Natural Resources In and Around Indian Country
by Lynn H Slade
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DRAWING BRIGHTER LINES: RECENT DEVELOPMENTS AFFECTING NATURAL RESOURCES IN AND AROUND INDIAN COUNTRY

by
Lynn H. Slade
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
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Those involved with natural resource development and regulation in and around Indian country know that federal Indian law complicates the process. Federal Indian law ultimately will resolve competing claims of tribal, state, and federal governments to regulate the many facets of resource development in "Indian country."[(1)] Federal Indian law also will determine in which courts disputes concerning the development can be resolved and what law will apply in those proceedings. Resource development in Indian country has been handicapped, however, either because the Supreme Court has not addressed an issue or because modern Supreme Court Indian law decisions often have laid down unpredictable, balancing-based tests to resolve these questions. Lacking clear guidance, some developers have pursued prospects less fettered by legal uncertainty.

Two recent Supreme Court decisions, however, suggest the Supreme Court may recognize the need for brighter lines.[(2)] Those decisions, while sharply criticized by tribal advocates, appear to reflect an analysis aimed towards objectively based, more predictable standards. While one may quarrel with the effect of the decisions on tribal powers, there may be grounds for consensus that decisions imparting greater predictability in this area are steps forward.

This paper will analyze the impact of those decisions and related developments upon jurisdictional controversies in and around Indian country. It will assess the impact of those decisions on two critical variables that often determine governmental powers in Indian country: the effects of land status and reservation boundaries. Then, it will analyze the implications of these decisions on current controversies allocating adjudicatory jurisdiction between federal, state, and tribal courts and determining tribal regulatory jurisdiction. Finally, in Part III, it discusses a recent Secretarial Order defining duties of the Interior and Commerce Department, regarding compliance with the Endangered Species Act.

I. THE REHNQUIST COURT'S JURISDICTIONAL JURISPRUDENCE

The Supreme Court's Indian law cases under Chief Justice William Rehnquist can be analyzed as addressing three major issues.

First, the Court has sought to qualify tribes' inherent sovereignty by defining powers "implicitly divested" by tribes' dependent status.[(3)]

Second, the Rehnquist Court has found that divestiture of tribal ownership of reservation lands has correspondingly reduced tribal power over nonmember activities on privately owned, fee lands within reservation boundaries. Under this analysis, the Court has limited tribal regulatory jurisdiction over nonmember activities on fee lands within reservation boundaries to circumstances where the nonmembers have entered into consensual relationships with the regulating tribe or where there activities significantly affect critical tribal interests.[4] The Court extended this analysis in concluding that the extent to which lands within reservation boundaries have come to be owned and populated by nonmembers is material to determining whether the tribe has zoning power over the nonmember-owned lands.[5]

The third focus of the Rehnquist Court's Indian law jurisprudence has been upon dispute resolution. In two cases, it held that issues within the subject matter jurisdiction of federal courts must be presented in the first instance to tribal courts.[6] Both cases require the question of tribal court jurisdiction to be decided in the first instance in the tribal courts, subject to federal court review. However, neither case addressed whether the tribal court would have subject matter jurisdiction over the controversy.

These Supreme Court rulings presented natural resource developers in the late 1980s and early 1990s with a dilemma. Although the Supreme Court's regulatory jurisdiction decisions appeared to limit tribal powers, the Supreme Court's National Farmers Union and Iowa Mutual decisions were interpreted broadly by many federal courts to require all such issues to be presented in the first instance in tribal court.[7] Rightly or wrongly, many companies lacked confidence that tribal courts would fairly decide issues defining tribal power. Additionally, the Supreme Court's pivotal decision in Montana had laid down factually-based tests to determine whether tribal regulatory powers extended to nonmembers' fee lands activities: (1) is there a "consensual relationship" between the nonmember and the tribe; or (2) whether the nonmember's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[8] However, the Supreme Court had done little to clarify the nature of the required consensual relationship or the conduct threatening political integrity, economic security or tribal health or welfare. Consequently, the Montana/Brendale standards were little used to define tribal powers.

