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Strate v. A-1 Contractors: A Perspective

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STRATE V. A-1 CONTRACTORS: A PERSPECTIVE*

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"It is a case where [the law] . . . is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their . . . nature; one which measures the red man's revenge by the maxims of the white man's morality."[1]

I. INTRODUCTION

The main purpose of this article is to provide a review and analysis of the United States Supreme Court decision of *Strate v. A-1 Contractors*.[2] This article will also attempt to briefly examine federal court decisions and the future of tribal civil jurisdiction over nonmembers following the *Strate* case.

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* This article is the second installment of a two-part series. The first installment of the Strate case can be found in Volume 74:4 of the North Dakota Law Review.

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1. *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883) (eloquently describing how the Indian defendant in that case would feel in a "foreign" court).

2. 117 S. Ct. 1404 (1997). This article will not attempt to outline the historical background and development of Indian law in this country. For an in depth analysis of the development of Indian law in this country, *see* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996).

Part II of this article will provide the factual background of the case as it was presented to the United States Supreme Court. Part III will outline the procedural history of the case as it made its way from the tribal courthouse in Fort Yates, North Dakota, to the United States Supreme Court in Washington, D.C. Part IV of this article will outline the legal arguments and issues as they were presented to the United States Supreme Court. Part V will analyze the United States Supreme Court's decision in *Strate v. A-1*. Part VI will provide a brief review and analysis of federal court decisions issued subsequent to, and applying, the *Strate* analytical framework. Part VII will conclude this article and provide this writer's analysis of the future of tribal court civil jurisdiction over nonmembers.

II. FACTUAL BACKGROUND

On November 9, 1990, Mr. Lyle Stockert [Stockert], a non-Indian, was driving a GMC tandem axle gravel truck owned by A-1 Contractors [A-1], a non-Indian owned business with its principle place of business off the reservation. He was traveling in a northbound lane on North Dakota Highway 8,[3] near Twin Buttes, North Dakota, within the exterior boundaries of the Fort Berthold Indian Reservation.[4] A-1 had entered into a landscaping subcontract with LCM, an alleged subsidiary of the tribe, to perform landscaping on a tribal community building. At the time Stockert was traveling north in the northbound lane, Gisela Fredericks [Fredericks] was traveling south in the northbound lane. Apparently Fredericks was driving in the wrong lane as she was preparing to turn off of Highway 8 to her residence. Although Stockert attempted to avoid a collision, Fredericks, also a non-Indian,[5] was injured when her vehicle struck the rear of the truck being operated by Stockert.

Local law enforcement responded to the accident after State Radio broadcast for a unit to cover the accident. Both the county Sheriff and a

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3. North Dakota Highway 8 crosses 6.59 miles of land within the reservation before it ends at the shores of Lake Sakakawea. Lake Sakakawea was created by the damming of the Missouri River pursuant to the 1944 Flood Control Act and is under the control of the Army Corps of Engineers. The easement provides that the State of North Dakota has control and responsibility for the realignment, improvement, and maintenance of Highway 8. The highway has always been open to the general public.

4. The Fort Berthold Reservation is located in central North Dakota. The Three Affiliated Tribes reside on the reservation which consists of the Mandan, Hidatsa, and Arikara Indians. The Reservation contains almost as many nonmembers as member residents (2,999 enrolled tribal members and 2,458 nonmembers, of whom 2,396 are non-Indians). *See* United States Department of Commerce, Bureau of the Census, 1990 Census of Population.

5. Although Ms. Fredericks is a non-Indian, she was married to an enrolled member of the Three Affiliated Tribes of the Fort Berthold Reservation. She also had five adult children who were named plaintiffs in the Tribal Court action. The adult children were all enrolled members of the Three Affiliated Tribes.

local Bureau of Indian Affairs (BIA) officer arrived on the scene. The BIA officer allowed the sheriff to conduct the investigation since the accident involved non-Indians. Fredericks was cited for being on the wrong side of the road at the time of the accident. The only damage to the truck was to the rear set of dual tires on the left side of the truck. The outside tire was flat and the wheels were pushed toward the inside of the truck. Fredericks' vehicle was seriously damaged and rescue crews needed to use the "jaws of life" in order to extricate Fredericks from the vehicle. Fredericks sustained serious injuries in the accident and was hospitalized for twenty-four days.[6]

III. PROCEDURAL HISTORY

On May 9, 1991, Fredericks sued Stockert, A-1, and its insurer, in tribal court seeking damages for personal injuries she received in the accident and claiming bad faith against A-1's insurer.[7] Fredericks' adult children, also named plaintiffs, asked for damages for loss of consortium in the litigation. The complaint set forth a request for compensatory damages in excess of $3,032,000 and punitive damages in the amount of $10,000,000.

Stockert made a special appearance and filed a motion to dismiss the action against him on the grounds that the tribal court lacked personal jurisdiction over him and jurisdiction over the subject matter of the litigation; A-1 joined in the motion.[8] In response to the motion, the only evidence the plaintiffs advanced concerning the relationship between Stockert, A-1, and the tribe was to proffer a copy of a subcontract agreement between A-1 and LCM, an entity described as a subsidiary of the tribe.[9] In the tribal court, the plaintiffs tendered no evidence addressing the impacts of the contract or the accident on the tribe itself or whether Stockert was acting under the subcontract.

Tribal Court Judge William Strate denied the motion to dismiss.[10] The tribal court judge determined that the court had authority to adjudicate the case relying primarily on the concept of inherent sovereignty and the presumption of civil jurisdiction. In support of this conclusion,

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6. Strate v. A-1 Contractors, 117 S. Ct. 1404, 1408 (1997).

7. *See generally* Joint Appendix at 5-10, Strate v. A-1 Contractors, 117 S. Ct. 1404, 1408 (1997) (No. 95-1872).

8. Although the parties challenged both personal and subject matter jurisdiction, the primary issue raised throughout the tribal and federal court process focused on subject matter jurisdiction. Unfortunately, tribal courts, federal courts, and commentators regularly confuse the two issues when examining tribal jurisdiction questions.

9. Interestingly, that contract had forum selection and choice of law provisions selecting Utah state courts and Utah law for dispute resolutions.

10. Joint Appendix at 19-25, *Strate* (No. 95-1872).

the judge cited *Iowa Mutual Insurance Company v. LaPlante*[11] and *National Farmers Union Insurance Companies v. Crow Tribe.*[12] The tribal judge also specifically noted that the "[d]efendants have entered upon and transacted business within the territorial boundaries of the Reservation."[13] Presumably, this statement was in reference to Stockert's subcontract with LCM to assist in building the tribal community building.

Stockert and A-1 appealed the tribal court decision to the Northern Plains Intertribal Court of Appeals. The Intertribal Court of Appeals affirmed the tribal court's ruling that the tribal court had personal and subject matter jurisdiction to hear the action.[14] Thereafter, pursuant to the parties' stipulation,[15] the tribal court dismissed the insurer from the suit.[16]

Before tribal court proceedings could resume, Stockert and A-1 brought an action in the United States District Court, for the District of North Dakota, seeking declaratory and injunctive relief against the tribal judge, the tribal court, and the plaintiffs.[17] The parties filed cross motions for summary judgment on the issue of whether the tribal court had jurisdiction. Relying primarily on *National Farmers Union* and *Iowa Mutual*, the district court determined that the tribal court had civil jurisdiction over the Fredericks' complaint against A-1 and Stockert; accordingly, the district court dismissed the action.[18]

Stockert and A-1 appealed from the district court's order of judgment to the Eighth Circuit Court of Appeals. On appeal, a divided panel

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11. 480 U.S. 9 (1987).

12. 471 U.S. 845 (1985).

13. Joint Appendix at 23, *Strate* (No. 95-1872). The Court indicated that this meant that the defendants had entered into a consensual relationship with the Tribe and its members, which under *Montana v. United States*, 450 U.S. 544 (1981) would also support the conclusion that jurisdiction of the tribal court was appropriate. *Id. Montana*, as will be discussed in more detail later, indicated that tribes were divested of jurisdiction over non-Indians unless the non-Indian had entered into a consensual relationship with the tribe or the incident directly affected the tribe's political integrity, economic security, or health or welfare.

14. Joint Appendix at 26-37, *Strate* (No. 95-1872). The appellate court also concluded that the tribal court, pursuant to *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) and *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1995), presumptively had jurisdiction since the accident occurred on the reservation. In response to the defendants arguments, the court noted that the "fact that the auto/truck collision occurred on a state highway does not in and of itself divest the tribal court of jurisdiction." Joint Appendix at 35-36, *Strate* (No. 95-1872).

15. Joint Appendix at 38-39, *Strate* (No. 95-1872).

16. *Id.* at 40.

17. *Id.* at 41-45. While noting that they had sovereign immunity and thus were not subject to the suit, the Tribal defendants waived immunity for the limited purpose of "remain[ing] in [the] action in federal court to defend the claim for declaratory relief raised by plaintiffs regarding the issue of tribal court civil jurisdiction . . . ." *Id.* at 49 (Tribal Defendants' Amended Answer).

