# TRIBAL JURISDICTION UNDER THE SECOND MONTANA EXCEPTION: IMPLICATIONS OF UNITED STATES V. COOLEY

TIMOTHY Q. PURDON, PARTNER, ROBINS KAPLAN LLP AND FORMER U.S. ATTORNEY FOR THE DISTRICT OF NORTH DAKOTA*

Good afternoon. I have the coveted post-lunch slot, but I'll try and bring some energy. I don't know if I'll be able to match Professor Christensen's energy. Great job this morning, that was a great presentation, and our presentations are going to dovetail a lot because I'm not going to have to cover some Indian Jurisdiction thicket. We'll talk about it, but Professor Christensen did a good job with that.

I appreciate the introduction, I've been at Robins Kaplan now for seven years, it's hard for me to think that I've been at Robins Kaplan longer than I served as U.S. attorney. That's how fast time flies, and at Robins my partner Brendan Johnson, who was the U.S. attorney in South Dakota, together we represent Indian tribes across the country on a variety of issues and have really built that part of our practice.

Erin Shanley is here; Rachel Egstad is here. When I was U.S. attorney I was lucky enough to work with both of them. They were young lawyers. Erin became a SAUSA [Special Assistant United States Attorney]. She was at the Standing Rock Tribe and became a Special Assistant United States Attorney in our office in Bismarck and was able to assist there. Rachel was one of our first Indian Law externs that we had in a program with the UND Law School where she spent the summer employed by the U.S. attorney's office but worked on issues for the Standing Rock Sioux Tribe all summer. It's just great to see the two of you; you were young eager law students. Erin worked for the Standing Rock Tribe for a long time and now does private practice, and Rachel is an assistant county attorney, and so I'm really proud of you guys and what you've accomplished, and it just is amazing to me that was ten, twelve years ago; it's just crazy.

Anyway, I'm going to talk today about *United States vs. Cooley*, which is a United States Supreme Court case from last summer, and I had some personal involvement in this case, but we're going to talk a little bit about the twists and turns in the law, talk about a very surprising holding, I think, from

---

* A recording of Mr. Purdon's presentation can be found online at: https://law.und.edu/library/cle/2022/ndlr-symposium html. This transcript has been edited and refined for readability.

the Supreme Court. They got the result right, but I don't think anybody would have predicted how they got there.

First, I'm going to do something a little different. I'm really going to dive into the facts of the stop in *Cooley* because I want to paint the picture of what it must have been like to be Crow Tribal Police Officer James Saylor on a cold and windy night on the Crow reservation at one o'clock in the morning in February of 2016. Because we sit here in a symposium and we debate the finer points of Indian Country jurisdiction: what entity has jurisdiction and what cops will investigate and what prosecutor will prosecute and which judge in going to sentence. But Officer Saylor was just alone by himself on the Crow Reservation, and he had to make some pretty instantaneous, and potentially very important, calls and we can't lose sight of how the complexity of Indian Country jurisdiction can create real hurdles to the delivery of public safety. We'll talk about putting yourself in Officer Saylor's shoes, then we will walk through the facts, and then we'll talk about the crazy horrible no-good in-defensible standard that the Ninth Circuit tried to put on him.

But let's take ourselves back to the Crow reservation. It's the middle of the night. You're Officer James Saylor; you're a tribal police officer employed by the Crow Tribe. It's 1 A.M. and you see on the side of the road while you're patrolling an extended cab pick-up parked on the shoulder. And this is an area of the reservation where you know that there is not very good cell service, which is the sort of thing you learn if you work on the reservation. And he contemplates that this might be someone who is having some trouble, it's late at night, they don't have cell service, they may need help, that's his initial reaction, maybe something is wrong with the vehicle; this motorist may need help.

