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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

EXC, Inc. *et al.*,

Plaintiffs,

v.

Jamien Rae Jensen *et al.*,

Defendants.

NO. CV 3:10-cv-08197-PCT-JAT

**REPLY IN SUPPORT OF
 PLAINTIFFS' MOTION FOR
 SUMMARY JUDGMENT**

As a matter of law, the Navajo Nation has no jurisdiction over this motor vehicle accident between members and non-members of the Navajo Nation on United States Highway 160. When the Tribe granted a right-of-way over its land, the Highway became equivalent to "land alienated to non-Indians" for purposes of jurisdiction. Pursuant to *Strate v. A-1 Contractors*, there was no consensual relationship between the Jensen Defendants and Plaintiffs, and regulating a motor vehicle accident of this nature does not implicate vital tribal interests. 520 U.S. 438, 454 (1997). Consequently, there is no tribal jurisdiction as a matter of law.

Defendants twist, convolute, and misapply the law and facts in a desperate attempt to confer jurisdiction on the Navajo Nation. Because the Supreme Court already held that Indian tribes generally have no jurisdiction over accidents on State and Federal highways,

1 Defendants have resorted to a sleight-of-hand attempt to make this case about tourism
2 regulations and retained treaty rights. But Defendants' underlying tort claims are not
3 about tourism regulations; they are about injuries sustained in the accident. And the
4 documents through which the Navajo Nation granted the right-of-way over its land do not
5 reserve any rights that would grant it jurisdiction over this accident.

6 *Strate* provides the proper analysis here and shows why the Navajo Nation does not
7 have jurisdiction over this accident. The general rule is that there is no Tribal jurisdiction
8 unless one of the *Montana* exceptions is met and *Strate* explained why neither of those
9 exceptions applies to accidents such as this: there was no consensual relationship between
10 Plaintiffs and the Jensen Defendants; whether there was a consensual relationship between
11 Plaintiffs and the Navajo Nation is immaterial because the Navajo Nation was not a party
12 to the accident; and, as a matter of law, these types of accidents do not implicate vital
13 tribal interests.

14 The Jensen Defendants have a right to their day in court, but only before a court
15 with jurisdiction over Plaintiffs, who are not members of the Navajo Nation, and this
16 accident. This Court should apply the holding and guidance from the United States
17 Supreme Court in *Strate*. Under that controlling law, the Navajo Nation courts have no
18 jurisdiction here and summary judgment in favor of Plaintiffs is proper.

19 **A. This Case Is Not About Tourism Activity On The Navajo Reservation.**

20 Defendants repeatedly try to convert this motor vehicle accident case into a tourism
21 regulatory action. This is a typical motor vehicle accident on a United States Highway.
22 The fact that this accident resulted in serious injuries does not change the nature of
23 Defendants' claims – they are tort claims arising from a motor vehicle accident.

24 A case implicating Navajo tourism laws would involve relevant issues regarding
25 whether the tour bus visited a Navajo monument, whether Plaintiffs applied for or
26 received permits to tour Navajo monuments, or whether, if they received such permits,
27 Plaintiffs followed the Navajo regulations to which they consented. However, none of
28 those issues are relevant to Defendants' tort claims. It is uncontroverted that Plaintiffs did

1 not apply for or receive permits to tour Navajo monuments. It is similarly uncontroverted
 2 that Plaintiffs did not consent to Navajo jurisdiction or regulations regarding their
 3 activities. Indeed, if anything, Plaintiffs' failure to apply for or receive Navajo tourism
 4 permits shows their lack of consent to Navajo jurisdiction over their activities.

5 There simply is no relevance to whether Plaintiffs' tour travels included visits to
 6 Navajo monuments. Nothing regarding Defendants' allegations of touring Navajo
 7 monuments has any bearing on whether Plaintiffs caused the accident with Jensen.
 8 Consequently, it does not defeat summary judgment. *See Orme Sch. v. Reeves*, 166 Ariz.
 9 301, 311, 802 P.2d 1000, 1010 (1990) (a dispute over irrelevant or immaterial facts does
 10 not preclude summary judgment).

