Docket No. 12-16958

In the

United States Court of Appeals

for the

Ninth Circuit

EXC INCORPORATED, a Nevada Corporation,
dba D.I.A. Express Incorporated, dba Express Charters,
CONLON GARAGE INCORPORATED, a Colorado Corporation,
GO AHEAD VACATIONS, RUSSELL J. CONLON
and NATIONAL INTERSTATE INSURANCE COMPANY,

Plaintiffs-Appellees,

v.

JAMIEN RAE JENSEN, Individually, and as Parent and Next Friend of D.J.J., and as Personal Representative of the Wrongful Death Estate of Corey Johnson, CHAVIS JOHNSON, Individually, and as Personal Representative of the Wrongful Death Estate of Burch Corey Johnson, MARGARET JOHNSON, FRANK JOHNSON, Individually, and as Parents and Next Friends of H.J. and D.J., FRANCESCA JOHNSON, Individually, JUSTIN JOHNSON, Individually, RAYMOND JENSEN, SR., Individually, LOUISE R. JENSEN, Individually, NICOLE JENSEN, Individually, RYAN JENSEN, Individually, JUSTIN JENSEN, Individually, KATRINA JENSEN, Individually, RAYMOND JENSEN, JR., Individually, and MURPHY JENSEN, Individually,

Defendants-Appellants.

Appeal from a Decision of the United States District Court for the District of Arizona (Phoenix), No. 3:10-cv-08197-JAT · Honorable James A. Teilborg

BRIEF OF APPELLANTS

Oral Argument Requested

MICHAEL J. BARTHELEMY, ESQ.
ATTORNEY AT LAW, P.C.
5101 Coors Boulevard NW, Suite G
Albuquerque, New Mexico 87120
(505) 452-9937 Telephone
(505) 897-9937 Facsimile

GEOFFREY R. ROMERO, ESQ.
LAW OFFICES OF GEOFFREY R. ROMERO
4801 All Saints Road NW
Albuquerque, New Mexico 87120
(505) 247-3338 Telephone
(505) 271-1539 Facsimile

Attorneys for Appellants Jamien Rae Jensen, et al.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Treaties: **Pages**

U.S. Supreme Court Cases:

Ninth Circuit Cases:

Navajo Cases:

State Cases:

Federal Statutes:

Navajo Statutes:

State Statutes:

I. Jurisdictional Statement

On October 8, 2010, Plaintiffs-Appellees herein—EXC, Inc., d/b/a Express Charters, Go Ahead Vacations, Inc., Conlon Garage, Inc., National Interstate Insurance Company, and Russell J. Conlon [hereinafter "Express Charter companies"]—filed suit in United States District Court for the District of Arizona challenging the subject matter jurisdiction of the Navajo Nation District Court for the Kayenta Judicial District, to adjudicate disputes arising from the September 21, 2004 tour bus/auto collision and seeking to enjoin any further proceedings in the Navajo Nation Courts to adjudicate claims arising from the collision brought against them by Defendants-Appellants herein—Jamien Rae Jensen, et al. [hereinafter "Jensen/Johnson family"]. The asserted basis for the jurisdiction of the U.S. District Court was federal question jurisdiction, 28 U.S.C. § 1331; *see Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985) ("Section 1331 encompasses the federal question whether the Tribal Court exceeded the lawful limits of its jurisdiction. . . . [Petitioners] have, therefore, filed an action 'arising under' federal law within the meaning of § 1331.").

The District Court Order and Judgment, which disposed of all parties' claims and terminated the action in the District Court, were filed August 9, 2012, and the Jensen/Johnson family timely filed their Notice of Appeal from the final Order and Judgment on September 5, 2012. This is an appeal from the U.S. District

Court's final Order and Judgment, over which this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II. Statement of Issues Presented for Review

A. The District Court erred in ruling that no treaty, statute, or intergovernmental agreement authorizes the Navajo Nation to entertain a civil suit for damages filed by the Jensen/Johnson family against the Express Charter companies in Kayenta District Court, which arose from a tour bus/auto collision occurring while the bus was engaged in commercial touring of the Navajo Nation.

