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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

EXC, Inc., a Nevada corporation, d/b/a Express Charters and D.I.A. Express, Inc.; Conlon Garage, Inc., a Colorado corporation; Go Ahead Vacations, Inc., a Massachusetts corporation; Russell J. Conlon, and; National Interstate Insurance Company,

Plaintiffs,

v.

Jamien Rae Jensen, individually, and as parent and next friend of D. J. J., and as Personal Representative of the Wrongful Death Estate of Corey Johnson; Chavis Johnson, individually, and as Personal Representative of the Wrongful Death Estate of Butch Corey Johnson; Margaret Johnson and Frank Johnson, individually, and as parents and next friends of H. J. and D. J.; Francesca Johnson, individually; Justin Johnson, individually; Raymond Jensen, Sr., individually; Louise R. Jensen, individually; Nicole Jensen, individually; Ryan Jensen, individually; Justin Jensen, individually; Katrina Jensen, individually; Raymond Jensen, Jr., individually, and; Murphy Jensen, individually; the Navajo Nation; the Kayenta District Court; the Navajo Nation Supreme Court; and Judge Jennifer Benally, a judge of the Kayenta District Court,

Defendants.

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

JENSEN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

(Oral Argument Requested)

COME NOW Defendants Jamien Rae Jensen, *et al*. (hereinafter Jensen Defendants), by and through their attorneys of record, and pursuant to FRCP, Rule 56, hereby submit their Motion for Summary Judgment and Memorandum in Support. Separately, but contemporaneously herewith, Jensen Defendants submit their Statement of Undisputed Material Facts (hereinafter JDUMF). A procedural history was previously set forth in Jensen Defendants' Memorandum in Support of Motion to Dismiss at 2-4 (Doc. 67). In bringing this Motion for Summary Judgment, Jensen Defendants ask this Court to enter judgment, holding as a matter of law that the Navajo Nation has regulatory authority, and hence adjudicatory authority, over Plaintiffs' commercial touring activities and tort claims arising from the tour bus/auto collision that occurred on September 21, 2004 in Kayenta Township on the Navajo Reservation. JDUMF ¶¶5-11.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Standard for Granting Summary Judgment

Summary Judgment is appropriate if the movant shows by reference to pleadings, depositions, affidavits, stipulations, and other discovery materials the absence of a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (a) and (c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the Federal Rules as a whole. *Catrett*, 477 U.S. at 327.

The party moving for summary judgment bears the initial burden; however, once the movant meets this requirement the burden shifts to the party resisting the motion to

set forth specific facts showing that there is at least a reasonable doubt as to the existence of a genuine issue of fact for trial. *Id.* The party opposing the motion cannot rely on the allegations contained in the complaint or upon the argument or contention of counsel to defeat it. Rather, the party opposing the motion must come forward and establish with admissible evidence that a genuine issue of fact exists. *Beard v. Banks*, 548 U.S. 521, 529 (2006); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990). If that party is unable to make that showing, then entry of summary judgment in favor of the moving party "shall" be granted. *Beard v. Banks* 548 U.S. at 529.

II. Standard for a Federal Court's Determination of a Tribal Court's Jurisdiction over Nonmembers, and Review of the Tribal Court's Prior Determination of Its Own Jurisdiction

When a federal district court decides whether a tribal court has jurisdiction, pursuant to federal law, over the on-reservation conduct of nonmembers after the tribal court already has ruled on the matter, the court's review is *de novo*, and the federal court reviews tribal court factual findings for clear error. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990) ("[T]he [clearly erroneous] standard accords with the traditional judicial policy of respecting the factfinding ability of the court of first instance."). The federal district court serves a quasi-appellate role with respect to tribal courts on questions of tribal jurisdiction, reviewing the tribal court's determination of its own jurisdiction for legal error on questions of purely federal law. *See id.* at 1313-14; *accord, Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808, 817 n.9 (9th Cir. 2011) (citations omitted) ("[T]he district court's review is akin to appellate review of the tribal court record."). In addition, "because tribal courts are competent law-

applying bodies, the tribal court's determination of its own jurisdiction is entitled to 'some deference.'" *Id.* (citations omitted). JDUMF ¶¶65-68. In conducting its inquiry, a federal court must be "mindful of the federal policy of deference to tribal courts and that the federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts." *Id.* (citations and internal quotation marks omitted). The federal district court defers to the tribal court on questions of purely tribal law. *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988) ("[T]he [tribal] court's determination of tribal law is binding on this court.")

