the above facts, the Strate Court explained that by the federal grant of a public highway right-of-way, the tribe had lost the "right of absolute and exclusive use and occupation," so that in such cases, for the limited purpose of determining civil jurisdiction over a nonmember defendant, the land

would be treated as alienated, non-Indian land. Id. Accordingly under Montana there was no tribal court jurisdiction over the nonmember defendant.[3] Id. at 454-55. Subsequent courts have followed the same analysis used in Strate. See, e.g., Wilson v. Marchington, 127 F.3d 805, 813 (9th Cir. 1997), cert. den'd 523 U.S. 1074, (Ninth Circuit Court of Appeals found tribal court had no jurisdiction against nonmembers over accident on federally-granted Montana State Highway, noting and following Strate examination of right-of-way for 1) federal grant; 2) tribal consent; 3) road open to public; and 4) maintenance by state).

B. The District Court in this Case Properly Applied Strate.

Against this backdrop of federal law, the Tribal Court argues first that the District Court misapplied Strate by failing to examine the right-of-way in question. Not so. The District Court did in fact examine the right-of-way at issue.

The District Court was presented with the same evidence, including the granting documents, that were presented in the Tribal Court proceedings, and which the District Court discussed when it confirmed the existence of the right-of-way in question. As in Strate, the District Court reviewed the federal granting law and the documents comprising the grant. (AD 7.) Under the federal law, the right-

[3] Jurisdiction would also lie if one of two exceptions was met, or if jurisdiction was expressly authorized by treaty or Congressional act. Strate, 520 U.S. at 457. There was no such express authorization in Strate, (Id.) and it is undisputed that there is no such treaty or authorization providing for jurisdiction over the Nords in this

of-way is an easement that runs in perpetuity. 25 C.F.R. §256.19 (1951). The District Court noted that the Tribe members were paid compensation, and that the State of Minnesota built and maintains the highway. (AD 7-8.) Further, the District Court noted that at oral argument the Tribe conceded that it consented to the roadway, and that it is open to public use. (AD 8-9.)

Contrary to the Tribal Court's assertion, the District Court never declared that no analysis of the instant right-of-way was required to see if Strate applied. Rather, upon examination of the right-of-way facts presented, and after concluding that such facts undoubtedly brought the case squarely under Strate, the Court indicated that no *further* analysis was needed beyond that undertaken in Strate. (at pp. 12-13).

In sum, the District Court in the instant matter was faced with nearly identical facts as those considered by the Supreme Court in Strate. Therefore it was no error for the District Court to acknowledge that this matter lines up with the binding precedent of Strate, and to have followed that precedent as required.

C. Any Overbreadth in the District Court's Opinion Does Not Allow the Tribal Court to Escape Strate Itself.

Notwithstanding the clear holding of Strate and its equally clear application to the instant matter, the Tribal Court also argues that the District Court's Order

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case. (See, Addendum -7) The other two exceptions are discussed more fully below, in Section II.

should be overturned in the instant case due to superfluous language in the decision allegedly suggesting that *any* right-of-way of any kind across reservation land would result in a lack of tribal court jurisdiction over nonmembers.

Contrary to the Tribal Court's assertion, it was neither the District Court's, nor is it the Nords' position that any and all rights-of-way are created equal under Strate. The District Court's analysis and opinion shows that 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. (AD 8-13.)

If the District Court had held meant to indicate that all rights-of-way are equal, as the Tribal Court suggests, and that any and all rights-of-way trigger the Strate rule, the Court would not have acknowledged McDonald v. Means, 309 F.3d 530 (9th Cir. 2002) where a right-of-way for a BIA road did not trigger the application of Strate. (AD 12-13.)

Furthermore, even if the Tribal Court's interpretation were correct- that the District Court used overbroad language in arriving at its decision, that still does not result in overturning that decision. This is because regardless of any District Court's statements that would arguably apply Strate to other rights-of-way, that does not change the fact that Strate clearly governs the instant right-of-way, as both Strate and the instant matter specifically involve federally-granted state

highways, open to the public and maintained by the states. Therefore, even if the District Court's used overbroad language, it does not change the fact that Strate controls the instant matter, and that as a matter of law there is no jurisdiction over the nonmember Nords, so the District Court's Order should be affirmed.

