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Litigating an Indian Jurisdiction Case: Where Must You Go First

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LITIGATING AN INDIAN JURISDICTION CASE: WHERE *MUST* YOU GO FIRST?*

MR. DELORIA:[1] Our first panel is going to be looking at hard questions about litigating, such as where you have to litigate and some of the consequences. There are practical consequences of being forced to litigate in tribal court—the bewildering experience of thinking you have everything lined up and then finding out somewhat at the last minute that you're kicked into a tribal court that is not terrifically enthusiastic about you, your client, or the issues you're presenting, particularly if the local people are not benefitting a lot. And I think we all have to recognize that is not a reaction that is unique to tribal courts. It's simply something that probably can be expected around the world.

This raises to me the very interesting question of how do we talk about rights and relationships that are established within one legal system, which suddenly jump the track and end up in a different legal system? That is a fascinating formulation of the problem. As Professor Laurence loves to point out, the wrong answer to that is to assure people that everything will be the same in the tribal legal system. If that were the case, what's the point of having it? Things will not be the same. Is this the only time you have to learn a new jurisdiction? Of course not. So, I will turn this over to two lawyers from Salt Lake City. Phil Lear is from Snell & Wilmer, and Blake Miller is from Suitter, Axland & Hanson—both distinguished firms in Salt Lake City, Utah, and both distinguished lawyers.

PRESENTATION BY PHIL LEAR AND BLAKE MILLER

Exhaustion of Tribal Court Remedies: Rejecting Bright-Line Rules and Affirmative Action.

MR. DELORIA: The more I think about this affirmative action analogy... As I say, affirmative action is scorned these days on the talk shows, the radio talkshows, but one of the reasons for affirmative action programs in the beginning was that in a situation—where I hate to say white because it was a multiracial situation, it's a multiracial society—where white people were hiring and they had opportunities to distribute and people who were equally qualified or within range. And, remember, we're not talking about precise measurements. They tend to hire the

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1. Currently serves as the Director of the American Indian Law Center in Albuquerque, New Mexico.

white guy because they felt more comfortable with him. Affirmative action came along as a bright line which said, "For a while you have to hire some of these other people for other reasons." In the law we're uncomfortable with bright lines. I have yet to hear, and maybe we will in the next two days, what the problem is. These guys [Lear and Miller] won their case in tribal court. So the complaint is, well, hell, if we brought it in tribal court in the first place—. We had to waste all that time in federal court before we got to tribal court. Whose problem was that? If there's not a bright line, then people are going to go to federal court first because they're more comfortable. It's across the street. It's not 400 miles away. We know those guys. We don't know these bozos in the tribal court. And that's not only a problem afflicting us here in the United States, it's a problem around the world. We have a world economy and the issues have got to be resolved on more subtle grounds than: we know these guys, we don't know those guys. So, I'm not sure what the problem is and I'm not sure why we can't co-exist with a bright line for a while.

Let me say one more thing before I turn this over. The thing that I'd like to draw your attention to is this: a lot of this also involves allocation and use of power, particularly in this case, which is interesting because it involves Indian people who, by taking direct action, wanted to prevent a company from using some resources that it had a legal right to. And whether they're Indian people or Norwegian grannies in North Dakota, self-help creates certain legal problems and may result in having to send people, uniformed people, out there to hit somebody over the head with a nightstick. And who do you want it to be and whose authority do you want them to be exercising? I think that's the most powerful argument for going to tribal court first and asking the tribe to take care of this than having the heel of the federal government come down on these people, whether it's Norwegian grannies in North Dakota or Navajo grannies in New Mexico. I obviously don't have the last word on this.

Our first commentator is Lynn Slade, who is a graduate of the University of New Mexico Law School, as is Judge Ferguson, who Mr. Lear spoke so highly of. Lynn is a lawyer with the highly blue-chip Modrall firm in Albuquerque, New Mexico, and has been working in this area for a long time.

MR. SLADE: Thank you, Sam. Good morning. I'm honored to be at this gathering. I have to say it's not unusual to be introduced, as Sam did in his opening remarks before Phil and his co-author spoke, as "ironically," a participant on a panel. It strikes me, when I look at the attendance list at this gathering and see a dozen of the most influential

law professors in the country on Indian law issues, that for reasons that still escape me, I was asked to write about abstention, the allocation of power between courts—five or six of the really most important authors in the country on that specific issue are here at this gathering. I am mystified, and it certainly is "ironic," that I'm speaking rather than they. I can only speculate that the reason that I, a practitioner from a—I'm so glad to hear—"blue-chip firm" from somewhere far away is here speaking to you, must be to report from the trenches on what it's like dealing with these very difficult jurisdictional issues as someone who's got the job of representing a client. And it will be my effort throughout this proceeding to do that.

