

No. 12-16958

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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EXC, INC., d/b/a EXPRESS CHARTERS, *et al.*,

Plaintiffs/Appellees,

v.

JAMIEN JENSEN, *et al.*,

Defendants/Appellants.

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On Appeal from the United States District Court for the District of Arizona  
United States District Judge James A. Teilborg (No. CV-10-08197)

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BRIEF *AMICUS CURIAE* OF THE NAVAJO NATION IN SUPPORT OF  
APPELLANTS

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**BRIEF *AMICUS CURIAE* OF THE NAVAJO NATION IN SUPPORT OF  
APPELLANTS**

The Navajo Nation respectfully submits this brief as *amicus curiae* in support of Appellants and for reversal of the decision of the U.S. District Court of Arizona in *EXC, Inc. v. Jensen*, No. CV-10-08197 (Aug. 9, 2012) (“*EXC II*”). The Navajo Nation files this brief as of right under Fed. R. App. P. 29(a) because the Nation is a sovereign government, like the United States and the states. Alternatively, the Navajo Nation states that all parties have consented to the filing.<sup>1</sup>

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<sup>1</sup> No counsel for any party authored any portion of this brief and no person or entity other than the Navajo Nation made a monetary contribution to the

**STATEMENT OF *AMICUS CURIAE* NAVAJO NATION**

This appeal concerns jurisdiction over a fatal traffic accident between a tour bus and a passenger car. The bus was touring the Navajo Nation, the passengers in the car were members of the Navajo Nation, and the accident occurred on a road within the boundaries of the formal Navajo Indian Reservation. The passengers and various of their family members are the appellants in this case (collectively, the “Jensens”). The tour bus was chartered by Express Charters (insured by National Interstate Insurance Company), pursuant to a Coach Service Agreement with Go Ahead Vacations, Inc., was owned by Conlon Garage, Inc., and was operated by Russell J. Conlon, all of whom are the appellees in this case (collectively, “EXC”). The road EXC traveled, Highway 160, traverses “almost 200 miles of pristine and scenic Navajo canyon lands and high desert” within the Navajo Reservation. *EXC v. Kayenta Dist. Ct.*, No. SC-CV-07-10 (Nav. Sup. Ct. September 15, 2010) (“*EXC I*”), slip op. at 9, ER-72.

The Navajo Nation is a sovereign Indian nation with a government-to-government relationship with the United States through its Treaty ratified in 1868. The Nation has the largest land base of any Indian nation, consisting of over 17,000,000 acres. *EXC I*, slip op. at 15, ER-78. Within the boundaries of the Nation are some of the most iconic locations in the American West, including

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preparation or submission of this brief.



Monument Valley Navajo Tribal Park, where many famous westerns were filmed and which EXC first visited while on its tour of the Nation. *Id.* at 9, ER-72. Other famous Navajo locations include Canyon de Chelly, operated as a National Monument by the National Park Service, and Four Corners Monument, a Navajo Nation park and the only location where four state boundaries meet.<sup>2</sup> National and international visitors also come to experience the unique culture of the Navajo people, exemplified by world-renowned Navajo rugs, jewelry, food, and architecture.

Numerous tour operators and millions of individual tourists visit the Navajo Nation annually. *See EXC I*, slip op. at 6, ER-69 (over 2.5 million tourists visited sites within the Nation in 2004). The approximately 10,000 miles of public roads these visitors use to tour the Nation may have been built and may be maintained by the Nation; the neighboring states of Arizona, New Mexico, or Utah; or the federal Bureau of Indian Affairs. *Id.*, slip op. at 15-16, ER-78-79. Many of these roads are narrow two-lane highways also used by Navajo Nation citizens to travel from one area of the Nation to another, resulting in contact between non-member touring companies and residents of the Nation such as occurred in this case.

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<sup>2</sup> *See Canyon De Chelly*, U.S. Dept. of the Interior, National Park Service (May 5, 2013), available at <http://www.nps.gov/cach/index.htm>; Navajo Nation Tourism Dept. (last visited May 9, 2013), available at <http://discovernavajo.com/fcp.html>.

Since 1972 the Nation has regulated tourism within its territory pursuant to the Navajo Nation Tour and Guide Services Act (“NNTGSA”), 5 N.N.C. §§ 2501-2505 (2005), ER-18-21, and the regulations, permits, and agreements issued under that Act. Whenever a tour company seeks to tour the Navajo Nation it is required by the NTGSA to obtain a permit from the Navajo Parks and Recreation Department. 5 N.N.C. § 2501(A). The permit generates revenue for the Department and assures compliance with the Nation’s safety and other requirements while the tour company is present within the Nation. *See also* 5 N.N.C. § 2501(B) (proof of insurance), (C) (permit fee); NNTGSA Regulations (“Regulations”), ER-22-27, Chapter I(A) (permit requirement) & (F) (requirement to enter into agreement setting terms and conditions and consenting to jurisdiction); Model Tourist Passenger Service Agreement (“Agreement”), ER-28-29. Given the Parks Department’s lack of enforcement resources, the Nation relies on tour operators to report their presence and register for a permit. *EXC I*, slip op. at 10, ER-73.

The Nation also regulates tour operators by adjudicating tort claims arising out of their activities, as it did in the suit brought by the Jensens that is at issue in this case. The Nation operates eleven judicial districts and its courts hear thousands of civil and criminal cases every year, providing fair and effective justice to members and nonmembers alike. *See EXC I*, slip op. at 22-24, ER-85-87,

(principles of due process, equal protection, right to counsel, and “other rights closely tracking the United States Bill of Rights are guaranteed by the Navajo Nation Bill of Rights” and “thousands of non-Navajos play important roles in Navajo government and society,” including in the Navajo Nation Bar); Judicial District Courts of the Navajo Nation - FAQs (May 6, 2013), available at <http://www.navajocourts.org/indexdistct.htm> (listing district courts); Bethany Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L.J. 1037 (2006) (empirical study showing Navajo court system displays no bias against nonmembers). The fairness concerns raised by the Supreme Court in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 337 (2008), are not, therefore, present here.