D. Application of Strate in the Instant Matter is Not Unjust.

The Tribal Court next argues that "categorical" application of Strate is unjust because it takes away a tribe's right of self-government and sovereignty. The Supreme Court has already held that it does not. The Court in Strate specifically noted that even when a tribe does not have jurisdiction over a nonmember on reservation land, federal law (to wit, Montana, 450 U.S. 544) provides an exception to protect a tribe's sovereignty. Strate, 520 U.S. at 457-459.

Under the exception, a tribe does have jurisdiction over a nonmember on alienated reservation land when the on-reservation activities of the nonmember threaten the tribe's sovereignty. Strate, 520 U.S. at 457-459, citing Montana, 450 U.S. 544. Therefore even when Strate applies, as it does here, a tribe's governmental autonomy and sovereignty are protected, and the Tribal Court's fear is unfounded.

Furthermore, the Strate Court held, and subsequent courts have affirmed, that automobile accidents on federally-granted rights-of-way do not trigger the exception, because they do not does not threaten a tribe's sovereign governmental

authority. Strate, 520 U.S. at 457-460; see also Wilson, 127 F.3d at 814-815; Boxx v. Warrior, 265 F.3d 771, 778 (9th Cir. 2001), reh. den'd (Nov. 20, 2001); and Burlington Northern Ry. Co. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999), reh. den'd (Jan. 6, 2000).

As the instant matter similarly arises out of an automobile accident on a federally-granted right-of-way, the Supreme Court has declared that the application of Strate does not interfere with the Tribe's sovereignty, and the District Court's Order should be affirmed.

E. The Instant Right-Of-Way Unquestionably Falls Under Strate.

The Tribal Court next argues that the specific right-of-way at issue in this case does not fall under the Strate rule. The crux of their argument is that when the Tribe consented to the right-of-way, it was not agreeing to transfer to the State of Minnesota the Tribe's governmental authority.

The Tribal Court's argument fails on two grounds. First, the claim misconstrues the issue in this case- the instant question before the courts has never been whether the State usurped or was given "general governmental authority" over the highway- by law the federally granted right-of-way is only an easement to build and maintain a public highway. It includes no jurisdictional grant. (Cf., 25 C.F.R. §256.19; Public Law 280, 28 U.S.C. §1360).

The sole question presented in this case is whether under federal law the Tribal Court has jurisdiction over the nonmember Nords for the accident occurring on the public highway at issue. As clearly indicated by Montana, Strate, et al., it does not. Nonetheless, the Tribal Court goes to great lengths to explain that the State of Minnesota did not usurp the Tribe's governmental authority over the land at issue, by presenting post-grant tribal resolutions and an affidavit from a current employee of the Minnesota Department of Transportation. These documents are irrelevant to the instant analysis.

Strate transfers no new authority to the State. Both prior to and after Strate, a nonmember, off-reservation Minnesota defendant could be sued for a reservation accident in state court in any county where the nonmember resides. See, Minn.Stat. §542.09. Both prior to and after Strate, Minnesota lacks civil jurisdiction over a member defendant residing on the Red Lake Reservation. Sigana, 164 N.W.2d 886; and State Farm Mut. Auto. Ins. Co. v. Thunder, 605 N.W.2d 750, 754 (Minn. 2000), (recognizing that "Minnesota ... does not have general jurisdiction over enrolled members of the Red Lake Band of Chippewa residing on their reservation."). Strate transfers no new authority to the State by federal grant of right-of-way.

All the State did, based on undisputed facts, was to obtain from the federal government a right-of-way through the reservation, with the Tribe's consent and

compensation, for a State Highway to be built and maintained and open to the public for use in perpetuity by federal law. Under these facts, pursuant to Strate the State Highway constitutes non-Indian land for the limited purpose of determining whether the Tribal Court has jurisdiction over the Nords, and the Tribal Court lacks jurisdiction over them as a matter of law.