18. *Id.* at 54-65 (Memorandum and Order). The court held that the "tribe has jurisdiction over Stockert because he entered the reservation, and he committed an act which resulted in the accrual of a tort action within the reservation." *Id.* at 63.

of the United States Court of Appeals for the Eighth Circuit affirmed.[19] Judges Theodore McMillian and Floyd Gibson, again relying primarily on *National Farmers Union* and *Iowa Mutual*, determined that the tribal court had jurisdiction. The majority determined that the case was not controlled by the *Montana* analytical framework since *Montana* was limited to disputes arising on fee lands owned by non-Indians.[20] Judge Hansen, in a lengthy and analytical dissent, concluded that the tribal court would not have jurisdiction over A-1 and Stockert.[21] On December 12, 1994, Stockert and A-1 filed a Petition for Rehearing with Suggestion for En Banc Disposition.[22] A-1 argued that en banc disposition was appropriate based upon the fact that the panel's majority decision misapprehended the law by artificially limiting the analytical framework announced in *Montana* to disputes involving fee lands owned by non-Indians. A-1 suggested that the ruling failed to recognize the implicit divestiture of tribal civil jurisdiction over nonmembers, absent a showing of a tribal interest, which results from the dependent status of Indian tribes.[23]

Stockert and A-1 pointed out that the majority panel's decision contradicted *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*.[24] *Duncan Energy* involved a dispute regarding the propriety of the tribe's imposition of a one-percent tax on real and personal property within the reservation. In *Duncan Energy,* the appellees failed to exhaust tribal remedies prior to seeking the intervention of the federal court. Duncan Energy argued that they were not required to exhaust their tribal court remedies pursuant to the Supreme Court's holding in *National Farmers Union* and *Iowa Mutual* since those cases did not specifically involve fee land disputes. A-1 pointed out that the Eighth Circuit had held:

> Duncan Energy contends that *National Farmers Union* and *Iowa Mutual* are inapplicable to cases involving fee lands. We find such a limited reading of those cases to be inappropriate; nothing in the broad language employed by the Supreme Court indicates that the reasoning in *Iowa Mutual* and *National Farmers Union* applies only to similar factual situations.[25]

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19. *Id.* at 68-90.
20. *Id.* at 77.
21. *Id.* at 81-90.
22. *See, e.g.*, FED. R. APP. P. 40; 8TH CIR. R. 35A.
23. *Cf.* Montana v. United States, 450 U.S. 544, 564 (1981).
24. 27 F.3d 1294 (8th Cir. 1994).
25. Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1300 (8th Cir. 1994).

In arguing for rehearing, A-1 suggested that the court in *Duncan Energy* correctly held that the broad language of *Iowa Mutual* and *National Farmers Union* requiring exhaustion of tribal court remedies, was not limited to the exact factual scenarios presented. A-1 argued that the same rule must be applied in its case. Thus, since there was nothing in the broad language employed by the Supreme Court in *Montana* which would indicate that the concept of limited sovereignty and accompanying divestiture of general civil jurisdiction over matters which do not affect a tribal interest should be limited to similar factual situations, the panel's restrictive ruling was in conflict with both *Montana* and *Duncan Energy*.

The Eighth Circuit granted rehearing on January 9, 1995, and vacated the previous panel decision.[26] Oral argument before the en banc panel was set for May 23, 1995, in St. Louis Missouri.[27] On February 16, 1996, in an 8 to 4 decision the Eighth Circuit, sitting en banc, reversed the District Court's judgment.[28] The court of appeals concluded that the controlling precedent for analysis of civil jurisdiction over nonmembers was *Montana v. United States*, rather than *National Farmers Union* and *Iowa Mutual*.

In particular, the court noted that:

> The appellees fail to recognize the fact that *Montana* specifically extended the general principles underlying *Oliphant* to civil jurisdiction. ("Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"). *Montana* did not extend the full *Oliphant* rationale to the civil jurisdiction question—which would have completely prohibited civil jurisdiction over nonmembers. Instead, the Court found that the tribe retained *some* civil jurisdiction over nonmembers, which the Court went on to describe in the *Montana* excep-

26. The order was entered by the Clerk, U.S. Court of Appeals, Eighth Circuit, at the direction of the Court.

27. The panel consisted of Richard S. Arnold, Chief Judge (Little Rock, Arkansas), Theodore McMillian (St. Louis, Missouri), George G. Fagg (Des Moines, Iowa), Pasco M. Bowman (Kansas City, Missouri), Roger L. Wollman (Sioux Falls, South Dakota), Frank J. Magill (Fargo, North Dakota), C. Arlen Beam (Lincoln, Nebraska), James B. Loken (St. Paul, Minnesota), David R. Hansen (Cedar Rapids, Iowa), Morris S. Arnold (Litlle Rock, Arkansas), Diane Murphy (Minneapolis, Minnesota), and Floyd R. Gibson, Senior Judge (Kansas City, Missouri).

28. A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1996) (en banc). Judge Hansen wrote the majority opinion and was joined by R. Arnold, Fagg, Bowman, Wollman, Magill, Loken, and M. Arnold. Judges Beam, F. Gibson, McMillian, and Murphy concurred and dissented, with all but Judge Murphy writing separately.

> tions. Thus, when *National Farmers Union* states that civil tribal jurisdiction over nonmembers is not foreclosed by *Oliphant*, that observation is perfectly consistent with *Montana*, which provides for broader tribal jurisdiction over non-Indians than does *Oliphant*. Under *Montana*, the tribe has the ability to exercise civil jurisdiction over non-Indians when tribal interests [as defined in the *Montana* exceptions] are involved.[29]

The court then soundly rejected the appellees argument that *Montana* only applies to a tribes ability to exercise authority over a non-Indian's conduct on non-Indian fee lands. The court examined *Montana* and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*[30] and concluded that the broad and unqualified language outlining the limitations on tribal power and authority was not restricted to issues evolving on fee lands.[31] Based on those facts, the court determined that "any attempt to limit the rationale of *Montana* and *Brendale* to fee land jurisdictional issues is both uncompelling and unsupported by the language of those two cases."[32] Thus, in order for any tribal court to properly be able to exercise jurisdiction over a non-Indian one of the *Montana* exceptions would have to be satisfied, demonstrating a sufficient tribal interest.

The appellees had also argued that *Montana* and its progeny only addressed a tribe's regulatory power over non-Indians, and *Iowa Mutual* and its progeny addressed tribal adjudicatory power over non-Indians. Thus, appellees' argued that *Montana* and its rule of general divestiture of tribal jurisdiction absent a tribal interest did not apply to the case. Instead, *Iowa Mutual's* rule of presumed jurisdiction controlled as it was a case involving adjudicatory power.

The panel noted that a regulatory/adjudicatory distinction "does not appear explicitly, or even implicitly, anywhere in the case law."[33] Moreover, the court noted that "any attempt to create or apply a distinction between regulatory jurisdiction and adjudicatory jurisdiction in this case would be illusory."[34] This is because the tribal court would have the power to decide what substantive law applied. Therefore, the tribal court would be defining the relationship and duties between parties on reservation roads. Thus, while adjudicating the case it would, in essence,

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29. A-1 Contractors v. Strate, 76 F.3d 930, 937 (8th Cir. 1996).
30. 492 U.S. 408 (1989).
31. *A-1 Contractors*, 76 F.3d at 937-38.
32. *Id.* at 937.
33. *Id.* at 938.
34. *Id.* While recognizing that some commentaries have suggested a distinction between regulatory and adjudicatory jurisdiction, the panel indicated that the case law did not support such a distinction. *Id.*

be regulating the conduct of drivers on the highways on the reservation.[35]

After rejecting the appellees attempt to distinguish or limit *Montana* the court examined whether either of the *Montana* exceptions had been satisfied in the case. In other words, whether there was a sufficient tribal interest in the matter.

The appellees argued that the first *Montana* exception, a consensual relationship, was satisfied since A-1 had entered into a contract with the tribe to perform work on the reservation and the accident occurred while performing the work. The court recognized that the dispute before it, "an ordinary run-of-the-mill automobile accident,"[36] did not arise under the terms of the contract, Fredericks was not a party to the subcontract, and the tribe was not involved in the accident.[37] The court concluded that there was no consensual relationship sufficient to satisfy the first *Montana* exception.[38]

In an attempt to demonstrate a direct effect on tribal political integrity, part of the second *Montana* exception, the tribes asserted that the ability to hear the case and function as a fully sovereign government satisfied the requirement. A-1 took the position that such a broad reading of the second exception would completely swallow up the general rule. In reiterating that the tribes were limited sovereigns the court stated that the "desire to assert and protect excessively claimed sovereignty is not a satisfactory tribal interest within the meaning of the second *Montana* exception."[39]

The court read all of the cases together and came up with one comprehensive and integrated rule:

> a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.[40]

On May 16, 1996, the tribal appellants filed a petition for a writ of certiorari with the United State Supreme Court. In seeking a writ of certiorari, the tribe argued that the en banc decision misconstrued and

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35. *Id.*
36. *Id.* at 940.
37. *Id.*
38. *Id.*
39. *Id.* The court went on to note that the *Montana* second exception clearly requires an impact on the tribe itself, not a nonmember.
40. *Id.* at 939.

misapplied *Montana* to the case at hand. The tribe also argued that the en banc decision was in conflict with *Hinshaw v. Mahler*,[41] a then recent Ninth Circuit decision. In *Hinshaw*, Christian Mahler was killed when a car being driven by Lynette Hinshaw struck the motorcycle he was driving. Mahler was not an enrolled member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation although he did reside on the reservation with his parents, Gloria and Kenneth Mahler. Hinshaw was not an enrolled member of the tribes but she resided on the reservation. Gloria Mahler, Christian's mother, was an enrolled member of the tribes.