Because this case concerns the regulatory authority of the Navajo Nation over commercial activities that, by their very nature, are inextricably linked to the use of the Nation’s land, because the accident at issue was a result of such activities and took place within the Nation, and because Navajo Nation members were injured, some fatally, in the accident, the Nation has an unquestionably strong interest in this case, one that supports the Nation’s adjudication of the tort claim at issue.<sup>3</sup>

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<sup>3</sup> EXC initially named the Navajo Nation as a defendant in the District Court. However, as EXC sought no actual relief against the Nation in its complaint, it voluntarily dismissed the Nation as a party to the proceeding. Stipulation for

## ARGUMENT

The District Court stated that “[t]here is no question that the Navajo Nation has the right to regulate tourism on the reservation.” *EXC II*, slip op. at 9, ER-10. The court based this statement on the Nation’s power to exclude, citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), and *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011). *Id.* The court found, however, that the Nation’s power to exclude did not extend to the road on which the accident took place, due to the Supreme Court’s decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *EXC II*, slip op. at 6, ER-7. The court therefore applied the analysis in *Montana v. United States*, 450 U.S. 544, 564-67 (1981), to determine whether the Nation had jurisdiction to adjudicate the issues in this case. *EXC II, id.*

In *Montana*, the Supreme Court held that, with respect to non-Indians on non-Indian fee land, tribes retain the inherent power necessary to “protect tribal

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Voluntary Dismissal of Navajo Nation Defendant, ER-133. EXC separately named the Kayenta District Court, the Navajo Nation Supreme Court, and Judge Jennifer Benally of the Kayenta District Court as defendants. After the dismissal of the Navajo Nation as a defendant, the Navajo judicial defendants did not participate actively as parties and simply referred the District Court to the Navajo Supreme Court’s opinion in this case. Resp. to EXC’s Mot. for Summ. J., ER-135. The District Court did not enjoin the Navajo judicial defendants in its order and, consequently, they did not seek to participate as parties in this appeal. *See EXC II*, slip op. at 12, ER-13. The Navajo Nation as *amicus* here is expressing the views of the entire Navajo Nation government.

self-government” and to “control internal relations.” *Id.* at 564. The Court found that this inherent authority includes the following:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

*Id.* at 565-66 (citations omitted). These two types of authority have become known as “the *Montana* exceptions.”<sup>4</sup>

The Navajo Nation maintains that its inherent right to regulate tour bus activities extends throughout the Nation, including on all roads within the Nation, and that the analysis provided in *Montana* for non-Indian fee land does not apply here. Tour bus activities by their nature take place on roads, making regulation of

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<sup>4</sup> As quoted above, *Montana* requires the conduct at issue to “threaten[] or [have] some direct effect” on the tribe for its second exception to be met. *Id.* at 566; accord *Strate*, 520 U.S. at 457. The Court in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 (1997) held the same, and additionally cited in a footnote the “imperil” language also found in *Montana*. *Atkinson*, *id.* at 657-58 n.12 (quoting *Montana*, 450 U.S. at 566). Justice White, writing for only four members of the Court in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), opined that the second *Montana* exception requires conduct “that is demonstrably serious and imperils the tribe.” *Id.* at 431. In *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 341 (2008), the Court refers to the standard as “menaces,” but since the Court found that the *Montana* test did not apply in that case because the sale of land at issue was not “conduct,” this language is *dicta*.

the industry on those roads a necessity and essential to the Nation's sovereign right to govern. The Nation adopts the arguments of the Jensens and the decision of the Nation's Supreme Court that the Treaty of 1868 reserves the Nation's right to regulate commercial touring activities, that the Nation's consent to the construction and use of Highway 160 as a state highway did not waive that right, and that the stretch of Highway 160 on which the accident occurred is not equivalent to non-Indian fee land for purposes of *Strate* and *Montana*.

Even if this Court finds that the *Montana* analysis applies, however, the Nation retains its inherent right to regulate the non-member commercial touring activities in this case under both *Montana* exceptions, for the reasons set forth in Appellants' Brief and below. Moreover, the Nation's right to regulate in this case includes the right to adjudicate a tort claim by a Navajo citizen arising out of those commercial touring activities. *See Plains Commerce Bank*, 554 U.S. at 331-32 (characterizing tort claim filed by tribal members against non-Indian bank as a type of tribal regulation); *see also Strate*, 520 U.S. at 453 ("where 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").

**I. THE NAVAJO NATION HAS INHERENT AUTHORITY UNDER MONTANA’S FIRST EXCEPTION TO REGULATE EXC’S CONDUCT, WHERE EXC ENTERED THE NATION SPECIFICALLY FOR COMMERCIAL TOURING PURPOSES AND WAS SUBJECT TO NAVAJO LAW REQUIRING CONSENT TO NAVAJO JURISDICTION**

**A. EXC Consented to the Navajo Nation’s Jurisdiction by Entering the Nation to Engage in Commercial Tour Activities.**

Both the District Court and the Navajo Supreme Court found that EXC consented to the regulatory jurisdiction of the Nation when it entered the Nation with the intention to commercially tour. *EXC II*, slip op. at 10, ER-11; *EXC I*, slip op. at 14, ER-77; *Plains Commerce*, 554 U.S. at 337 (nonmembers may consent expressly in an agreement or by their conduct); *Water Wheel*, 642 F.3d at 818 (same). *See also Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (inherent tribal authority to tax “non-Indians entering the reservation to engage in economic activity”). In addition, the fact that, prior to the accident, EXC left Highway 160 and entered Monument Valley Tribal Park, on Navajo trust land, bolsters the Nation’s regulatory power. *See Water Wheel*, 642 F.3d at 811-12 (Indian nation has inherent authority to regulate non-Indians on tribal lands). EXC’s consent to jurisdiction by its conduct lasted as long as EXC remained within the Nation’s territorial boundaries, regardless of the roads it used to tour.

Moreover, the NNTGSA required EXC to obtain a permit and, under the Regulations, required EXC to enter into an agreement with the Navajo Nation, under which EXC would have been required to acknowledge its consent to Navajo Nation jurisdiction. NNTGSA § 2501(A) (requiring permit), ER-18; Regulations Ch. 1(F) (requiring agreement and consent), ER-23; Agreement ¶ 2 (requiring consent), ER-28. As the District Court explained,

Plaintiffs [EXC] cannot claim that, by ignoring the Nation's laws, they have not consented to the Nation's jurisdiction. The Court agrees with the Navajo Nation Supreme Court's holding that "no person or entity may deny the Navajo Nation's regulatory and adjudicatory jurisdiction on the basis of a violation of [the Nation's] laws."

*EXC II*, slip op. at 10, ER-11.

The District Court erred, however, in its interpretation of the Agreement that EXC should have signed pursuant to the NNTGSA. Under the District Court's reading, the Navajo Nation surrendered its otherwise inherent authority to regulate EXC's conduct by including the following provision in the Agreement: "Permittee consents to the jurisdiction of the Navajo Nation courts relating to the activities under this Agreement *on lands within the jurisdiction of the Navajo Nation.*" *EXC II*, slip op. at 9, ER-10 (quoting Agreement ¶ 2, ER-28) (emphasis added). According to the District Court, because the Nation allegedly cannot exclude motorists from a state highway, that highway is not "within the jurisdiction of the



Navajo Nation.” *EXC II*, slip op. at 10-11, ER-11-12. The District Court provided no further explanation for its construction of the Agreement.<sup>5</sup>

The Navajo Nation clearly did not intend to surrender its jurisdiction over state highways in its mandatory Tourist Passenger Service Agreement. After all, the whole purpose of the Agreement was to set forth the terms and conditions with which tour companies must comply and to provide for consent to Navajo jurisdiction. *See* Regulations Ch. 1(F), ER-23. Given the nature of Navajo tours – in this case the tour traversed almost 200 miles of contiguous Navajo Nation territory from its northeastern to western external borders, *see EXC I*, slip op. at 7, ER-70 – that goal could not be accomplished if the Nation did not insist on consent to jurisdiction when the tour bus was on the road.

