

This memorandum is provided to inform you of the activities of the Office of the South Dakota Attorney General regarding litigation involving Indian country and the *positions advocated by the State*. Please find for your review the following cases where the South Dakota Attorney General has allocated South Dakota resources in filing amicus briefs<sup>1</sup> against the interests of Indian tribes throughout the United States. A wide array of additional amicus briefs have been filed outside the State of South Dakota regarding issues that were unrelated to Indian issues. Again, it appears that the South Dakota Attorney General has expended significant legal resources on drafting amicus briefs for litigation outside the State of South Dakota.

*State of Idaho v. United States of America and Coeur D'Alene Tribe, 138 L.Ed.2d 438. (1997)*

The Coeur D'Alene Tribe brought this action in District Court claiming ownership in the submerged lands and the bed of the lake and its tributaries, which lie within the 1873 boundaries of the reservation. The District Court dismissed the action. The Appellate reversed in part and affirmed in part. South Dakota's amici brief relies on the Constitutional provision that the federal government holds title in navigable waters for pre-statehood territories and that such navigable waterways cannot be placed entirely beyond the direction and control of the future state, Illinois Central Railroad v. Illinois 146 U.S. 387,454 (1892). Any prestatehood withdrawal must be made by a clear and specific act of Congress, because of the importance of the public trust doctrine enumerated in the Constitution. South Dakota's amicus brief goes on to state that the only allowable acts of disposal of trust lands before statehood would have to be based upon an international duty or a public exigency, neither which exists in this case:

Once states were granted statehood, they entered the union on an equal footing with the original thirteen colonies. They therefore became sovereigns having stewardship over their navigable water and held such in trust for the citizens of the state. The equal footing doctrine played a major role in shaping the United States. Any interference with this doctrine would have had a major impact on the early territories, because if Congress could take away the sovereignty over navigable waters before statehood, the states that entered the union after the original thirteen states would have been at a great disadvantage. A state's sovereignty over the navigable lands is historical in nature and can only be diminished by an act of Congress. Even though a river or lake may run through an Indian reservation does not make it subject to their jurisdiction. It is an established principle that the state holds the waters in trust for the people, which includes the Indian tribes of the region.

However, the Supreme Court addressed this case differently although the Court also touched upon the equal footing doctrine and the public trust responsibility of the individual states. The Court agreed with the South Dakota amici on the described issues, but based most of their

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<sup>1</sup>Amicus curiae means literally, friend of the court. A person with strong interest in or views on the subject matter of an action, but not a party to the action, may petition the court for permission to file a brief, ostensibly on behalf of party but actually to suggest a rationale consistent with its own views. Such amicus curiae briefs are commonly filed in appeals concerning matters of a broad public interest. Such may be filed by a private person or the government. In appeals to the U.S. courts of appeals, such brief may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof. Fed.R.App.P. 20 See also Sup.Ct.Rule 37.

analysis on the Eleventh Amendment. They framed the issue as whether the Eleventh Amendment bars a federal court from hearing the tribe's claims. Because this case was equivalent to a quiet title action it could have been properly heard in the state court. This allows a state the option of hearing such a claim in its own court system. Thus, the Court dismissed the action.

*Atkinson Trading Company, Inc. v. Joe Shirley, Jr. et al.*, 532 U.S. 645.

A non-Indian hotel proprietor maintaining a business within the boundaries of the Navajo Indian Reservation brought this action in Tribal Court challenging the tribe's authority to impose a hotel occupancy tax upon his establishment. However, the tax was actually paid by his hotel guests and he turns the revenue into the Navajo Tax Commission. The Navajo Court dismisses the action. Petitioner then brought the action to District Court which held that the Navajo occupancy tax was allowable. The Tenth Circuit Appellate Court affirmed.