Gloria and Kenneth Mahler filed an action for damages against Hinshaw in the tribal court. Hinshaw appeared specially to contest jurisdiction. "The tribal court denied her motion to dismiss, and found jurisdiction because the accident occurred on the reservation and Gloria Mahler was an enrolled member of the Tribes."[42] Hinshaw appealed to the tribal appellate court, which affirmed the tribal court's decision.

The Ninth Circuit addressed the jurisdiction of the tribal court over the action. The court specifically noted that Hinshaw's actions injured Gloria Mahler, a tribal member.[43] Based upon this factual distinction, A-1 argued that certiorari was not appropriate since Gisela Fredericks was not an enrolled member of the Three Affiliated Tribes. Therefore, the en banc decision was not in direct conflict with *Hinshaw*.[44] The United States Supreme Court granted the tribes' petition for writ of certiorari and ordered an expedited briefing schedule.[45]

IV. THE ARGUMENTS AND ISSUES AS PRESENTED TO THE SUPREME COURT

In order to fully analyze the *Strate* decision, a detailed analysis of the issues, as presented, is necessary. The tribes, along with their amici curiae,[46] including the United States, argued that the *Montana* analytical

41. 42 F.3d 1178 (9th Cir. 1994).

42. Hinshaw v. Mahler, 42 F.3d 1178, 1180 (9th Cir. 1994).

43. *Id.*

44. Despite A-1's argument, a comparison of the holdings in *A-1 Contractors* and *Hinshaw* suggested a conflict among the circuits.

45. A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1996), *cert. granted*, 518 U.S. 1056 (Oct. 1, 1996) (No. 95-1872).

46. Several amicus briefs were filed in support of the tribe's position. These included amici briefs from the United States by the Solicitor General; a brief by the Northern Plains Tribal Judges Association; a brief by the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Confederated Tribes of the Colville Reservation, the Ho-Chunk Nation, the St. Croix Band of Chippewa Indians, and the Standing Rock Sioux Tribe; a brief by the Shakopee Mdewakanton Sioux (Dakota) Community, Sisseton-Wahpeton Sioux Tribe, Spirit Lake Sioux Tribe and the Red Lake Band of Chippewa; and a brief by the Yavapai-Apache Nation, Shoshone Tribe of the Wind River Indian Reservation, and Lummi Nation.

framework did not govern this case. The tribal petitioners maintained that the controlling precedents were *National Farmers Union* and *Iowa Mutual* and that those decisions established a rule of presumptive jurisdiction absent congressional action. The tribal petitioners also argued that the *Montana* rule, which stated that absent express authorization by federal statue or treaty, tribal jurisdiction over nonmembers existed only in limited circumstances, related solely to regulatory authority and not adjudicatory authority in disputes arising within a reservation. The tribal petitioners alternatively suggested that the *Montana* analysis does not apply to lands owned by, or held in trust for, a tribe or its members. Thus, they argued that the *Montana* analysis only would apply with respect to alienated reservation land owned in fee simple by non-Indians.

The respondents, Stockert and A-1, also supported by several amicus briefs,[47] argued that the sovereignty retained by Indian tribes did not include the power to exercise civil jurisdiction over actions between nonmembers. Thus, A-1 argued for a broad based ruling determining that tribal courts do not have jurisdiction over nonmembers at all. Alternatively, A-1 argued that even if the tribal courts had not been generally divested of all civil jurisdiction over nonmembers, absent compliance with the *Montana* exceptions, the tribal court still lacked subject matter jurisdiction in this particular case since the federal right of way, granted by the Secretary of the Interior pursuant to the General Right of Way Act of 1948,[48] divested the tribes of civil jurisdiction over the activities of nonmembers on the highway in question. A-1 argued that the right of way grant, which opened the highway to the general public, divested the tribe of any authority to exclude or regulate the conduct of nonmembers on the state highway, thus divesting the tribal court of jurisdiction for activities occurring on the highway.

A-1 argued that the *Montana* analytical framework applied to all lands where a tribe had been divested of the power to exclude non-Indians. A-1 noted that while both *Montana* and *Brendale* involved questions of tribal authority over non-Indians on non-Indian owned fee lands, neither case in any way limited its discussion, rationale, or holding to issues arising on fee lands. Instead, *Montana* specifically found,

47. Several amici briefs were filed in support of A-1 and its position. These included a brief submitted by 14 states including Montana, Arizona, California, Colorado, Idaho, Massachusetts, Mississippi, Nevada, New York, South Dakota, Utah, Washington, Wisconsin and Wyoming; a brief by the American Trucking Associations, Inc., the American Automobile Association, and the Burlington Northern Railroad Company; a brief by the Council of State Governments, National Conference of State Legislatures, National Governors' Association, National Association of Counties, U.S. Conference of Mayors, International City/County Management Association, and the National League of Cities; and a brief by Lake County, Montana, and Flathead Joint Board of Control of the Mission, Flathead, and Jocko Valley Irrigation Districts.

48. 25 U.S.C. § 323 (1994).

without qualification or caveat, that tribal power itself is limited to what is necessary to protect tribal self government and to control internal relations, absent express congressional delegation of more expansive authority.[49] Furthermore, *Montana* specifically addressed the "forms of civil jurisdiction over non-Indians on their reservations" and outlined the two limited situations wherein that jurisdiction may apply.[50] A-1 argued that the Court did not limit its rationale to cases arising on non-Indian fee lands but was referring broadly to tribal power over nonmembers. A-1 suggested that the *en banc* decision correctly noted that "any attempt to limit the rationale of *Montana* and *Brendale* to fee land jurisdictional issues is both uncompelling and unsupported by the language of those two cases."[51]

In support of its argument that the *Montana* analysis should apply to the case, A-1 outlined in detail the nature of the Federal easement. The accident underlying the case occurred on North Dakota Highway 8 within a grant of easement for right-of-way dated May 8, 1970, issued by the Secretary of the Interior pursuant to the General Right-of-Way Act of 1948[52] and its implementing regulations.[53] The only specific rights reserved to the Indian landowners were outlined in the easement:

> the right is reserved to the Indian landowners, their lessees, successors, and assigns to construct crossings of the right-of-way at all points reasonably necessary to the undisturbed use and occupany[sic] of the premises affected by the right-of-way; such crossing to be constructed and maintained by the owners or lawful occupants and users of said lands at their own risk and said occupants and users to assume full responsibility for avoiding, or repairing any damage to the right-of-way which may be occasioned by such crossing.

The tribes reserved no other right to exercise any dominion or control over the right-of-way in consenting to the grant by the Secretary.

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49. Montana v. United States, 450 U.S. 544, 564 (1981).

50. *Id.* at 565-66.

51. Joint Appendix at 106; *Strate* (1997) (No. 95-1872) (quoting *A-1 Contractors*, 76 F.3d at 938).

52. 25 U.S.C. §§ 323-28 (1988).

53. In 1948, Congress enacted a comprehensive, general purpose right of way statute which delegates to the Secretary, not to tribes, the right to grant rights-of-way for all purposes over and across tribal trust lands. *See, e.g.*, Act of Feb. 5, 1948, ch. 45, §§ 1-6, 62 Stat. 17-18 (codified at 25 U.S.C. §§ 323-328 (1994)); Fredericks v. Mandel, 650 F.2d 144, 147 (8th Cir. 1981) (holding that the Fort Berthold Reservation tribal court had no jurisdiction to grant a right of way or easement over trust lands with the Fort Berthold Reservation). While § 324 requires consent of the tribe, the right-of-way grantor is the United States. Section 325 prohibits the grant of rights-of-way without the payment of just compensation. Loring v. United States, 610 F.2d 649, 650 (9th Cir. 1979). These consent and compensation provisions are triggered because the tribe's right of occupancy is to be extinguished. *See generally* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974).

Thus, A-1 argued the grant of easement for right-of-way divested the tribes of any and all rights, duties or control over North Dakota State Highway No. 8, except those narrow interests specifically reserved.

