IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-16958

EXC INC., a Nevada Corporation dba D.I.A. Express, Inc/, et al.,
Plaintiffs-Appellees,

v.

JAMIEN RAE JENSEN, et al.,
Defendants-Appellants,

BRIEF OF AMICI CURIAE NATIONAL CONGRESS OF AMERICAN INDIANS, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, NEZ PERCE TRIBE, and PRAIRIE BAND POTAWATOMI NATION

Sarah Krakoff
University of Colorado Law School
Campus Box 401
University of Colorado, 80309
(303) 492-2641
sarah.krakoff@colorado.edu
Counsel for Amici

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Amici Curiae National Congress of American Indians is a not for-profit corporation and has no parent companies, subsidiaries or subordinate companies, and no affiliate companies that have issued shares to the public. The Confederated Tribes of the Colville Reservation, the Nez Perce Tribe, and the Prairie Band Potawatomi Nation are federally-recognized Indian tribes.

IDENTITY AND INTERESTS OF AMICUS CURIAE[1]

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native villages. NCAI, through its member tribes, and the Confederated Tribes of the Colville Reservation, the Nez Perce Tribe, and the Prairie Band Potawatomi Nation (the "tribal *amici*") are dedicated to protecting the rights and improving the welfare of American Indians and tribes. The tribal amici regulate commercial activities within their territorial boundaries, and have rights-of-way and fee land throughout their reservations.

[1] All parties have consented to the filing of this brief. No counsel for any party authored any portion of this brief. No person or entity other that the National Congress of American Indians, Confederated Tribes of the Colville Reservation, the Nez Perce Tribe, and the Prairie Band Potawatomi Nation, and their counsel made a monetary contribution to the preparation and submission of this brief.

The Supreme Court of the United States and the U.S. Court of Appeals for the Ninth Circuit have long recognized that Indian tribes retain inherent sovereign powers—the power to make their own laws and to be ruled by them. These inherent sovereign powers include judicial authority to exercise civil jurisdiction over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements," and over the "conduct of non-Indians on fee lands within [a] 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." *Montana* v. *United States*, 450 U.S. 544, 565-66 (1981). The tribal amici's interests lie in ensuring that *Montana* is interpreted in a way that does not threaten the exercise of core sovereign powers, including the regulation of commercial activity that affects tribal lands and the ability to ensure compliance with tribal laws.

ARGUMENT

I. Introduction

The question before the Court is whether the Navajo Nation judicial system has jurisdiction over a case brought by tribal members against a nonmember commercial touring company (EXC, et al., plaintiffs/appellees ("EXC")) for a fatal auto accident that occurred when EXC was transporting

its customers across the Navajo Reservation after visiting sites on tribal lands. The district court properly found that the Navajo Nation had the authority to impose its commercial touring regulations, including a condition requiring consent to tribal jurisdiction, on EXC. *See* District Ct. Order 9-10. The district court erred, however, in concluding that the Tribe's jurisdiction categorically excluded any authority over the highway on which the accident occurred. *See id*. at 11. The district court misapplied the law and failed to engage in the analysis that the Supreme Court has outlined for questions of tribal powers over nonmembers. Under that analysis, the Tribe has regulatory and judicial authority over the nonmember conduct in this case. This Court should therefore reverse the decision below.

The Supreme Court has developed a multi-factored approach to questions of tribal civil jurisdiction over nonmembers, and while the circumstances for asserting jurisdiction over nonmembers on non-Indian lands are limited, the Court has never held that such jurisdiction is categorically excluded. *See Montana v. United States,* 450 U.S. 544, 565-66 (1981); *Nevada v. Hicks*, 533 U.S. 353, 358-60 (2001); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327-30 (2008). Where a tribe retains the inherent authority to exclude nonmembers from tribal lands, the tribe presumptively has the authority to regulate use of those lands, including

nonmember conduct and activities. *See Montana*, 450 U.S. at 557; *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 810-12 (9th Cir. 2011). If the nonmember activity occurs on non-Indian lands over which the tribe has lost its gatekeeping authority, tribes have jurisdiction pursuant to what have become known as the *Montana* exceptions. *See Montana*, 450 U.S. at 565-66; *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997). The first—the consensual relationship exception—allows tribes to regulate nonmembers who have entered into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." *Montana*, 450 U.S. at 565. The second—the direct effects exception—recognizes that tribes may retain inherent power to exercise civil authority over nonmembers on fee lands 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 566.