South Dakota's amici brief focuses on the case of Montana v. United States, 101 S.Ct. 1245. This case held that Indian tribes lack the civil authority over non-members who are on non-Indian land within a reservation. The court allows for two exceptions to this rule:

1). Tribes have civil authority over non-members who enter into consensual relationships with the tribes or its members; 2). Tribes have civil authority over non-members who are on fee lands within the tribe's jurisdiction when the non-member's conduct threatens or has some direct effect on the tribe's political integrity, economic security, or health or welfare. The above exceptions apply to the tribe's regulatory powers as well as their adjudicatory authority.

The brief argues that the Montana case applies, but neither of the exceptions pertain to the Navajo occupancy tax. When an Indian tribe conveys its land to a non-member it loses all right of absolute and exclusive use and occupation of the conveyed lands. The state will then assume control over the non-Indian land, therefore the buyer of the land will be subjected to state taxation. The tribal land once sold to a non-member becomes subject to state jurisdiction in all aspects. The first exception to Montana has no effect, because the hotel proprietor did not consent to tribal jurisdiction merely by operating a business within the reservation. One does not consent to such jurisdiction every time they enter upon Indian land. Montana establishes that the consent exception is only applicable to situations where a tribe may condition access to a privilege or a product by a non-member upon compliance with tribal law. The tribe has no such control over the hotel proprietor.

The second exception is limited to situations where the application of tribal laws is needed to preserve the right of reservation Indians to make their own laws and be ruled by them. The establishment of a hotel on reservation land has no effect upon the tribe or any of its members. In light of the above analysis, "there is no dispute over whether state law generally, and state tax law specifically, can be applied to the commercial relationship between Petitioner and his guests." Brief. The Supreme Court applied the Montana case and found that the occupancy tax did not fall into any of its exceptions. The Court stated that a tribe's sovereignty reaches no further than its land, and therefore invalidated the occupancy tax.

*C&L Enterprises, Inc. v. Citizen Potawatomi Nation*, 532 U.S. 411

The Potawatomi Nation entered into a construction agreement with C&L Enterprises, Inc. for the construction of a new roof on a tribally-owned commercial building. This building lies off the reservation and is not held in trust by the federal government for the tribe. The Potawatomi Nation eventually decided to solicit bids from other construction companies. They accepted a bid from another company. C&L Enterprises, Inc. brought this suit in District Court, which granted an arbitration award for the construction company. The Oklahoma Court of Civil Appeals affirmed. The Supreme Court remanded in light of the Kiowa decision (discussed supra). The Appellate Court upon remand found the tribe immune from suit.

The issue before the Supreme Court is whether the arbitration clause and the enforcement provisions of the construction contract expressly waived the tribe's immunity from suit in state court. The parties entered into a standard form construction contract, which contained an arbitration clause. The clause allowed for the parties to adhere to the American Arbitration Association Rules for construction contracts, which states that an award may be entered in any federal or state court having jurisdiction thereof. The other relevant provision in the contract provided: "Contract shall be governed by the law of the place where the Project is located" (which is the state of Oklahoma).

South Dakota's amici brief holds stated "a strong interest in ensuring that Indian tribes and tribal businesses comply with generally applicable, nondiscriminatory civil laws." The increase of tribal involvement in commercial activities off the reservation implies a need for less sovereign immunity. Safeguards against tribal immunity from, suit are needed to protect the innocent non-Indian businessman who is unaware that the person with whom they are dealing is a tribe or that such a concept as sovereign immunity exists. A tribe should not be allowed to take advantage of immunity to avoid their responsibilities as businessmen. "Immunity serves no legitimate purpose and is a trap for an unsuspecting non-Indian business." Brief.