Second and more importantly, the Tribal Court's argument is based on a premise inconsistent with federal law. It is axiomatic that Indian Tribes are bound by federal law. U.S. v. Santee Sioux Tribe of Nebraska, 254 F.3d 728, 737 (8th Cir. 2001), reh. den'd (Sept. 26, 2001), en banc reh. den'd (Oct. 2, 2001). Under federal law, Indian Tribes are "domestic dependant nations." Cherokee Nation v. Georgia, 5 Pet. 1, 17, 8 L.Ed. 25 (1831). While they may have originally been fully independent nations, they are no longer.

As explained by the Supreme Court in the Montana case, "Through statute, treaty, and incorporation into the United States, the Indian Tribes have lost many of the attributes of sovereignty." Montana, 450 U.S. at 563. "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers." Id., (citation omitted). The Court further explained that when attempting to ascertain what inherent authority the tribes have retained: "[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is

inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Id.

The Supreme Court in Strate addressed this very issue- whether jurisdiction over nonmembers for automobile accidents occurring on State highways was "necessary to protect tribal self-government or to control internal relations." Strate, 520 U.S. at 459, quoting Montana, 450 U.S. at 564. The Supreme Court answered this question in the negative, and accordingly held that the tribe did not have authority over the nonmember defendants. Id.

Accordingly, absent some Act of Congress, under federal law Indian tribes have no such authority over nonmembers except in one of two limited circumstances: where the nonmember enters into a consensual relationship with the tribe, or where (as explained above) the nonmember's activity threatens the tribe's self-government or internal relations (i.e. sovereignty). Montana, 450 U.S. at 564-565.

As noted by the District Court in the instant matter, it is undisputed that there is no treaty or statute conferring such authority on the Tribe in this case. (AD 6-7.) Therefore, regardless of the terms of the right-of-way grant in this case, the history of the Tribe, or the Tribe's relationship with the State in maintaining the public highway, the Tribal Court does not have jurisdiction over the nonmember Nords in this matter.

Additionally, a more recent decision for the Supreme Court on this issue makes the Tribal Court's arguments even less tenable. In the case of Nevada v. Hicks, 533 U.S. 353 (Minn. 2001), the Supreme Court again examined the extent of tribal court jurisdiction and authority over nonmembers, for a civil suit by a member against a nonmember law-enforcement officer from the State of Nevada. Id. The Nevada Court reiterated that Montana set forth a general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id., at 358-359, quoting Montana, 450 U.S. at 565.

The Nevada Court then went on to explain that when a federal court examines the extent of authority a tribe has over nonmembers, the status of the land on which the disputed conduct occurs (Indian vs. non-Indian land) is not automatically dispositive of whether a tribe may exercise jurisdiction over a nonmember. Id., at 359-360, and citing Strate, 520 U.S. 438. Instead, land ownership status "is only one factor to consider," with the ultimate goal of the court being to determine whether tribal authority over the activity at issue is "necessary to protect tribal self-government or to control internal relations." Id., at 360.

Based on that criteria, the Supreme Court has already declared that jurisdiction over a nonmember for a civil suit based on an automobile accident occurring on a state highway passing through a reservation is not necessary to so

protect tribal sovereignty or self-government. Strate, 520 U.S. 438. Accordingly, subsequent Supreme Court precedent only further confirms that tribal courts lack jurisdiction over nonmembers in the circumstance presented in the instant matter, and that the District Court's decision was not in error, nor was its analysis of the right-of-way deficient. Id.

II. THE DISTRICT COURT DID NOT ERR IN DENYING THE TRIBAL COURT ADDITIONAL TIME FOR DISCOVERY UNDER RULE 56(F).

In the alternative, the Tribal Court argues that at minimum it should have been granted more time to conduct additional discovery with its Rule 56(f) Motion.

> In considering a motion for additional time under Rule 56(f), "Summary judgment is appropriate when there is "adequate time" for discovery and not solely when discovery is complete. See, Celotex Corp. v. Catrett, 477 U.S. 317, 322, (1986). The district court has discretion to determine when there has been adequate time for discovery and we review that determination for abuse of discretion.