In *Strate*, the Supreme Court applied the *Montana* framework to the question of whether the tribal court had jurisdiction over a case involving an automobile accident in which both the plaintiff and the defendant were not members of the tribe. 520 U.S. at 456-59. The accident occurred on a state highway on the reservation, and for the purpose of its analysis, the *Strate* Court determined that the highway should be treated the same as non-

Indian fee land. *Id*. at 454-56. As the Appellants suggest, there are distinctions between the right-of-way at issue here and the right-of-way in *Strate* that justify aligning Highway 160 (where the accident occurred) with trust land rather than non-Indian fee land. *See* Appellants' Br. 23-32; *see also McDonald v. Means*, 309 F.3d 530, 538-40 (9th Cir. 2002). But even if this Court determines that Highway 160 is the equivalent of non-Indian fee land, there are ample grounds to uphold tribal court jurisdiction under the *Montana* exceptions.

First, the Navajo Nation has the inherent authority to regulate commercial activity within its reservation. A tribe's authority to set the terms and conditions on which nonmembers engage in economic activity within reservation boundaries has been repeatedly recognized as one of the core retained inherent tribal powers. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332-33 (2008); *Strate*, 520 U.S. at 446; *Montana*, 450 U.S. at 557; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980). Under Navajo Nation law, EXC was required to obtain a commercial touring permit, which includes a number of conditions including consent to tribal court jurisdiction for disputes arising out of touring activities. *See* District Ct. Order 8:21-27; Navajo Nation Tour and Guide Services Act (the "NNTGSA"), 5 N.N.C. § 2501, *et seq.* Had EXC

complied with Navajo law and obtained the permit to take its customers to Monument Valley and Kayenta, it would have had to consent to the Tribe's jurisdiction. This satisfies *Montana*'s consensual relationship test. Second, EXC's conduct of flouting Navajo law and then carrying on its commercial activities in a way that resulted in death and injuries to tribal members threatens the Nation's ability to protect the health and welfare of tribal members. This satisfies *Montana*'s "direct effects" test. These arguments are addressed in greater detail below, after an explanation of how the district court erred in its approach to the *Montana* analysis.

II. The Navajo Nation Has Judicial Jurisdiction over EXC Under the *Montana/Strate* Framework

The district court's order provides little guidance concerning how to interpret the *Montana* exceptions in this case because it failed to engage in that analysis. The district court appropriately found that EXC was subject to the Navajo Nation's laws regulating the tourism industry, and further that Navajo law legitimately included a requirement of consent to jurisdiction. District Ct. Order 8-10. But then the district court committed legal error by finding that the Nation's jurisdiction could not extend to non-Indian lands within the reservation. The district court reasoned that EXC could not have consented to jurisdiction because Highway 160, like the highway in *Strate*, was aligned with fee land and the tribe had therefore lost its "landowners

right to occupy and exclude." District Ct. Order 11:1-11 (citing *Strate*, 520 U.S. at 456).

The district court's reasoning and logic are faulty. The *Strate* Court's observation that the tribe had lost its gatekeeping authority, and therefore could not assert a landowner's right to exclude, was made in *support* of the Court's conclusion that the *Montana* exceptions governed. Had the tribe retained its gatekeeping right, the Court might have analyzed the question differently, applying instead a general presumption in favor of tribal jurisdiction. *See Strate*, 520 U.S. at 454 ("We can 'readily agree,' in accord with *Montana*, that tribes retain considerable control over nonmember conduct on tribal land.") In other words, the tribe's loss of a gatekeeping right *triggers* the analysis under the *Montana* exceptions; it does not terminate it. In *South Dakota v. Bourland*, 508 U.S. 679, 695-96 (1993), for example, the Court held that the tribe had lost its gatekeeping right, and therefore the presumptive right to regulate, but then remanded to the lower courts to apply the *Montana* exceptions. If the district court's approach to analyzing the consensual relationship exception is embraced by this Court, there will *never* be circumstances in which a non-Indian's consensual relationship with a tribe will result in tribal jurisdiction if the action arises on non-Indian fee land within tribal territorial boundaries. While the *Montana* exceptions may

be narrow, it would be bizarre if they had constricted to the point of erasing themselves entirely. This Court must therefore conduct the analysis that the district court failed to undertake.[2]