My practice has been in the Indian law area since I got out of law school around 1976. And I represent business, not just in the energy area, in transportation, in timber, in finance, in transactions, in waste, and in transactions on Indian lands in many states. And it isn't easy, I'm here to tell you, dealing with this question of dispute resolution. And I'm going to, as Phil did, disclose my biases. And my bias, and it is at the core of all of my thoughts, is there's nothing wrong with wanting to win. And that's something that has to be filtered into an analysis that, in my mind has become focused myopically and narrowly on questions of power. Lost from *National Farmers Union*[2] to cases decided in 1995, has been the impact on the private litigation.

It is not just in the Indian law area that I worry who's going to decide my case. I'm trying a case in Houston in two weeks. It has nothing to do with Indian law. And the first thing my client and I did was to spend a lot of time, a lot of trouble, and it turned out to be a lot of money, figuring out who we needed to have decide the case. And what did we talk about? We talked about the things that every lawyer, in my mind, has a responsibility to work with his or her client about to achieve goals in dispute resolution. And it's true at the time a transaction is structured and a contract is drafted to contemplate that dispute resolution. And it's true at the time a transaction falls apart and there's a litigation.

What are those goals? One is a sympathetic ear. And that is not evil in my mind. It is not improper. It is reasonable and necessary. But there are others. They include convenience, which, Sam just commented, cuts both ways in many cases. They include, particularly in the 1990s, a dispute resolution that is fast and cheap, because clients are tired of dumping more money into resolving the dispute than the dispute is

2. National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985).

worth with the result that the economic benefits of the transaction are lost.

My client and I in this matter we're about to try, which has nothing to do with Indian land, talked about all of those things. We, after a lot of hard work, ended up in an arbitration, not in litigation, with a three-arbitrator panel—we pick one arbitrator, one the other side picked, and one the two of them picked that we were comfortable with. It's been done in a year, and it's going to be done for a case of this sort for a lot less money and a lot less drain on the resources of that client than would be true if I had blithely wandered into state court in Houston, Texas, as the other side wanted to do, or removed it to federal court, as I was entitled to do. We made that decision because the issues were not power. They were getting a reasonable dispute resolution in the context of the controversy in question that's consistent with the larger goal of the client.

That's what I'm going to talk about today. How can those goals and that approach be factored into a case in Indian country where tribal, state, or federal courts are theoretically possible forums.

The first approach, in my view, to that question should be to seek agreement on dispute resolution. All of us face a set of decided cases that reflects that whatever any party does can result in a huge waste of resources battling over jurisdiction, which may not be in the interests of the parties. Their goal is a dispute resolution. And my first suggestion is the matter should be resolved by agreement, if possible, between the parties to the litigation.

When should it be resolved by agreement? The best time is when a transaction is put together and a contract is written. And all of us have worked or many of us have had to work our way through that process, but it should be the subject of negotiation. What court assuming subject matter jurisdiction will hear a dispute, if a court is desired? There are legal questions underlying the ability to agree because federal courts are not courts of general jurisdiction. Issues exist, particularly in Public Law 280 states. As to whether state courts may have subject matter jurisdiction. And the abstention doctrine further raises question in my mind as to the enforceability of agreements regarding jurisdiction, which I'll discuss in a moment. But there should be negotiation, if possible, over whether there can be an agreement as to a court within which to resolve disputes. But in my mind and in my experience it can be very difficult to reach such an agreement because everybody distrusts the other party's court.

What do you do? We have, in the group of lawyers that I practice with, found that the answer that comes to the fore, again and again, is an

agreement to an alternative dispute resolution. We often have agreed to a three-party arbitration panel to resolve any dispute arising under the contract. We pick one, they pick one, the two pick a third one. That seems calculated to come up with a dispute resolver that everybody is comfortable with. There are other formulations that may also work.

There will then be a question of who will enforce, which court will enforce, an award in arbitration. And that, again, must first be a court with subject matter jurisdiction and secondly, that this is agreeable to all parties. The lawyers also may need to write enough law into the agreement or incorporate the kind of laws that limit the power of a court on review of an arbitration decision. Ideally, the question should be of what body can provide complete relief, because there should be a limited ability to overturn the arbitration award. That's a model that can work in a transaction in my view.