Nat'l Bank of Commerce of El Dorado, Arkansas v. Dow Chemical Co., 165 F.3d 602, 606 (8th Cir. 1999), (extension properly denied where defendants had a year to conduct discovery).

The rule is only that "courts should refrain from entertaining summary judgment motions until after the parties have had a sufficient *opportunity* to conduct necessary discovery." Velez v. Awning Windows, Inc., 375 F.3d 35, 39 (1st Cir. 2004), (emphasis added). A Rule 56(f) motion is also properly denied

where the purported discovery sought would not "create[] a genuine issue of material fact sufficient to defeat summary judgment." Ingle ex rel. Estate of Ingle v. Yelton, 439 F.3d 191, (4th Cir. 2006); see also U.S. Through Small Business Admin. v. Light, 766 F.2d 394, 398 (8th Cir. 1985), (denial of Rule 56(f) motion proper where additional evidence sought would not affect outcome of case).

When a party seeks additional time for discovery:

> such a motion must (1) be presented in a timely manner; (2) show good cause for the failure to discover the necessary facts sooner; (3) set forth a plausible basis for believing that the necessary facts probably exist and can be learned in a reasonable time; and (4) establish that the sought facts, if found, will "influence the outcome of the pending motion for summary judgment.

Adorno v. Crowly Towing & Transp. Co., 443 F.3d 122, 127 (1st Cir. 2006); quoting Resolution Trust Corp. v. North Bridge Assocs., Inc., 22 F.3d 1198, 1203 (1st Cir. 1994). Thus, the Tribal Court Motion needed to comply with the four factors above to avoid summary judgment based on Rule 56(f). It could not demonstrate compliance with all four factors, and so it was not a clear abuse for the District Court to deny the Tribal Court's motion.

A. The Tribal Court Had Sufficient Time to Conduct Discovery and Therefore Cannot Show Good Cause For Failing to Conduct Discovery Sooner.

The Tribal Court's Motion was first properly denied because the Tribal Court did in fact have time to conduct discovery, and therefore could not show good cause for failure to conduct such discovery sooner. Dismissal under Rule

56(f) is only prohibited where a party has had no *opportunity* to conduct discovery. Velez, 375 F.3d at 39. That is certainly not the case here.

The Nords initiated this matter in June of 2005. Even including the 3-month stay, the Tribal Court had 7-8 months to conduct discovery prior to filing of the dispositive motion briefs. The Tribal Court never even filed its required Rule 26(a) discovery disclosure. (Appx. 0003-0013). Furthermore, after the stay ended the Tribal Court actually moved to prevent discovery from taking place. They were delinquent with their discovery and actively tried to prevent discovery. Under these facts, the Tribal Court could not show good cause for an extension.

Moreover, the Tribal Court admitted that the evidence, including the granting documents, supporting the Nords' federal summary judgment motions is the same as that presented in the tribal court proceedings, which were presented to the Tribal Court a year-and-a-half before this matter was even filed in federal court. The Tribal Court has been dealing with this matter for years, and there were no new facts which the Tribal Court needed additional time to investigate. This was not a matter of surprise, nor was this a matter where the Nords moved for summary judgment as soon as possible after filing suit. The Nords initiated suit in June of 2005, and the summary judgment motion was originally scheduled for May 22, 2006. (Appx. 0003, 0007).

The Tribal Court had the exact same time and opportunity as the Nords to develop evidence in this matter. The Tribal Court was delinquent in its discovery, actively moved to block discovery, and has no one to blame but itself for any deficiencies in its discovery. Under these facts, the Tribal Court Red Lake could not provide the necessary "good cause for the failure to discover the necessary facts sooner." Adorno, 443 F.3d at 127. At minimum, the facts demonstrate that it was not clear error for the District Court to deny the Tribal Court's motion, and its decision should be affirmed.

B. The Additional Discovery Sought Would Not Create Any Issues of Material Fact Regarding the Right-of-Way.

The District Court was also correct in denying the Motion because the additional discovery sought would have no affect on the outcome of the Summary Judgment Motion.