B. The District Court erred in ruling that the stretch of U.S. Highway 160 within the Navajo Nation on which the September 21, 2004 tour bus/auto collision occurred is the equivalent of alienated, non-Indian fee land for purposes of governing a nonmember commercial touring company engaged in commercial touring of the Nation.

C. The District Court erred in ruling the Navajo Nation has no power to regulate or adjudicate the conduct of a nonmember commercial touring company engaged in commercial touring of the Nation on U.S. Highway 160, despite the Court ruling that the Navajo Nation unquestionably has the power to regulate commercial touring on the Navajo Reservation generally.

D. The District Court erred in ruling that commercial touring of the Nation, a consensual relationship of the qualifying kind under *Montana*'s first

exception, does not apply to validate the Navajo Nation's regulatory and adjudicatory jurisdiction in this case.

E. The District Court erred in ruling that the Express Charter companies' commercial touring of the Navajo Nation does not sufficiently threaten or directly affect the political integrity, economic security, or the health or welfare of the Navajo Nation under *Montana*'s second exception.

III. Statement of the Case

The fatal collision between a tour bus chartered, owned, and operated by the tour companies and a 1997 Pontiac sedan, occupied by enrolled members of the Navajo Nation, occurred on September 21, 2004 on U.S. Highway 160 in Kayenta, Arizona within the boundaries of the Navajo Reservation. On September 11, 2006, the Jensen/Johnson family filed a Complaint for Personal Injury and Wrongful Death in the Kayenta District Court against the Express Charter companies. On January 17, 2007, Defendants EXC, Inc. and National Interstate served their Special Appearance and Motion to Dismiss (which Defendant Go Ahead Vacations, Inc. joined on February 16, 2007), seeking to dismiss the Jensen/Johnson family's Complaint against themselves, Russell J. Conlon, and Conlon Garage, Inc. Defendants argued that the Kayenta District Court lacked subject matter jurisdiction over the case. The parties briefed the issues raised in the Express Charter companies' Motion to Dismiss, and on September 20, 2007, a

hearing was held in Kayenta District Court. On December 4, 2009, the Kayenta District Court issued its Order denying Defendants' Motion to Dismiss. ER-88-99. On February 28, 2010, the Express Charter companies filed a Petition for a Writ of Prohibition asking the Navajo Supreme Court to prohibit the trial court from proceeding to hear the case on the merits for an alleged lack of subject matter jurisdiction. On September 15, 2010, the Navajo Nation Supreme Court issued an opinion holding that the Kayenta District Court had jurisdiction over the Express Charter companies and the claims in the underlying case. *EXC, Inc. v. Jensen*, No. SC-CV-07-10, slip op. (Navajo Sup. Ct. Sept. 15, 2010), ER-87. The Supreme Court denied the Petition. ER-87.

On October 8, 2010, Plaintiffs, the Express Charter companies, filed a complaint in U.S. District Court seeking a declaratory judgment that Defendants, the Jensen/Johnson family, had exceeded the subject matter jurisdiction of the Kayenta District Court in bringing a civil action for damages arising from a September 21, 2014 tour bus/auto collision and sought an injunction enjoining Defendants from pursuing their claims in Navajo District Court.[1] ER-123. On

[1] On November 23, 2010, the Express Charter companies filed their First Amended Complaint correcting clerical errors, noting that several minor Defendants had reached the age of majority, and excluding parties who were no longer part of the underlying suit in Navajo District Court. On December 20, 2010, the Express Charter companies filed their Second Amended Complaint describing one Defendant, Murphy Jensen, with more particularity.

February 22, 2011, the Express Charter companies filed a Third Amended Complaint, adding as Defendants the Navajo Nation, the Kayenta District Court, the Navajo Nation Supreme Court, and Kayenta District Court Judge Jennifer Benally [hereinafter "Navajo Court Defendants"], seeking a declaratory judgment that Navajo Court Defendants are prohibited, and seeking to enjoin them, from adjudicating any claims arising from the September 21, 2004 collision. ER-129.