A. Tribes May Impose Conditions on Nonmembers Conducting Commercial Activity Within Tribal Territory

Under *Montana*'s first exception, tribes may regulate the conduct of nonmembers who enter into consensual relationships with the tribe or tribal members. In *Strate*, the Supreme Court discussed the types of consensual relationships that would qualify, based on the list of cases in *Montana* itself. *See* 520 U.S. at 457. Each of the cases involved the tribe's right to regulate commercial activity within tribal territory. *See id*. First, in *Williams v. Lee*, 358 U.S. 217, 223 (1959), the Supreme Court held that the tribe had *exclusive* jurisdiction over a lawsuit arising out of an on-reservation sales transaction between a nonmember plaintiff and tribal member defendants. In the next two Supreme Court cases from *Montana*'s list, the Court approved tribal taxation of non-Indian commercial activities within tribal territory. *See Strate*, 520 U.S. at 457 (citing *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Colville*, 447 U.S. at 152-54).

[2] The Appellants also correctly argue that the district court erred in failing to defer to the Navajo Supreme Court's interpretation of its jurisdictional statutes. *See* Appellants' Br. 48-49. Because the Navajo Nation's interpretation is also entirely consistent with the federal law of tribal jurisdiction, this brief focuses on the district court's error under federal law.

The cases listed in *Montana* all support the proposition that tribes have inherent authority to prescribe the terms and conditions under which nonmembers may transact business on their reservations. *See Strate*, 520 U.S. at 457. Some of these cases affirm tribal authority to impose conditions on nonmember economic activity without discussing land status. In *Colville*, for example, the tribes' cigarette sales' taxes were upheld on the grounds that tribes have inherent authority to tax "non-Indians entering the reservation to engage in economic activity." *Strate*, 520 U.S. at 452 (quoting *Colville*, 447 U.S. at 153). It is also clear, however, that the tribes' interests are strongest when the activity occurs on or relates to tribal land. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 440 (1989) (opinion of Stevens, J.) (approving zoning of non-Indian fee land in portion of the reservation that was dominated by tribal trust land).

Here, the Navajo Nation, through its commercial tourism laws and regulations, imposes conditions on nonmember companies that enter the reservation to engage in economic activity there. The Nation's regulations are analogous to the tribal taxes that the Supreme Court has approved in *Merrion, Colville*, and other cases. *See, e.g., Merrion,* 455 U.S. at 144-45; *Colville*, 447 U.S. at 152-53. As in the taxation cases, the Nation is exercising power

over nonmembers who "accept privileges of trade, residence, etc.," to which the tribe's regulations "may be attached as conditions." *Colville*, 447 U.S. at 153 (quoting *Powers of Indian Tribes*, 55 Interior Dec. 14, 46 (1934)).

Further, in this case, the Nation's interests in regulating commercial tourism are bolstered by EXC's visits to tribal lands. EXC did not merely drive hastily across the reservation to get from one off-reservation site to another. It took its paying customers to the Monument Valley Tribal Park, including a stop at its visitor center and panoramic view-point, and then housed them at a hotel on tribal trust land in the Navajo township of Kayenta. EXC, in other words, marketed and sold a tribal land-based reservation experience as part of its package.[3] *See EXC, Inc. v. Kayenta Dist. Court*, 9 Am. Tribal Law 176, 182-83 (Nav. Sup. Ct. 2010); District Ct. Order 2:12-18. This is precisely the type of activity that falls within *Montana*'s rationale. As the Supreme Court has stated, "[t]he logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing

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[3] Go Ahead Vacations, one of the plaintiffs/appellees and the company that contracted with EXC to charter the bus for the trip, describes the overall itinerary and includes the following description of the Navajo part of the tour on its website: "CLIMB THE CLIFFS OF MESA VERDE AND THE BUTTES OF MONUMENT VALLEY: This morning, visit Mesa Verde National Park. On your guided tour, you'll view the fascinating 800-year-old cliff dwellings that honeycomb the canyon walls. Later today, pass through Monument Valley before arriving in Kayenta, Arizona, where you'll spend the night." *U.S. National Parks with Go Ahead Tours,* GOAHEADTOURS.COM, http://www.goaheadtours.com/npt/us-national-parks (last visited May 13, 2013). The site also includes the following description of the hotel in Kayenta: "The hotel is located 20 miles south of the Utah border on US 163, *and sits right on the Navajo Reservation*." (follow "hotel info" hyperlink under "KAYENTA, UTAH" [sic]) (emphasis added).

tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent that they do, such activities or land uses may be regulated." *Plains Commerce*, 554 U.S. at 334-35. Consistent with this logic, the Nation's ability to regulate EXC'S activities throughout the reservation, including on non-Indian fee lands, is necessary for the Nation to protect its core sovereign interests in protecting access, in particular commercial access, to tribal lands. *See Brendale*, 492 U.S. at 440 (opinion of Stevens, J.) (upholding tribal zoning of non-Indian fee land in part of reservation dominated by tribal lands); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 818 (9th Cir. 2011) (noting that commercial dealings that involve the use of tribal lands affect "one of the tribe's most valuable assets.")

Similar to the zoning regulations upheld in *Brendale*, if the Nation's regulations cannot include nonmember conduct on rights-of-way running through the reservation, they risk being wholly ineffective. *See Brendale*, 492 U.S. at 440 (opinion of Stevens, J.). Just as zoning laws cannot achieve their purposes without landscape-wide enforcement, laws governing commercial tourism throughout the reservation cannot be enforced in any practical manner if they are suspended for each stretch of roadway that is considered non-Indian fee land. Limitations of this kind would undermine the larger

economic, health, and safety goals of the regulatory scheme, reducing it to a series of entry fees. Moreover, nonmember commercial touring companies would be able to market and benefit from the many tribal sites one can see and appreciate even from the ribbons of highway throughout the vast reservation. Commercial tourism within tribal territory is therefore the kind of nonmember behavior that, "even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight." *Plains Commerce*, 554 U.S. at 335.

B. *Montana*'s Consensual Relationship Exception Includes Consent to Jurisdiction

The Navajo Nation has the right to regulate commercial tourism, and therefore impose conditions on nonmembers who choose to engage in that activity on the reservation. This alone might well be sufficient to subject EXC to the tribal court's jurisdiction for conduct arising out of those activities. But the Navajo Nation, by including a requirement of consent to jurisdiction in its permit application, has made the analysis even simpler. Rather than ask the broader question of whether the Tribe's right to regulate commercial tourism *automatically* includes the right to subject nonmember defendants to judicial jurisdiction, the question the Court faces is the narrower one of whether consent to the tribe's jurisdiction is a "consensual relationship" within the meaning of *Montana*. This Court has answered that question in the affirmative. In *Smith v. Salish Kootenai College*, 434 F.3d 1127

(9th Cir. 2006), a nonmember's consent to jurisdiction qualified under *Montana*'s first exception as a basis for tribal judicial jurisdiction. *Smith* involved a nonmember who had been sued in tribal court and then cross-claimed against a co-defendant, the Salish Kootenai Tribal College. When all of the other parties and claims dissolved from the case, the nonmember, who was then the sole plaintiff, sought to have the tribal proceedings enjoined for lack of jurisdiction. *Smith* held that the nonmember, by voluntarily filing a claim, had consented to the tribal court's jurisdiction, and that this fell within the ambit of *Montana*'s rationale. *See id*. at 1138-39.

To arrive at this conclusion, first the *Smith* Court noted that the nonmember's claims arose out of activity conducted or controlled by a tribal entity on tribal lands. *See* 434 F.3d at 1135. This was so despite the fact that the auto accident, which formed the basis for the claims, occurred on a U.S. Highway. *See id*. As the *Smith* court observed, "[o]ur inquiry is not limited to deciding precisely when and where the claim arose . . . Rather, our inquiry is whether the cause of action brought by these parties bears some direct connection to tribal lands." *Id*. As explained above, EXC's tour through the Navajo Nation included visits to and an overnight stay on tribal lands, thus triggering the tribe's regulatory authority and ability to impose conditions of

entry. The Navajo Nation's exercise of jurisdiction in this case thus rests on a "direct connection" to tribal lands.