As stated in Appellant's Brief, the Tribal Court sought additional discovery to show that the right-of-way granted in Strate is different from the right-of-way granted in the instant matter. However, the undisputed facts are that both rights-of-way were granted pursuant to federal law, were for State Highways open to the public, were of unlimited duration, and were maintained by the States. The District Court determined that under these facts, the additional discovery would not affect the Strate analysis, and as its decision was not an abuse of discretion it must be affirmed.

The Tribal Court primarily seeks additional time for discovery regarding the history between the State and the Tribe in regards to the right-of-way, again to show that the Tribe did not agree to a transfer of governmental authority to the State by consenting to the right-of-way. As explained above, this argument is irrelevant. First, the District Court conducted the same analysis into the validity and nature of the right-of-way as the Strate Court did, considering the same factors. It needed no additional evidence to apply Strate.

Second, once again the argument in this matter is not whether the Tribe consented to a transfer of its governmental powers to the State by consenting to the grant of the right-of-way. The question is limited to whether a tribal court has jurisdiction over nonmembers for a "commonplace state highway accident" while traveling on a State Highway open to the public. On this matter the Supreme Court has spoken, and the District Court simply followed binding law.

C. The Discovery Sought Could Not Trigger a Montana Exception.

In addition, the Tribal Court argues that it should have been granted additional time to conduct discovery to see if a Montana exception could apply. This argument also fails, because the Supreme Court in Strate has already declared that neither exception applies regardless of the information sought by the Tribal Court.

1. The consensual relationship nexus exception does not apply.

Under the first Montana exception, a Tribal Court could exercise jurisdiction over a nonmember if the underlying dispute *directly* arose out of a nonmember's consensual relationship with the tribe in question, Strate, 520 U.S. at 457, quoting Montana, 450 U.S. at 566.

In Strate, as in the instant matter, the nonmember defendants did have a business relationship with the tribe involved, and the accident involved the nonmembers' business vehicle. Id. The question also arose of whether the nonmember was on tribe-related business when the accident occurred. Id.

Nonetheless, the Strate Court declared that the first exception does not apply. Id. The Strate Court explained that a "run-of-the-mill [highway] accident" is "distinctly non-tribal in nature," and a personal injury action resulting therefrom does not directly arise out of a party's commercial relationship with the tribe. Strate, 520 U.S. at 457, quoting Montana, 76 F.3d at 940. The Strate Court made this determination even though it was unclear whether the defendant's purpose in passing through the reservation when the accident occurred was business-related. Id. at 438, 457. Accordingly, any additional discovery sought on this issue is irrelevant, and could not prevent dismissal.

2. The sovereignty exception does not apply.

The same result occurs on examination of the second exception from Montana. The sovereignty exception (discussed above), permits a tribe to exercise jurisdiction if the underlying matter "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Strate, 520 U.S. at 457.

As explained above, the Strate Court declared that this exception was also inapplicable to an automobile accident occurring on a state highway. Id. The Strate Court explained that while careless drivers may threaten the physical safety of a tribe and its members, this was insufficient to meet the second exception, which the Court observed "can be misperceived." Id. at 458. As the Supreme Court explained, when placed in its proper context the exception relates to matters affecting a tribe's sovereignty:

> "Indian Tribes retain their inherent power to [punish tribal offenders], to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members... But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." **Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them.**"

Id. at 458, quoting Montana, 450 U.S. at 564; and Williams v. Lee, 358 U.S. 217, 229 (1959), (emphasis added). The Court concluded that personal injury claims

against nonmember defendants arising out of accidents on public rights-of-way do not satisfy the second exception- they do not threaten a tribe's sovereignty. Strate, 520 U.S. at 459; see also Burlington Northern, 196 F.3d 1059; Wilson, 127 F.3d at 814-15; and Boxx, 265 F.3d 771. This is the case even if the plaintiffs in tribal court are tribe members. Burlington Northern, 196 F.3d 1059; Wilson, 127 F.3d at 805; and Boxx, 265 F.3d 771.