On November 28, 2011, the Express Charter companies and the Jensen/Johnson family filed Joint Stipulations Regarding Documents for Purposes of Motions for Summary Judgment (ER-107-113, 132) and a Joint Stipulated Statement of Facts for Purposes of Motions for Summary Judgment. ER-100-106, 132. On January 3, 2012, the Express Charter companies and Navajo Court Defendants filed a Stipulation to Voluntarily Dismiss Defendant the Navajo Nation Without Prejudice. ER-133. On January 4, 2012, the District Court granted the Stipulation. ER-113.

On February 27, 2012, the Express Charter companies filed a Motion for Summary Judgment and Separate Statement of Facts in Support, and the Jensen/Johnson family filed a Motion for Summary Judgment and Memorandum in Support and Statement of Undisputed Material Facts in Support. ER-134. Oral argument on the competing Motions was held before U.S. District Court Judge James A. Teilborg on August 6, 2012. By the Court's Order (ER-2-12,138) and

Judgment in a Civil Case (ER-1,138), both dated August 9, 2012, Judge Teilborg granted the Express Charter companies' Motion for Summary Judgment, entered a declaratory judgment that the Kayenta District Court lacks jurisdiction to hear the Jensen/Johnson family's claims relating to the September 21, 2004 tour bus/auto collision, permanently enjoining the Jensen/Johnson family from proceeding with their claims in Kayenta District Court, denying their Motion for Summary Judgment, and terminating the District Court action. On September 5, 2012, the Jensen/Johnson family timely filed a Notice of Appeal from the Order and Judgment of the District Court. ER-138-139.

IV. Statement of the Facts Relevant to Issues Submitted for Review

In the early hours of September 21, 2004, a Van Hool tour bus operated by Express Charter companies was traveling on U.S. Highway 160 on the Navajo Reservation and collided head-on into a sedan driven by Butch Corey Johnson, and occupied by his wife Jamien Jensen, their unborn child, Corey Johnson, and their minor child, D. Johnson, all enrolled members of the Navajo Nation. ER-3, 101-103. Butch Johnson died at the scene. ER-3,102. Jamien Rae Jensen was seriously injured, sustaining a broken arm and a head injury. ER-103. As a result of the collision, Jamien Rae Jensen later miscarried and her unborn child Corey Jensen Johnson died. ER-3, 103. D. Johnson also sustained bodily injuries. ER-3, 102. Navajo Nation Emergency Medical Services, the Navajo Police Department, the

Navajo Department of Criminal Investigations, and the Navajo Nation Department of Fire & Rescue Services were present on the scene of the collision and, with the assistance of the Arizona Department of Public Safety, secured the crash site, investigated the collision, cleared the scene of the collision, issued reports, and provided governmental services. ER-4, 101.

At the time of the accident the Express Charter companies were engaged in a 12-day tour of national monuments, which included two scheduled stops on their tour of the Navajo Nation (ER-3, 38, 102-105, 116), an overnight stop at a Navajo Nation hotel, the Hampton Inn, and a visit to the Navajo Tribal Park at Monument Valley. ER-3, 102-105, 116. The Monument Valley Visitors Center and the Hampton Inn in Kayenta, Arizona are both located on tribal trust land within the Navajo Nation. ER-3, 103-104. The Monument Valley Tribal Park is located at the end of a 5-mile loop road on which the tour bus entered and exited the Monument Valley Visitors Center, traveling upon Monument Valley Road [Co. Rd 486] and Indian Route 42. ER-3, 103-104. The tour route traversed almost 200 miles of contiguous Navajo Nation territory from its northeastern to western external borders, including travel on U.S. Highway 160. ER-3-4, 49, 70, 103. Monument Valley Road [Co. Rd 486], Indian Route 42, and U.S. Highway 160 are all located on tribal trust land within the Navajo Nation. ER-4, 101, 103-104. On September 20, 2004, the Express Charter companies paid an entrance fee for their tour bus to

enter the Monument Valley Tribal Park at Monument Valley, which is operated by the Navajo Nation Department of Parks and Recreation. ER-104.