Furthermore, the consent provision in the Agreement is based on the requirements of the Regulations, which state at the outset that the NNTGSA “provides for the regulation of tour operations *within the jurisdictional limits of the Navajo Nation.*” ER-22 (emphasis added). This language makes even clearer the intent in the NNTGSA to include the entire territorial jurisdiction of the Navajo Nation in the consent provision. The proper construction of the phrase in question therefore must be that “jurisdiction” refers to the *overall* jurisdiction of the Navajo

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<sup>5</sup> EXC did not make this argument in its briefing before the District Court, and therefore neither the Jensens nor the Navajo Nation had the opportunity to challenge that construction.

Nation, not to a legal definition of the word that assumes that the Nation has already conceded jurisdiction in some circumstances or over some areas of its territory.

Indeed, this broader interpretation of “jurisdiction” is confirmed by Navajo Nation law. The jurisdiction of the Navajo Nation is defined in 7 N.N.C. § 254(A) (2005) as “*all* land within the exterior boundaries of the Navajo Indian Reservation” (emphasis added). The legislative history of this provision further explains that “[i]t is the intent of these amendments that the reference to ‘all land’ is comprehensive and includes rights-of-way, fee land, and other lands, notwithstanding the nature of title thereto, within the exterior boundaries of the Navajo Reservation.” Navajo Tribal Council Res. No. CJY-57-85 (July 25, 1985), Preamble ¶ 7 (reproduced at 7 N.N.C. § 254 “History”).

The Navajo Supreme Court treats this interpretation of the consent-to-jurisdiction language under the NNTGSA as so obvious that there is no need for discussion, stating that the consent clause is “clear and unambiguous.” *EXC I*, slip op. at 12, ER-75. The court subsequently explains that Navajo jurisdiction extends to all land within the exterior boundaries of the reservation, including rights-of-way, based on the definition of the Nation’s territorial jurisdiction in 7 N.N.C. § 254(A) and the definition of Indian country in 18 U.S.C. § 1151, on which the

Navajo Nation definition is based. *EXC I*, slip op. at 15-16, ER-78-79.<sup>6</sup> *See also Manygoats v. Cameron Trading Post*, 8 Nav. R. 3, 16 (Nav. Sup. Ct. 2000) (“Navajo Nation ‘reservation’ for purposes of the Treaty of 1868 includes ‘all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.’ 18 U.S.C. § 1151.”) (emphasis omitted).

It is an established principle of construction that a federal court should defer to a tribe’s interpretation of its own laws. *Hinshaw v. Mahler*, 42 F.3d 1178, 1180 (9th Cir. 1994) (“The [tribal court’s] interpretation of tribal law is binding on this court.”); *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988) (“[tribal] interpretation of tribal law is binding on this court”); *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 982 (9th Cir. 1983) (“this case involves a genuine issue of tribal ordinance construction which must be left to the tribal court for resolution”); *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2d Cir. 1997) (“[T]o hold that the [tribal court] is a nullity under the tribal

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<sup>6</sup> The definition of the Navajo Nation’s territorial jurisdiction in the Navajo Nation Code states that it “shall extend to Navajo Indian Country,” thus referencing the definition of Indian country in 18 U.S.C. § 1151. 18 U.S.C. § 1151, the widely accepted definition of Indian country, makes clear that Indian country means “*all* land within the limits of any Indian reservation . . . including rights-of-way running through the reservation.”

constitution would require this court to construe tribal law. This we may not do.”). *See also Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (“tribal courts are best qualified to interpret and apply tribal law”) (internal citations omitted); *Attorney’s Process & Investigation Services, Inc. v. Sac & Fox Tribe*, 609 F.3d 927, 943 (8th Cir. 2010) (“rule is clear that federal courts do not conduct de novo review over tribal court rulings under tribal law”). *Compare West v. AT&T Co.*, 311 U.S. 223, 236 (1940) (“[A]s was intimated in the Erie Railroad case, the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts”).

The Nation’s regulatory jurisdiction therefore applied once EXC entered the Nation’s boundaries to commercially tour the Nation and until such time as it left the Nation. Any other construction would be contrary to the principles of consent by conduct as confirmed in *Plains Commerce* and *Colville* and agreed to by both the District Court and the Navajo Supreme Court, and would be contrary to the Nation’s interpretation of its own laws. *See also Williams v. Lee*, 358 U.S. 217, 223 (1959) (upholding the “authority of Indian governments over their reservations”). It also would render the Nation’s ability to uniformly and consistently regulate touring a nullity because that regulation would be dependent on the vagaries of the road system that the commercial touring company chose to use, which could include any combination of BIA, state, or tribal roads. *See Smith*

*v. Salish Kootenai College*, 434 F.3d 1127, 1135 (9th Cir. 2006) (*en banc*) (“Our inquiry is not limited to deciding precisely when and where the claim arose . . . . Rather, our inquiry is whether the cause of action . . . bears some direct connection to tribal lands.”)

**B. The Nation’s Adjudication of the Jensens’ Tort Claim, which Arose Directly from EXC’s Touring Activities, has the Necessary Nexus to EXC’s Consent to Regulation of those Activities.**

EXC explicitly consented to the jurisdiction of the Navajo Nation courts. Regulations Ch. 1(F) (“Consent to Navajo Laws and Courts”), ER-23; Agreement ¶ 2 (consent to “jurisdiction of the Navajo Nation Courts relating to the activities under this Agreement”), ER-28. *See also* Navajo Nation Long-Arm Statute, 7 N.N.C. § 253a(C).<sup>7</sup> Even without these specific references to tribal court jurisdiction, however, because the adjudication of the Jensens’ tort claim in Navajo

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<sup>7</sup> The Long-Arm Statute provides for Navajo court jurisdiction over nonmembers who consent to jurisdiction by their conduct, including (1) engaging in “commercial dealings . . . within the territorial jurisdiction of the Navajo Nation,” § 253a(C); (2) “causing tortious injury by any act or omission within the Navajo Nation,” § 253a(C)(3); (3) “causing tortious injury in the Navajo Nation by an act or omission outside the Navajo Nation if he or she regularly does or solicits business, . . . or derives substantial revenue from . . . services rendered in the Navajo Nation, § 253a(C)(4); and (4) by “any action or inaction outside this jurisdiction which causes actual injury or damage within the Navajo Nation, where such injury or damage was reasonably foreseeable,” § 253a(C)(9). EXC therefore consented to the jurisdiction of the Navajo Nation courts both under the Navajo Supreme Court’s interpretation of the NNTGSA consent provision (the first two subsections cited above) and the District Court’s interpretation (the second two subsections).