So, Officer Saylor comes up behind the car, stops, and approaches the vehicle. He sees that the plates on the truck are from Wyoming, the engine is running and the bed of the truck is full of personal belongings. He walks up, it's Montana but it's a Wyoming plate, and of course the truck, extended cab, has tinted windows and it goes without saying, I mean heavily tinted windows, he can't see in, so he knocks on the door and the rear passenger window goes down, and goes back up like someone is trying to open the window and pressed the wrong button. Officer Saylor assumed that the driver's window is going to come down next. But it doesn't. Okay, that's odd, right? Officer Saylor gets his flashlight out and shines it in the tinted windows and sees the driver and the driver gives him a thumbs down signal. Hey, it's one o'clock and you're this officer, you're out by yourself, he's got no backup, guy gives him the thumbs down. He said that was unexpected, that's what Officer Saylor said.

So eventually the driver drops the window about six inches, just enough for Officer Saylor to see the top of his face, and Officer Saylor notices two things. Classic police report right? The guy's eyes, guess what, his eyes are watery and bloodshot. And he notes that the driver, a man, appears to be non-Indian. That's a fact that's going to become important later on, but it's not as if he knew the man, knew that he was an enrolled member, knew that he wasn't an enrolled member. He didn't have that knowledge, but he says he appears to be non-Indian.

So Officer Saylor asks him, "what's going on, why are you parked here?" The guy says, "well, I'm tired." Officer Saylor says, "oh, what are you doing here?" And the driver says "well, I'm just coming from Lame Deer which is only 26 miles away and I drove up there because I was going to buy a car from a guy up there" and he named two different individuals he was going to buy a car from and the tribal police officer actually knew both of the people; Officer Saylor actually knew who they were which is sort of amazing and thought to himself, well, I don't know if those guys are selling cars and I don't know if they're doing it at midnight. And the driver said, "well the car I was gonna buy broke down, and so the guy who sold it to me lent me his pickup so I could get home." And the officer is like, yeah he lent you a pickup with all his personal belongings in the bed, that doesn't make sense. The officer says to the driver, "well that story really doesn't really make much sense" right? So, things become a little bit more tense. At that point, Officer Saylor asks him to roll the window down further, he does, and now the officer sees in the passenger seat, two semi-automatic rifles. Okay, you're a tribal police officer, you're all alone, you're on a stop, you've got a guy that's just told you a story that doesn't make any sense and you see two semi-automatic rifles. And, I neglected to mention this, there is a child in the car as well.

This situation is becoming more and more complicated, more and more complex, more and more pressure on this officer as he's trying to decide what to do. At this point the conversation continues, he notes that the driver's speech is slurred and as Officer Saylor starts to talk about how the guy's story is not making sense, the driver, Mr. Cooley, develops what the officer characterized as a thousand-yard stare. Mr. Cooley disengages, he starts looking forward, and the officer realizes he's seen that before, he's got training on that, and that's the sort of behavior by someone that can precede an act of violence.

So, at that point, Officer Saylor unholsters his weapon and orders Mr. Cooley to show his hands and get out of the vehicle. At that point, what do we have? It is a seizure, right? Officer Saylor unholstered his gun, hasn't pointed it at him, unholstered it, and he's ordered him out; he's seized him. Mr. Cooley gets him out of the truck, and Officer Saylor gets Mr. Cooley and

the child in the back of the police cruiser. He gets the guy's Wyoming driver's license. At this point, from his cruiser, he can call for backup; he wasn't able to call for backup on his radio up by the car because he doesn't have enough reception. He needs the more powerful radio in his car to call for backup. So, he calls for backup. Mr. Cooley says someone is coming to meet him. In light of this, Officer Saylor thinks, I'm going to secure this scene, maybe other people are going to roll up here, I'm going to get those weapons away from that car, right? So, he gets the rifles, takes them back to his car, secures them, and at that point he sees in the car some methamphetamine as well. Officer Saylor called not only BIA, the federal agents, but because he thought the guy seemed non-Native, or appeared non-Native, he called the county sheriff as well.