The individual tribes have amassed wealth due to the gaming industry. Many tribal governments are strictly involved with economic growth and do not perform the traditional government practices to which immunity applied. "Tribal immunity extends beyond what is needed to safeguard tribal self-governance." Ibid. The contract involved in this case clearly waived any sovereign immunity that the Potawatomi Nation may have raised. By choosing the state jurisdiction for arbitration, they are clearly saying that the state court may hear any dispute. "The validity of a contractual waiver of tribal immunity should be evaluated by the clarity of the intent expressed in the language of the contract, not by whether specific language was used to express that intent." Ibid. The Supreme Court entered a judgment for C&L Enterprises, Inc. They relied on the fact that the tribe tendered the contract and that the language contained therein was unambiguous. Sovereign immunity was thereby waived.

State of Nevada v. Hicks, 533 U.S. 353

Hicks is a member of the Fallon Paiute-Shoshonee Tribe located in Nebraska. He resides on the reservation. State game warden executed state-issued and tribal-issued search warrants on his premises for evidence of a crime committed off the reservation. He filed suit in Tribal Court which concluded they had jurisdiction to maintain the suit.

The District Court filed summary judgment for the Tribal Court and the Ninth Circuit affirmed.

The issue here involves instances when state officers are sued in tribal court with respect to the performance of activities within the scope of their governmental employment, must they exhaust tribal remedies before seeking a federal court determination of whether an Indian tribe possesses inherent authority over them; if not, does the tribe have such authority? The State's Amici brief alleges that inherent in the state's immunity is the right not to be exposed to proceedings in tribal court for any purpose. An essential element of a state's sovereignty is the freedom from the burden of responding to another's assertion of authority. States enjoy dual sovereignty with the federal government. In the early history of America, the states gave up their right to govern Indian tribes when Congress enacted the Indian Commerce Clause. No basis exists for the premise on which to conclude the state's grant of power over Indian affairs to Congress waived their preexisting immunity from regulation by the tribes themselves.

Tribal inherent authority does not extend to regulating or adjudicating the rights of states or their officers when carrying out sovereign responsibilities. The Indian tribes merely have the inherent powers of a limited sovereign and therefore, their adjudicatory authority does not exceed their legislative authority. The Supreme Court relied on *Montana v. United States* 450 U.S. 544 to hold that tribe's adjudicative authority does not exceed their legislative jurisdiction. "The Indian's right to make their own laws and be governed by them doesn't exclude all state regulatory activity on the reservation." According to the Court, the state's sovereignty does not end at the border of an Indian reservation. The Indian reservation is considered to be part of the territory of the state.

*State of Minnesota v. Mille Lacs Band of Chippewa*, 143 L.Ed.2d 270

The Mille Lacs Band of Chippewa commenced this action claiming hunting, fishing, and gathering rights on lands in Minnesota and Wisconsin. In 1837, the tribe signed a treaty ceding lands in both Minnesota and Wisconsin. The United States guaranteed the Chippewa their hunting, fishing, and gathering rights on the ceded lands "at the pleasure of the President". In 1850, President Taylor issued an Executive Order revoking all usufructuary rights and order the removal of the Mille Lacs Band in accordance with the Removal Policy of the times. In 1855, the United States entered into another treaty with the tribe and set aside a reservation for their use. This treaty made no mention of any previous treaty provisions. The District Court held that the tribe's usufructuary rights that were reserved under the treaty continued to exist. The Eighth Circuit Court of Appeals affirmed. The issues here involved:

Whether a treaty ceding to the US "all right, title and interest of whatsoever nature" in previously ceded territory abrogates whether a treaty provision giving Indian bands the right to hunt and fish "during the pleasure of the President" creates only temporary rights that are extinguished when a state is admitted to the Union on an equal footing with the original 13 states.

Whether a treaty ceding to the United States "all right, title and interest of whatsoever nature" in previously ceded territory abrogates hunting and fishing rights reserved in the previous treaty under the rule set forth in *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*.

Whether the President acted within the scope of his authority when he revoked Indian hunting and fishing rights that had been guaranteed by treaty “during the pleasure of the President of the United States”.