11 **B. No Treaty Confers Jurisdiction On the Navajo Nation Courts.**

12 Defendants misunderstand the basis for the abrogation of the Navajo Nation treaty
 13 rights as they pertain to jurisdiction over this accident. The issue is not whether Congress
 14 has abrogated those rights or whether other Courts have, in dicta, stated that certain
 15 services have been provided to the Navajo Nation "in compliance with its treaty
 16 obligations." Response at 5-6 (quoting *Warren Trading Post Co. v. Arizona St. Tax*
 17 *Comm'n*, 380 U.S. 685, 690 (1965)).¹ Nor is the Navajo Nation's lack of jurisdiction is
 18 tied to a particular statute or treaty.

19 Here, the Navajo Nation lacks jurisdiction because it relinquished exclusive control
 20 and authority over the land on which U.S. Highway 160 lies. That relinquishment makes
 21 U.S. Highway 160 equivalent to "land alienated to non-Indians" for purposes of
 22 jurisdiction. *Strate*, 520 U.S. at 455. The Navajo Nation cannot maintain jurisdiction
 23 over these nonmember Plaintiffs regarding conduct that occurred on non-Indian land.

24
 25 ¹ The citation to *Warren Trading Post* does not help Defendants' cause. That
 26 opinion includes the uncontroversial statement that since the creation of the Navajo
 27 Reservation, the Tribe has largely been left "free to run the reservation and its affairs
 28 without state control ..." 380 U.S. at 690. As the analysis under *Montana*'s second
 exception makes clear, a motor vehicle accident on land not controlled by the tribe and
 involving non-Indians does not implicate the Navajo Nation's ability to "run the
 reservation and its affairs."

1 Defendants seem to contend that the Navajo Nation retained ultimate jurisdictional
2 authority over nonmembers' actions on U.S. Highway 160. But that argument has no
3 specific basis and ignores the holding and analysis in cases such as *Strate* and *South*
4 *Dakota v. Bourland*, 508 U.S. 679 (1993). To be sure, the treaties that created
5 reservations for the Indian Tribes in *Strate* and *Bourland* granted similar rights to self-
6 govern and regulate conduct within tribal borders. But the issue for those Courts was not
7 whether rights in the original reservation treaties reserved regulatory control over the
8 conduct at issue; it was whether any subsequent treaty or statutes reserved the right to
9 tribal regulatory control after the tribe granted rights to others over that land.

10 A treaty or statute would only be relevant here if it explicitly granted tribal
11 jurisdiction over non-Indian conduct on land, such as U.S. Highway 160, over which a
12 right-of-way had been granted. Defendants have not identified any such treaty, statute, or
13 agreement and there are none. The Navajo Nation relinquished exclusive control over
14 U.S. Highway 160 when it granted a right-of-way over its land to the United States and,
15 by transference, the State of Arizona, without any reservation to regulate conduct of non-
16 members over that land. Accordingly, under *Strate* and *Montana v. United States*, 450
17 U.S. 544, 565 (1981), jurisdiction exists only in the limited circumstances recognized in
18 those cases.

19 **C. U.S. Highway 160 Is Non-Indian Land.**

20 Contrary to Defendants' assertion, *Strate* does not compel a "nuanced, multifactor
21 analysis" to determine whether a U.S. Highway is aligned with land alienated to non-
22 Indians. Indeed, even the case upon which Defendants rely, *McDonald v. Means*,
23 analyzed those factors only after distinguishing *Strate*. 309 F.3d 530 (9th Cir. 2002).

24 The issue in *McDonald* was whether the Cheyenne Tribe had jurisdiction over a
25 claim regarding negligent horse trespass on Route 5, a Bureau of Indian Affairs ("BIA")
26 Road. *Id.* at 536. The Ninth Circuit started by explaining the holding of *Strate*: "a tribal
27 court may not hear civil claims against nonmembers arising from accidents on a state
28 highway that crosses a reservation, because the tribe had relinquished all gatekeeping

1 rights over the highway right-of-way.” *Id.* at 537 (citing *Strate*, 520 U.S. at 455-56). The
2 Court then held that *Strate* did not control in that case because Route 5 was a “tribal road
3 within a reservation” as opposed to part of the state highway system. *Id.*

4 The *McDonald* Court further noted that the right-of-way was not being granted to a
5 state (such as to North Dakota in *Strate*), but instead to the BIA, which holds the right-of-
6 way in trust for the direct benefit of the tribe. *Id.* at 537-38. Therefore, Route 5, unlike
7 the land in *Strate*, was not “land acquired in fee simple by non-Indian owners.” *Id.* at 538
8 (quoting *Strate*, 520 U.S. at 446).