In deciding whether an accident which occurred on a U.S. highway within the boundaries of an Indian reservation supported tribal court jurisdiction, the district court in *Swift Transp., Inc. v. John*,[54] examined the 1948 Rights-of-Way Act, the same statutory scheme under which the right-of-way underlying Highway 8 was granted. The *Swift* court noted that "[i]t is well established that Indian title is 'only a right of occupancy . . . extinguishable only by the United States.'"[55] After noting that an intent to extinguish Indian property rights is not lightly imputed to Congress and requires a clear expression of congressional intent, the court in *Swift* held that there was "just such a clear expression of congressional intent to extinguish Indian title in rights-of-way such as U.S. Highway 89."[56]

In 1948, Congress enacted the Indian Rights-of-Way Act, which empowers the Secretary of the Interior to grant rights-of-way for all purposes over Indian lands. The right-of-way for U.S. Highway 89 was established pursuant to this statute. Before granting a right-of-way the Secretary must obtain the consent of the landowner under most circumstances. Plaintiffs assert without contradiction that consent was obtained in this case. Moreover, § 325 and 25 C.F.R. § 161.12 prohibit the grant of rights-of-way without the payment of just compensation. These compensation and consent revisions plainly indicate that Congress envisioned that Indian interest in the land affected would be extinguished. It is axiomatic that designating these lands as a U.S. Highway open to the general public is wholly inconsistent with an intent to allow the continued right of Indian occupancy. Accordingly, the Court concluded that the status of U.S. Highway 89 is equivalent to that of the non-Indian fee land in *Montana*.[57]

A-1 pointed out that in its case all statutory requirements were met in granting the easement to the State of North Dakota, including just compensation pursuant to the 1948 Act.[58] As in *Swift*, the compensation and consent provisions "plainly indicate that Congress envisioned that Indian interest in the land affected would be extinguished."[59]

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54. 546 F. Supp. 1185 (D. Ariz. 1982), *vacated as moot*, 574 F. Supp. 710 (D. Ariz. 1983).
55. Swift Transp., Inc. v. John, 546 F. Supp. 1185, 1192 (D. Ariz. 1982) (citations omitted).
56. *Id.*
57. 25 U.S.C. §§ 323-28; 25 C.F.R. § 161.3 (citations omitted) (emphasis added).
58. 25 U.S.C. § 325.
59. *Id.*; *see also* Wilson v. Marchington, 934 F. Supp. 1176, 1185 (D. Mont. 1995) (stating that "it is beyond dispute that designating a right-of-way as a U.S. Highway with the concomitant unrestricted access to the general public, abrogated any preexisting right to regulatory control" by the Indian

The only specific rights reserved to the tribe and its members involved the right to construct crossings of the right-of-way at all points reasonably necessary. Tribal jurisdictional powers over reservation lands "must be read in light of the subsequent alienation of those lands."[60] In *South Dakota v. Bourland*,[61] the Court considered whether the Cheyenne River Sioux Tribe could regulate hunting and fishing by non-Indians on lands and overlying waters located within the tribe's reservation but acquired by the United States for operation of the Oahe Dam and Reservoir. The Cheyenne River Act reserved to the tribe the use of the former reservation lands for minerals, grazing and access rights, and for hunting and fishing. The *Bourland* Court recognized that the taking from the Cheyenne River Sioux Reservation differed "from the conveyances of fee title in *Montana* . . . in that the terms of the Cheyenne River Act preserve certain limited land-use rights belonging to the tribe."[62]

The Court then concluded that:

> regardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control. Although *Montana* involved lands conveyed in fee to non-Indians within the Crow Reservation, *Montana's* framework for examining the 'effect of the land alienation' is applicable to the federal takings in this case.[63]

A-1 argued that in its case, the easement the United States granted to the State of North Dakota for Highway 8, pursuant to the Indian Rights-Of-Way Act, completely opened up Highway 8 to the use and occupancy of all. Indeed, A-1 pointed out that the 6.59 mile stretch of road is utilized to access the shores of Lake Sakakawea, a federally created water resource project. Anyone who seeks to enjoy the recreational activities and facilities located on Lake Sakakawea, which was created and is maintained by the Army Corps of Engineers pursuant to the Flood Control Act of 1944, may utilize the road. Since "Con-

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tribe). The district court, in *Marchington*, after undertaking a detailed analysis of why civil jurisdiction should not rest with the tribe, ultimately concluded that the court "constrained by the doctrine of *stare decisis*, is bound to follow the holding of *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994) despite the court's misgiving regarding the reasoning employed therein and the result dictated in the present action." *Marchington*, 934 F. Supp. at 1187. Ultimately the trial court's analllysis was accepted by the Ninth Circuit. *See infra* notes 137-150.

60. South Dakota v. Bourland, 508 U.S. 679, 697 (1993) (citing Montana v. United States, 450 U.S. 544, 561 (1981) (referring to Puyallup Tribe v. Washington Game Dept., 433 U.S. 165 (1977))).

61. 508 U.S. 679, 681-82 (1993).

62. South Dakota v. Bourland, 508 U.S. 679, 692-93 (1993).

63. *Id.* at 692 (footnote omitted) (emphasis added).

gress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control."[64]

Thus, the stage was set. The tribal petitioners argued that *National Farmers Union* and *Iowa Mutual* created presumptive tribal civil jurisdiction over non-Indians. The tribal petitioners argued that *Montana* did not govern the case because the land underlying the scene of the accident was held in trust for the Three Affiliated Tribes. Tribal petitioners also attempted to create a distinction between adjudicatory and regulatory jurisdiction.

A-1's counterargument was that *National Farmers Union* and *Iowa Mutual* were simply exhaustion cases and did not outline a rule of presumptive civil jurisdiction. In addition, A-1 asserted that the *Montana* analytical framework controlled the case since the tribes had lost the power to regulate or exclude non-Indians from the highway in question. Lastly, A-1 argued there was no factual or legal basis to draw a distinction between adjudicatory and regulatory jurisdiction.

The case was argued to the Court on January 7, 1997.[65] The Court's questioning during oral arguments provided insight into its analysis and concerns. The Court was concerned with several particular areas. First, the Court asked several questions regarding the practical aspects of which entity controlled the highway, including speed and regulation of driver's conduct.[66] The Court also asked about "speculation about due process horribles."[67] In particular, the Court inquired regarding information about any documented examples of due process concerns arising out of tribal court proceedings. The Court was specifically concerned with alleged due process violations in a recent Ninth Circuit decision.[68] The Court also inquired, perhaps in light of its

64. *Id.*

65. A transcript of the oral argument can be viewed at 1997 WL 10398. Melody L. McCoy argued the case on behalf of the tribal petitioners. Ms. McCoy works with the Native American Rights Fund in Boulder, Colorado. Jonathan E. Nuechterlein, Assistant to the Solicitor General, Department of Justice, Washington, D.C., argued on behalf of the United States as amicus curiae in support of the tribal petitioners. Patrick J. Ward, a partner with Zuger Kirmis & Smith, Bismarck, North Dakota, argued on behalf of A-1 Contractors and Lyle Stockert.

66. Strate v. A-1 Contractors, No. 95-1872, 1997 WL 10398 at *4-*8 (U.S. Jan. 7, 1991).

67. *Id.* at *41-*42.

68. *Id.* at *42-*43. *See* Burlington Northern R.R. Co. v. Estate of Red Wolf, 106 F.3d 868 (9th Cir. 1996), *vacated*, 118 S. Ct. 37 (1997). The *Red Wolf* case outlined significant due process concerns. In 1995, Burlington Northern was sued in tribal court on the Crow Reservation in Montana by the survivors of two members of the tribe killed in a railroad crossing accident on the reservation. In 1996, the case was tried to a jury made up entirely of members of the tribe, including some relatives of the plaintiffs. During jury selection, many potential jurors expressed a deep seated bias against the railroad. That bias was echoed by the court itself when a tribal judge, who was not presiding over the case, addressed the venire panel in the Crow language, telling them, "A train runs through the middle of our land, Crows, you know, I don't have to tell you. Bodies, in the past, bodies are scattered along

discussion regarding due process concerns, about post trial review of tribal court decisions in the federal court system.[69] The Court clearly expressed skepticism as to whether an adjudicatory/regulatory jurisdictional distinction could exist.[70] It is with these questions and concerns in mind that the Court took the matter under advisement.

V. THE UNITED STATES SUPREME COURT DECISION IN *STRATE V. A-1 CONTRACTORS*

On April 28, 1997, the Court issued its decision in *Strate v. A-1*. The Court opened its opinion by unequivocally stating that the case law established that "absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances."[71] The Court noted that in *Oliphant v. Suquamish Tribe*,[72] it had held that Indian tribes lacked criminal jurisdiction over non-Indians. The Court then noted that *Montana*, decided three years later, is the "path marking case" concerning tribal civil authority of nonmembers.[73] After analyzing the *Montana* decision, the Court noted:

> *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 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.[74]

As noted above, the tribal petitioners and the United States as amici curiae argued that *Montana* did not control this case. The tribe asserted

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the railway. Now, this is the day." Although the evidence showed that the driver and her mother were intoxicated at the time of the accident, the jury found Burlington Northern 100% liable for wrongful death and awarded the five heirs what the jury described as "compensatory" damages in the astonishing amount of $250 million.

69. *Strate*, 1997 WL 10398, at *42-*43. A-1 pointed out that the Supreme Court's decisions left unresolved whether federal courts may review tribal court's deprivation of fundamental equal protection and due process rights under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1988). *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). For one writer's view on federal court review of tribal court decisions, *see* Judith V. Royster, *Stature and Scrutiny: Post- Exhaustion Review of Tribal Court Decisions*, 46 KAN. L. REV. 241 (1998).