So eventually a federal agent, a BIA agent, shows up, a county deputy shows up, county official shows up, and you've got a tribal police officer, so all three jurisdictions. They cooperate, they collaborate, they decide what are we going to do. Mr. Cooley is arrested by the county deputy sheriff and taken to county jail. Now eventually the feds indict him on methamphetamine and possession of a gun in furtherance of drug trafficking. Those are pretty serious charges. The possession of a gun in connection with drug trafficking is a five-year mandatory minimum. So those are serious sentences, but my point is, having worked in Indian country, having done what I could when I was in the US attorney's office to facilitate collaboration and cooperation between law enforcement, the *Cooley* arrest is a best care scenario. That is exactly what you want to have happen. You want the officer to come out safe, you want the county sheriff to show up when called, you want the Feds there so you got a federal agent also observing and creating a report in case the crime is serious enough to end up in federal court. This is literally the gold standard of how in our current self-determination era, you want these things to go.

When I was US attorney, I would spend a lot of time on the reservations, a lot of time talking to law enforcement, and you're faced with this jurisdictional thicket of who has jurisdiction. Professor Christensen did a great job this morning, of laying out what prosecutor and what officer has jurisdiction. It's very complicated. And it creates hurdles to the delivery of public safety that doesn't exist in Bismarck or Grand Forks. And because of those hurdles, it makes it harder to deliver those public safety services. When I tell people the story of when I was US attorney, there was a quadruple homicide in New Town, a home invasion, five people in the home, four of them killed: a grandmother and three grandchildren, one of the grandchildren survived. All non-Native on the reservation in New Town. The shooter commits the crime and leaves. Law enforcement shows up; we have four non-Native victims on the reservation and we don't know if the perpetrator is

Native or non-Native. So, we don't know if North Dakota BCI or the FBI has primary jurisdiction to investigate that crime. That's not an issue that arises at a crime scene in Bismarck or Grand Forks or Fargo. And thank goodness that we had a great relationship, that the FBI and BCI had worked together, they were able to work through that and eventually work the case together until it was resolved. But imagine if they had looked at each other and said, "well, I don't have jurisdiction, I can't do anything." And when I went from reservation to reservation and tried to facilitate cross-deputization agreements because, again what happened at Crow that night was a best-case scenario, but if you can go one step further and get all those officers cross-deputized, you do away with some of these issues as well. But I will tell you, literally every time I talked to a tribal police department or a county sheriff, on any of the reservations in North Dakota, and talked about the importance of cooperation or collaboration, I would hear a version of this story, every single time: "Well, you know, when I was a rookie cop, seventeen years ago, I was a tribal cop and I stopped someone who was non-Native and I called for the county sheriff and they didn't show up" or "oh, I was a young county deputy, thirteen years ago and I stopped a Native on the res and I called the tribal police to come and get them and nobody showed up."

That only has to happen once to an officer, and they talk about it for the rest of their career. You fight that every day, you say, "yes that's terrible what happened to you, seventeen years ago, but don't you understand that if we're going to keep the community safe, the reservation communities, the border communities in the county that you work in, you're going to have to collaborate and cooperate like the folks did in *Cooley*." That's what you have to strive for, but it's very, very difficult because those stories, those grudges, those bad feelings, they last a generation.

So, because of my experience as US attorney, when the Ninth Circuit *Cooley* decision came out, I was appalled because of the ruling in *Cooley*. The United States charged Mr. Cooley with the drug crime and gun crime, and he was in trial court, a federal district court in Montana, Mr. Cooley filed a motion to suppress saying that Officer Saylor did not have the right to detain him and search him, so the charges against him should be thrown out, and the district judge agreed. And the case went up to the Ninth Circuit and the Ninth Circuit agreed. The Ninth Circuit held that in order for an officer who detains someone in Officer Saylor's position, they have to answer two questions: They are entitled to ask the subject, the potential defendant one question: are you an enrolled member? Are you a Native; are you an Indian? And then, if the answer is yes, then, if it is apparent or obvious that a federal or state crime has been committed, they can detain until the proper authorities with jurisdiction show up. So, the Ninth Circuit, that night when Officer Saylor walks up to the window, what the court would have him do is ask that person

a single question: are you an American Indian, are you an enrolled member, a tribal member? And if the person says no, that's the end of it. Well, I mean, you don't have to be the Joker or the Penguin, to figure out if you're Native and you get pulled over by a tribal cop and they ask you if you're Native, that maybe if you say no you might get to drive away, right, so that seems relatively unworkable.