Next, *Smith* addressed whether consent to jurisdiction was a proper form of "consensual relationship" under *Montana*. The Court noted that while the Supreme Court has described tribal jurisdiction as "'pertaining to subject-matter, rather than merely personal, jurisdiction,'" it is more properly thought of as a hybrid of the two. *See* 434 F.3d at 1137 (quoting *Hicks*, 533 U.S. at 367 n.8). First, tribal court jurisdiction, unlike federal courts' subject matter jurisdiction, is not limited by the United States Constitution. *See id*. Rather, the limits derive from the Supreme Court's line of "implicit divestiture cases," and are therefore not subject to the hard, non-waivable restrictions that Article III commands. *See id*.; *see also* Sarah Krakoff, *Tribal Civil Jurisdiction Over Non-Members: A Practical Guide for Judges*, 81 COLORADO L. REV. 1187, 1230 (2010). Second, the concerns addressed through the prism of tribal jurisdiction are similar to those raised in the personal jurisdiction context under Due Process analysis, including the predictability of being sued in the forum, fairness to the parties, and a connection between the activity and the location of the forum, among others. *See Smith*, 434 F.3d at 1138. The *Smith* court therefore concluded that, "a nonmember who knowingly enters tribal courts for the purpose of

filing suit against a tribal member has, by the act of filing his claims, entered into a 'consensual relationship' with the tribe within the meaning of *Montana*." *Id*. at 1140.

Here, the nexus between the type of consent and the tribe's jurisdiction is equally compelling. The Navajo Nation has adopted a comprehensive regulatory regime to govern the tourism industry. 5 N.N.C. § 2502. Its reasons for doing so include a strong interest in ensuring the health and safety of tribal members, who must share the roads with tour busses. *See* 5 N.N.C. § 2501(B); NNTGSA Regulations §1(D)-(E). While the Nation may not be able to exclude all private, non-commercial drivers from passing through the reservation on Highway 160, the Nation, like any other government, may condition operation of commercial industries on compliance with their reasonable regulations, and exclude them from their territory if they refuse to comply. *See* District Ct. Order 9:4-19 ("there is no question that the Navajo Nation can place conditions on nonmembers touring the Navajo Nation . . . If nonmembers do not agree to the conditions set by the Nation, the Nation may exclude those members.") One of the Navajo Nation's conditions was that EXC consent to jurisdiction in the Navajo Nation courts for disputes relating to the tourism permit and agreement. *See* NNTGSA Regulations §1(G)(3). Finally, EXC was engaged in

commercial touring activity—the very activity the tribe sought to regulate—when the collision that resulted in death and injuries to tribal members occurred. In these circumstances, subjecting a nonmember defendant to tribal jurisdiction pursuant to the consensual relationship exception comports with all of the Due Process-like concerns in the *Montana/Strate* analysis, and does not implicate any of the Supreme Court's limitations (such as strong state interests, ownership of tribal lands, or unfairness to the defendant). *See Hicks*, 533 U.S. at 364; *Plains Commerce*, 554 U.S. at 332-33; *Smith*, 434 F.3d at 1136-39.

Had EXC followed the law instead of ignored it, it would be clear that it entered into a consensual relationship with the tribe that legitimately included consent to the Navajo Nation's jurisdiction. In the alternative, EXC could have chosen not to agree to the Nation's conditions, and rerouted its tour outside of the reservation's boundaries, in which case the tragic accident involving the Jensens would never have occurred. EXC's failure to obey the law should not be rewarded with this Court's failure to apply it.

C. The Navajo Nation Has Jurisdiction Over EXC Because EXC's Conduct Has Direct Effects on the Political Integrity, Economic Security, and Health and Welfare of the Tribe

Tribes also have jurisdiction over nonmember conduct on fee lands within their reservations "when that conduct threatens or has some direct

effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. The Supreme Court has clarified that to qualify under the "direct effects" exception, nonmember conduct must do more than pose a risk to individual tribal members. *See Strate*, 520 U.S. at 458. Rather, the nonmember conduct must interfere with the *tribe*'s ability to make its own laws and be ruled by them. *See id*. at 458-59; *see also Plains Commerce*, 554 U.S. at 341 ("[t]he second exception authorizes . . . civil jurisdiction when non-Indian 'conduct' menaces the 'political integrity . . . of the tribe'" (quoting *Montana*, 450 U.S. at 566)).