South Dakota’s amici brief advocates state’s rights because of their trust responsibilities of the natural resources that lie within their borders. State’s interest in managing fish and game is a core attribute of their sovereignty, which the federal government has a duty to respect. Implementation of usufructuary rights directly conflicts with state sovereignty. The analysis centers on the same analysis of equal footing and state’s trusteeship over navigable waters and natural resources as the brief for State of Idaho v. United States & Couer D’Alene. Furthermore, Bands usufructuary rights became subject to full state regulation upon Minnesota’s admission to the Union in 1858 when the state maintained trusteeship over the natural resources. The state of Minnesota possesses the power and the responsibility as trustees and fiduciaries to manage it’s resources for all of it’s people. If the state and the tribal entities were allowed dual sovereignty over the resources by having concurrent resource management, the result would be problematic and unnecessary.

The treaty provisions “all right, title” are plain, unambiguous terms that should be read to divest the tribe of all hunting, fishing, and gathering rights. Courts should not rely on the circumstances surrounding the signing of the treaty to attempt to decipher what the treaty means. The plain terms should be the touchstone of their decision. The Supreme Court held that the Executive Order was ineffective to abrogate treaty rights, because the 1830 Removal Act did not authorize any such removal order. The court relied on the absence of any language pertaining to hunting, fishing, and gathering rights in the 1837 treaty, because they treaty writers used express language when abrogating treaty rights. The Court disclaimed the notion that statehood could terminate these rights, because Congress must clearly intend to abrogate treaty rights. Affirmed. Arizona Department of Revenue v. Blaze Construction Company, Inc., 526 U.S. 32, 119 S.Ct. 957

Under the Federal Lands highways Programs, the federal government finances road construction and improvement projects on federal public roads which includes those located on the reservations. The BIA contracted with Blaze Construction to build roads through the state of Arizona. Blaze is incorporated under the Blackfeet Tribe of Montana, but is the equivalent of a non-Indian business because it isn’t employed by the tribe. At the end of the contract term, the Arizona Department of Revenue issued a tax deficiency statement to Blaze for failure to pay the Arizona transaction privilege tax on proceeds from the BIA contracts. The District Court held for the Department and the Appellate Court reversed. Here, the issues involved:

Does the Indian preemption doctrine determine the validity of a state tax imposed on federal contractors performing work for the Bureau of Indian Affairs on Indian Reservation, where that doctrine has been previously applied only to taxpayers contracting with tribes, tribal members or tribal entities.

If the Indian preemption doctrine were applicable, does the Federal Lands Highway Program evince a congressional intent to preempt state tax on the construction of public federal roads built for the BIA on tribal reservations as required by Cotton Petroleum Corp v. New Mexico, 490 U.S. 163 (1989).

South Dakota's amici brief argues that Arizona's authority to tax Blaze is determined under intergovernmental tax immunity principles, and not under the special Indian preemption doctrine. Such an intergovernmental immunity prohibits only direct tax on the federal government. The argument provides a history of tribal and intergovernmental immunity from the 1930's to the present. Today, there is no immunity unless Congress has specifically addressed the issue. Cotton Petroleum restored congressional intent as touchstone of Indian preemption analysis. Congress intended these Indian reservation roads to be treated the same as the federal lands highways and should be taxed accordingly.

The brief argues against the Indian preemption doctrine applying because it has only been applied to taxpayers dealing with tribal members and tribal entities on a reservation. It also states that the United States is the contracting party and that it cannot derive its sovereign immunity from a "dependent" entity who it has power over. The Supreme Court reversed the decision by relying on the absence of a congressional immunity and a congressional exception. It held that federal law doesn't shield Blaze from Arizona's tax. The Supreme Court did not address the issue of Indian preemption, because the tribe was not involved in the case at hand.