The Supreme Court had not addressed tribal powers over nonmembers outside the reservation. The Court did clarify limitations on States' powers to tax certain activities generally occurring on tribal trust lands not within declared Indian reservations;[9] however, those cases did not address off-reservation tribal powers over nonmembers on lands not held in trust for the tribe. As Indian nations sought to expand their jurisdictional powers beyond reservation boundaries, controversies arose regarding the scope of that jurisdiction.[10]

Against this background, the Supreme Court decided A-1 Contractors v. Strate and Native Village of Venetie. The impact of those cases is discussed in turn below.

II. STRATE v. A-1 CONTRACTORS

In Strate, a nonmember of the Three Affiliated Tribes of the Fort Berthold Reservation filed suit in tribal court against a nonmember-owned corporation,

seeking money damages for injuries arising from a truck-auto collision. The collision occurred on a state highway running through the Fort Berthold Reservation. The highway was situated on a right-of-way granted by the United States under the General Right-of-Way Act of 1948 with the consent of the Three Affiliated Tribes.[11] The tribal court denied A-1 Contractor's motion to dismiss for lack of subject matter jurisdiction, and the Intertribal Court of Appeals affirmed. A-1 then filed suit in federal court seeking to enjoin the tribal court proceeding based on its contention that tribal court lacked subject matter jurisdiction over the action. The Supreme Court affirmed the conclusion of the Eighth Circuit Court of Appeals[12] that tribal court lacked subject matter jurisdiction over the case.

The Supreme Court's decision in Strate addresses both subject matter jurisdiction and the "tribal exhaustion" doctrine. Its holding that the tribal court lacked subject matter jurisdiction is based on several premises; some having implications beyond subject matter jurisdiction issues.

1. The Nature of Tribal Adjudicatory Jurisdictions:

The court addressed the relationship between the regulatory power of tribes and the subject matter jurisdiction of tribal courts and found the two to be identical: "as to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[13] This is a significant holding. The Court rejected the contention of amici tribes suggesting a different, though bright; line that tribal court jurisdiction should be territorial covering at least all levels within a reservation.

2. Whether Montana Applies to Non-Fee Lands:

Because Strate equates tribal court adjudicatory and regulatory powers, the Supreme Court then analyzed whether the Tribes would have legislative authority over the accident in Strate under the standards of Montana. In this analysis, it concluded that the State's highway right-of-way was the equivalent of the fee lands in Montana, notwithstanding that the Tribes retained a reversionary interest in the highway right-of-way.[14] Consequently, the Court was required to analyze whether either of the two prongs under the "Montana test" applied. This holding steps beyond Montana, which relied on fee lands and allotment era policies to break up reservations, and extends its reach to lands non-Indians entered under a post-Indian Reorganization Era Statute, the 1948 General Right-of-Way Act.[15]

3. Application of the Montana Rule:

The Court's application of the Montana test to the facts of Strate clarifies the application of the Montana rule. Despite that the contractor in Strate had entered into a subcontract arrangement with respect to a construction project for a tribal entity, the Court held there was no "consensual relationship" satisfying the first prong of Montana: "Although A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a 'consensual relationship' with the Tribes, Gisela Fredericks was not a party to the subcontract, and the [T]ribes were strangers to the accident.'"[16] Consequently, Strate suggests that the consensual relationship required under Montana must be between the nonmember and the tribal court plaintiff or must have a close nexus to the subject of asserted tribal powers than that presents in Strate[17].

Strate also addressed Montana's second exception, requiring that the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. . .". Strate's holding suggests that broad categories of activities may fall outside tribal powers:

"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."[18]

Consequently, Strate suggests that courts may not aggregate the effects of numerous incidents similar to those involved in the specific exercise of power under consideration that may arise within the reservation in determining whether Montana's second exception is satisfied. For example, Strate raises a significant question whether a tribe can regulate highway safety. Presumably, since Strate equates adjudicatory and regulatory powers, its conclusion that tribal courts lack power to adjudicate over highway accidents implies tribes cannot regulate that conduct.