III. Summary of Argument

An Indian tribe's authority to regulate the conduct of nonmembers within reservation boundaries, and to adjudicate disputes arising from such conduct, derives from several sources. Treaty provisions, interpreted in accordance with longstanding Indian law canons of construction prescribed by the Supreme Court, may reserve to the tribe authority to govern nonmember conduct. *Cf. Montana v. United States*, 450 U.S. 544, 558-59 (1981) (noting that the Fort Laramie Treaty of 1868 "arguably conferred upon the [Crow] Tribe the authority to control hunting and fishing" on lands reserved under the treaty for the Tribe's use). In addition, tribes presumptively retain regulatory and adjudicatory authority over nonmember conduct occurring on land owned by the tribe or its members, unless the exercise of that authority conflicts with Supreme Court precedents. *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 814, 815 (9th Cir. 2011). Finally, with respect to nonmember conduct occurring on alienated, non-Indian fee lands, or rights-of-way judicially deemed the equivalent thereof

for nonmember governance purposes, a tribe's residual inherent governing authority is established if it satisfies either of two exceptions to the presumption against such authority developed by the Supreme Court in a series of federal common law rulings, most notably *Montana v. United States*, 450 U.S. 544 (1981) and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

In this case, resort to the common law *Montana-Strate* analytic framework is unnecessary and inapposite because the Navajo Nation retains federally sanctioned governing authority over Plaintiffs' commercial touring activities and the on-reservation highway collision that arose from those activities. In particular, the Navajo Nation's jurisdiction over the underlying lawsuit filed in tribal court is reserved by the Navajo Treaty of 1868, and this implied, treaty-based governing authority has never been abrogated by Congress. On the contrary, the congressional acts and intergovernmental agreements that induced the Navajo Nation's consent to granting a limited right-of-way for the purpose of constructing a highway—eventually designated U.S. Highway 160, the site of the tour bus/auto collision in this case—expressly reserved to the Navajo Nation its pre-existing treaty rights.

Moreover, the Navajo Nation's retained fee ownership of the land over which the right-of-way in this case runs, together with the Nation's undisputed ownership of tribal roads traversed by Plaintiffs in the course of their on-reservation commercial touring activities, further secure a land ownership-based right to (1) regulate Plaintiffs' on-reservation touring activity and (2) adjudicate lawsuits arising from that activity, including the underlying suit in this case. Finally, even if Defendants were required to

justify the Navajo courts' jurisdiction pursuant to the common law *Montana-Strate* framework, such jurisdiction plainly exists by virtue of either *Montana* exception, *i.e.*, (1) the consensual relationship established through Plaintiffs' commercial touring activities within the Navajo Reservation and (2) the demonstrably serious impacts imperiling the Navajo Nation's sovereign interests posed by on-reservation commercial touring activities unconstrained by Navajo governing authority. *See Atkinson v. Shirley*, 532 U.S. 635, 659 (discussing threshold for satisfying *Montana*'s second exception); *Montana*, 450 U.S. at 565-66 (delineating two exceptions to Court's presumption against tribal regulatory jurisdiction over nonmember conduct on non-Indian fee lands).