court is an aspect of the Nation's regulation of EXC's activities, and because the Jensens' claim arose directly from those activities, EXC's consent to regulation, through its entry into the Navajo Nation, has the nexus required by *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656-57 (1997) (a tribe's assertion of civil authority over a nonmember must be in the same area as the nonmember's consensual relationship with the tribe).<sup>8</sup>

The nexus between EXC's consent to Navajo regulation of its tour operations and the adjudication of the Jensens' claim in Navajo court is one of the primary distinctions between this case and *Strate*. In *Strate*, the consent by the non-Indian defendant arose from its subcontract with a tribal corporation to perform landscaping work. *Strate*, 520 U.S. at 443. The Court found that the subcontract had no connection to the accident at issue (the record did not even show "whether [defendant] was engaged in subcontract work at the time of the accident," *id.*), and that the tribes in that case were "strangers" to the accident, which involved no tribal members. *Id.* at 457. The tribes in *Strate*, moreover, did

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<sup>8</sup> The Navajo Nation also has the requisite adjudicatory authority over the Jensens' claims pursuant to *Strate* and *Water Wheel*: the Nation's exercise of its adjudicatory authority here did not exceed its regulatory authority, *Strate*, 520 U.S. at 453, and "the important sovereign interests at stake," *Water Wheel*, 642 F.3d at 816, which are discussed throughout this brief and Appellants' brief, justify the extent to which the Nation exercised that adjudicatory authority.

not seek to regulate any commercial activity through adjudication of the tort claim in that case.

Here, driving on roads within the Navajo Nation is an essential aspect of the commercial touring activities being regulated, and in fact gave rise to the accident at issue. Further, Navajo regulation of commercial touring activities depends at least in part on adjudication of tort claims arising from those activities. Requiring tour operators to compensate other travelers for injuries occurring on roads within the Nation under the Nation's tort laws is an extension of the Nation's regulation of commercial tourism. *See Smith*, 434 F.3d at 1140 (“The Tribes’ system of tort is an important means by which the Tribes regulate the domestic and commercial relations of its [sic] members”).

In addition, a tour operator's knowledge that it may be subject to suit in the Nation's courts helps ensure that the operator adheres to the Nation's regulations and helps prevent the precise situation that happened here, where the operator evaded the NNTGSA permit requirements. Relying on adjudication as part of the regulatory scheme is especially important where there are few resources available for enforcement. *See EXC I*, slip op. at 19, ER-82 (“Suits pressed in our courts concerning alleged negligent operation of such vehicles, whether by the Navajo Nation directly or otherwise, is an effective method for ensuring compliance with our laws.”).

There is therefore a clear nexus between adjudication of the Jensens' tort claim and EXC's consent to jurisdiction, such that the Nation has the inherent authority to regulate Appellees' conduct and adjudicate claims arising out of such conduct under *Montana's* consensual relationship exception.

## **II. REGULATION OF COMMERCIAL TOURING ACTIVITIES IS VITAL TO THE SAFETY OF THE NAVAJO NATION AND KEY TO THE NATION'S ECONOMIC DEVELOPMENT, THUS SATISFYING MONTANA'S SECOND EXCEPTION**

The Navajo Nation extends over 17,000,000 acres and contains 10,000 miles of public roads. *EXC I*, slip op. at 15, ER-78. The Navajo Nation Tourism Department lists over 30 tourist attractions on its website and promotes tourism as a means of economic development for the Nation.<sup>9</sup> The Navajo Supreme Court noted that “[i]n 2004, over 2.5 million tourists visited scenic sites within the Navajo Nation.” *EXC I*, slip op. at 6, ER-69. With this much land and this much interest in touring, tour bus safety presents a significant concern for the Navajo Nation.

As the Navajo Supreme Court found, “[d]ue to their size, concerns with vehicle maintenance and driver fatigue, inattention, and speeding, and the narrowness, curves, and often rolling nature of Navajo Nation roads, tour buses are a potential public safety menace. Their conduct and the need to regulate that

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<sup>9</sup> Navajo Tourism Department (last visited May 9, 2013), available at <http://www.discovernavajo.com>



conduct have a direct impact on Navajo Nation interests.” *EXC I*, slip op. at 7, ER-70. *See also id.*, slip op. at 6, ER-69 (“As a matter of economics, culture and public welfare, the Navajo Nation must regulate the millions of visitors traveling to and from sites in its territory . . . . Tour buses are responsible not only for their passengers, but for the safety of other vehicles on our roadways and the safe and respectful interaction between cultures on Navajo sites.”); *id.*, slip op. at 19, ER-82 (“Unregulated tour buses can be a public safety menace.”).

Indeed, the motorcoach industry is notoriously unsafe: from 1990 until 2012, there have been at least 178 documented motorcoach crashes and fires throughout the United States, resulting in at least 317 deaths and 3,111 injuries.<sup>10</sup> The Federal Motor Carrier Safety Administration (“FMCSA”) reports that during the ten years between 2001 to 2010 there were an average of 17 motorcoach occupant fatalities annually; in 2011 alone, eight motorcoach crashes resulted in 28 occupant fatalities. U.S. Dep’t of Transp., FMCSA, *The Motorcoach Safety Action Plan Implementation Report 1* (Feb. 2013) (“Motorcoach Safety Action Plan”).<sup>11</sup> *See*

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<sup>10</sup> Advocates for Auto & Highway Safety, *Motorcoach Crashes & Fires Since 1990*, available at <http://www.saferoads.org/files/file/Motorcoach%20Crash%20List-%20February%202012.pdf>

<sup>11</sup> Available at <http://www.fmcsa.dot.gov/documents/congress-reports/Motorcoach-Safety-Action-Plan-Report-Enclosure-FINAL-February-2013-508.pdf>

*also* Nat'l Transp. Safety Bd., Special Report NTSB/SR-11/01, Report on Curbside Motorcoach Safety 15 (2011) (buses have a higher likelihood of fatal accident involvement than passenger cars and light trucks).<sup>12</sup>

The motorcoach industry also remains largely unregulated, so that reliance on federal regulation in the absence of regulation by the Navajo Nation would be of little avail. As one highway safety advocate noted, motorcoaches often carry more passengers than commuter airline flights and “operate in a much more dangerous and congested highway environment,” yet they are not required to meet the same safety standards as airlines or even passenger vehicles but instead “are governed by the same weak, ineffectual safety oversight and enforcement regime that is used for trucking freight.” *How Best to Improve Bus Safety on Our Nation’s Highways: Hearing Before the H. Comm. on Transp. & Infrastructure, 112th Cong. 2, 57-79 (2011) (statement of Jacqueline Gillan, Vice Pres., Advocates for Highway & Auto Safety).*<sup>13</sup> Recommendations by the National Transportation Safety Board have languished for decades, due largely to vigorous lobbying by the motorcoach industry. *See id.* at 66-67. Even congressionally mandated regulation to ensure the safety of motor coach travel has been stymied.