Per Strate *et al.*, the second exception does not apply. It is undisputed that the suit between the Nords and Mr. Kelly arose out of a highway automobile accident on Minnesota State Highway 1 & 89. There are no additional facts that could change that outcome. Therefore, as a matter of law the second Montana exception does not apply and cannot be used as a basis to grant additional discovery under Rule 56(f), and the District Court's Order regarding same must be affirmed.

The bottom line is that the purported evidence the Tribal Court seeks extra time to develop would not change anything. The arguments the proposed evidence would support have already been considered and rejected by the Courts, or have no legal merit. Furthermore, the Tribal Court cannot and does not provide the required explanation as to why it was unable to conduct discovery on any of this proposed evidence before now. See, Adorno, 443 F.3d at 127. Given these facts,

the District Court did not commit clear error when it denied the Tribal Court's motion for additional time, and the Court's Order should be affirmed.

D. Additional Facts Put Forth by the Tribal Court Are Also Irrelevant.

While cognizant of Strate and Montana, the Tribal Court also tries to distract this Court with additional irrelevant facts that have already been considered and rejected by the Supreme Court, including that: (1) the tribal-court claimant, Mr. Kelly, is a tribe member; and (2) the Tribe exercises law enforcement jurisdiction over the highway. Neither of these facts has any impact on the outcome of this case.

First, it is irrelevant whether the tribal court claimant is a tribe member; it only matters whether the tribal court *defendant* is a tribe member: "tribal courts may not entertain claims **against** nonmembers arising out of accidents on state highways." Strate, 520 U.S. at 442, (emphasis added); see also Wilson, 127 F.3d at 814; Burlington Northern, 196 F.3d 1059; and Nevada, 533 U.S. 353. Only the member status of the tribal court defendant is relevant for the jurisdictional determination, and as the Nords are undisputedly nonmember defendants in the tribal court action, the Tribal Court has no jurisdiction.

Second, it is irrelevant whether the Tribe retained law enforcement authority over the State Highway. The Strate Court held that the tribal court had no jurisdiction over the nonmember defendants notwithstanding the Court's express

acknowledgement that tribal law enforcement authorities had authority over the public road in question. Strate, 520 U.S at 455-56, n. 11. This did not change the fact that with the easement for a state highway, the tribe no longer had a right of "exclusive use and possession" over the roadway in question. Tribal law enforcement authority over the right-of-way changes nothing, and pursuant to Strate the Tribal Court is still without jurisdiction over the Nords.

III. THE DISTRICT COURT DID NOT ERR IN FINDING THE RIGHT-OF-WAY WAS VALIDLY GRANTED.

The last argument the Tribal Court makes is that there is a fact question of whether the federal grant of the right-of-way was valid. There is none. The documents from both the State of Minnesota and the BIA conclusively establish that a right-of-way was applied for and granted, and that the Tribe consented to and was compensated for the public highway. These records also include the BIA Superintendent's endorsement approving the application- there can be no uncertainty over whether the BIA approved the State's application, and the District Court did not err in finding that a federal grant was made.

A. The Tribe Cannot Challenge the Federal Grant.

Federal law dictates when a party can challenge federal administrative action. There is a specific set of regulations applicable to decisions of the Bureau of Indian Affairs. See 25 C.F.R. §§2.1 *et seq.* Absent application of another

federal law, to challenge an agency approval, administrative appeal must first be taken before a court may review the BIA's action. See 25 C.F.R. §§2.1 *et seq*. Review must be taken within 30 days after the complaining party received notice of the BIA's decision. 25 C.F.R. §2.9. In this case, the relevant conduct occurred in 1955. The time for Tribal Court to challenge the Superintendent's approval of the right-of-way has definitely passed.

Notwithstanding the Tribal Court's failure to challenge the federal grant within the time set forth under federal law, the Tribal Court cites to Gray v. Johnson, 395 F.2d 533, 536 (10th Cir. 1968), cert. den'd (June 10, 1968), and Sangre de Cristo Development Co., Inc. v. U.S., 932 F.2d 891, 894 (10th Cir., 1991), to argue that the departmental approval is void. Not so.