Even more insane to me is the second standard. I know what reasonable articulable suspicion is because there have been thousands and thousands of cases decided on that, and I know what probable cause is because there have been thousands and thousands of cases decided on it. I don't know what an apparent or obvious violation of federal or state law means, because the Ninth Circuit created that out of whole cloth and now was going to engraft that as a requirement for a detention of somebody stopped in the middle of the night on the reservation.

When you try to explain to people how difficult it is to deliver public safety services in Indian country, you talk to them about the confusion of statutes and case law that don't make sense and just overlap, I mean the Amnesty International called it a maze of injustice. Imagine if the Ninth Circuit had prevailed and their ruling had become the standard over the last year in Indian country. The Ninth Circuit was asking the Officer Saylors of the world to navigate those requirements before they can stop somebody who's armed, with a child and methamphetamine in their truck, whether or not they have the right to detain them.

So, luckily, that wasn't the end of the case. There was a request for rehearing en banc that was denied, and the Department of Justice sought cert to the Supreme Court, and that's where I got involved. I will talk a little bit about this process because I'm not sure everybody knows about this. I was involved in this case in an amicus brief and that brief came about and was part of a project, a joint project between the National Congress of American Indians and the Native American Rights Fund. In the early 2000s, in 2001, after a series of really devastating decisions by the United States Supreme Court, decisions that were really hard on Indian country and eroded jurisdiction and tribal sovereignty, the two great Indian organizations, NARF and NCAI, joined together and said we're going to build a project, we have to be better; we can complain about the Supreme Court or we can do something about it, and so they founded The Supreme Court Project.

So, there are full time lawyers at NARF and NCAI that monitor the Supreme Court and the circuit courts for cases that involves issues of tribal sovereignty, and when cert gets accepted, they will convene. I'm a part of this group, it varies I suppose, there's almost three hundred lawyers across the country, people like me in private practice, a lot of academics, in house lawyers at tribes, and there will be a series of phone calls to put together a

strategy to make sure that tribal interests are fully represented and fully litigated at the Supreme Court.

So, when the *Cooley* case went up, I took special interest in it. I've been involved in a couple of prior amicus briefs. My firm wrote an amicus brief; Robins Kaplan wrote an amicus brief pro bono in the *Bryant* case, which was a case about domestic violence prosecutions in federal court. We didn't write the brief, but I was an amicus with other former US attorneys in both *McGirt* cases that went to the Supreme Court, and now *Cooley* came along and I instantly knew this was an opportunity where the a group, a bi-partisan group, another great thing about this group of folks that I have worked with on these amicus briefs is we work very hard to balance the former US attorney amici in the briefs, we generally try and have half of them as Republican nominees and half of them as Democrat nominees. In today's society, there's very little non-partisan, bi-partisan cooperation on anything. But there's a group of US attorneys here that come together in these cases to say we're not Republicans, we're not Democrats, what we are is experts in trying to deliver public safety services on the reservation and we're here to tell you why in *Bryant* it was important that prior tribal domestic violence convictions be able to be used as predicates in federal court. The court needs to understand how complicated it is to deliver these services and how unworkable the standards were that the Ninth Circuit attempted to impose.

This was a case where our law firm actually drafted the brief, there were ten former US attorneys from Montana, North Dakota, South Dakota, Minnesota, Arizona, and New Mexico who served as amici and we filed an amicus brief to the Court. The appellate group in my law firm does this pro-bono, does these amicus briefs. An associate at our firm was the primary drafter, he got to sign the brief, send it in to the Supreme Court, he can put that on his resume, that's great and we provide this public service pro bono to Indian country.

So, our amicus brief went in support of the United States' request to reverse the Ninth Circuit's holding, and we really focused on two arguments. Our primary briefing to the Court was what I've talked about here: Justices of the Supreme Court, this is how it really works on the ground, this is why it's so important. For the last thirty years, no one has thought that there was some standard as articulated by the Ninth Circuit where you can ask whether or not someone is an enrolled member, that's not how it works on the ground. And if you were to impose that standard, it would make it even more difficult to deliver the public safety services.