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<sup>12</sup> Available at <http://www.nts.gov/doclib/safetystudies/SR1101.pdf>

<sup>13</sup> Available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hrg66918/pdf/CHRG-112hrg66918.pdf>

*See Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136, 1139-1140 (D.C. Cir. 2005).

What federal regulation there is of the motorcoach industry is by-and-large unenforced. Gillan, *supra* at 75. Even when motor carriers have been ordered to stop operations for safety reasons, they often restart their businesses under different company names, leaving law enforcement officials – most typically after a tragic crash – to sort out and prove which companies are conducting illegal operations. *See id.* at 61. Recently passed registration requirements seemingly address this issue, requiring applicants to have “disclosed any relationship involving common ownership, common management, common control, or common familial relationship between that person and any other motor carrier” or applicant for the prior three years. Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405, 777, § 32101(a) ‘(1)(C)’ (2012) (internal quotation marks omitted).<sup>14</sup> These requirements are eviscerated, however, by the widespread practice of informal and unregulated leasing arrangements that allow an unsafe or unregistered motor carrier to lease its vehicles and drivers to another motorcoach company with insurance and operating authority. *See Report on*

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<sup>14</sup> Available at <http://www.gpo.gov/fdsys/pkg/PLAW-112publ141/pdf/PLAW-112publ141.pdf>

Curbside Motorcoach Safety, *supra*, at 12-13; *see also* How Best to Improve Bus Safety on Our Nation's Highways: Hearing Before the H. Comm. on Transp. & Infrastructure, 112th Cong. 2, 36-48 (2011) (statement of Anne S. Ferro, FMCSA Administrator).<sup>15</sup>

These considerations distinguish the safety concerns raised by the commercial tour bus industry from those of the automobile industry and highlight the difference between the accident that occurred here and the one in *Strate*. *See EXC II*, slip op. at 11-12, ER-12-13. The Nation has attempted to address these safety issues at least in part through the NNTGSA regulatory scheme. The Regulations require tour bus companies to provide proof of insurance; have trained employees who are certified in first aid and CPR and hold valid driver's licenses; transport no more than the permitted number of passengers; and remain on established roads. *Id.* Ch. 1(C), (D); Ch. 2(D)(2) & (5), (E)(2) & (3); Ch. 3(A)(2), ER-22, 24-26. The Tourist Passenger Service Agreement additionally requires that

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<sup>15</sup> Available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhr66918/pdf/CHRG-112hhr66918.pdf>. The situation at hand is an example of just such an opaque leasing arrangement. The tour bus involved in the accident was owned by Conlon Garage of Fort Collins, Colorado but was operated pursuant to a coach service agreement between EXC, a Nebraska corporation sharing the same mailing address as Conlon Garage, and Go Ahead Vacations, a Massachusetts corporation. *EXC I*, slip op. at 2; ER-33-38.

all tour vehicles be “in good mechanical condition” and that “safety equipment is provided and available.” *Id.* ¶ 9(g), ER-29.

The Nation regulates the commercial touring industry not only for safety concerns but also because tourism is key to the Nation’s economy. *See* Navajo Nation 2009-2010 Comprehensive Economic Development Strategy (“Plan”) at 44-45, 53-54.<sup>16</sup> Over ten million tourists visited sites on and near the Navajo Nation in 2007. *Id.* at 53, 130 (Table 28A).<sup>17</sup> In 2002, tourists spent over \$100 million in connection with their tours of these sites, *id.* at 53, and the Navajo Nation Division of Economic Development is considering ways to capture more of these revenues, *id.* at 44. By comparison, the Nation’s top two sources of revenues – taxes and coal mining – brought in \$70.9 million (all taxes combined) and \$62.4 million, respectively, in FY 2008, *id.* at 12, and revenues from coal mining are decreasing due to mine closures and reduced operations at coal-fired power plants, *see id.*<sup>18</sup>

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<sup>16</sup> Available at [http://www.navajobusiness.com/pdf/CEDS/CED\\_NN\\_Final\\_09\\_10.pdf](http://www.navajobusiness.com/pdf/CEDS/CED_NN_Final_09_10.pdf)

<sup>17</sup> The Antelope Point Marina and Resort, located within the Navajo Nation and referenced in the Plan at 44-45, opened in 2008 and is already drawing significant numbers of tourists, according to Navajo Nation Parks & Recreation Department internal statistics.

<sup>18</sup> These statistics do not include gaming revenues. The Navajo Nation’s first casino opened at the end of 2008 and two others have opened subsequently.

Pursuant to the NNTGSA, the Navajo Nation Division of Economic Development issues permits setting the conditions for touring and collects permit fees. NNTGSA §§ 2501 (issuing permits); 2502 (adopting rules to implement Act), ER-18-19.<sup>19</sup> The conditions include requirements to portray the Navajo Nation accurately and in a favorable light, essential elements in a plan to develop tourism. *See, e.g.*, NNTGSA § 2502, ER-19; Regulations Ch. 3(A)(1), ER-26; Agreement ¶ 9(c), (i), ER-29; Navajo Tribal Council Res. No. CN-82-72 (Nov. 2, 1972), ¶ 5. Permit fees are used to pay for the facilities, administration, and other implementation costs of a tourism program. *See* Res. No. CN-82-72, ¶ 5 (regulation required to ensure that commercial tour operations “bear an equitable share of the financial burdens necessary to provide and maintain the utilized resources and services”).

The ability to address both safety and economic concerns is vital to the Nation’s ability to run its own affairs. These are the very concerns that were singled out by the Court in *Montana* as areas of retained inherent tribal jurisdiction. *Montana*, 450 U.S. at 566 (conduct that “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe”). The Nation’s efforts to regulate commercial touring activities, through

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<sup>19</sup> Amendments to the NNTGSA enacted in February 2005 transferred responsibility for implementing the Act to the Navajo Parks & Recreation Department, within the Division of Natural Resources.

the NNTGSA regulatory scheme and the Nation's courts, specifically address these concerns. *See also Smith*, 434 F.3d at 1133 (“‘tribal self-government’ is at the heart of tribal jurisdiction,” citing *Montana*, 450 U.S. at 564).