70. *Strate*, 1997 WL 10398, at *17-*18.

71. Strate v. A-1 Contractors, 117 S. Ct. 1404, 1409 (1997) (emphasis added); *see also* Montana v. United States, 450 U.S. 544, 565 (1981); Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1091 (8th Cir. 1998); County of Lewis v. Allen, 141 F.3d 1385, 1388-90, 1392 (9th Cir. 1998); Burlington Northern R.R. Co. v. Estate of Red Wolf, No. CV 96-000-BLG-JDS, slip op. at 9 (D. Mont. April 9, 1997).

72. 435 U.S. 191 (1978).

73. *Strate*, 117 S. Ct. at 1409.

74. *Id.* at 1409-10.

that *Montana* was limited to issues regarding regulatory authority and not adjudicatory authority in disputes occurring within a reservation. Instead, the tribe argued that *National Farmers Union* and *Iowa Mutual* created a presumptive rule of civil jurisdiction over nonmembers. In addressing this argument, the Supreme Court indicated "we read our precedent differently."[75] The Court concluded that both decisions simply described an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction; and neither established any specific tribal court adjudicatory authority in general, or even over the lawsuits involved in those cases.[76] Recognizing that its precedent had been "variously interpreted,"[77] the Court undertook an extensive analysis of its decision in *National Farmers Union* and *Iowa Mutual.* The Court then reiterated that "*National Farmers Union* and *Iowa Mutual* enunciate only an exhaustion requirement, a 'prudential rule,' based on comity."[78]

The Court also dismissed the tribal petitioners' argument suggesting a distinction between adjudicating and regulatory jurisdiction. Although the tribe had argued vehemently that *Montana* only related to regulatory control, the Court unequivocally held:

> *As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.* Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding. Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'do[es] not extend the activities of nonmembers of the tribe.'[79]

The tribal petitioners had alternatively argued that the *Montana* analysis did not govern the case because the land underlying the scene of the accident was being held in trust for the Three Affiliated Tribes and their members. In response, Stockert and A-1 had argued that while both *Montana* and *Brendale* involved questions of tribal authority over non-Indians on non-Indian owned fee lands, neither case limited its

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75. *Id.* at 1410.

76. *Id.* (*citing* Brendale v. Confederated Tribes and Bands of the Yakima Nation, 493 U.S. 408 (1989)).

77. *Id.* at 1412.

78. *Id.*

79. *Id.* (*citing* Montana v. United States, 450 U.S. 544, 565 (1981)) (emphasis added). Despite the court's unequivocal ruling, commentaries continue to advance arguments for a distinction between adjudicatory and regulatory authority. *See* Jamelle King, *Tribal Court General Civil Jurisdiction Over Actions Between Non-Indian Plaintiffs and Defendants: Strate v. A-1 Contractors*, 22 AM. INDIAN L. REV. 191 (1997).

discussion, rationale or holding to issues solely arising on fee lands. Instead, A-1 argued that *Montana* specifically found, without qualification, that tribal power itself is limited to what is necessary to protect tribal self-government and to control internal relations, absent express congressional delegation of more expansive authority.[80] Furthermore, A-1 argued that *Montana* specifically addressed the "forms of civil jurisdiction over non-Indians on their reservations" and outlined the two limited situations in which that jurisdiction could apply.[81] In *Montana*, the Court did not limit its rationale to cases arising on non-Indian fee lands but referred broadly to tribal power over nonmembers.

In *Strate*, the Court noted that the action underlying the case occurred on North Dakota Highway 8 within a grant of easement for right of way dated May 8, 1970, issued by the Secretary of the Interior pursuant to the general right-of-way act of 1948, at 25 U.S.C. § 323-28 and its implementing regulations.[82] The only specific rights reserved to the Indian landowners were outlined in the easement itself and did not include the right to control the highway or exclude non-Indians.[83]

The Court noted that the right of way opened up the state highway to the public and that traffic on it was subject to the state's control.[84] Importantly, the Court held so long as the stretch is maintained as part of the state's highway, the tribes cannot assert a landowner's right to occupy and exclude. "We therefore align the right of way, for the purpose at hand, with land alienated to non-Indians. Our decision in *Montana*, accordingly, governs this case."[85] Thus, it is apparent, that regardless of the purpose of the alienation, if a tribe loses its "gate keeping right" and its concomitant power to exclude, it also loses jurisdiction, absent compliance with one of the *Montana* exceptions.[86] Having rejected the tribal petitioner's arguments and attempts to distinguish *Montana*, the Court then had to apply the *Montana* exceptions to see if jurisdiction was appropriate.

After concluding that the *Montana* analytical framework controlled the analysis, and after noting that no treaty or federal statute specifically

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80. *See Montana*, 450 U.S. at 564.

81. *See id.* at 565.

82. *See supra* note 53.

83. *Strate*, 117 S. Ct. at 1414. The tribes reserved no other right to exercise any dominion or control over the right of way in consenting to the grant by the secretary.

84. *Id.* One of the Court's first questions during oral argument related to who controlled the highway. *See supra* note 66 and accompanying text.

85. *Strate*, 117 S. Ct at 1414 (citations omitted).

86. *Id.* at 1407 (stating that "we express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation."). The Court's reference was in its opening paragraphs and was not inserted into the opinion along with the discussion regarding the status of the land.

authorized the Three Affiliated Tribes to entertain highway accident tort suits, the Court undertook an application of the two *Montana* exceptions to determine whether either had been satisfied. The first *Montana* exception covers "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[87] The Court noted that although A-1 was clearly engaged in subcontract work on the Fort Berthold Reservation, and therefore had a "consensual relationship" with the tribes, the action was distinctly nontribal in nature since "Gisela Fredericks was not a party to the subcontract, and the tribes were strangers to the accident."[88]

In reviewing the scope of *Montana's* first exception, the Court was guided by the cases *Montana* cited in support of that proposition. The Court noted that the "list of cases" fitting within the first exception indicates the type of activities the court had in mind. After outlining the four cases,[89] the Court, in a terse one statement conclusion held that "measured against these cases, the Fredericks/Stockert highway accident presents no 'consensual relationship' of the qualifying kind."[90]

The Court, in indicating that Gisela Fredericks was not a party to the subcontract and that the dispute was distinctly nontribal in nature, narrowly defined the first *Montana* exception to include consensual commercial relationships and disputes arising directly from those relationships. Thus, it appears, torts, nonconsensual activities, will rarely, if ever, fall within *Montana's* first exception unless arising directly from the agreement or relationship.[91]

The second exception to *Montana's* general rule that tribe's lack jurisdiction over nonmembers relates to conduct that "threatens or has some direct affect on the political integrity, the economic security, or the health and welfare of the tribe."[92] In analyzing this exception, the Court

87. Montana v. United States, 450 U.S. 544, 565 (1981).

88. *Strate*, 117 S. Ct. at 1415.

89. Williams v. Lee, 358 U.S. 217 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on reservation sales transaction between nonmember plaintiff and member defendants); Morris v. Hitchcock, 194 U.S. 384 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasa Nation); Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905) (upholding the tribe's permit tax on nonmembers for the privilege of conducting business within tribe's borders. The Court characterized as "inherent" the tribe's "authority . . . to prescribe the terms upon which non-citizens may transact business within its borders." *See* Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152-54 (1980) (tribal authority to tax on reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status").

90. *Strate*, 117 S. Ct. at 1415.

91. Indeed, this concept of consent based jurisdiction appears to be the trend if not the reality. *See* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996).

92. *Montana*, 450 U.S. at 566.

acknowledged "undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity and surely jeopardize the safety of tribal members. But if *Montana's* second exception requires no more, the exception would severely shrink the rule."[93] In analyzing the scope of *Montana's* second exception, the Court again indicated that the cases cited in *Montana* to support the exception indicate the character of the tribal interest the Court envisioned. In examining these cases, the Court noted:

> The Court referred first to the decision recognizing the exclusive competence of a tribal court over an adoption proceeding when all parties belong to the Tribe and resided on its reservation. Next, the Court listed a decision holding a tribal court exclusively competent to adjudicate a claim by a non-Indian merchant seeking payment from tribe members for goods bought on credit at an on reservation store. Thereafter, the Court referred to two decisions dealing with objections to a county or territorial governments imposition of a property tax on non-Indian-owned livestock that grazed on reservation land; in neither case did the Court find a significant tribal interest at stake.[94]

After reviewing all of these cases, the Court was quick to note:

> Read in isolation, the *Montana* rule second exception can be misperceived. Key to its proper application, however, is the Court's preface: '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.'[95]

The Court concluded that neither regulatory nor adjudicatory authority over North Dakota State Highway 8 was needed to preserve the right of the Indians to either make their own laws or be ruled by them. Thus, the

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93. *Strate*, 117 S. Ct. at 1415.