State of Montana v. Crow Creek, 523 U.S. 696, 118 S.Ct 1650

This particular case is a culmination of a series of cases beginning in the early 1980's. The Crow tribe sought to enjoin Montana and its counties from taxing coal extracted from mines held in trust by the United States for the tribe. The District Court dismissed the action and the Ninth Circuit reversed. The tribe then entered into an agreement with the company extracting the coal where the latter agreed to pay the tribe a tax equal to the state's then-existing tax law, less anything it was required to pay to the state. The Tribe and the company filed a motion with the District Court to deposit severance tax payments into the District Court's registry pending resolution over Montana's authority to tax coal mined at the ceded strip of land. The District Court granted the motion and thereafter the company paid them the tax in lieu of paying the state of Montana. The District Court also granted a motion for same interim relief for gross proceeds tax.

In 1984 the District Court concluded that federal law did not preempt the state's taxes on coal on the ceded strip. The Ninth Circuit reversed. In 1988, the tribe brought a claim in District Court seeking an order directing release of the funds held in the court's registry.

Montana did not object, but the company intervened instead claiming the tribe did not have a valid tax. Montana could not claim, because the Ninth Circuit held that state tax laws were preempted. The District Court rejected the company's claim stating that the accord between the tribe and the company controlled and tax was to have been paid to the tribe. Money was disbursed to the United States to be held in trust for the tribe.

The present case was brought by the tribe and the United States under an assumpsit and constructive trust theory over taxes paid prior to the 1983 and 1987 orders directing deposit into the registry. The parties claimed Montana was to return all monies illegally collected. The District Court refused to order Montana's coal taxes to be remitted to the tribe. The Ninth Circuit reversed. South Dakota's amici brief argues that the ability to tax is a function critical to states sovereignty and the States have a vital interest in their ability to have consistent, effective and assured tax collection and protest programs. The argument centers around cases holding that federal equity practice prohibits federal court interference in state taxation systems when the state provides adequate procedures for relief from inappropriate tax assessments. When the state has such procedures, the federal courts will refrain from interfering with those procedures.

The State's brief relies heavily on United v. California, 507 U.S. 746 which required that elements of assumpsit action for money had and received be met to award relief under that theory. Assumpsit action for money had and received were missing in this case . . . contrary to California's holding. The Supreme Court reversed the Ninth Circuit's holding, because neither the state nor the tribe enjoys authority to tax to the total exclusion of the other. During the time period in question, the tribe could not have taxed the company, because the Interior Department had not given the tribe permission to tax the company. The Court mentioned that although Montana's taxes were high, the tribe did not seek the appropriate remedy to recover damages for coal that could not be sold due to the high price.

*Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 118 S. Court 1700

Kiowa Industrial Development Corporation, a tribal entity, agreed to buy stock from Manufacturing Technologies. The chairman signed a promissory note on behalf of the tribe and delivered it to Manufacturing Technologies at their home office in Oklahoma City which is off the reservation. The note obligated the tribe to make payments in Oklahoma City. It does not specify a governing law, but states "Nothing in this note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." The tribe defaulted on the note and Manufacturing Technologies brought this action. The tribe moved for a dismissal on the grounds of lack of jurisdiction, basing their claim on tribal sovereign immunity. The District Court denied the motion. The Oklahoma Court of Civil Appeals affirmed.

South Dakota's amici brief argues that neither petitioner nor the United States has demonstrated that the tribes possessed sovereign immunity beyond Indian Country as a matter of common law. They claim there is also no basis in international law to recognize sovereign immunity for off-reservation commercial transaction. A lengthy

discussion of foreign law ensues which concludes that the law of the United States is now foreign subjects are subject to jurisdiction for their commercial transactions. “The tribes certainly do not possess more sovereignty than do foreign nations” and they cannot claim sovereign immunity as states. The brief also argues that there is no basis in American law to require states to grant sovereign immunity to Tribes for their off-reservation commercial activities and that Tribal power is subject to complete defeasance by the United States. Precedent of this court indicates that the states may entertain suits against Indian tribes engaged in commercial activities off the reservation. They argue that Congress has not granted tribes sovereign immunity, therefore they should not be allowed to claim sovereign immunity for their off-reservation commercial activities.