IV. Argument

a. As a Matter of Federal Treaty and Statutory Law, and Based on Its Status as Owner of Tribal Land, the Navajo Nation Has Subject Matter Jurisdiction over the Civil Tort Claims Brought in the Underlying Lawsuit

i. Tribal Authority Under the Navajo Treaty of 1868

This case implicates the Navajo Nation's sovereign on-reservation governing authority *as guaranteed by treaty*. *See, e.g., Williams v. Lee*, 358 U.S. 217, 221-22 (1959) (discussing Navajo Treaty of 1868, art. II, 15 Stat. 667) ("Implicit in these treaty terms. . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."); *cf. Montana*, 450 U.S. at 558-59 (noting Crow treaty provision, whose language is virtually identical to that of the Navajo Treaty of 1868, "arguably conferred upon the Tribe the authority to control fishing and hunting on [tribal] lands."). In *Strate v. A-1 Contractors*, the Supreme Court specifically reiterated that the presumption against tribal jurisdiction over nonmembers on non-Indian

lands applies "only in the absence of a delegation of tribal authority by treaty or statute." *Strate*, 520 U.S. at 439-40; *see also id.* at 456 (noting that *Strate* litigants "refer[red] to no treaty or statute authorizing" the kind of jurisdiction asserted in *Strate*). Here there is a treaty which requires review. *See* Navajo Treaty of 1868, art. II, 15 Stat. 667.

The Navajo Nation Supreme Court correctly held that the Navajo Treaty of 1868 guaranteed the Navajo Nation's sovereign right to exercise jurisdiction over Plaintiffs in the lawsuit brought against them in tribal court. JDUMF ¶¶1, 2, 51-54; *EXC, Inc. v. Kayenta District Court*, No. SC-CV-07-10, slip opinion, at 4-5, 21 (Nav. Sup. Ct., Sept. 9, 2010) (hereinafter NNSC Opinion) (*available in* Doc. 83 and Exhibit 7 to Plaintiff's Response to Jensen Defendants' Motion To Dismiss Without Prejudice (hereinafter PRJDMD), Doc. 73-2). Article II of the Treaty recognizes that the Navajo Nation has authority to exclude all nonmembers, other than certain federal employees, from reservation lands. Navajo Treaty of 1868, Art. II, 15 Stat. 667 (describing reserved lands as "set apart for the use and occupation of the Navajo tribe of Indians"); *see also id.*, Art. XIII (confirming reserved lands are "set apart for the exclusive use and occupation of the Indians"). JDUMF ¶¶52-54; NNSC Opinion at 4-5, 21. This treaty power to exclude is the basis for the Navajo Nation's sovereign authority to regulate the activities of non-Indians entering reservation lands, by conditioning their presence upon conformity with Navajo laws. JDUMF ¶¶52-54; NNSC Opinion at 4-5, 21 ("Ancestors of the Navajo people understood that the Navajo Treaty terms provided that Navajo people would be free to handle all reservation affairs not expressly excepted in the document, and handle them according to their own laws."); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S.

130, 147 (1982) ("Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose."). The Navajo Nation thus retains governing power to regulate Plaintiffs' conduct within the Navajo Reservation, pursuant to rights reserved under the Navajo Treaty of 1868, provided these treaty rights have not been abrogated by Congress. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 526 U.S. 172, 202 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."). As discussed below, *infra* Part IV.b.ii., Congress has not abrogated the Navajo Nation's treaty-based authority to regulate Plaintiffs' commercial touring activities on the Navajo Reservation.

ii. Effect of Limited Grant of Right-of-Way on the Navajo Nation's Treaty-Based Regulatory Authority over Plaintiffs' On-Reservation Commercial Touring Activities

Because Congress has never abrogated the Navajo Nation's authority under the Navajo Treaty of 1868 to regulate the conduct of nonmembers engaged in commercial business activity on Indian lands within the Navajo Reservation, that authority remains intact. Congress's enactment of the statute that induced the Navajo Nation to consent to granting a limited right-of-way, for the purpose of constructing the roadway upon which the tour bus/auto collision at issue in this case occurred, does not comprise any such abrogation. Indeed, far from divesting the Navajo Nation of jurisdiction, the enabling statute that appropriated funds for constructing and improving Route 1 (later designated U.S. Highway 160) was passed expressly "in order to *further the purposes of existing treaties with the Navajo Indians*," Act of Apr. 19, 1950, c. 92, § 1, 64 Stat. 44 (emphasis

added), JDUMF ¶55,[1] including the Navajos' right to exclude nonmembers from tribal lands and exercise the lesser included power to condition nonmembers' presence upon conformity with the Navajo laws, *see discussion supra* Part IV.a.i.