94. *Id.* at 1415, 424 U.S. at 386; *see also Williams*, 358 U.S. at 220 (stating that "absent governing acts of Congress, the question of state court jurisdiction over and on reservation conduct and actually have the question [of state court jurisdiction over on reservation conduct] has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."); Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906) (stating that "the Indians' interest in this kind of property [livestock], situated on the reservation, was not sufficient to exempt such property, when owned by private individuals, from [state or territorial] taxation"); Thomas v. Gay, 169 U.S. 264, 273 (1898) (stating that "[territorial] tax put upon the cattle of [non-Indian] lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians").

95. *Id.* at 1416 (*citing Montana*, 450 U.S. at 564) (emphasis added).

Court held that the *Montana* rule, and not its exceptions, applied to the case.

Perhaps the most significant aspect of the *Strate* decision lies in its footnotes. In particular, footnote 14. Footnote 14 provides:

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.[96]

Prior to the *Strate* decision, exhaustion was mandated absent very specific criteria. These criteria were announced in *National Farmers Union*. They required exhaustion unless an assertion of tribal jurisdiction was motivated by a desire to harass or in bad faith, or where the action is patently violative of express jurisdictional prohibitations, or where exhaustion would be futile because of a lack of an opportunity to challenge the court's jurisdiction.[97] Previously, the courts had applied this exhaustion requirement very strictly.[98]

Strate changed all that. Footnote 14 now appears to both authorize and approve federal court involvement in any case where it is plain that no federal grant provides for tribal governance of nonmember conduct. Thus, as a practical matter, litigants can, and in most cases will, seek federal court intervention at a much earlier stage of litigation.[99] Footnote 14 is even more interesting in light of the fact that in *Strate*, A-1 had exhausted its remedies. Thus, the issue was not even directly before the Court. Regardless, the Court took the opportunity to change the scope of the rule, thus making it easier to obtain federal court review.

In order to put the decision and its impact on tribal jurisdiction in context, a review of federal decisions applying the *Strate* analytical framework is necessary.

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96. *Id.* at 1416 n.14 (emphasis added). *Cf.* National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 856 n.21 (1995).

97. *National Farmers Union*, 471 U.S. at 856 n.21.

98. *See, e.g.*, Duncan Energy Co., Inc. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1300 (8th Cir. 1994). For an in depth analysis of the exhaustion of tribal court remedies see Phillip W. M. Lear and Blake D. Miller, *Exhaustion of Tribal Court Remedies: Rejecting Bright-Line Rules And Affirmative Action*, 71 N.D. L. REV. 277 (1995).

99. *See, e.g.*, Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1092 (8th Cir. 1998).

VI. SUBSEQUENT DECISIONS

At the time of the writing of this article, several courts have applied the *Strate* decision. A brief review of some of those cases helps put the decision in context. In perhaps the first reported decision to apply the *Strate* analysis, the Mexico Court of Appeals issued its decision in *Halwood v. Cowboy Auto Sales, Inc.* on May 20, 1997.[100] Wilson Halwood, Jr. and Loraina Halwood were enrolled members of the Navajo Tribe.[101]

The Halwoods purchased a used car from Cowboy Auto Sales, Inc. The Halwoods sued Cowboy Auto Sales, Inc. and the salesman who sold them the car, Bruce Williams, after the defendants repossessed the car from the plaintiffs' residence on the Navajo Reservation near Chinle, Arizona, while the plaintiffs were not at home.[102] The Halwoods sued the defendants for illegal repossession, trespass, and conversion. The defendants, although properly served, failed to plead or answer the complaint in any way. The plaintiffs' moved for default judgment and after the defendants did not respond, the tribal court eventually entered a default judgment in favor of the plaintiffs.

The tribal court judge granted the plaintiffs $5,000 in interest, costs, and compensatory and statutory damages along with attorneys' fees. The tribal court also granted $25,000 in punitive damages. In determining that civil jurisdiction was proper with the Navajo Nation, the court analyzed the *Strate* decision. In particular, the defendants argued that following *Strate*, civil jurisdiction no longer existed over them. The court noted: "We disagree for two reasons. First, the court in *Strate* was careful to emphasize that the land on which the incident in that case arose was a state highway, and the court expressed no opinion on whether the same result would obtain if the incident arose on a tribal road within the reservation."[103] The court also indicated that civil jurisdiction over disputes arising out of consensual relationships with the tribal members through commercial dealings and contracts presumptively lies

100. Halwood v. Cowboy Auto Sales, Inc., 946 P.2d 1088 (N.M. Ct. App. 1997).

101. *Halwood*, 946 P.2d at 1090. All of the factual background as presented to the Court of Appeals of New Mexico came from the findings of fact and conclusions of law and judgment entered by default by the District Court of the Navajo Nation, Chinle, Arizona, on January 27, 1992. *Id.*

102. *Id.* Cowboy Auto Sales, Inc. and Bruce Williams alleged to the Court of Appeals that the repossession of the car took place in Gallup, New Mexico, while the plaintiffs were shopping and then they drove the plaintiffs to their home on the reservation as a matter of courtesy. *Id.* at 1093. The court noted that the defendants alleged this for the first time in almost six years of litigation. In particular, the court noted that "defendants allege these facts to the wrong court." *Id.*

103. *Id.* at 1092 (*citing* Strate v. A-1 Contractors, 117 S. Ct. 1404, 1408 (1997)).

in the tribal courts.[104] Thus, the court held that civil jurisdiction over the defaulting defendants was appropriate.[105]

In *Harrison v. Boyd Mississippi Inc.*,[106] a non-Indian employee initiated an action for damages against the gaming management company which was operating an Indian casino alleging battery, false detention, and false imprisonment. A suit was initiated in state circuit court. The circuit court dismissed the case for lack of subject matter jurisdiction. The circuit judge concluded that since the cause of action arose within the boundaries of the tribal reservation of the Mississippi Band of Choctaw Indians "substantial tribal interests are present in the controversy and the sovereignty of the Mississippi Band of Choctaw Indians must be recognized by this court."[107]

The Mississippi Supreme Court reversed the circuit court's ruling finding that the tribal courts of the Mississippi Band of Choctaw Indians lacked subject matter jurisdiction. *Harrison* is important for several reasons. First, the court specifically noted that all conduct which formed the basis for the alleged torts, occurred in and on Choctaw Indian country. Furthermore, neither the plaintiff nor any of the defendants were members of the Choctaw Band. Even though the incidents occurred on Indian country, the court applied the *Montana* analysis to determine whether jurisdiction existed in tribal court. Thus, the court appeared to answer the question which *Strate* left for another day, which is whether the *Montana* analysis applied to activity occurring on Indian Country.[108]

Harrison is also important for its application of the *Montana* exceptions. In *Harrison*, the court noted that the "case at bar concerns a tort action, not a contract, lease or other arrangement."[109] The court noted that no consensual relationship existed between the plaintiff and the Band of Choctaws or any of its members. As such, the court narrowly applied the first *Montana* exception restricting consensual relationships to issues arising directly from contracts, leases, or other commercial arrangements.

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104. *Id.* Therefore, the court appeared to read the *Montana* first exception in a relatively broad fashion. Although there was a commercial transaction, the repossession itself (the tort) did not arise directly from the contract.

105. *Id.* The court also concluded that the imposition of punitive damages was civil in nature and thus the district court's decision to vacate the punitive damages award based on it being criminal in nature pursuant to *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) was incorrect.

106. 700 So. 2d 247 (Miss. 1997).

107. Harrison v. Boyd Mississippi, 700 So. 2d 247, 249 (Miss. 1997).

108. *Id.* at 251. In *Strate*, the court indicated that it would leave for another day what the outcome would be if the accident had occurred on a tribal road. 117 S. Ct. at 1408.

109. *Harrison*, 700 So. 2d at 251.

In *Kerr-McGee Corporation v. Farley*,[110] members of the Navajo Nation initiated suit in the Navajo Tribal Court seeking damages for alleged negligence resulting in death arising out Kerr-McGee's operation of a uranium processing mill located on leased tribal land within the reservation.[111] Kerr-McGee filed a declaratory judgment action in federal district court seeking to enjoin the Navajo Tribal Court from proceeding and to declare the tribal court lacked jurisdiction over the claims. The Federal District Court of New Mexico stayed the proceedings and ordered Kerr-McGee to exhaust its tribal remedies. Kerr-McGee initiated an interlocutory appeal. The court of appeals concluded that the tribal court's exercise of jurisdiction was not so contrary to the federal law as to preclude application of the tribal exhaustion rule.

In determining whether exhaustion was appropriate or whether it was patently violative of express jurisdictional prohibitations,[112] the court examined the *Strate* case. After the *Strate* decision was issued, the 10th Circuit requested supplementary briefs on its significance to the *Kerr-McGee* case.[113] The 10th Circuit noted:

> In *Strate* the Supreme Court found that, absent a treaty or statute, a tribe had jurisdiction to adjudicate a dispute between nonmembers of the tribe arising out of an automobile accident occurring on a state highway. Relying principally on *Montana*, the Court held that with respect to lands over which the tribe had ceded sovereign authority, tribal jurisdiction is substantially limited. After carefully reviewing *Strate*, we concluded it is of limited usefulness in our case. Kerr-McGee's alleged torts did not occur on lands over which the tribe has ceded authority and control to another sovereign for an indefinite period. Here, the lease was to a private entity and for a finite period. The Supreme Court simply has not spoken to such a situation.[114]

Thus, the court suggested that this was an exhaustion case and as such, jurisdiction could be appropriate since the activity occurred on tribal lands. Therefore, *Kerr-McGee* appeared to restrict the *Strate* analysis to land which was the equivalent of non-Indian land.