So, we filed our brief and had oral argument, and I was listening to the oral argument and there were questions asked from our brief, from the amicus brief from the United States attorneys and a couple of the Justices asked questions of the lawyers: what do you think about this thing the former US

attorneys say? That was pretty cool. We were all really excited. Then eventually the *Cooley* decision came out, and they actually cited to our amicus brief in two different locations in the opinion. So, needless to say, as former US attorneys trying to relive their glory days, we were very excited about those developments.

So I'm going to do two things now here, I'm about half-way done. I'm going to save time for questions. The *Cooley* decision turned on something that nobody really thought that's where they were headed. I'm going to talk a little bit about the *Cooley* decision, and then I'm going to talk about ramifications of the *Cooley* decision going forward, which I think go are even broader, much broader, frankly, then criminal justice and *Terry* stops, if you will.

So, the *Cooley* decision, in the briefing below, there's a lot of briefing, district court briefing, Ninth Circuit briefing, en banc briefing, cert briefing, merits briefing, lots of briefing. Most of the briefing by the DOJ [Department of Justice] said Officer Saylor had jurisdiction because he's on a right of way, he's on a public road that goes through the reservation and there's an easement there and so it's not one of the key factors, it's not tribal trust land, and the public has a right of access. There is Supreme Court case law, which actually my law firm that I was a member of filed the car accident case in tribal court, and in that case they had this *A1 Contractor* argument, that's why there's jurisdiction here, and then there's a lot of briefing about the idea that tribes have the inherent right to exclude people from the reservation. Nobody contests that tribes have the right to exclude people, and so inherent in that is the ability to do a *Terry* stop on a non-Native. If you can exclude someone, certainly you can perform a *Terry* stop and detain them for a reasonable amount of time while you figure out who has jurisdiction. I mean, that was what all the briefing was about.

And then oral argument happened and there was all this talk about *United States v. Montana,* which is a case that says generally tribes do not have jurisdiction over non-Natives on the reservation and then there are two exceptions. The first, if you come to the tribe and conducted business with them, you've signed a contract with the tribe, you provide some service and the tribe wants to sue you in their tribal court, you've come to them, you voluntarily, sort of, come to them and entered into an agreement with them, they're going to have jurisdiction. There's a jurisdictional exception for that. And then there's the second *Montana* exception which says, "the tribe retains inherent sovereign authority to address conduct that threatens, or has some direct effect on, the health or welfare of the tribe." The second *Montana* exception: activity by a non-Native on the reservation that threatens or has some direct effect on the health or welfare of the tribe is key here.

I think as a practitioner, I can say most of the tribal jurisdiction fights that I've been involved in civil cases over the last twenty-five years have been about the first *Montana* prong, right? It's a lot of commercial dealings with tribes, people who are doing business with tribes, and generally they've got a contract, they've come there and you can get jurisdiction. The second *Montana* prong, I've been involved in a couple of cases, maybe over the last twenty-five years, but it is not really, in my experience as a practitioner, sort of the hot burning way that that tribes grab jurisdiction. Justice Breyer tells us that we've all been wrong about this for a really long time and that it's obvious that the *Montana* analysis is the one that applies here. He tells us that right up front, that it's going to be a *Montana* case. Most people before *Cooley* would have said *Montana* jurisdiction, that's sort of administrative, tribal court, civil, sort of stuff. The criminal stuff is more *Oliphant*, *Duro*, those sorts of cases and Justice Breyer says, well no, you all have had that wrong the whole time, it's actually *Montana,* and he's not so subtle about it, right? He tells us we're not just wrong, but that we've been obviously wrong because he says that the second *Montana* exception fits the present case, almost like a glove. Right, of course, it's the second *Montana* exception that you're going to look at here. He says it's highly relevant, he takes the second *Montana* exception, which is activity, conduct that threatens direct effect on the health or welfare of the tribe. And he says, what do you have here? You have a motorist that has bloodshot and watery eyes, slurry speech, methamphetamine, rifles in the vehicle, and if this person was allowed to not be detained, if this person was allowed to drive away, they could get into a car accident, they could hurt a tribal member, and that this has a serious impact on the health and wellness of the tribe.