9 Here, the right-of-way over Route 1, which eventually became U.S. Highway 160,
10 was granted for purposes of constructing a state highway over the land. Indeed, the
11 Resolution of the Navajo Tribal Counsel No. CAP-25-59 explicitly refers to the transfer of
12 rights-of-way to the State of Arizona for the construction of highways built to State
13 standards.² Conversely, there is no explicit language that the construction of the highway
14 over Routes 1 and 3 would be solely for tribal purposes. *Id.*

15 *McDonald*, if anything, shows why *Strate* decisively controls this case. First, the
16 *McDonald* Court recognized the controlling nature of *Strate* regarding accidents on state
17 highways involving non-Indians. Second, the *McDonald* Court found tribal jurisdiction
18 only because the road was not a state highway, the right-of-way was held in trust for the
19 tribe by BIA, and the tribe retained gatekeeping rights regarding traffic regulations and
20 enforcement. 309 F.3d at 537-540.

21 Defendants’ analysis of the five factors listed in *McDonald* is similarly misleading.
22 First, the *purpose of the roadway* is not material when a right-of-way was granted over the
23 land to non-Indians. Nothing in *Strate* listed the purpose as a factor. Indeed, the
24 reference in *Strate* to the purpose of the roadway appears to be relevant only to specific
25 language in the granting instrument at issue in that case (“The grant provides that the
26 State’s ‘easement is subject to any valid existing right or adverse claim and is without
27

28 ² The Resolution is attached as Exhibit 3 to Plaintiffs’ Separate Statement of Facts.

1 limitation as to tenure, so long as said easement shall be actually used for the purpose . . .
2 specified.”). 520 U.S. at 455. Regardless, Defendants identify no language in the
3 granting instruments that support a claim that right-of-way was granted purely for direct
4 tribal purposes.

5 Second, the operative language in the Navajo grant is identical to that analyzed in
6 *Strate*. In *Strate*, the grant provided an easement “subject to any valid existing right or
7 adverse claim ...” *Id.* Here, Defendants base their argument on the following language:
8 “Subject to any prior valid existing right or adverse claim ...” The language is identical
9 and provides no basis for distinguishing *Strate*.

10 Third, although the Tribe had a right to payment in exchange for the right-of-way,
11 the Tribe expressly waived its right to compensation. *See* Response at 10 (quoting
12 JDUMF para 57). Defendants identify no reason why the Navajo Nation’s decision to
13 waive its right to compensation instead of receiving compensation as occurred in *Strate*
14 makes any difference. Indeed, the *McDonald* Court assumed that no compensation was
15 provided in that case precisely because the right-of-way was being maintained for the
16 benefit of the tribe. 309 F.3d at 539.

17 Fourth, as in *Strate*, U.S. Highway 160 forms part of Arizona’s highway system
18 and is open to the public. The mere fact that Navajo police or paramedics respond to a
19 collision on the highway does not convert U.S. Highway 160 into a Navajo roadway under
20 tribal jurisdiction. The provision of emergency services is irrelevant to the jurisdictional
21 issue and is not evidence of regulatory and enforcement authority.

22 U.S. Highway 160 is a state highway controlled by the State of Arizona and subject
23 to state control. The Navajo Nation consented to the construction and use of U.S.
24 Highway 160 by the public when it granted a right-of-way over its property for that
25 purpose. As such, pursuant to *Strate*, U.S. Highway 160 is equivalent to “land alienated
26 to non-Indians” for purposes of jurisdiction.