4. Tribal Court Exhaustion / Abstention:

Strate also provides guidance on the circumstances in which a federal court may retain jurisdiction to address challenges to the jurisdiction of tribal courts, rather than require the federal court plaintiffs to exhaust tribal remedies before obtaining a federal decision. Strate clarified that the exhaustion rule of National Farmers Union and Iowa Mutual is not a jurisdictional, but rather is a "prudential rule" based on considerations of comity.[19] In a potentially significant footnote 14, Strate 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." In such cases, "the otherwise applicable exhaustion requirement, must give way, for it would serve no purpose other than delay."[20] Strate's footnote 14, consequently, suggests a more flexible exhaustion rule, allowing federal courts to retain jurisdiction to address challenges to tribal court jurisdiction when the absence of tribal court jurisdiction is "plain." It will require federal courts to determine whether they may proceed without requiring tribal court exhaustion, when the absence of tribal court jurisdiction is "plain" for reasons other than application of the Montana rule.

5. Application of Strate in the Lower Courts:

The courts appear to have recognized that Strate establishes new standards governing tribal court subject matter jurisdiction. The Ninth Circuit Court of Appeals has extended Strate to apply to a vehicular accident in which the plaintiff is a member of the applicable tribe.[21] Following entry of the Eighth Circuit's decision in A-1 Contractor's, the Ninth Circuit in Yellowstone County v. Pease[22] held that a tribal court was powerless to adjudicate a suit filed by a tribal member to challenge the applicability of county property taxes to land he owned in fee within the exterior boundaries of the reservation. The Ninth Circuit premised its ruling in Pease on the relationship between regulatory and adjudicatory jurisdiction, concluding that the Montana analysis applied to divest the tribal court of jurisdiction over the law suit.[23]

The federal courts have been less consistent in their interpretations of Strate's footnote 14. Two Courts of Appeals have required abstention or, stated differently, exhaustion of tribal remedies since entry of Strate.[24] In Kerr-McGee and El Paso, both courts distinguished Strate based upon the different land status involved in those cases, in which the liability allegedly arose on lands held in trust for the tribes on uranium mining leases within reservation boundaries. Those cases are significant because a comprehensive federal statutory scheme, the Price-Anderson Act,[25] governs liability for the injuries resulting from uranium contamination alleged in both tribal court cases. Both cases present the issue under Strate whether the absence of tribal regulatory authority requires the conclusion that tribal courts lack subject matter jurisdiction. In Kerr-McGee the Tenth Circuit concluded that that issue should be addressed in the first instance in the tribal court.[26] The Ninth Circuit did not address this issue, distinguishing Strate exclusively on land status grounds, although a dissent by Judge Kleinfeld argued that, "because there are no claims that can be made that are not Price-Anderson claims, it necessarily follows that. . .there are no claims that can be made in tribal court. [27]

Several decisions suggest the federal courts will find room for additional flexibility in exhaustion decisions following Strate. Prior to Strate, the Ninth Circuit reversed on exhaustion grounds an injunction against enforcement of a $250 million judgment entered by a Crow Tribal Court against Burlington Northern Railroad Company arising from a crossing accident on the Crow Reservation,[28] holding exhaustion to be mandatory unless one of the three "exceptions" to tribal court exhaustion described in National Farmers Union is present.[29] The Supreme Court vacated and remanded the Ninth Circuit decision for further consideration in light of Strate. The Ninth Circuit subsequently vacated its earlier panel decision, which had held exhaustion to be required, and remanded to the district court for further proceedings in light of Strate. Those proceedings are pending. And, several federal district courts have treated Strate's footnote 14 as justifying the decision not to require exhaustion of tribal remedies.[30]

The early returns suggest that Strate v. A-1 Contractors will afford an earlier opportunity to test tribal jurisdiction over nonmembers' activities in Indian country. However, whether applied by federal courts or tribal courts, Strate's guidelines regarding the application of Montana will assist resource developers and governments to predict when tribal regulatory powers extend to nonmember natural resource development in Indian country.