That Congress did *not* abrogate the Navajos' treaty right to regulate nonmember activity on tribally owned land when it facilitated the Navajo Nation's grant of a right-of-way for Route 1 (later designated U.S. Highway 160) is clear in light of the Supreme Court's stringent standard for finding abrogation of Indian treaty rights. "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so. There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" *Mille Lacs Band*, 526 U.S. at 202-203 (citations omitted) (quoting *United States v. Dion*, 476 U.S. 734, 740 (1986)). Here, there is no "clear evidence" of Congress's intent to abrogate the Navajo Nation's treaty-based right to regulate nonmember conduct on tribal land through passage of the 1950 road construction legislation or otherwise.[2] To the contrary, the Act funding construction of the roadway

[1] The statute's other objectives, all of which are consistent with preserving the Navajos' pre-existing treaty rights, are (1) "to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes"; (2) "to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities"; and (3) to facilitate "the fullest possible participation of the Navajos in the administration of their affairs". Act of Apr. 19, 1950, c. 92, § 1, 64 Stat. 44; JDUMF ¶ 55.

[2] *Montana v. United States*, 450 U.S. 544 (1981), and *South Dakota v. Bourland*, 508 U.S. 679 (1993), thus are distinguished. In *Montana*, the Supreme Court held that the Crow Tribe's presumptive treaty-based right to regulate hunting and fishing by

evinces Congress's clear intent to advance pre-existing Navajo treaty rights, as discussed above, and to promote Navajo economic development, enhance the Navajo people's health and welfare, and support their full participation in the administration of their own affairs. JDUMF ¶55.

Consistent with congressional purposes for constructing U.S. Highway 160, the Navajo Nation enacted its Tour and Guide Services Act (formerly denominated the Tourist Passenger Services Act), 5 N.N.C. §2501 *et seq*., in 1972. By means of this Act, the Navajo Nation (1) exercises its retained treaty rights by defining the conditions upon which commercial touring businesses may enter and tour the Navajo Reservation and asserting the Nation's treaty-based right to exclude those tour businesses that do not conform to its laws; (2) promotes Navajo economic development by regulating the commercial touring industry, an important source of revenue for the Nation; (3) protects the health and welfare of Navajo people by prescribing safety rules for the touring industry, including licensing, proof-of-insurance for drivers and vehicles traversing the Reservation, and requiring written consent to acknowledge tribal jurisdiction; and (4) more fully participates in the administration of its own affairs by regulating commercial

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nonmembers on the reservation was abrogated, *as to alienated fee lands*, by allotment legislation, which vested fee title of those parcels in the new, non-Indian owners and extinguished the Indians' previous title. *Montana*, 450 U.S. at 558-60. In *Bourland*, the Court likewise found an abrogation of the Cheyenne River Sioux Tribe's treaty-based right to regulate hunting and fishing by nonmembers with respect to an area of the Tribe's reservation taken by the United States for constructing a dam, resulting in an alienation and transfer of legal title to the land. *Bourland*, 508 U.S. at 687-94. In the instant case, the land underlying the roadway in question remains tribal trust land and Plaintiffs' commercial touring activities all took place on tribal trust land. JDUMF ¶ 2, 3, 35-45; NNSC Opinion at 9.

activities on tribal lands, including the very roadway whose construction Congress funded, by providing needed governmental services, and establishing an effective and broad-based court system. JDUMF ¶¶1, 4, 26, 46-49, 51, 52-55; Navajo Nation Tour and Guide Services Act (hereinafter NNTGSA), 5 N.N.C. §2501A., Exhibit 1, Navajo Nation Tourist Passenger Service Act Rules and Regulations, Exhibit 2, and Tourist Passenger Services Agreement – Vehicle Tours , Exhibit 3; and NNSC Opinion.

iii. Land Ownership-Based Authority of the Navajo Nation to Regulate, and Adjudicate Disputes Arising from, Plaintiffs' On-Reservation Commercial Touring Activities

In addition to its retained treaty rights, the Navajo Nation has sovereign authority over Plaintiffs' conduct in this case pursuant to the Nation's ownership of lands traversed by Plaintiffs in the course of conducting commercial touring activities. The present case implicates the Navajo Nation's authority to *regulate* commercial touring within the boundaries of the Navajo Reservation, giving rise to a presumption *in favor of* the tribe's adjudicatory jurisdiction over Plaintiffs.