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110. 115 F.3d 1498 (10th Cir. 1997).

111. Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1500 (10th Cir. 1997).

112. *See* National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 856 n.21 (1985).

113. *Kerr-McGee*, 115 F.3d at 1506 n.4.

114. *Id.* (*quoting* Strate v. A-1 Contractors, 117 S. Ct. 1404, 1408 (1997) (stating that "we express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation.")).

In *County of Lewis v. Allen*,[115] the Ninth Circuit Court of Appeals, sitting *en banc*, addressed tribal jurisdiction in light of the *Strate* decision. Lewis County is a subdivision of the state of Idaho with much of its territory located within the Nez Perce Indian Reservation.[116] The Nez Perce Tribe had consented to Idaho's assumption of concurrent criminal jurisdiction within the boundaries of the reservation over several minor offenses, including disturbing the peace.[117] John Allen and a woman contacted the county sheriff's office in order to complain of a battery perpetrated by a bartender.[118] Deputy Sheriff Tom Myers proceeded to the Allen house in order to interview the woman. Allen and his wife, along with the other woman, had all been drinking together at the bar. All three were intoxicated and continually kept interrupting Deputy Myers as he attempted to interview the woman. Eventually, Deputy Myers gave up.[119] As Deputy Myers was leaving Allen's residence, Allen yelled obscenities and shook his fist at the deputy.[120] Eventually, after providing warnings, Deputy Myers arrested Allen for disturbing the peace. The criminal charge was dismissed after a jury trial.

Once the criminal case ended, Allen sued Deputy Myers and Lewis County, among others, in the Nez Perce Tribal Court. Allen sued for false arrest, assault and battery, false imprisonment, and malicious prosecution.[121] The case went to trial in the tribal court. The jury determined that damages were attributed ten percent each to Mr. and Mrs. Allen, forty-five percent to Deputy Myers, twenty-five percent to the Sheriff, and ten percent to Lewis County. Although the tribal jury found that Deputy Myers acted in good faith, they awarded punitive as well as compensatory damages.[122] The defendants had objected to the tribal court jurisdiction from the initiation of the case. Although the record indicated that the Allen's house was on fee land, not trust land, it did not indicate who actually owned it. Allen was a member of the tribe although his wife and the deputy were not.[123] Deputy Myers and Lewis County initiated an action in the United States District Court seeking a declaratory judgment that the tribal court lacked jurisdiction, rendering its judgment void. The district court granted summary judgment in

115. 141 F.3d 1385 (9th Cir. 1998), *withdrawn*, 149 F.3d 1228 (9th Cir. 1998), *aff'd on reh'g en banc*, 163 F.3d 509 (9th Cir. 1998).
116. County of Lewis v. Allen, 163 F.3d 509, 511 (9th Cir. 1998).
117. *Id.*
118. *Id.* at 512.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*

favor of the county and the deputy sheriff[124] The Nez Perce Tribe and the Nez Perce Tribal Court appealed the decision.

On appeal it was argued that the status of the land determines whether the tribal court has jurisdiction. It was argued that the tribal court has jurisdiction over non-Indians for torts on tribal and trust lands, although not on land held in fee simple by non-Indians. The court was urged to remand the issue to the tribal court, since the record did not establish whether the fee land the Allen residence was on was Indian owned or non-Indian owned. The Ninth Circuit Court of Appeals rejected this suggestion.[125]

The *Allen* court clearly rejected the argument that the status of the land underlying the alleged tort was determinative of tribal court jurisdiction.[126] The critical issue, according to the court, is whether the nonmember has the right to be on the land where the alleged conduct occurs. In other words, has the tribe lost or given up its right to exclude the nonmember. If the nonmember of the tribe has the right to remain where he is, then under *Strate*, the status of the land or legal title of the land does not justify the tribe's adjudicative authority. In *Allen*, the court concluded that the tribe ceded its "gatekeeping right" to exclude county officials from engaging in law enforcement activities on the reservation when it entered into the Joint Law Enforcement Agreement with the State.[127] "From the standpoint of the exercise of adjudicative authority over nonmember [defendants], it does not matter how the land was owned because the consent to criminal jurisdiction was tantamount to alienation of the land to non-Indians . . . ."[128]

The court went on to examine the *Montana* exceptions and determined neither had been satisfied. In relation to *Montana*'s first exception the court noted that the cases fitting within that exception "involve either direct regulation by a tribe of non-Indian activity on the reservation or lawsuits between a private party and the tribe or tribal members arising from on-reservation transaction or agreement."[129] The court, in conclusory fashion, then noted that the agreement between the tribe and the State was not a "consensual relationship" sufficient to satisfy *Montana*'s exception.[130]

In examining *Montana*'s second exception the court noted:

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124. *Id.* at 513.
125. *Id.* at 516.
126. *Id.* at 514.
127. *Id.*
128. *Id.*
129. *Id.* at 515.
130. *Id.*

> [T]he tribal court plaintiff's status as a tribal member alone cannot satisfy the second exception. Nor is it sufficient to argue, as the tribe does, that the exception applies because the tribe has an interest in the safety of its members. That simply begs rather than answers the question. Under the tribe's analysis, the exception would swallow the rule because virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe.[131]

The court reiterated the narrow reading of *Montana*'s exception and cautioned that "the exception must be read to 'sufficiently protect Indian tribes while at the same time avoiding undue interference with state sovereignty.'"[132] The court also indicated "that subjecting county law enforcement officers to suit in tribal court was not necessary to protect Indian tribes or the members who could pursue their cause of action in state or federal court." The reason this is important is that both the *Strate* and the *Allen* court had noted that alternative state and federal remedies are an important consideration in examining the extent of tribal jurisdiction.

Lastly, the court was urged to abstain from ruling on the jurisdictional issues and, instead, to remand the issue to the tribal court for determination of its own jurisdiction in light of *Strate*.[133] The court emphasized that exhaustion had already occurred. Moreover, the court reiterated that exhaustion is a "prudential" not "jurisdictional" rule.[134] The court concluded: "Because we hold that tribal court jurisdiction does not exist under *Montana* and *Strate*, remand would be futile, serving only to delay judgment day in a case that began in tribal court eleven years ago. The time has come to close this matter."[135]

Thus, the *Allen* decision indicates that the status of the land underlying the tort is not determinative. Instead, the key is whether the tribe has lost the ability to exclude the nonmember for whatever reason.

In *Wilson v. Marchington*,[136] the court addressed under what circumstances a tribal court tort judgment is entitled to recognition in the United States courts. *Marchington* involved a traffic accident between Mary Jane Wilson, who is an enrolled member of the Black Feet Indian

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131. *Id.*

132. *Id.* (citing Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408, 431 (1989)).

133. *Id.* at 516.

134. *Id.*

135. *Id.*

136. 127 F.3d 805 (9th Cir. 1997).

Tribe, and Thomas Marchington, who is not.[137] Marchington was driving his vehicle on U.S. Highway 2 within the boundaries of the Black Feet Indian Reservation in Montana. Wilson was driving ahead of Marchington on the two-lane road and signaled to make a left turn.[138] Marchington apparently unaware or in disregard of Wilson's intent to turn, attempted to pass her on the left, colliding with her car as she exited Highway 2. Wilson sued Marchington and his employer[139] in the Black Feet Tribal Court.[140] The tribal jury awarded Wilson $246,100.[141] Although the Black Feet Court of Appeals reversed the trial court for a hearing on whether punitive damages had been improperly awarded, the Black Feet Supreme Court reversed the court of appeals' decision and reinstated the original judgment.[142] Wilson initiated suit in the United States District Court for the District of Montana in an attempt to register the tribal court judgment in the federal court system.[143] The district court reluctantly granted summary judgment in favor of Wilson and the appeal ensued.

In order to determine whether comity was appropriate, the court outlined the relevant criteria for such an examination.[144] The court specifically noted the lack of personal jurisdiction "mandates rejection of a foreign judgment under the Restatement (Third) and that requirement must logically extend to tribal judgments."[145] The court held that: "Applying the comity analysis to this case, we find that the tribal judgment is not entitled to recognition or enforcement because the tribal court lacked subject matter jurisdiction, one of the mandatory reasons for refusing to recognize a tribal court judgment. Our jurisdictional determination is commanded by *Strate v. A-1 Contractors* . . . ."[146]

Basically, the court undertook an analysis of the land underlying the accident and concluded that U.S. Highway 2, the road where the accident between Marchington and Wilson occurred, was similar in all relevant respects to the highway examined in the *Strate* case.[147] The

137. Wilson v. Marchington, 127 F.3d 805, 807 (9th Cir. 1997).
138. *Id.*
139. Wilson was on assignment for his employer at the time of the accident.
140. *Wilson*, 127 F.3d at 807.
141. *Id.*
142. *Id.*
143. *Id.* Wilson argued her judgment was entitled to full faith and credit or comity.
144. *Id.* at 809-10. The court noted that "full faith in credit is not extended to tribal judgments by the Constitution or Congressional act, and we decline to extend it judicially." *Id.* at 809.
145. *Id.* at 810-11. The court determined that the existence of subject matter jurisdiction is mandatory under the Uniform Foreign Money-Judgments Recognition Act and thus in order for federal court recognition of a tribal judgment both personal and subject matter jurisdiction must exist. *Id.* at 811.
146. *Id.* at 813.
147. *Id.*

highway involved a right-of-way granted to the state of Montana by the tribe, the tribe had consented to the right-of-way, and the public had unrestricted access to Highway 2.