III. ALASKA V. NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT:

The Supreme Court decided Alaska v. Native Village of Venetie[31] on February 25, 1998. In 1948, Congress enacted legislation defining the scope of federal criminal jurisdiction in "Indian country," codified at 18 U.S.C. § 1151. Section 1151 defined the geographic scope of federal criminal jurisdiction over certain statutorily identified serious crimes committed by or against Indians in Indian country. Section 1151 defined three major categories of lands to which federal criminal jurisdiction extended and labeled all as "Indian country": lands within reservation boundaries, allotted lands, and "dependent Indian communities within the borders of the United States." Before Venetie, however, the Supreme Court, had not addressed the geographic scope of "dependent Indian communities" since enactment of § 1151 in 1948. Although the Supreme Court had observed in dicta that "Indian country" had civil, not just criminal, implications,[32] it had specifically addressed neither whether

tribes have civil jurisdiction over off-reservation "Indian country" nor the geographic scope that term encompasses. Native Village of Venetie provides direct Supreme Court guidance on the geographic scope of "Indian country" and bolsters dicta in earlier Supreme Court cases suggesting tribes have civil jurisdiction in off-reservation "Indian country."

Native Village of Venetie addresses whether lands conveyed to the Village, an Alaskan native corporation under the Alaska Native Claims Settlement Act[33] constitute a dependent Indian community that could be subject to a tribal tax imposed on business activities conducted on tribal fee lands. Slip Opinion at 3. ANCSA was intended to be a comprehensive resolution of complex issues related to Indian lands in Alaska. It provided for the "reserves" previously set aside for Alaskan Native use to be revoked, and it transferred federal funds and federal lands to state-chartered private business corporations to be formed under the statute, requiring all shareholders of the corporations to be Alaskan natives. The ANCSA corporations received title to the transferred land in fee simple, and no federal restrictions applied to subsequent land transfers by them. Some years later, the Village imposed a tax on a private contractor's receipts arising from construction of a school with State funds. The State and the contractor filed suit in federal court in Alaska to enjoin collection of the tax.

The Supreme Court's decision in Native Village of Venetie holds that fee lands of native corporations under ANCSA are not "dependent Indian communities," and non-Indian activities on those lands cannot be subject to tribal tax. In reaching that conclusion, the Supreme Court defined "dependent Indian communities" as:

. . .a limited category of Indian land that are neither reservations nor allotments, and that satisfy two requirements -- first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.[34]

Native Village of Venetie makes clear that lands are "set aside" for Indians if they are held in trust for a tribe or individual Indians by the United States or are held in fee by the tribe subject to federally enforceable restraints on alienation.[35] Native Village of Venetie reflects that the requirement that land be subject to "federal superintendence" will be satisfied when "the Federal Government actively controls[s] the lands in question, effectively acting as a guardian for the Indians."[36]

Native Village of Venetie clarifies prior law developed in the circuits regarding the definition of "dependent Indian community." The Circuit Courts of Appeals had developed multi-factor tests to determine whether particular lands were within a dependent Indian community.[37] Native Village of Venetie appears to make clear that its requirements of a federal set aside and superintendence of the land are absolute prerequisites to a determination that particular lands are within a "dependent Indian community." The Court criticized the Court of Appeals' six-factor test as having improperly "reduced the federal set-aside and superintendence requirements to mere considerations."[38] Reinforcing that emphasis, Justice Thomas's opinion uniformly refers to the set-aside and superintendence "requirements."