Further, commercial touring activities involve the use of Navajo Nation lands, “one of the tribe’s most valuable assets.” *Water Wheel*, 642 F.3d at 818. *See also Plains Commerce Bank*, 554 U.S. at 318, 334-35 (sovereign interest in managing tribal land); *Smith*, 434 F.3d at 1131 (“the tribes hold territory reserved by the United States for the tribes as their principal physical asset”). As this Court explained in *Water Wheel*, preventing the Nation from regulating the commercial use of its lands would “not only deprive[] the [Nation] of its power to govern and regulate its own land, but also of its right to manage and control an asset capable of producing significant income. Thus . . . *Montana*’s second exception would provide regulatory jurisdiction.” *Water Wheel*, 642 F.3d at 819. *See also Brendale v. Confed. Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 457-58 (1989) (Blackmun, J.) (upholding zoning regulation of tribal land). Considering the dangerous nature of the tour bus industry, as well as the key role tourism plays in the Nation’s economic development, the regulation here meets even the heightened test suggested by the Supreme Court in *Plains Commerce*. *See* n.3, *supra*.

## CONCLUSION

This Court should overturn the decision of the District Court.

Respectfully submitted,

s/Paul S. Spruhan

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May 22, 2013



## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This Brief uses a proportional typeface and 14-point font, and contains 6,025 words.

May 22, 2013

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**ADDENDA**

**\*3167 7 NAVAJO CODE § 254**

**NAVAJO NATION CODE ANNOTATED  
TITLE 7. COURTS AND PROCEDURE  
CHAPTER 3. JUDICIAL BRANCH  
SUBCHAPTER 3. DISTRICT COURTS**

*Current through December 2009.*

**§ 254. Territorial jurisdiction**

A. The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, all land owned in fee by the Navajo Nation, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians.

B. The Courts of the Navajo Nation may also exercise jurisdiction over any action for probate, domestic relations, child custody, adoption and Navajo Nation benefits and services, in which a party is a Navajo resident of the Hopi-Partitioned Lands.

**HISTORY**

CO-72-03, October 24, 2003.

CJA-11-00, January 28, 2000.

CD-94-85, December 4, 1985.

CJY-57-85, July 25, 1985.

CMY-28-70, May 7, 1970.

Preamble. CJY-57-85 contained the following preamble:

"7. It is the intent of these amendments that the reference to 'all land' is comprehensive and includes rights-of-way, fee land, and other lands, notwithstanding the nature of title thereto, within the exterior boundaries of the Navajo Reservation, Eastern Navajo Agency, dependent Navajo communities, Navajo Indian allotments and all lands held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians. Nothing herein shall be construed as constituting authorization for the purchase or lease of lands by any Band of Navajo Indians; and"

"8. 'Dependent Navajo Indian Communities' is intended to encompass all lands currently within the Eastern Navajo Agency and such other lands as may be determined consistent with federal law to constitute dependent Navajo Indian communities."

**ANNOTATIONS****1. Concurrent jurisdiction**

In determining whether Navajo Tribal Court had concurrent jurisdiction over ejectment and trespass action brought in district court, Court of Appeals would consider statutes of Navajo Nation. U.S. v. Tsosie, 92 F.3d 1037 (10th Cir. (N.M.) 1996). Courts ↻510

**\*3168 2. Outside reservation**

Dispute between two Navajo Indians over land located in Navajo Indian country but outside reservation boundaries fell within jurisdiction of Navajo Tribal Court. U.S. v. Tsosie, 92 F.3d 1037 (10th Cir. (N.M.) 1996). Indians ↻221

"... [R]eading 7 N.T.C. § 254 as including the Moencopi Administrative Unit within its definition of Navajo Indian Country is not inconsistent with federal law. The Moencopi Administrative Unit lies within the exterior boundaries of the Navajo Indian Reservation and

it has yet to be decided that the Hopi Tribe holds an exclusive interest in the lands." *Taylor v. Bradley*, 6 Nav. R. 147, 149 (Nav. Sup. Ct. 1989).

### 3. Scope of jurisdiction

"After reviewing the documents submitted by both sides in this case, we believe we do not have to reach the question of whether the parcel is within the territorial jurisdiction of the Navajo Nation. This is because Cabintels is bound by an explicit consent to Navajo jurisdiction in the lease between NHA and the Navajo Nation." *Cabintels Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03, slip op. at 3-4 (Nav. Sup. Ct. February 11, 2004).

"Petitioner claims that, regardless of any Navajo Nation definition of its territorial jurisdiction, e.g. 7 N.N.C. § 254 (1995), which definition includes land owned in fee by the Nation, the Labor Commission must show that the parcel is a 'dependent Indian community' under the federal Indian Country statute, 18 U.S.C. § 1151, and the United States Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998)."

"History shows that the Navajo Tribal Council gave the Navajo courts their jurisdiction. Consequently, the Navajo courts can exercise only that jurisdiction granted by the Navajo Tribal Council." *Plummer v. Brown II*, 6 Nav. R. 88, 90 (Nav. Sup. Ct. 1989), citing *Nez v. Barney*, 3 Nav. R. 126, 129 (1982).

### 4. Elections

\*3169 "Furthermore, the use of the definition of the Navajo Nation's modern territorial jurisdiction, 7 N.N.C. § 254, to demarcate the land upon which one must reside if he or she desires to run in an election is itself unreasonable." In the Matter of the Appeal of Vern Lee, No. SC-CV-32-06, slip op. at 7 (Nav. Sup. Ct. August 11, 2006).

### 5. Subject matter jurisdiction

"Subject matter jurisdiction means that a court has authority over a case or issue, as defined by Navajo Nation statutory law and the Treaty of 1868." *Navajo Transport Services, et al. v. Schroeder, et al.*, No. SC-CV-44-06, slip op. at 3 (Nav. Sup. Ct. April 30, 2007).

Current through December 2009.

CJY-57-85

Class "C" Resolution  
No BIA Action Required.

RESOLUTION OF THE  
NAVAJO TRIBAL COUNCIL

Amending Title 7 of the Navajo Tribal Code,  
Section 254, Jurisdiction - Territorial

WHEREAS:

1. The Navajo Tribal Council is the governing body of the Navajo Nation; and
2. The Advisory Committee of the Navajo Tribal Council, pursuant to Section II, C, of its Plan of Operation adopted by Resolution CJA-1-81, is responsible for recommending legislation to the Navajo Tribal Council and by Resolution ACJY-146-85, recommended that the Navajo Tribal Council amend 7 NTC §254, Jurisdiction - Territorial; and
3. There is a need for purposes of clarification and consistency of Navajo law for modifications to the territorial jurisdiction definition found in Title 7 of the Navajo Tribal Code, Section 254, said modifications being attached hereto as Exhibit "A", with additions underscored and deletions overstruck as indicated in Exhibit "B"; and
4. Recent Federal case law which is based on the Federal definition of "Indian Country" suggests Tribal jurisdiction over dependent Indian communities, allotments and all trust lands would be lawful. The existing reference to such jurisdiction needs clarification by using the same language found in the Federal definition of "Indian Country"; and
5. Recent Navajo regulatory laws (e.g., water code, tax code, juvenile code, fireworks, etc.), can be better enforced by clarifying the existing territorial definition; and
6. The Judiciary Committee of the Navajo Tribal Council, by resolution, has recommended the proposed amendments of 7 NTC Section 254, (Exhibit "C"); and
7. It is the intent of these amendments that the reference to "all land" is comprehensive and includes rights-of-way, fee land, and any other lands, notwithstanding the nature of title thereto, within the exterior boundaries of the Navajo Reservation, Eastern Navajo Agency, dependent Navajo communities, Navajo Indian allotments and all lands held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians. Nothing herein shall be construed as constituting authorization for the purchase or lease of lands by any Band of Navajo Indians; and