What else do you need to negotiate? Law. In complex transactions in the natural resources area, such as are the focus of this conference, it often is necessary when a dispute arises to have commercial law apply. Few tribes have well-developed commercial law sufficient to readily resolve the questions that will arise. We just put together a joint venture for a very substantial economic enterprise with a tribe that has—are you ready for this—12 acres of tribal land and very few members. What are we going to do for law? There's going to be a corporation, a tribally-chartered corporation, for various acts and other reasons. There's going to be redemption rights in the event of a buyout of the corporation under corporate law. There are several transfers of rights in timber in this situation. What are you going to do for appealable law? And what we've done in that case is incorporate by reference, basically as a matter of tribal law, now applicable to this transaction; the Model Business Corporations Act to cover whatever goes on in the organization of that corporation. The UCC, Uniform Commercial Code, as adopted by the Commissioners of Model Acts, so there's no jurisdiction given up or surrendered or conceded by any party in choice of law. It's simply a body of law that exists to be applied. Those are the kinds of things that have to be negotiated to make a transaction work in the event of dispute.

How will review or appeal be handled? If you go to court, what will be the rights upon appeal? The best time to resolve a dispute on Indian lands is at the time the original agreement is struck. But if there is no such agreement, what are the answers there? It may surprise you, but I'm going to fall back first to what I just suggested. And that is, first explore whether you can reach an agreement now with the tribe, with another business, with the plaintiff, to a method of dispute resolution because if you don't want to be in tribal court, the first thing you're

going to do is go through long and expensive litigation of doubtful outcome before you find out what court is going to resolve this dispute.

If you can't reach agreement, then the first thing you need to learn is what tribal court is like. And you need to investigate that thoroughly. You can't really evaluate whether you even want to try to go to federal court, unless you really know what tribal court is like. You're going to need that when you go to federal court to support your arguments in the first instance. Consequently, you should consider hiring immediately, if you represent business as I do, the best lawyer you can find who practices constantly within that tribal Court system as co-counsel, if it's a case of magnitude that warrants that. Then, evaluate with that lawyer what tribal court is like. As I have said, you have no choice but to analyze that decision within the context of the factors that motivate parties to go to one court or another. What will achieve my client's goals? Is this a major jurisdictional issue for my client? Do they really care about this from a standpoint of jurisdiction for the long haul? Have they got a point to make? Or, rather, do they just want to get this dispute resolved? If they don't have that point to make, then my strong suggestion is to look very seriously at tribal court, unless you can come up with very objective reasons why tribal court is not correct.

I have no greater batting record in any forum than in the Navajo Tax Commission where I have had five proceedings and all have been resolved favorably for my client. You're not going to do that in state court or federal court unless you're Gerry Spence. And I assure you I'm not.

The point that tribal advocates should recognize, in my view, is that it implies no disrespect for tribes, for their courts, for their members, for a non-Indian to conclude after looking at factors such as a sympathetic decisionmaker, speed, efficiency, cost, and knowing the law. Nobody is as familiar with the law in another jurisdiction as they are of their own and sometimes the law is much less knowable in tribal court, that a federal or state court is in its interest. It implies no disrespect. It is not racist. It is not colonizing to conclude that that litigation ought to be decided elsewhere. Lawyers do that every day. They don't go to federal court because they think state judges are dumb. They have a whole set of factors that they consider if they're good lawyers that should be objective, that they must take into account to do a proper job of representation of their clients. Certainly, there's a concern the lawyers will make those choices out of ignorance of the tribal system, the tribal judges, and the tribal processes. I'm not defending those decisions. I don't suggest that tribal judges can't handle these decisions because I don't think that's a fact. I think that the early cases in this

area often made mistakes because the lawyers for the non-Indians came in and said, "Wait a minute. These guys can't handle this stuff. Let's go to a real court." The Supreme Court correctly said, "No. Sorry. We're not going to listen to those arguments." If you look at *Iowa Mutual*,[3] Iowa Mutual Insurance Company came in arguing, "Wait a minute. Those judges, they're just not smart enough. They can't do this." And they basically put all of their eggs in that basket; and it's no surprise that they lost. That's not the way to resolve those issues.

My recommendations, then are to evaluate factors that are material, consider tribal court, and make an informed decision between federal, state, and tribal dispute resolution. Thank you.