Native Village of Venetie leaves questions for clarification. The opinion is unclear whether other factors or considerations may be material to the "Indian country"

determination in addition to satisfying the set-aside and superintendence requirements. Apart from rejecting the Ninth Circuit's failure to treat federal set-aside and superintendence as "requirements," the Native Village of Venetie opinion appears to accept that all six factors the Ninth Circuit applied in its balancing tests were relevant, though some more relevant than others and others "extremely far removed from the requirements themselves. . .". Consequently, subsequent litigation will be necessary to clarify whether all lands satisfying the federal set-aside and superintendence requirements are "Indian country," or whether the courts must also consider whether other factors, in addition to the two "requirements," must be present to qualify the lands as "Indian country." Additionally, though Justice Thomas's opinion seems clear to reject such an approach, the federal courts may need to address contentions that lands close to or used with lands subject to federal "set-aside and superintendence" can be Indian country by virtue of application of multi-factor test.[39]

Finally, there remains a question regarding the implications of Native Village of Venetie for tribal off-reservation civil jurisdiction. Justice Thomas's opinion observes that, "[a]lthough this [Indian country] definition by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction such as the one at issue here."[40] The Native Village of Venetie opinion further notes that "[g]enerally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the state."[41] Nonetheless, Native Village of Venetie's statement clearly is dictum: because the court held the Village's lands not to be "Indian country," it was not required to and did not, reach the question whether 18 U.S.C. § 1151(b) somehow bestowed civil jurisdiction on tribes within "dependent Indian communities." Although some Court of Appeals decisions are premised upon this conclusion,[42] the Supreme Court has never analyzed the statutory or federal common law principles that might underlie this conclusion. DeCoteau v. District County Court is the font of this notion, but it concerned only the question whether lands are "Indian country" under 18 U.S.C. § 1151(a), which pertains to lands within reservation boundaries.[43] However, the Supreme Court's decisions in Montana, Brendale, and Strate make clear that tribal civil jurisdiction does not extend to all lands within reservation boundaries, as footnote 2 of DeCoteau would suggest. Consequently, the Supreme Court should continue to examine whether tribal civil jurisdiction extends to off-reservation "Indian country" under 18 U.S.C. § 1151(b).

Nonetheless, Strate and Native Village of Venetie significantly clarify the scope of tribal powers in and around Indian country. Strate provides useful guidance on the application of the two "exceptions" to Montana's rule defining tribal powers over non-Indian activities on fee lands within reservation boundaries. Secondly, Strate clarifies that other property interests beyond fee lands, by which nonmembers have been allowed access onto tribal lands, can be equivalent to fee lands for purposes of the Montana rule. Third, Strate makes clear that tribal adjudicatory power is no broader than tribal regulatory power. Finally, Strate reflects that federal courts need not require exhaustion of tribal remedies when the absence of jurisdiction in tribal courts is "plain." Consequently, Strate will facilitate resolution of on reservation and off-reservation jurisdictional disputes.

Native Village of Venetie clarifies the reach of tribal power into off-reservation "Indian country." It appears to establish a bright line requirement that any lands alleged to be within a dependent Indian community be set-aside by the Federal

Government for Indians and be subject to federal superintendence. If this rule is applied in that fashion by the lower federal courts, it may clarify the outer limits of tribal regulatory power, and consequently, adjudicatory power, in off-reservation areas.

IV. DEVELOPMENTS IN WILDLIFE CONSERVATION LAW IN INDIAN COUNTRY

On June 5, 1997, the Secretaries of the Interior and Commerce issued a Secretarial Order entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibility, and the Endangered Species Act."[44] The Secretarial Order defines the "government-to-government relationship" between tribes and the United States with respect to Endangered Species Act compliance.

Secretarial Order No. 3206 recognizes tribal governments "as sovereign entities with authority and responsibility for the health and welfare of ecosystems on Indian lands. The Departments recognize that Indian tribes are government sovereigns with inherent powers to make and enforce laws, administer justice, and manage and control their natural resources.[45] The Order requires both Departments to consult with, and seek the participation of, affected tribes to the maximum extent practicable in any action under ESA. The Order provides for the Departments to provide technical assistance to tribes to expand tribal programs that promote healthy ecosystems, including for the development of tribal conservation and management plans to promote the maintenance, restoration, enhancement and health of the eco systems upon which sensitive species (including candidate, proposed, and listed species). . ." [46]