Addendum 2

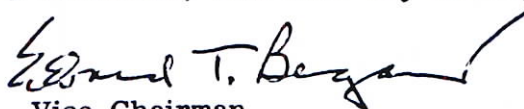
8. Dependent Navajo Indian communities is intended to encompass all lands currently within the Eastern Navajo Agency and such other lands as may be determined consistent with Federal law to constitute dependent Navajo Indian communities.

NOW THEREFORE BE IT RESOLVED THAT:

The Navajo Tribal Council hereby adopts the proposed amendments of 7 NTC, Section 254, attached hereto and incorporated herein as Exhibit "A".

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 64 in favor, 0 opposed and 1 abstained, this 25th day of July, 1985.



Vice Chairman  
Navajo Tribal Council



Exhibit "A"

PROPOSED AMENDED  
7 NAVAJO TRIBAL CODE SECTION 254

The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to, the Navajo Tribe or any Band of Navajo Indians.

PROPOSED AMENDMENTS TO  
7 NAVAJO TRIBAL CODE SECTION 254

~~"(a)--The territorial jurisdiction of the Navajo Tribe, and of the Navajo Tribal Courts, shall extend to and include Navajo Indian country."~~

~~"(b)--For the purpose of this section, the term Navajo Indian country shall be defined as and shall include all land within the exterior boundaries of the Navajo Reservation as the same may exist from time to time, including rights of way and fee land within such boundaries, all land included within the exterior boundaries of the Eastern Navajo Agency, land management districts 15, 16, and 19, all land not included above administered by the Federal Indian Service for the benefit of dependent Navajo Indian communities, all lands owned in fee or leased by the Navajo Tribe of Indians and all land not otherwise mentioned herein included within the definitions of the territorial jurisdiction of the Navajo Tribal Courts provided in the Resolution of December 18, 1945, and Resolutions 60-69-58 and CJA-5-59."~~

~~"(c)--It is the intent of the Navajo Tribal Council that the Navajo Tribe's jurisdiction shall extend to and include all areas within the exterior boundaries of lands administered by the Federal Indian Service for the benefit of dependent Navajo Indian communities," and that such jurisdiction shall be in no way dependent upon the title to the land within such areas:~~

~~"(d)--All predominantly non-Indian communities within the exterior boundaries of Navajo Indian Country are excepted from and not included within the definition of Navajo Indian Country," in compliance with 18 U.S.C. § 1151.~~

"The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to, the Navajo Tribe or any Band of Navajo Indians."



Exhibit "C"

RESOLUTION OF THE JUDICIARY COMMITTEE  
OF THE NAVAJO TRIBAL COUNCILRecommending to the Navajo Tribal Council, Amendment of Title 7  
of the Navajo Tribal Code, Section 254 Jurisdiction - Territorial

## WHEREAS:

1. The Judiciary Committee of the Navajo Tribal Council, pursuant to Section IV, B, 6 of their Plan of Operation adopted by Resolution ACMA-35-84, has the following responsibility and authority:

"To recommend such legislation as will, in the opinion of the Committee, improve the Navajo Judicial System, including its functions of implementing the laws of the Navajo Nation"; and

2. There is a need for purposes of clarification and consistency of Navajo Law for minor modifications to the territorial jurisdiction definition found in the Navajo Tribal Code, Section 254; and

3. The existing territorial definition is in need of amendment because the BIA has renumbered Eastern Agency land management district 15 to 20 and the present Section 254 does not reflect this change; and

4. Recent federal case law which is based on the federal definition of "Indian Country" suggests tribal jurisdiction over dependent Indian communities, allotments and all trust lands would be lawful. The existing reference to such jurisdiction needs clarification by using the same language found in the federal definition of "Indian Country"; and

5. Recent tribal regulatory laws (e.g. water code, tax code, juvenile code, fireworks, etc.) can be better enforced by clarifying the existing territorial definition; and

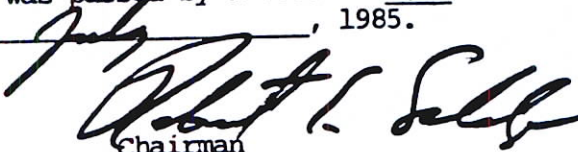
6. The Judiciary Committee of the Navajo Tribal Council finds the drafted proposed amendments of 7 NIC Section 254 (Exhibit "A") are necessary and appropriate to clarify jurisdiction of the Navajo Nation and strengthen tribal sovereignty.

## NOW, THEREFORE, BE IT RESOLVED THAT:

The Judiciary Committee of the Navajo Tribal Council hereby adopts and recommends to the Navajo Tribal Council adoption of the proposed amendments of 7 NIC Section 254, attached hereto and incorporated herein as Exhibit "A".

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Judiciary Committee of the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 4 in favor and 0 opposed, this 8 day of July, 1985.

  
Chairman  
Judiciary Committee

CN-82-72

Class "B" Resolution  
Area Approval Required.

RESOLUTION OF THE  
NAVAJO TRIBAL COUNCIL

The Adoption of the Regulation of Tourist  
Passenger Services Within the Navajo Nation

WHEREAS:

1. By Resolution ACS-364-72, the Advisory Committee of the Navajo Tribal Council has recommended to the Navajo Tribal Council to enact this resolution regulating tourist passenger services within the Navajo Nation, and

2. The Navajo Nation contains many areas of scenic beauty and holds great attraction for tourists and other visitors, and

3. A number of public transportation companies, organizations, associations and the like, are taking advantage of the natural wonders of the Navajo Nation by conducting tours and other sightseeing operations, and

4. These operations are utilizing Navajo roads and facilities, and benefitting from protection by the police force and other safety and administrative departments of the Navajo Nation, and by their operation reflect on the dignity and image of the Navajo Nation, and

5. It has become necessary to regulate these activities to insure that a proper and fitting reflection on the Navajo Nation is maintained, and that operations so utilizing Navajo resources bear an equitable share of the financial burdens necessary to provide and maintain the utilized resources and services, and

6. The Navajo Tribal Council, pursuant to Tribal Council Resolution CMY-33-70, May 12, 1970, has the exclusive authority to grant, deny or withdraw the privilege of doing business within the Navajo Nation, and to regulate the same.