MR. DELORIA: Remind me to call the Navajo Tax Commission. Is Lynn Slade your cousin or something? What's going on? Someone once said, "Buy low, sell high is the secret of life." I still hear an assumption that the tribal courts are likely to be disadvantageous to outsiders for reasons that are familiar. And nobody's talking about racism here. We are talking about sometimes cultural predisposition. That's different from racism. I would think that the courts representing the poorest people in America could be persuaded that it is in their interest to be somewhat favorable to business interests from outside because you want money to flow in. So I would think that it would be worth considering that these courts, rather than being predisposed against outside business interests, might be persuaded to be predisposed for them, but maybe not.

Our next presenter is a guy that I always talk about a lot and always presents or comes up with things that I never thought of before, and I'm sure he will again. And he's a pal of mine and he's down there occupying the Leflar chair of law where Bill Clinton used to teach law, Robert Laurence, Professor Laurence.

MR. LAURENCE: I'm suspicious of international analogies. Not only am I suspicious but I'm the guy that is usually held up when some other author wants to point to just exactly how parochial an American law professor can be. I thought I might have to talk about those because of the title of the paper, but neither Lear nor Miller really pushed the international analogies, so we'll leave that for another time.

But I'm equally suspicious of what I might call "should-be-treated-as" rules. And so, if I can refer to the paper now,[4] I want to start with a quote, because there's both some suspicion, and it's

3. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

4. Throughout this commentary, Professor Laurence's references are to an earlier draft of Phil Lear's and Blake Miller's paper.

also an occasion for a point I want to make. And so they write, "If one is to view Indian tribes as dependent sovereigns within the federal system, technically they should be"—here's the "should be" rule—"they should be treated analogously to territories or possessions subject to comity among states, full faith and credit and abstention. On the other hand, if we consider Indian tribes to be sovereign nations, international choice of law rules and the judicial policy of comity should govern." Well, my suspicion is that neither of these analogies works very well and so we ought to be leery of them, if that's not a terrible pun to use given the authorship of the article. I do like those two statements, though, because to me they draw together three disparate issues, which are more closely related than they might appear to be.

First issue: tribal civil adjudicatory authority over non-Indians; second issue: this federal court abstention doctrine that we're going to talk about throughout the conference; third, full faith and credit issues. What do you do when the judgment from one jurisdiction is taken to another jurisdiction? My views succinctly stated: to me the first of those three issues is the key. (This is what I think. It's not what the tribes think. And I like to listen to tribes, but here is what I think.) The key to a lot of Indian law as we know it is the question of the existence and extent of civil adjudicatory jurisdiction by the tribes over non-Indians. Of those three issues, that's the key one for me. My feeling is that if the other two issues are maxed out, in other words, if we have the maximum abstention doctrine, as well as the maximum full faith and credit doctrine, then that will leave number one, which I think is most important, vulnerable. And so my usual rap is that I'm not, shall we say, a full court press person with respect to abstention nor with respect to full faith and credit, and the reason for that is because I don't want to leave number one, the existence of the jurisdiction itself in tribal courts, vulnerable. And so I push for a little cutback on the abstention doctrine. I push for what has become known as the asymmetric full faith and credit doctrine, which you can read about endlessly if you want to. It's pleasing to be talking in this particular room, which I note is asymmetric, like most of the world is. The entire world is asymmetric. Why shouldn't full faith and credit be?

For my second comment I want to pick up on something that I think Phil Lear said when he was contrasting exhaustion and abstention, which is a nice contrast. I expect the panel, where Lynn's paper is the lead, to pick up on that. But I'd like to add a third element to that mix and that is the word "removal." I would like to look at a lot of these questions as removal questions. Now by "removal," I'm thinking here particularly of the removal from state court into federal court which is

done by statute. I am no expert on removal and over a beer at Whitey's last night I threatened to call on Dean Davis and have him give us a short review of what the removal doctrine is. But time short, I don't trust that he remembers it. And, besides, I came up with a better analysis. I spend most of my time doing commercial law and bankruptcy and there's a removal doctrine in bankruptcy court that says that any—well, don't worry about what it says right now because it might say two different things. It might say that any case brought in state court that is related to what we call a core bankruptcy proceeding—that is, something that is directly flowing from the Bankruptcy Code—the removal statute could say that any state court case that involves core proceedings is removable from state court to bankruptcy court. Or, on the other hand, the removal statute could say that any case brought in state court that is related in any way to a bankruptcy case is removable from state court to bankruptcy court. I like that choice. As a matter of fact, the bankruptcy removal statute that we have is the more expansive removal doctrine. Any case that is related to a bankruptcy case can be removed into bankruptcy court. There's the possibility of remand by the bankruptcy court back to the state court. The bankruptcy judge gets to decide whether to remand or not and it's nonappealable whatever he or she decides.[5]