Policy reasons militate against the recognition of off-reservation sovereign immunity with regard to tribal commercial enterprises. They claim that businessmen are unsophisticated and may not realize they are dealing with a tribal entity which enjoys sovereign immunity. The fact that tribes are entering into the commercial field in increasing numbers makes the sovereign immunity doctrine obsolete. It no longer pertains to the situations for which it was established. The Supreme Court states that according to federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. Neither has occurred in this case. The Court recites the history of sovereign immunity and agrees that it may no longer be needed to protect the Indian tribes. They conclude by stating the courts sets the boundaries of sovereign immunity, but it is up to Congress to define it. The Court will defer to Congress and reverse the action.

*State of Alaska v. Native Village of Venetie, 118 S. Court 948*

The issue in this case was whether approximately 1.8 million acres of land in Northern Alaska, owned in fee simple by the Native Village of Venetie Tribal government pursuant to Alaska Natives Claims Settlement Act, is “Indian Country”. ANCSA was enacted to settle all land claims in Alaska. It revoked all reserves that were set aside. Money and land were transferred in fee simple to the shareholders of stock-chartered private corporations in exchange for giving up land. The Act required all shareholders of these corporations were to be Alaska Natives.

Two corporations were established for the Native Alaskans in question. They chose to take title to former reservation land in lieu of money and transfers of non-Indian lands. The United States conveyed fee simple title to the land that was the former Venetie Reservation to the two corporations as tenants in common. The corporation then transferred title to the Venetie Tribal Government. In 1986, the state entered into a joint venture agreement with a private contractor to build a public school in Venetie. The tribe notified the contractor that they must pay taxes for conducting business activities on tribal land. The state joined the suit, because under the contract, they were the responsible party for paying taxes. The state and the contractor refused to pay taxes and brought suit in District Court.



The District Court held the tribe's ANCSA lands were not "Indian Country", and therefore the tribe did not have the authority to tax. The Ninth Circuit reversed. The amici brief argues strongly against taking lands out of state jurisdiction. They claim the land involved is not Indian country, because ANCSA expressly eschewed traditional reservations and trust lands and displaced federal government authority with that of the state. Judicial recognition of a dependent Indian community essentially diminished the states traditional public powers and sovereign authority to protect and regulate the conduct of their citizens. They believe that classifying lands as "Indian Country" affects criminal law and deprives the states of their ability to apply it's civil laws in a uniform manner, to tax activity on those lands and to protect the states natural resources, environmental quality and consumer health and safety.

South Dakota's brief states that the Ninth Circuit has misinterpreted the intent of Congress in enacting ANCSA by allowing virtually any federal activity in the area, flowing from the government's ongoing relationship with Indians and Native Alaskans to constitute the kind of superintendence that satisfies this Court's test. The Ninth Circuit dismissed the notion that superintendence must relate in any way to the land, but instead need only go to the Indian people. The brief urges the court to accept the First Circuit standard that a "set aside" and "superintendence" are met only when the federal government, and not the state, is the dominant political institution in the area. The court should adopt the tests established in United States v. Sandoval, 34 S. Court 1. The court in Sandoval added two requirements to the definition of "Indian Country": 1). There must be a dominant political presence which includes federal superintendence; and 2). There must be a "set aside" by the federal government. An Indian community must exist and it must be "dependent" in nature. Amici urge the court to reverse and adopt the first Circuit's standard.

The Supreme Court unanimously reversed the Appellate Court's decision. Whether the Venetie lands can be classified as "Indian Country" depends on certain factors. First, ANSCA revoked the Venetie Reservation. Second, no allotments were involved. Therefore, whether the land is "Indian Country" depends on whether it falls into "dependent Indian communities". The Supreme Court holds that "dependent Indian communities" is refers to a limited category of Indian lands that are neither reservations nor allotments and they must satisfy two requirements: 1). The land must have been set aside by the federal government for the use of the Indians as Indian land; and 2). The land must be under federal superintendence.