If EXC is permitted to ignore Navajo law, and yet carry on its commercial business within the Navajo reservation in a way that causes death and injury to tribal members, the Navajo Nation's ability to regulate commercial activity within its boundaries is imperiled. *See Plains Commerce*, 554 U.S. at 341 (describing the direct effects test as asking whether the nonmember conduct "imperils" the tribe's ability to subsist as a community). In this case, unlike in *Strate*, much more is at stake than tribal jurisdiction over a single auto accident. *See* 520 U.S. at 459. Here, EXC's conduct undermines the Navajo Nation's ability to enforce its commercial tourism laws. If EXC is permitted to ignore Navajo law and then evade any consequences for that behavior by, first, conducting its tour despite the

absence of a permit, and second, engaging in activity that results in the death and injury of tribal members without having to account for those actions in tribal court, the Nation's laws and regulations are virtually useless. Nonmember companies will have no incentive to apply for commercial tourism permits, let alone comply with their conditions. The Nation's commercial tourism laws will be nothing more than pieces of paper in Window Rock, while nonmember businesses reap profits by touring their clients on tribal lands. This would, in *Strate*'s formulation, "trench unduly on tribal self-government." 520 U.S. at 458.

Cases approving of tribal jurisdiction under the "direct effects" prong of *Montana* are instructive. In *Smith*, the Court did not reach the second exception (having approved jurisdiction under the first) but noted that the tribes' ability to enforce their own laws in tribal courts will be critical to Indian self-governance. 434 F.3d at 1140. *Smith* further observed that "the Tribes' *system* of tort is an important means by which the Tribes regulate the domestic and commercial relations of its members." *Id*. (emphasis added). In *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 850 (9th Cir. 2009), the Court remanded to the tribal court for exhaustion of tribal remedies, holding that it was plausible that the tribe would have jurisdiction in circumstances in which a nonmember set a fire that resulted in the

destruction of millions of dollars of tribal property. *Elliott* stressed that the tribe's ability to enforce its own laws to protect its property was at stake. *See id*. Here, as in *Smith* and *Elliott*, what is at stake is the Nation's ability to enforce its own laws with respect to the conduct of nonmembers whose actions take advantage of tribal resources and, in this case, also had severe and negative effects on tribal members. This is distinguishable from *Strate*, as well as other single-accident cases, in that the Nation's inability to subject EXC (and similarly situated nonmembers) to tribal jurisdiction would destabilize its entire regulatory scheme in this area. EXC should therefore be subject to the Navajo Nation's jurisdiction pursuant to *Montana*'s second exception.

III. Conclusion

The *Montana* exceptions provide avenues for tribes to assert regulatory and judicial jurisdiction over nonmembers, even on non-Indian land, when necessary to protect tribal self-government. In this context, the Supreme Court has repeatedly affirmed tribal power to regulate nonmembers who engage in commercial and economic activity within tribal territory, especially when that activity affects tribal lands. One of the conditions that tribes may impose is a requirement to consent to tribal jurisdiction. Nonmembers who wish to engage in commercial conduct that affects tribal

lands can choose to accept the tribes' conditions, or reroute their business elsewhere. This works no unfairness on the nonmembers, while preserving tribes' abilities to make their own laws and be ruled by them. The Court should therefore reverse the district court and hold that the Navajo Nation tribal courts have jurisdiction over EXC.

Dated: May 22, 2013

Respectfully submitted by,

/s/Sarah Krakoff

Sarah Krakoff
University of Colorado Law School
Campus Box 401
Boulder, CO 80309-0401

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. P. 29 AND 32(a)(7)

I certify that pursuant to Federal Rule of Appellate Procedure 29 and 31(a)(7), the attached Brief of Amici Curiae in Support of Appellants is proportionally spaced, has a typeface of 14 point Baskerville, and contains fewer than 7,000 words. No counsel for a party has authored the brief in whole or in part. No counsel for a party, or any person other than amici, has made a monetary contribution to the preparation or submission of the brief.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28.2-2.6(b), Amici state that there are no pending related cases.

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2013, I electronically filed the foregoing Brief of Amici Curiae with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I further certify that all parties are represented by counsel registered with the CM/ECF system, so that service will be accomplished by the CM/ECF system.

BY: /s/ Sarah Krakoff

Sarah Krakoff
University of Colorado Law School
Campus Box 401
Boulder, CO 80309
Telephone: 303-492-2641
Email: sarah.krakoff@colorado.edu