I've been working on a case for years in Arkansas that involves a state law question, a question of whether a particular exemption under Arkansas law is usable in bankruptcy court. The bankruptcy judges say that it would violate Arkansas state law for that exemption to be used in bankruptcy court. The bankruptcy courts concede it's a question of state law. And I can't get it before a state judge to answer it because of this removal doctrine. Every time we come up with a case we say, "Let's present this to the state court and let them decide the issue of state law." Boom! It gets removed into federal court and the bankruptcy judges say, "We know what state law is." It strikes me that there is a nice analogy there to what's going on in the Indian law area. What I would like to see as a solution to all this abstention stuff is a federal removal statute in which Congress says precisely in what circumstances cases should be removed from federal court into tribal court, and that will settle it.

On the merits of the Lear & Miller paper: I don't know very much oil and gas law or mineral law. It appears to be settled that the mineral estate is the dominant one and the surface estate is the subservient one. As a surface dweller, that strikes us as an unusual choice of words—"sub-servient."

5. 28 U.S.C. § 1452.

They cite this *Kinney-Coastal* case, which I take to be a non-Indian case, and they talk maybe less than they might have about whether that case ought to apply in full force to Indian country. I like to look, for the purposes of teaching the Indian law course, for a place in which dominant-society law is likely to differ from tribal-law (even though it's hard to make generalizations about tribal law). I used to use the famous *Martinez* case, where a tribe made a distinction based upon gender that ran afoul of what some members of the dominant society thought the law should be. But in the last couple of months I've come up with two better examples. Some of this same crew was in Hartford recently at a Symposium, and it was observed that Connecticut is apparently a state which in general really admires labor unions. The state is at loggerheads with the Mashantucket Pequot tribe, which I understand doesn't admire the social utility of labor unions as much as the state of Connecticut does. So there's a nice, new example of a place where the rules change as you cross reservation boundaries.

I've got another one from the Lear & Miller paper. My guess is that many tribes in addressing the question under tribal law of the relative status of the surface owner versus the mineral owner might come out differently from this *Kinney-Coastal* case. And that, of course, is the problem. To what extent will those different determinations of what the law should be with respect to the conflicting rights of surface and mineral owners be honored? How will we manage that difference? As I will mention in my paper, the Supreme Court seems increasingly candid in expressing its reluctance to apply tribal law to non-Indians. I understand a bit of the Court's reluctance because the rules are different. The dominant society of Connecticut thinks that labor unions are a hot idea. A tribe in Connecticut is not persuaded that labor unions advance the interest of society. Now there is a major difference in the way two societies that live next to each other feel about things. And in my view you can't expect the citizens of Connecticut who feel strongly about the social utility of labor unions to put that strong feeling aside when they're dealing with another government who thinks labor unions do nothing but cause trouble. Likewise, you can't expect the society that thinks that labor unions are not a valuable thing to have around to put that strongly held belief aside when they're dealing with another society that thinks that labor unions are a good idea. It's expecting too much to expect the differences to be ignored.

Furthermore, I think it's wrong to destroy those differences. That's what Indian law is all about: the fact that the rules are different. If the rules were not different across Indian reservation boundaries, we would not all be sitting here today. We would be discussing some other thing

like, I don't know, the anti-trust status of baseball. The very fact that the rules are different is what makes us all interested. It's what makes the field important. So, on the one hand, differences need not be ignored because differences matter to people. On the other hand, differences should not be destroyed because differences are important.

Two last comments on the Lear & Miller paper: first, they make this observation, about which I've changed my mind today: "Since most mineral extraction companies are non-Indian owned or controlled, they have an interest in seeking resolution of their rights under a legal system that is inclined to weigh traditional Anglo-American property ownership principles." My first reaction to that was to say, "well, yeah, that's fair enough." One thing I do not expect lawyers to do is to seek out tribunals that are not the most favorable tribunal for them. I think that's too much to ask. So I thought that was a sensible statement, almost a truism. Something that Sam said made me realize that there's a lot that goes without saying with respect to that sentence. That is that it is not necessarily true that the dominant society's law will be more favorable to the interests of these mineral extraction companies than tribal law will be. As he pointed out, we're dealing with, in some cases, the poorest counties in the country. You might expect in some circumstances the tribal law to be more favorable to economic development than the dominant society's law. I guess one shouldn't count on that, but I don't think one can presume the opposite.