The tribe's ANCSA lands satisfy neither of these requirements. The land was actually terminated as reservation land by an act of Congress. Superintendence is not present, because at any time the corporation could sell the land to a non-Indian. The primary purpose of ANCSA was to effect Native self-determination and to end paternalism. The court defers to Congress on whether the term "Indian Country" needs to be modified. William Strate v. A-1 Contractors, 117 S. Court 1404

The issue is whether an Indian tribal court has jurisdiction to adjudicate a tort suit brought by a non-member plaintiff against a non-member defendant arising out of an

automobile accident on a state highway within the reservation. In 1990 Ms. Fredericks and Mr. Stockert were involved in a traffic accident on a North Dakota Highway that runs through the Fort Berthold Indian Reservation. The road is maintained by the state under a right-of-way granted by the federal government. Fredericks collided with a gravel truck driven by Stockert and owned by A-1 Contractors. A-1 Contractors is a non-Indian owned company under contract with a corporation that is wholly owned by the tribe. A-1 performed all the work under the subcontract within the boundaries of the Indian Reservation. Fredericks sued A-1 Contractors and Stockert in the Tribal Court. Respondents contested the tribal court's jurisdiction. The Tribal Court denied their motion to dismiss. They appealed to the Northern Plains Intertribal Court of Appeals which affirmed the lower court's decision. Respondents then brought suit in state District Court claiming that the Tribal Court lacked jurisdiction. The District Court dismissed the action by holding that the Tribal Court had jurisdiction. The Eighth Circuit Court of Appeals reversed.

South Dakota's amici brief argues that this court has consistently recognized that the dependent sovereign status of Indian tribes carries with it a general divestiture of authority over nonmembers and that tribal territorial authority is of a unique and limited nature. Indian tribes' inherent powers of self-government are unknown to any other sovereignty. This is evidenced by the fact they were not a party to the Federal union. Indian tribes are no longer independent nations, and have lost certain authority which other completely independent governmental bodies retain. The fact that the tribes may retain a servient or reversionary interest in the subject highway does not render it "Indian land" for jurisdictional purposes. The Fort Berthold Indians signed an agreement and were compensated for the state's right-of-way. They can no longer claim it as tribal land. Opening the land to non-members destroyed any pre-existing Indian rights to regulatory control over that area.

The brief explains that the holding in Montana v. United States 101 S. Court 1258 is the applicable rule. Case law has established that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of non-members exists only in limited circumstances. The Montana case provides two exceptions: 1). A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribes or it's members; and 2). The tribe may exercise civil authority over non-members on fee lands within it's reservation, when that conduct threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe.

Amici States argue Respondents didn't consent to tribal court jurisdiction and the second Montana exception does not otherwise provide a basis for direct tribal authority. They conclude the court should adopt the premise that the second Montana exception doesn't provide a basis for finding direct tribal authority over nonconsenting nonmembers but instead serves to identify a federal interest that may be enforced against nonmembers in federal or state forums. They feel the exception is too broad and some courts will use it to swallow the rule. The states believe this proposed rule will strike a balance between the tribal interests and those of non-consenting nonmembers through the intermediation

of courts to which the latter have consented and which will “accord them the full panoply of constitutional protections as a matter of right.”

The Supreme Court relied on the Montana case and held that neither of its two exceptions applied. The case involved a simple traffic accident that does not trigger exception two. The parties involved did not consent to tribal jurisdiction merely by driving on that road or by entering into an agreement with the tribe. The Court also stipulated that when the tribe signed the right-of-way agreement and were compensated therefore, they did not expressly reserve any right to exercise dominion or control over the right-of-way. The court held that the Tribal court did not have jurisdiction.