The existence of this supplemental source of tribal authority over the conduct of nonmembers on Indian reservations was recently affirmed in a unanimous decision of the Ninth Circuit Court of Appeals. In *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), the Ninth Circuit held that generally, Indian tribes have authority to adjudicate civil causes of action brought against nonmembers for conduct occurring on tribal lands within a reservation, as an incident of the tribe's ownership of its lands. The case involved the question whether the judicial system of Colorado River Indian Tribes had subject matter jurisdiction to adjudicate unlawful

detainer and trespass claims brought by the Tribes against a closely held corporation and its non-Indian owner for conduct occurring on land leased to the nonmember tribal court defendants. The Ninth Circuit held that because the nonmembers' conduct occurred on tribal land, the Tribes had regulatory authority incidental to the Tribes' "authority to exclude non-Indians from tribal land." *Id.* at 811. JDUMF ¶2, 3, 35-45 and NNSC Opinion (Exhibit 7 to PRJDMD). The Ninth Circuit Court of Appeals followed *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which likewise validated tribal governing authority over the activities of nonmembers on tribal lands, rejecting as inapposite in these circumstances the presumption against such authority as applied in *Montana*, a case decided before *Merrion*. *See Water Wheel*, 642 F.3d at 810-11. The Court of Appeals further held that the Tribes' valid *regulatory* authority in turn gave rise to valid tribal *adjudicatory* authority, since such authority did not conflict with any Supreme Court precedent and "[a]ny other conclusion would impermissibly interfere with the tribe's inherent sovereignty, contradict long-standing principles the Supreme Court has repeatedly recognized, and conflict with Congress's interest in promoting tribal self-government." *Id.* at 815-16; *accord, Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (quoting *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (alterations added by the *Strate* Court)) ("[W]here tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.' ").

The "plenary jurisdiction over tribal land," acknowledged repeatedly by the Supreme Court and the Ninth Circuit Court of Appeals, *see Water Wheel*, 642 F.3d at 816

(citing *Long Family Land and Cattle Co., Inc. v. Plains Commerce Bank*, 554 U.S. 316, 328 (2008)), applies in this case and validates the Navajo Nation's authority to regulate Plaintiffs' commercial touring activity occurring on roadways crossing tribal lands within the Navajo Reservation, including U.S. Highway 160, and to adjudicate disputes arising from that conduct. Here, Plaintiffs entered the reservation conducting commercial tours. JDUMF ¶1, 2, 27-32, 35-45, 50, Coach Service Agreement, Exhibit 6 and NNSC Opinion (Exhibit 7 to PRJDMD). The tour bus traversed roads other than U.S. Highway 160, tribal roads for which the tribe's ownership cannot be disputed. JDUMF ¶35-44 and NNSC Opinion (Exhibit 7 to PRJDMD). Both *Water Wheel* and *Merrion* therefore compel the conclusion that the Navajo Nation has the right, as sovereign landowner, to exclude nonmembers from the tribal lands at issue, and hence to regulate those nonmembers' conduct, authority the Nation affirmatively asserts over commercial guided tours in particular. *See* JDUMF ¶46-49, 51, Exhibits 1, 2 and 3. This legitimate regulatory authority in turn justifies Navajo adjudicatory authority over the dispute at issue in this case, since this dispute stems from the Navajo Nation's regulatory authority and no Supreme Court precedent precludes tribal judicial jurisdiction in this case. *See also infra* Part IV.b.iii.