My second comment concerns this statement: "The only real interest the tribe has"—they pointed out that in their hypothetical the tribe doesn't own the minerals itself—"the only real interest the tribe has is to ensure the health, safety, morals, and environment of the tribe will not be adversely affected." Well, I'll say holy cow! I mean, that is a lot to be worried about it seems to me; "health, safety, morals, and environment." I mean, what's left? So it seems to me the point is that even in these situations where you're talking about an enclave of non-Indian land within the reservation, there are still substantial tribal interests involved. I'll stop there.

MR. DELORIA: I'm going to read this question from the audience while you're formulating your questions. And this question is "once the Navajo tribe said they were not opposing the drilling, where was the federal question?" He says, "It seems to me that this boiled down to a case wherein a non-Indian company wanted to get some court to order individual Indians to do or not to do something. What's the difference in this case from the *Kennedy* case?"

MR. LEAR: The federal question precisely was, what are the rights of a mineral lessee under the Mineral Leasing Act of 1920? The

authority to be on the land at all stemmed from that statute. The federal regulations which control the actions of the Department of the Interior, which has operational responsibility not only for mineral development on federal lands but also on Indian lands, talk about a conflict of interest, requires or gives precedent to this sovereign of state theory.

The whole issue that would eventually have come up, the injunction notwithstanding, was what are those rights? Now maybe I've begged a question in this statement, but the injunction gave us only a temporary relief. There were going to be numerous wells drilled, getting back to our fact situation, numerous wells drilled had that first well been successful. Were we going to spend the next ten or fifteen years of professional energies, juries' energies determining each point whether the injunction for each specific well was valid or were we going to have a decision on the merits? And for that reason we sought federal question and went to federal court.

So although we did get what we wanted, and, again, I state this, I've had better experiences or certainly as good experiences by and large in tribal courts, specifically the Navajo Court, and I'm licensed in a couple of other tribal courts, we got what we wanted in the short run but that didn't solve our problem. It didn't solve the long-range problem because that same driller was going to have to come back to obtain permits on subsequent wells on the same lease and in the same split-estate situations under the same circumstances, and we couldn't have injunctive relief go on forever. We needed a determination on the merits, and you need to know one of the things that we asked for was declaratory judgment.

So, it did set the stage, but another shoe needs to drop. The well was a dry hole.

I don't know whether I should tell you this, but Professor Laurence was our consultant on the case. I hope I haven't ripped the rug out from under you. And I didn't.

A mandatory exhaustion, now we get back to our thesis statement, is neither necessary nor advisable. The Restatement factors of comity that we set forth in our paper take into consideration the applicable jurisdictional interests of federal and tribal courts. A mandatory exhaustion rule, a bright-line test, if you will, I personally find demeaning and debasing to the tribal court. I think the tribal court should stand on its own jurisdictional legs. I am firmly a believer in the concept of equal dignity of the court whether one couches this as dependent sovereign status or independent sovereign status or we call them nations or we call them political communities. I think that either in the realm of federalism or outside the realm of federalism, or maybe I'm

drawing bright lines right now, we're either in, and if we are in, Professor Vetter makes a good case for falling under the Section 1738 of extension of full faith and credit to possessions and territories, and I won't debate that issue. But if we are out, as Mr. Joranko argues we probably are, then comity helps us. And I don't think—I agree with Professor Laurence—I don't think bright lines help us. I don't think we need affirmative action right now. I think the Courts can stand on their own legs. And if they do, and if we accept that premise, then they owe equal dignity to the federal comity and community and vice versa. So that's why we think the balancing factors give the best analysis. Thank you very much.

MR. DELORIA: Let his team leader have a moment of rebuttal. Go ahead.

MR. MILLER: Actually I have no need for rebuttal other than just a comment. A question was raised why we didn't go to tribal court first. In retrospect, it probably made more sense. In light of the federal issue; that is, what rights did the defendants have vis-a-vis the dominant mineral estate under the federal statute, we did not want to submit this issue twice. The concern we had is that if we went to tribal court and obtained a ruling on federal law, we were uncertain as to the preclusive effect of that ruling. Thank you.