Thus, in most respects, *Wilson v. Marchington* involved a simple application of the *Strate* decision. However, what is important about the decision is the court's examination of the *Montana* second exception. Wilson and several amici supporting her claim argued that "a traffic accident injuring a tribal member sufficiently affects the economic security, political integrity, or health and welfare of the tribe, thus satisfying the second *Montana* exception."[148] The court noted that the Court in *Strate* basically rejected this argument when it observed that although those who drive carelessly on the highway surely jeopardize the safety of tribal members, *Montana's* second exception requires more.[149] Thus, the *Marchington* case applied the *Strate* analysis even though the plaintiff was an enrolled member of the tribe. Therefore, what was implicit in the *Strate* decision, that it is the status of the defendant being a non-consenting non-Indian which divests jurisdiction, was made explicit in *Marchington*. The arguments of tribal proponents attempting to limit *Strate* to cases involving two non-Indians has proven less than successful.

In *Hornell Brewing Company v. Rosebud Sioux Tribal Court*,[150] the Eighth Circuit addressed tribal court jurisdiction in the aftermath of *Strate*. This case involved the manufacture, sale, and distribution of an alcohol beverage called "The Original Crazy Horse Malt Liquor."[151] The estate of Crazy Horse[152] filed suit in tribal court asserting causes for defamation, violation of the estates right of publicity, and negligent and intentional infliction of emotional distress.[153] The estate sought both injunctive and declaratory relief as well as damages. The tribal judge, the Honorable Stanley E. Whiting, pro-tem tribunal judge of the Rosebud Sioux Tribal Court, dismissed the estates' complaint on the grounds that the tribal court lacked personal jurisdiction over the breweries and it lacked subject matter jurisdiction over the claims.[154] On appeal, the Rosebud Sioux Supreme Court reversed holding that the breweries had sufficient contacts with the Rosebud Sioux Reservation to uphold both process and jurisdiction.

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148. *Id.* at 814.
149. *Id.* at 814-15.
150. 133 F.3d 1087 (8th Cir. 1998).
151. Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1089 (8th Cir. 1998).
152. Tasunke Witko, a leader of the Oglala Sioux, who died in 1877.
153. *Hornell Brewing Co.*, 133 F.3d at 1089.
154. *Id.* at 1089.

The breweries then filed suit in the United States District Court for the District of South Dakota against the estate and the tribal court.[155] The district court enjoined the tribal court from conducting any further proceedings noting that it disagreed with the rationale the court had used to find subject matter jurisdiction. In particular, the Rosebud Sioux Supreme Court had held that *Montana* was inapplicable to the case because it was specifically limited to fee lands and dealt with regulatory rather than adjudicatory authority.[156] These were the arguments directly raised and rejected in *Strate*. The federal district court ruled that the *Montana* case was applicable and that since neither exception had been satisfied, the tribal court lacked subject matter jurisdiction. However, the court concluded that since the breweries had not exhausted their remedies the matter should be remanded to tribal court for a full opportunity to determine the jurisdictional issue.[157] On appeal, the Ninth Circuit began its discussion by quoting *Strate*: "absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances."[158] The court then specifically noted:

> Indian tribes do, however, 'retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations.' The operative phrase is 'on their reservations.' Neither *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside their reservations.[159]

The tribal appellants argued that the *Montana* second exception had been satisfied because the use of the Crazy Horse name for the sale of an alcoholic beverage had a direct effect on the political and economic security of the tribe. The court rejected this argument noting "we deem this issue misleading."[160] The court found the issue misleading because the activity on which the complaint was based was the sale and distribution of an alcoholic beverage. The court specifically noted that the sale and distribution did not occur on the reservation. Thus, where the

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155. *Id.*

156. *Id.*

157. *Id.* at 1090-91. The Rosebud Sioux Supreme Court, in its opinion, indicated that the plaintiffs had made out "a prima facie" case for jurisdiction. The district court noted that the question of the jurisdiction should have been determined by a preponderance of the evidence rather than merely a prima facie case of jurisdiction. Therefore, the district court order remanded the case to the tribal court to complete that review. *Id.* at 1091.

158. *Id.* at 1091 (quoting Strate v. A-1 Contractors, 117 S. Ct. 1404, 1409 (1997) (citations omitted)).

159. *Id.* (quoting Montana v. United States, 450 U.S. 544, 565 (1981)).

160. *Id.* at 1093.

conduct did not occur on the reservation there would be no plausible basis for jurisdiction. The court concluded that: "Following the admonition of the Supreme Court in *Strate*, we think it plain that the Breweries' conduct outside the Rosebud Sioux Reservation does not fall within the Tribe's inherent sovereign authority. We deem it clear the tribal court lacks adjudicatory authority over disputes arising from such conduct."[161] *Hornell Brewing* thus provided explicitly what had been implicit for some time. Activities must occur within the reservation in order to even plausibly support tribal court jurisdiction.

VII. CONCLUSION

The question remains what lesson do we take away from *Strate*. I think there are four main holdings that come out of the decision. First, the notion of inherent tribal sovereignty over nonmembers has ended. *National Farmers Union* and *Iowa Mutual* were simple exhaustion cases. Neither case supported the assumption of "presumed" jurisdiction over nonmembers. This was perhaps both the largest single blow to tribal jurisdiction and yet the most predictable.

Second, *Strate* provided a very restrictive reading of the two *Montana* exceptions. Thus, the "consensual relationship" test is basically restricted to commercial arrangements and matters arising directly thereunder; likely excluding all torts. The "direct effects" exception is severely limited. Indeed, this exception primarily relates to tribal self-government and internal relations. Absent the involvement of a governmental purpose (taxation), this exception will rarely, if ever, be met in individual tort cases.

Third, *Strate* leaves open the question of what impact the status of the land has on the jurisdictional issue. In particular, *Strate* did not address what outcome would result if the action had occurred on a tribal road. However, in reviewing the language of *Strate*, and a subsequent decision[162] it appears that if non-Indians have the right to be on the land, the Indians have lost the right to exclude. Without the right to exclude the *Montana* rule divesting jurisdiction absent a tribal interest will likely be applied. Thus, while *Strate* leaves open the question of the outcome if the accident had occurred on tribal roads, its reasoning, analysis, and logic dictate the same result.

Fourth, in perhaps what was the most important aspect of the *Strate* decision, the court addressed the issue of exhausting tribal remedies

161. *Id.* Given its holding, the court determined that exhaustion of tribal court remedies regarding the jurisdictional issues was unnecessary. *Id.*

162. *See supra* notes 115-135 and accompanying text.

prior to seeking federal court intervention.[163] Footnote fourteen has opened the door for litigants in tribal court to seek federal court review much more quickly than before.[164]

Perhaps the best law review article this writer has read addressing Indian law, written by L. Scott Gould[165] suggested that the "consent paradigm that has emerged in the past two decades largely replaces the doctrine of inherent sovereignty, the conceptual underpinning of tribal power over territory that had endured for more than 160 years."[166] The *Strate* decision is simply another step or piece of the consent paradigm. Tribes have long and vigorously fought for inherent sovereignty over all territory within their reservations, which is the equivalent of an independent foreign government. As indicated above, *Strate* indicates that the concept of inherent territorial sovereignty no longer exists. Thus, jurisdiction over non-Indians will be appropriate, under the present case law, only in situations where the person or entity consents to jurisdiction which is a restrictive application of *Montana's* first exception, or the activities have a "direct effect" on the tribe. This direct effect must be in relation to tribal self-governance or internal relations. To date, tribes have understandably been unwavering in their notion of inherent sovereignty. Battles over jurisdiction and inherent sovereignty have been waged in the courts. The litigation has been counterproductive to all parties. It is time for all parties to work together within the congressional legislative arena to outline and adopt reasonable boundaries and guidelines regarding tribal court jurisdiction. Absent cooperative legislative effort, it appears the court system will not allow the tribes to achieve their desired result.

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163. *See supra* notes 97-100 and accompanying text.

164. Footnote 14 has already been relied on by the Eighth Circuit to all but eliminate the exhaustion requirement. *See* Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998). *Cf.* National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21 (1985) (noting that exhaustion would not be required where the exertion of jurisdiction "is motivated by a desire to harass or is conducted in bad faith," or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an opportunity to challenge the court's jurisdiction).

165. Gould, *supra* note 91.

166. *Id.* at 894.