b. Alternatively, the Navajo Nation Courts Have Subject Matter Jurisdiction in This Case Pursuant to Common Law Test for Residual Inherent Tribal Sovereignty Set Forth in *Montana v. United States* and *Strate v. A-1 Contractors*

i. Threshold Determination of the Status of U.S. Highway 160 for Nonmember Governance Purposes

In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Supreme Court addressed the question whether, in the absence of controlling treaty or statutory provisions, the federal common law test for inherent tribal governing authority over the conduct of nonmembers on non-Indian fee lands, as applied in *Montana v. United States*, 450 U.S. 544 (1981), should be used to determine a tribal court's jurisdiction over a lawsuit arising from the activities of nonmembers on a highway right-of-way crossing tribal trust lands. The Court announced a multi-factor threshold inquiry for deciding whether a highway should be judicially "align[ed] . . . , for the purpose at hand, with land alienated to non-Indians," thereby triggering further consideration of the tribal court's jurisdiction pursuant to a *Montana*-type analysis. *Strate*, 520 U.S. at 456. The Court determined that while "tribes retain considerable control over nonmember conduct on tribal land," on the "particular matter" of tribal jurisdiction over an accident involving only non-Indian parties on a 6.59-mile on-reservation segment of a North Dakota highway, the short segment should be "align[ed]" with non-Indian fee lands because (1) the purpose of the roadway was to facilitate public access to a federal water resource project; (2) the granting instrument detailed only one specific reservation to the tribe, *i.e.*, the right to construct crossings, with the tribe expressly reserving no other right to exercise dominion and control; (3) the tribe received payment for use of the land; (4) the highway formed a part of the state's highway system; and (5) the highway was open to the public. *Id.* at 454-56.

As discussed previously, the Navajo Nation's treaty-based and land-ownership-based right to exercise jurisdiction, *see supra* Part IV.a., removes this case from the

control of *Strate*'s common law approach to the question of tribal jurisdiction, an approach that applies only in the absence of governing treaty or statutory law. But even if *Strate*'s threshold factor analysis were applicable, it would militate strongly *against* judicially aligning the 197.4-mile-long highway at issue in this case with non-Indian fee land where (1) it lies entirely within the exterior boundaries of the Navajo Reservation (2) nonmember business entities were conducting commercial touring activities across tribal lands on the reservation (3) when tribal members were killed or seriously injured in the collision. Three of the five conditions considered pursuant to the *Strate* factors are not present in the instant case. First, the congressionally declared purpose of the roadway was to serve distinctly *tribal* purposes, *i.e.*, to further Navajo treaty rights and provide for economic development and self governance for the Navajo Nation. Act of Apr. 19, 1950, c. 92, § 1, 64 Stat. 44. Second, the granting instruments in this case allowed a right-of-way for limited purposes, without ceding jurisdiction or relinquishing reserved treaty rights. JDUMF ¶46-49, 33-34, 51-57, 59, Exhibits 1, 2, 3, excerpts from Map No. A-3-T-599 and Survey, Exhibit 4, and Navajo Nation Tribal Council Resolution CAP-25-59, Exhibit 5; and NNSC Opinion (Exhibit 7 to PRJDMD). And third, the Navajo Nation received no payment for the grant of the right-of-way. JDUMF ¶57, Exhibit 5. While the highway in question also forms part of the state's highway system and is open to the public, the tribe exercises joint maintenance and control (JDUMF ¶4, 46-49, 51-57, 59, Exhibits 1, 2, 3, 4 and 5; and NNSC Opinion at 21). JDUMF ¶33-34.

Applying the factors considered in *Strate*,[3] the status of the roadway in this case is clearly distinguished from the roadway in *Strate*.

ii. Tribal Regulatory Authority Based on *Montana* Exceptions

Even if the Navajo Nation did not have a continuing right to regulate Plaintiffs' conduct pursuant to its treaty and land-ownership based rights, and even if the limited right-of-way where the tour bus/auto collision in this case occurred was judicially deemed to be the equivalent of on non-Indian fee land, the Navajo Nation's regulatory authority would be justified in this case as an application of both *Montana* exceptions. In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Supreme Court concisely stated the *Montana* general rule and its two exceptions:

> *Montana* . . . described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare.