The Order gives tribal conservation and management plans considerable weight in ESA administration on tribal lands. The Order requires the Departments to "give deference to tribal conservation and management plans for tribal trust resources that: (a) govern activities on Indian lands, including, for the purposes of this section, tribally-owned fee lands, and (b) address the conservation needs of listed species." The Order defines "Indian lands" to mean lands either held in trust by the United States for the benefit of a tribe or individual Indian or held by a tribe subject to federal restraints on alienation. However, the underscored language reflects that tribal conservation and management plans may extend beyond lands to tribal lands held in fee not subject to federal restraints on alienations.[47] That provision is unusual in according tribal primacy to tribal lands and may raise questions of the appropriate scope of tribal powers, particularly in off reservation areas, could present issues under Native Village of Venetie.

The Secretarial Order recognizes considerations to guide federal actions in cases involving an activity that could result in an incidental take under the ESA. The agency must consider whether conservation restrictions are necessary for conservation of the species, whether the measure is the least restrictive alternative available to achieve the conservation purpose, and whether voluntary tribal measures would be adequate. Additionally, despite that the Order requires that "the restriction does not discriminate against Indian activities, either as stated or applied," it also requires the agency to determine that "the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities." The suggestion that non-Indian activities should be curtailed before tribal activity would appear to raise significant equal protection concerns.

Addressing an oft-litigated issue,[48] the Secretarial Order requires the Departments to "take into consideration the impacts of their actions and policies. . .on Indian use of listed species for cultural and religious purposes. The Department shall avoid or minimize, to the extent practicable, adverse affects upon the non-commercial use of listed sacred plants and animals in medicinal treatments and in the expression of cultural and religious beliefs by Indian tribes." Secretarial Order, Principle 4.

An appendix to Secretarial Order No. 3206 provides guidelines to federal agencies for implementing the Principles contained in the Order. The guidelines require the Departments to consult with affected tribes when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally owned fee lands, or the exercise of tribal rights. "Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species."[49] The guidelines further require the Departments to "evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands."[50] These provisions may afford tribes and natural resource developers with opportunities to carefully tailor development activities in areas of potential critical habitat that might otherwise be off limits under the ESA.

The guidelines also address consultation under Section 7 of ESA. If developed, tribal conservation and management plans for trust resources and tribally-owned fee lands "shall serve as the basis for developing any reasonable and prudent alternatives, to the extent practicable."[51] Developers should be aware of the existence and content of any potentially applicable tribal conservation and management plans and should take them into account in planning development activities and structuring ESA compliance. Two other provisions of the guidelines deserve consideration. First, the habitat conservation planning process is expressly sanctioned on Indian lands. "The Services shall advocate for HCP provisions that eliminate or minimize the diminishment of tribal trust resources." Second, Recovery Plans are expressly required to be structured in a manner that "minimizes the social, cultural and economic impacts on tribal community, consistent with the timely recovery of listed species."[52] The Services must be "cognizant of tribal desires to obtain population levels and conditions that are sufficient to support the meaningful exercise of reserve rights and the protection of tribal management or development prerogatives for Indian resources." This language appears to require consideration of such goals and prerogatives, but would not make them controlling. Of course, recognition of a tribal interests in attaining species population levels "sufficient to support the meaningful exercise of reserved rights" may entail complex, controversial determinations.

Secretarial Order No. 3206 clearly elevates the role of tribes in the ESA process. Its provisions suggesting the Departments should minimize impacts on tribal resources arising from ESA conservation measures could allow tribes and developers to cooperatively with the agencies to allow development that might otherwise be unavailable. However, its provisions for deference to tribal management plans, goals, policies could elevate tribal interests above others in the ESA process.

1. See generally, Lynn H. Slade, *Puzzling Powers: Overlapping Jurisdictions of Indian Tribes and the Federal, State, and Local Governments in Development of Natural Resources in "Indian Country"*, 42 Rocky Mtn. Min. L. Inst. 11-1 (1996); Rebecca Tsosie, *Natural Resource Development in Indian Country: An Update*, ABA SONREEL, 12th Annual Developments and Trends in Public Land, Forest Resources and Mining Law (1998).