Well, I think that's right, I think that a drunk driver that has the possibility of killing tribal members is a serious risk and that the tribal jurisdiction here, the tribal police should have the ability to detain that individual. I'm for public safety, I'm for safe streets on the reservation, I agree with that, but you know, some of the case law that's out there on the *Montana* second exception seems to require more. I'm involved in a case where a federal judge said the harm envisioned to establish and give jurisdiction under the second *Montana* prong has to be catastrophic to the tribe, that it really has to be almost an existential risk to the tribe to be able to grab jurisdiction over that non-Native company or person and exercise jurisdiction over them on the reservation. But that's not what Breyer says. He says that a drunk driver is enough, and you know, I agree with him. It's good to be the judge because you don't have to really struggle with how does this fit in to our cannons of Indian law, right? They kind of wave at *Duro* on the way past to be sure in *Duro*, we traced the relevant tribal authority to the tribe's right to exclude non-Indians from the reservation, but tribes have

inherent sovereignty independent of the authority arising from their power to exclude. Okay, he kind of waves at *Duro* and says, we could have taken that off-ramp but we're not going to. We're not, that's not it at all. It's the second *Montana* prong.

The US attorneys, the former US attorneys in our amicus brief, had talked about how unworkable the *Cooley* standard that was created by the Ninth Circuit would be in practice, and there's a paragraph near the end here where Judge Breyer says, finally, they have doubts about the workability of the standard the Ninth Circuit has set out. Yes, right? And he goes through that and talks about a lot of the things we talked about in our brief and, as I said, he cites to our brief for that. So, here's an opportunity for a group of former US attorneys to say judge, Justices of the Supreme Court, this clearly won't work on the ground for people like Officer Saylor in the middle of the night. And it's, I mean, it's incredibly rewarding to see the Supreme Court say, well that makes sense and we're going to trust this bi-partisan, non-partisan group of former US attorneys who are at least in their own opinion, experts on this and they've convinced us.

One of the arguments Mr. Cooley had raised is that, these officers, these departments, could have entered into cross-deputization agreements and that's the remedy here. It should be suppressed because they didn't have cross-deputization agreements. That's the way you protect public safety. And again, one of the things that we talked about in our brief was that it's not always that easy. There's this history, you've got other governments involved and it's not always that easy to get these cross-deputization agreements in place, and the Supreme Court talks about that as well and kind of rejects that as what should be the preferred remedy here.

The Court concludes with something that we also said in our brief which is, for a long time, everybody's operated under the idea that a tribal officer has the ability to *Terry* stop a non-Native and call the county sheriff. I mean, that's how, what, millions, thousands, tens of thousands, maybe hundreds of thousands of arrests have happened. And in the end the Court ends and says, well yeah, I know it's the second *Montana* exceptions, but everybody has been doing it this way for a long time already and so that's another reason to keep the status quo and not adopt the Ninth Circuit's questionable standard. So, the opinion came out and I think it surprised a lot of scholars that it was not a discussion, as I said, of the status of the easement on the public highway, and that it was not a *Duro* power to exclude sort of case, but that it was: we're going to apply the *Montana* exceptions, not just to civil and administrative cases, but to criminal cases as well.

I now want to talk a little bit about possible ramifications and how practitioners and tribes can use the *Cooley* decision going forward, and I'm going to tell you a little bit about a case that I'm involved in, and everything