NOW THEREFORE BE IT RESOLVED THAT:

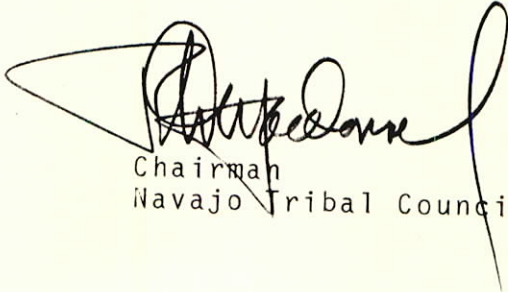
The Navajo Tribal Council hereby adopts the attached Exhibit "A", Regulation of Tourist Passenger Services Within the Navajo Nation, which is hereby incorporated and made a part of this resolution.

Addendum 3



CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 51 in favor and 0 opposed, this 2nd day of November, 1972.



Chairman  
Navajo Tribal Council

RECEIVED

DEC 1 - 1972

THE NAVAJO TRIBE  
LEGAL DEPARTMENT

## EXHIBIT "A"

## Regulation of Tourist Passenger Services

1. No person, firm, association or corporation shall, either directly or indirectly, furnish, provide or conduct passenger transportation for hire, for the purposes of touring, visiting, sightseeing or like activities within the Navajo Nation unless said person, firm, association or corporation shall first obtain a permit from the Commerce Department of the Navajo Nation to perform such activities within the Navajo Nation.

2. Any person, firm, association or corporation desiring to obtain such permit shall deliver to the Commerce Department of the Navajo Nation a true copy of the articles of association, partnership, incorporation or organization, whichever the case may be, together with a verified statement showing the rates to be charged for the activity involved, and the basis therefor; and a proposed schedule of routes, distances, and times to be covered by such activity.

3. (a) At the time of filing said verified statement, each person, firm, association or corporation, shall pay the Treasurer's Office of the Navajo Tribe a fee in accordance with the following schedule:

A permit for: Daily (1 to 5 days) \$5.00 per day -  
Educational Student and Charitable  
Groups Only:

30 days	\$100.00
60 days	\$200.00
90 days	\$300.00
Annual	\$500.00

(b) The fee requirement of subsection (a) of this section shall not apply to any person, firm, association or corporation owned by an enrolled member of the Navajo Tribe for the first year such enrolled member shall engage in such passenger tourist services, if it shall be determined by the Commerce Department of the Navajo Nation, upon information submitted to such department, that payment of such fee shall be prohibitive to engaging in said services by such enrolled member. Such exemption from the payment of the required fee shall not extend beyond the first year of operation of such services by such enrolled member.

(c) Nothing in this section shall relieve any applicant from any other requirements of this act.

4. The Commerce Department is hereby authorized and directed to adopt, publish and enforce such reasonable rules, regulations and directives as are necessary or convenient to implement this act and to insure that all facilities, services,



vehicles and personnel engaged in the described activities conducted within the Navajo Nation are of such quality as will not reflect to the discredit of the Navajo Nation. The Commerce Department is granted such authority as is necessary to insure compliance with this act and with the rules, regulations and directives adopted and published pursuant to this act.

5. Upon payment of the required fee and upon satisfaction of the Commerce Department of the quality of the activity, the Commerce Department shall issue to the applicant a permit to perform such activities within the Navajo Nation. Provided, however, no such permit shall be issued unless the applicant shall first undertake in writing to hold the Navajo Nation harmless for any damages occasioned by the activities of such permittee within the Navajo Nation, and to indemnify the Navajo Nation for any liability which might accrue because of the activities of such permittee within the Navajo Nation. Such permit shall expire on the day specified on the permit and may be renewed by payment of such fee, as referred to in Section 3, and the filing of the copy and verified statement referred to in Section 2 of the act.

6. If, during the period of any permit, the Commerce Department shall determine that any such person, firm, association, or corporation holding such permit shall have failed to abide by the reasonable rules, regulations or directives herein adopted and published by the Commerce Department, a notification of such discrepancy shall be forwarded by the Commerce Department to such person, firm, association or corporation, requiring correction of the discrepancy within the ten (10) days of revocation of the permit. If such discrepancy is not corrected within ten (10) days, then, upon adequate notice and fair hearing in accordance with rules of procedures to be established by the Commerce Department, such permit shall be revoked and the applicable person, firm, association or corporation shall not be permitted to conduct such activities within the Navajo Nation until such discrepancies are corrected. After correction of such discrepancies, application for a new permit may be submitted in accordance with sections two (2) and three (3) of this act.

7. Upon denial or revocation of such license, an aggrieved party may appeal such denial or revocation, within fifteen (15) days, to the Navajo Court of Appeals for review, which Court is hereby specifically granted jurisdiction to hear such appeals. Review by the Court of Appeals shall be limited to questions of abuse of discretion and lack of a reasonable basis for such denial or revocation. After hearing the appeal, the Court of Appeals may either affirm or remand for further hearings by the Commerce Department in accordance with the decision of the Court of Appeals. Evidence or information not presented to the Commerce Department shall not be admissible before, or considered by the Court of Appeals. Appeals taken to the Court of

Appeals found to be frivolous or not based on reasonable grounds shall be considered in bad faith, and any party found by the Court of Appeals to have made an appeal in bad faith shall be subject to a fine not exceeding five hundred dollars (\$500.00). Appeals found to be in bad faith shall not be heard by the Court of Appeals.

8. All decisions of the Commerce Department shall be final and binding unless such appeal as hereinabove allowed is taken within fifteen (15) days of the decisions of the Commerce Department.

9. Any person, firm, association or corporation who shall furnish, provide or conduct any of the prescribed activities without first obtaining and without having in its possession a valid permit therefor shall be subject to exclusion from the Navajo Nation under the provisions of Navajo Tribal Council Resolution CN-60-56 (A56), and with due process of law.

10. Irrespective of any exclusion proceedings, the Commerce Department is hereby authorized to initiate an action in the Trial Court of the Navajo Tribe, at the discretion of the Commerce Department and when circumstances warrant, to recover on behalf of the Navajo Nation an amount not exceeding five hundred dollars (\$500.00) for each separate occurrence. Jurisdiction over such actions is hereby specifically granted to the Trial Court of the Navajo Tribe.

11. If any provision of this act or the application of such provision to any person, firm, association or corporation or circumstances shall be held invalid, the remainder of the act and the application of such provision to persons, firms, associations or corporations or circumstances other than those as to which it is held invalid shall not be affected thereby.



**CERTIFICATE OF SERVICE**

I hereby certify that on May 22, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Jill Elise Grant