2. See Strate v. A-1 Contractors, 117 S. Ct.1404 (1997); Alaska vs. Native Village of Venetie, 1998 WL 75038 (February 25, 1998).

3. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) (tribes lack power to impose criminal sanctions upon non-Indians); see also Duro v. Reina, 495 U.S. 676, 682 (1990) (tribes lack criminal jurisdiction over nonmember Indians).

4. Montana v. United States, 450 U.S. 544, 564 (1981); see also South Dakota v. Bourland, 508 U.S. 679, 689 (1993) (extending Montana to lands taken by the United States but in which the tribe retained certain possessory rights).

5. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 427 (1989).

6. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 855-56 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

7. See, e.g., Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994), cert. denied, 513 U.S. 1103 (1995); Crawford v. Genuine Parts Co., 947 F.2d 1405 (9th Cir. 1991), cert. denied, 502 U.S. 1096 (1992); Pittsburgh & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995).

8. 450 U.S. at 565.

9. See, e.g. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991); Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993); Chickasaw Nation v. Oklahoma, 515 U.S. 450 (1995).

10. See Pittsburgh & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1541 (10th Cir. 1995) (requiring federal district court to abstain from deciding whether Navajo Nation can tax off-reservation coal mine if mine is located within "Indian country").

11. 25 U.S.C. § 323-328 (1982); see 117 S. Ct. at 1404, 1408.

12. 76 F.3d 930 (8th Cir.), cert. granted, 117 S. Ct. 37 (1996), aff'd, 117 S. Ct. 1404 (1997) (en banc).

13. Id.; one commentator has noted that, "[o]utside the area of Indian law, the distinction between adjudicatory and legislative jurisdiction is well-established." See Laurie Reynolds, *"Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*," 27 N.M. L. Rev. 359, 377 (1997). Consequently, the Strate holding reflects limitations on tribal court jurisdiction that do not apply to state and federal courts.

14. Id. at 1413-14.

15. See 25 U.S.C. § 323-28 (1988).

16. Id. at 1415.

17. The Court notes that the record in Strate did not indicate whether A-1 was engaged in work under the subcontract at the time of the accident. Id. at 1408.

18. Id.

19. 117 S. Ct. at 1413.

20. Id. at 1416 n.14.

21. Wilson v. Marchington, 127 F.3d 805, 814-15 (9th Cir. 1997), petition for cert. filed, (February 22, 1998); see also Lewis County Idaho v. Allen, U.S. D.C. No. 93-0382 N-HLR Idaho August 18, 1994), appeal pending, No. 94-35978 (9th Cir.) ("the impact on the health or welfare of a single member of the Nez-Perce Tribe is simply not the proper focus of the [Montana] test").

22. 96 F.3d 1169, 1175 (9th Cir. 1996).

23. See also Louis v. United States, 967 F. Supp. 456, 461 (D.N.M. 1997) (Pueblo of Acoma Tribal Court lacks subject matter jurisdiction under Montana because it lacks regulatory authority over the provision of medical services by the United States).

24. See Kerr-McGee Corporation v. Farley, 115 F.3d 1498, 1508 (10th Cir. 1997), cert. denied, 118 S. Ct.880 (1998); El Paso Natural Gas Co. v. Neztsosie, Nos. 96-17121, 96-17139, 1998 WL 52032 (9th Cir. Feb. 11, 1998) (The author is one of the counsel for El Paso in this proceeding.)

25. 42 U.S.C. §§ 2210, 2214 (1994).

26. 115 F.3d at 1507, n.6. Petitions for Rehearing are pending in the Ninth Circuit.

27. 1998 WL 52032 at 8.

28. Burlington Northern R.R. v. Red Wolf, 106 F.3d 868, vacated, 118 S. Ct. 37 (1997) (the author is one of the counsel for Burlington Northern in this case).