1 **D. Montana Exceptions Do Not Support Tribal Jurisdiction.**

2 1. There is no consensual relationship

3 Defendants misunderstand the first Montana exception of a consensual
4 relationship. Under that exception, the party seeking recovery needs to be the party that
5 has the consensual relationship supporting jurisdiction. *See Strate*, 520 U.S. at 457. Here,
6 Defendants maintain that the Navajo Nation has rights to regulate tourism activity and that
7 it has rights to regulate activities of all members and non-members travelling on U.S.
8 Highway 160 based on retained treaty rights.

9 *Strate* analyzed the cases cited by *Montana* as supporting the first exception. Each
10 of those cases involved a direct transaction between the member and non-member (see,
11 *e.g.*, *Williams v. Lee*, 358 U.S. 217 (1959)) or the authority to tax on-reservation business
12 transactions (*e.g.*, *Buster v. Wright*, 135 F. 947 (8th Cir. 1905); *Washington v.*
13 *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)) or on-
14 reservation owned livestock (*e.g.*, *Morris v. Hitchcock*, 194 U.S. 384 (1904)). 520 U.S. at
15 457. Clearly, none of those situations apply here. There was no consensual relationship
16 between Plaintiffs and the Navajo Nation. And, even if such a relationship existed, it did
17 not involve the Defendants.

18 Nor can Defendants take any solace in language from *Plains Commerce Bank v.*
19 *Long Family Land & Cattle Co.* characterizing examples of Montana's first exception as
20 those in which "non-Indian activities on the reservation that had a discernible effect on the
21 tribe or its members." Response at 14 n.3 (quoting *Plains Commerce*, 554 U.S. 316, 332
22 (2008)). Defendants fail to note that the language quoted referred to the activities of non-
23 Indians activities *on the reservation*. Indeed, the Supreme Court only shortly thereafter
24 noted that: "Tellingly, with only "one minor exception, we have never upheld under
25 Montana the extension of tribal civil authority over nonmembers *on non-Indian land*."
26 *Plains Commerce*, 554 U.S. at 333 (emphasis in original) (quoting *Nevada v. Hicks*, 533
27 U.S. 353, 360 (2001)). Here, Defendants cannot ignore the fact that this accident occurred
28 on U.S. Highway 160, which is considered non-Indian land.

1 The fact that injured Defendants include members of the Navajo Nation does not
2 change the analysis of whether Plaintiffs entered into a consensual relationship with the
3 Defendants. *Strate* makes it perfectly clear that the issue is whether the Plaintiffs and
4 Defendants involved in the accident had a consensual relationship between themselves.
5 Furthermore, there is no evidence that Plaintiffs entered into a consensual relationship
6 with the Navajo Nation. Indeed, Defendants' whole argument is that Plaintiffs should
7 have, but did not, apply for and receive a tourism permit. There simply is no evidence
8 that Plaintiffs entered into any consensual relationship with any other party to this lawsuit.

9 2. Tribal rights to self-govern are not implicated

10 Defendants read the second *Montana* exception so broadly that it would swallow
11 the entire general rule of non-jurisdiction. There is no legal basis for Defendants'
12 argument that the second exception applies to any case where the remedies would be
13 different in a tribal forum. *Montana* and *Strate* were very clear that it is the allegedly
14 wrongful *conduct* that must threaten or have some direct effect on the political integrity,
15 the economic security, or the health or welfare of the tribe. *Strate*, 520 U.S. at 457.
16 Defendants' argument is that the differences in tribal remedies, as opposed to the conduct,
17 implicate tribal self-governance. But that is not the test.

18 Indeed, *Strate* directly held that *Montana*'s second exception is not met by careless
19 driving on public highways running through reservations. 520 U.S. at 458. And that is
20 exactly what is alleged here. As a matter of law, the regulation of a motor vehicle
21 accident on a state highway running through a reservation does not trigger *Montana*'s
22 second exception.

23 **Conclusion**

24 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their
25 Motion for Summary Judgment and find that the Navajo Nation has no jurisdiction over
26 Plaintiffs regarding the Jensen Defendants' tort claims arising from the motor vehicle
27 accident at issue. Plaintiffs also respectfully request that the Court enter a permanent
28

1 injunction enjoining the Jensen Defendants from pursuing their claims in any Navajo
2 Nation court or forum.

3 RESPECTFULLY SUBMITTED this 30th day of April, 2012.

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