Gray also involved a lease approved by administrative action of the Bureau of Indian Affairs ("BIA"). Gray, 395 F.2d at 535-36. Unlike in the instant matter, the validity of that grant/lease was first properly challenged by administrative appeal pursuant to then-existing federal regulations. Gray, 395 F.2d at 535-36. The matter subsequently came before federal court only after "administrative remedies ha[d] been exhausted" and the federal Court vacated the lease. Id. at 535.

Despite the general rule that federal grants should not be disturbed once given, (See, Seaton v. Texas Co., 256 F.2d 718 (D.C. Cir. 1958)), the vacation of the lease was upheld. Id. at 537. The Gray Court also distinguished its holding on

the grounds that there was a separate regulation for BIA decisions providing a "continuing right of appeal in the case of injustice to the Indian," and so the lease was voidable as both being contrary to federal regulation *and* as "not being in the best interest of the Indian." Id. at 537 (emphasis added). The Gray Court noted that there was a specific regulation tolling the time to appeal a BIA decision to prevent the appeal from being untimely Id., citing then 25 C.F.R. §2.14; see also Sangre de Cristo, 932 F.2d at 894, (relying on Gray and referring to Gray's invalidation of lease "when the BIA approved a lease that was contrary to regulations *and* not in the best interest of the Indian lessors" (emphasis added).

However, the regulation indefinitely extending the time to challenge a BIA approval has apparently since been repealed, as counsel for the Nords was unable to locate any indefinite extension provision in the current applicable regulations in a case of "injustice. See, current 25 C.F.R. §2.14 (relating only to notice of appeal), and 25 C.F.R. §2.9, 30-day limit for appeal, no unlimited exception for "injustice."). Accordingly, Gray is no longer applicable for the proposition that a defective administrative grant can be appealed indefinitely, and the time for the Tribal Court to challenge approval of the instant right-of-way is long past. As Sangre de Cristo directly relied on Gray, Sangre de Cristo is now also inapplicable for that point of law.

In addition, Sangre de Cristo is also inapplicable on other grounds. In Sangre de Cristo, the claimants challenged the BIA's invalidation of a lease as a taking under federal law. Sangre de Cristo, 932 F.2d 891. The Sangre de Cristo Court declared that the BIA's invalidation was not a taking, because the lease had already previously been invalidated by the Federal Court for violation of the National Environmental Policy Act ("NEPA"). Id., citing previous action from Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), and 335 F. Supp. 1258. (D.N.M. 1972). NEPA provided the courts with separate federal authority to review the BIA's administrative action pursuant to 28 U.S.C. §1331, and no one challenged at any stage whether the regulations applicable to administrative appeal of BIA decisions applied to limit the Court's review of the matter. Sangre de Cristo, 932 F.2d 891; Davis, 469 F.2d 593, and 335 F. Supp. at 1260.

In contrast, in the present case there is no indefinite extension for the Tribal Court to challenge the validity of the right-of-way grant, and there has been no showing of "injustice to the Indian" (nor could there be- as the Tribal Court was compensated for the highway, acknowledged that benefits would accrue by consenting to the highway, and that the right-of-way's impact on jurisdiction over nonmembers in no way interferes with the tribe's sovereignty or ability to govern itself and its people pursuant to Strate, 520 U.S. 438).

The Tribal Court also cites U.S. v. So. Pac. Transp. Co., 543 F.2d 676 (9th Cir. 1976), and Johnson v. McIntosh, 21 U.S. 543 (1823), for a purported blanket proposition that interests in trust lands do not vest without valid federal approval. Both cases are also inapplicable to the present dispute.

The So. Pac. Case involved a railroad right-of-way that the company had originally obtained directly from the tribe in question, but was found invalid because of (now) 25 U.S.C. §177, which prohibits anyone but the United States government from entering into treaties with Indian Tribes,. So. Pac., 543 F.2d at 681, citing (now). In contrast, in the instant matter the State did not obtain the right-of-way directly from the Tribe, but through federal application and grant. So. Pac. is inapplicable.