Id. at 446.

In this case, Plaintiffs entered into "consensual relations" with the Navajo Nation and its members, within the meaning of *Montana*'s first exception, when they engaged in commercial touring activity within the Navajo reservation. Plaintiffs are not exempt from

[3] *Strate*'s multi-factor analysis has been followed by the Ninth Circuit Court of Appeals when determining, for jurisdictional purposes, whether the land on which nonmember conduct occurs is the equivalent of non-Indian fee land. *See, e.g., McDonald v. Means*, 309 F.3d 530, 538 (9th Cir. 2002) (distinguishing a BIA road from a right-of-way granted to the state "for a specific, non-Indian related purpose"); *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999) (finding that a congressional grant of a railroad right-of-way across reservation trust lands defeases tribal jurisdiction to the extent the grant's purposes require).

Navajo commercial regulations, moreover, for having heretofore evaded them. *See, e.g., Water Wheel*, 642 F.3d at 818 (quoting *Long Family Land and Cattle Co., Inc. v. Plains Commerce Bank*, 554 U.S. 316, 337 (2008)) (rejecting argument that tribe lacked jurisdiction over trespassing, nonmember holdover tenant for alleged lack of a consensual relationship and reiterating that "[f]or purposes of determining whether a consensual relationship exists under *Montana*'s first exception, 'consent may be established expressly *or by [the nonmember's] actions*.'"); JDUMF ¶¶49, 63.

The Navajo Nation's regulatory authority in this case also would be justified by application of *Montana*'s second exception. That exception is satisfied by a showing of "demonstrably serious" impacts on a tribe's sovereign interests posed by the activity of nonmembers, impacts that "imperil the political integrity, the economic security, or the health or welfare of the tribe." *Atkinson v. Shirley*, 532 U.S. 635, 659 (citation and internal quotation marks omitted); JDUMF ¶¶58-64. The Supreme Court has clarified that the purpose of the second *Montana* exception is to allow a tribe to "vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember *activity* on the land, within the limits set forth in our cases." *Plains Commerce Bank*, 554 U.S. at 336. In the instant case, commercial touring on the Navajo Reservation unconstrained by tribal regulatory authority "menaces" the political integrity and the health and welfare of the tribe, and comprises a serious "intrusion on tribal relations [and] self-government." *Id.* at 336, 341; JDUMF ¶¶65-68.

The State of Arizona does not recognize a right of recovery for the wrongful death of an unborn child who is not viable outside the womb and does not recognize many of

the claimants in this case as survivors/beneficiaries of the wrongful death estates of decedents, Butch Corey Johnson and the unborn child Corey Johnson. JDUMF ¶¶12-25. These claimants and the claim for the lost life of the unborn child are only cognizable in the courts of the Navajo Nation. To deny Navajo Nation courts jurisdiction over this matter "would infringe on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220.

iii. Tribal Adjudicatory Jurisdiction *a fortiori* Tribal Regulatory Authority

In *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), the Ninth Circuit Court of Appeals provided crucial guidance for determining when an Indian tribe will be held to have authority to *adjudicate* civil claims brought against nonmembers, once valid tribal authority to *regulate* the nonmembers' on-reservation conduct has been established. The court intimated that unless acknowledging tribal court jurisdiction in such instances would conflict with Supreme Court precedents, sound principles counsel in favor of affirming the existence of tribal adjudicatory jurisdiction. *See id*. at 814-16, 819. No Supreme Court precedents would conflict with this Court's recognition of the Navajo Nation's authority to adjudicate claims against Plaintiffs.

V. Conclusion

For the foregoing reasons, Jensen Defendants urge this Court to grant their Motion for Summary Judgment confirming Navajo Nation jurisdiction over the underlying lawsuit.

Respectfully submitted,

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February 27, 2012 — s/ Michael J. Barthelemy

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February 27, 2012 — s/ Geoffrey R. Romero with permission

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I hereby certify that on this 27th day of February, 2012, I electronically transmitted and mailed by first class mail, postage prepaid, a true and correct copy of the foregoing document to:

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