I'm going to tell you here is public record; there are court filings that happen to contain all these arguments. I represent the MHA nation in a dispute with an oil company and with the BLM. An oil well was permitted on Fort Berthold Reservation, and the well itself drills into fee minerals and government minerals. There are no tribal minerals and no tribal trust land involved in the citing of the well or the horizontal drilling into the minerals of the well, and the well seeks to pump oil from under Lake Sakakawea, horizontal drilled and hydraulically fracked, but no tribal minerals implicated. So, you have a non-Native company, off-reservation company, and the BLM gave them a permit, the rest of the story is that the well site is within, I don't know the exact distance, but it's within a thousand feet of Lake Sakakawea. The Tribe, some years ago, passed a series of resolutions that said we're going to have a setback, a tribal ordinance, a setback from the Missouri River and Lake Sakakawea on the reservation and you can't drill closer than a thousand feet to the lake or the river unless you come to tribal counsel and get a variance, which some people have done, and then the tribe can say well if you're going to do that, then we want you to have a higher berm, or we want you to take these extra precautions, and they're not saying you can't drill, they're saying you have to come to us and get permission to be within that setback. BLM granted the drilling permit but did not require the oil company to comply with the setback, so the well, which is pumping today, it's in operation inside the Tribe's thousand-foot setback.

So, the Tribe initiated an administrative proceeding and appealed the case administratively within the Department of Interior Indian Land Appeals Board. There was some administrative litigation the Tribe originally won. There was a stay put in place, the oil company went to federal court, got an injunction to get the stay struck down, they won on that. There was a lot of litigation early on in this that the Tribe did not prevail in, and then the administrative action took place. Eventually, there was final administrative action by the BLM that said, you know, we're not going to revoke this permit, we're not going to require that they comply with the setback. At that point then, the Tribe filed the case in federal court on the final administrative action. I wasn't involved in any of that litigation; I haven't entered the stage yet of this case. There were cross-motions for summary judgement on the administrative record. Do they have to comply with the setback or not?

So, last summer I was asked to step in and assist in federal court. In North Dakota, the Tribe brings me in for North Dakota federal cases and I assist, and the Report and Recommendations was issued, it's like a seventy-five-page Report and Recommendations from the US magistrate finding in favor of BLM and stating the oil company does not have to comply with the setback. The Report and Recommendation comes out and *Cooley* is decided about a month later, and I'm reading *Cooley* and I'm thinking, if a single

drunk driver allowed to leave the side of the road in the middle of the night creates a substantial risk of harm or welfare to the tribe, to the extent that the tribe had jurisdiction over that non-Native, how can the Tribe not have jurisdiction over the drilling of a horizontally drilled, hydraulically fracked well within a thousand feet of Lake Sakakawea, the Tribe's primary source of drinking water, a culturally important body of water, Missouri river water to and for the Tribe and an integral part of their creation story? Why do we have the setback? We have the setback to protect the lake. How can that not be a potential harmful impact to the health and welfare of the Tribe? And so, we eventually filed an objection on behalf of the Tribe to the Report and Recommendation and we have argued that *Cooley* changed the law here. *Cooley* explained the law here and that it does not have to be a catastrophic risk to the Tribe. It has to be a risk, apparently, no more than that of a single drunk driver on a reservation road in the middle of the night. And I'm not sure if the district judge will, again it's a Report and Recommendation from the Magistrate to the US District Judge, adopt, reject, or amend the Report and Recommendation and decide the case, and I don't know what he's going to do, but I can't image a scenario now where, as a lawyer for a tribe, you would be advocating for tribal jurisdiction where you wouldn't be thinking about what is the risk to the tribe here. Is it more of a risk, or less of a risk, then a single drunk driver, and I'm not diminishing the risk of a single drunk driver, there is a risk there, but I think that risk, for a practitioner, is a lot lower than what we used to think was required to use the second *Montana* jurisdiction prong as a hook.

I want to thank everybody for coming. I've been working in Indian Country in North Dakota almost my whole career, but in depth for fifteen years, and today was the first time I attended an event, off reservation, well any event, where there was a formal land acknowledgment in North Dakota. Now, I'm not saying it was the first one, there are other land acknowledgments. It was the first event that I ever attended where there was a formal land acknowledgement, and that is so important. I want to thank UND, I want to thank the Law School, I want to thank the Law Review for making sure that was on the agenda today. It is incredibly important that we take that step. As Mr. Keith Malaterre said, they do a land acknowledgement before the Grey Cup in Canada, that's how important it is, it is infused into their society, it is a common everyday occurrence and to see that happen for the first time in my experience as a North Dakotan today was really meaningful and moving for me. So, I want to thank the University for doing that and the Law Review as well. Thank you.