The Johnson case, in turn, dealt with various property rights purportedly obtained from Indians for lands involving French, British, and American interests around the time of American Independence, and similarly stands only for the proposition that one could not obtain legal title from Indians without government approval. Johnson, 21 U.S. at 603. Federal approval was obtained in the instant matter, and Johnson changes nothing.

The time for challenging the grant has long passed, and the Tribal Court was unable to cite to the District Court any laws authorizing belated review. As such,

the District Court properly found that The Tribal Court could not challenge the validity of the grant.

B. The Federal Grant Is Not Defective.

Even if the Tribal Court could go back and challenge the grant itself, the right-of-way was properly granted. The right-of-way in question was granted to the State by application to and approval by the BIA. The federal grant was therefore an administrative agency decision.

Review of a lower court's determination of an agency action is *de novo.* Sierra Club v. Davies, 955 F.2d 1188, 1192 (8th Cir. 1992). To challenge the informal action of an administrative agency, a party must show the agency action was arbitrary, capricious, or a clear abuse of its discretion. Sierra Club, 955 F.2d at 1192, and at n. 10.

To challenge that the grant was improper, the Tribal Court points out that the relevant regulations required that the right-of-way application be accompanied by a Stipulation from the State expressly agreeing to the terms contained in 25 C.F.R. §256.7. The Tribal Court does not dispute that the granting documents contain such a Stipulation. However, the Tribal Court claims that the Stipulation did not expressly agree to all the necessary terms.

In the Stipulation, the Minnesota Commissioner of Highways expressly "Agrees to conform and abide by *all* pertinent rules and regulations of the

Department of the Interior." (JA 0062), (emphasis added). As noted by the District Court, "all means all." See also Gray, 395 F.2d at 536, (clause that lease was made "in accordance with existing laws and regulations prescribed by Secretary of Interior" made all applicable regulation provisions part of agreement.). The State expressly agreed to be bound by the federal regulations at issue, and there is no defect with the grant.

While the Stipulation also makes "special reference" to three specific subsections of the regulation, a "special reference" does not negate the prior language of the State expressly agreeing to be bound by all provisions, nor does the regulation itself require that the provisions be listed singly in the Stipulation. 25 C.F.R. §256.7

Nonetheless, the Tribal Court would have this Court second-guess a 50-year old document with a hyper-technical reading, which the District Court properly declined to do. At minimum it is reasonable to interpret the Stipulation as expressly agreeing to all terms as required, and therefore administrative approval based on same was not clearly erroneous, and the grant must be upheld.

CONCLUSION

The instant matter falls squarely under Supreme Court precedent of Strate, and the District Court properly rejected of the Tribal Court's various attempts to avoid application of same. Accordingly, the Nords respectfully request that the Judgment and Order of the District Court be affirmed.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32 AND 8TH CIR. R. APP. P 28A

1. This Brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) as this brief contains 8,031 words, excluding those parts of the brief exempted under Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief also complies with the typeface requirements of Fed.R.App.P. 32(a)(5), type style requirements of Fed.R.App.P. 32(a)(6), and Word Processing Identification requirement of 8thCir.R.App.P. 28A(c), as this brief was prepared in a proportionally-spaced typeface using Microsoft Word 2003, in 14-point, Times New Roman font.

3. This brief also complies with 8thCir.R.App.P. 28A(d), as a digital version of this brief is being provided in PDF format, and the disk provided containing the digital version has been scanned for viruses and is virus-free.

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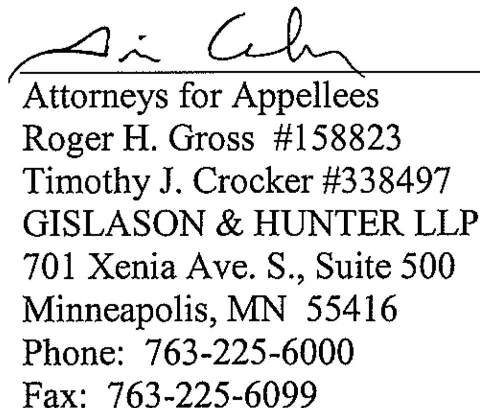

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