29. See National Farmers Union, 471 U.S. at 856 n.21.

30. See e.g., Louis v. United States, 456 U.S. at 459-60; Austin's Express, Inc. v. Arneson, No. CV-97-133-BLG-JDS (D. Mont., Dec. 30, 1997)(exhaustion not required in action to enjoin suit by tribal member arising from on-reservation auto injuries); Montana Dep't of Transp. v. King, No. CV-98-098 GF (D. Mont., Nov. 13, 1997) (exhaustion not required in suit to enjoin tribal regulation of employment in construction of state highway on reservation); Glacier County School Dist. v. Galbreath, No. CV-97-061 (D. Mont., Dec. 8, 1997) (exhaustion not required in suit regarding public school expulsion of Native American child); but see Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe, 117 F.3d 61 (2d Cir. 1997 (exhaustion required in suit over bingo management contract) and Strate v. Bremner, 1997 WL 464499 (D. Mont. 1997) (requiring exhaustion of tribal court remedies where tribal member injured in auto accident.

31. 1998 U. S. Lexis 1449 (1998).

32. See DeCoteau v. District County Court, 420 U.S. 425, 427, n.2 (1975); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 n.5 (1987).

33. 43 U.S.C. § 1601-1629a (1986 and 1997 Supp.) ("ANCSA").

34. Slip Opinion at 5. The Venetie Court relied on United States v. Pelican, 232 U.S. 442, 449 (1914) (Indian allotments retained character of original reservation that was Indian country "simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the Government.") The Supreme Court observed that later cases followed Pelican on this point. See United States v. McGowan, 302 U.S. 535, 539 (1938).

35. See United States v. Sandoval, 231 U.S. 28, 46 (1913); see also United States v. Candalaria, 271 U.S. 432, 441-42 (1926) (lands of New Mexico Pueblos, though held in fee, are subject to federal restrictions on alienation and, consequently, to federal statutes protective of Indian lands).

36. Slip Opinion at 12; the Court emphasized that ". . . it is the land in question, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." Slip Opinion at 9, n.5 (emphasis added)..

37. See, e.g., Pittsburgh & Midway Coal Mining Company v. Watchman, 52 F.3d at 1545 (four factor test); Alaska v. Native Village of Venetie, 101 F.3d 1286, 1293 (9th Cir. 1996), rev'd, 1998 WL 75038 (U.S. Feb. 25, 1998) (six-factor balancing test).

38. Slip Opinion at 10, n.7.

39. South Dakota v. Yankton Sioux Tribe, decided just weeks before Village of Venetie, indicated that states have "primary jurisdiction" to regulate waste disposal on fee lands outside reservation boundaries. The opinion does not suggest that the relationship of the fee lands to lands subject to federal "set-aside and superintendence" could lead to a different result.

40. Slip Opinion at 5; citing DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

41. Slip Opinion at 5, citing South Dakota v. Yankton Sioux Tribe, 118 S. Ct. 789, 793 (1998) ("[i]f the divestiture of Indian property. . . effected a diminishment of Indian territory, then the ceded lands no longer constitute "Indian country" as defined by 18 U.S.C. § 1151(a), and the State now has primary jurisdiction over them."

42. See Pittsburgh & Midway Coal Mining Co. v. Watchman, 52 F.3d at 1541 (18 U.S.C. § 1151 "represents an express Congressional delegation of civil authority over Indian country to the tribes.").

43. See 420 U.S. at 427 n.2. The cases DeCoteau cites for this proposition, likewise, concern on reservation conduct. See, e.g., McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 177-78 (1973); Williams v. Lee, 358 U.S. 217, 220-22 (1959).

44. Secretarial Order No. 3206, June 5, 1997.

45. Order at 4.

46. Secretarial Order, Principle 3(A).

47. Secretarial Order, Principle 3(B).

48. See United States v. Dion, 476 U.S. 734 (1986) (Eagle Protection Act applies to tribal Indians).

49. See Guidelines, Section 3(B)(4).

50. Id.

51. See Guidelines, Section 3(C)(3)(a).

52. See Guidelines, Section 3(E)(2).