The collision occurred on U.S. Highway 160 located on tribal trust land on the western edge of the Kayenta Township in Kayenta, Arizona. ER-3-4, 101. The portion of U.S. Highway that crosses the Navajo Nation is approximately 197.4 miles in length according to the Agreement for Construction and Maintenance of Roads. ER-3-4, 49, 70, 103. This portion of U.S. Highway 160 in Arizona is wholly within the boundaries of the Navajo Nation. ER-3-4, 103.

The commercial touring engaged in by the Express Charter companies were regulated by the Navajo Nation Tour and Guide Services Act, 5 N.N.C. § 2501 *et seq*., [formerly Tourist Passenger Services Act and hereinafter "NNTGSA"], and its associated regulations. ER-9-12, 18-29; Addendum 4, 5 & 6. The Act required commercial touring companies to (1) apply for and secure a touring permit; (2) pay an annual permit fee of $3,000.00; (3) provide proof of liability insurance; (4) execute a Tourist Passenger Service Agreement; and (5) follow any other requirements of the Act and its associated regulations. ER-9-12, 18-29; Addendum 4, 5 & 6. According to the Navajo Nation Tourist Passenger Service Agreement, commercial touring companies were required to consent to the jurisdiction of the Navajo Nation to adjudicate disputes arising out of activities covered under the Act. ER-9-12, 19, 23, 28; Addendum 4, 5 & 6.

While every commercial touring company is required to execute a Tourist Passenger Service Agreement, pursuant to Navajo law, before touring the Navajo Nation, no such Agreement was signed by Express Charter companies. ER-8-11, 104. At the time of the accident, the Express Charter companies were operating in violation of Navajo law. ER-8-11, 104; Addendum 4, 5 & 6. Express Charter companies failed to secure a permit, pay the required permit fee, provide proof of liability insurance, or execute a Tourist Passenger Service Agreement. ER-8-11, 104; Addendum 4, 5 & 6.

V. Summary of Appellants' Argument

The question in this case is whether the Navajo Nation has jurisdiction to adjudicate claims arising from a fatal tour bus/auto collision occurring within the boundaries of the Navajo Reservation on a U.S. highway located on tribal trust land where commercial tourism is subject to extensive tribal regulation. An Indian tribe's authority to regulate nonmembers conducting commercial activities within reservation boundaries, and to adjudicate disputes arising from such conduct, derives from several sources. Treaty provisions, interpreted in accordance with longstanding Indian law canons of construction prescribed by the Supreme Court, may reserve to the tribe authority to govern nonmember conduct. *See, e.g.*, *Montana v. United States*, 450 U.S. 544, 558-59 (1981) (noting 1868 treaty prohibited most non-Indians from residing on or passing through reservation lands

used and occupied by Tribe, arguably conferring upon Tribe authority to regulate fishing and hunting on those lands). The United States Supreme Court decisions in *Montana* and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), provide a clear analytical framework for resolving the jurisdictional issues of this case.

Within this *Montana-Strate* framework there is a presumption *in favor of* tribal jurisdiction over nonmember conduct on tribal trust lands. *See, e.g.*, *Montana*, 450 U.S. at 557 (showing Supreme Court "readily agree[ing]" Tribe may prohibit nonmembers from hunting or fishing on, and may condition their entry upon, lands belonging to Tribe or held by United States in trust for the Tribe). There is also an opposite presumption *against* tribal jurisdiction over nonmember conduct on non-Indian fee lands or the equivalent thereof, *see Strate*, 520 U.S. at 446 (observing that "*Montana* . . . described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions"). In this case, resort to the presumption *against* tribal civil authority found in the common-law portion of the *Montana-Strate* analytical framework is unwarranted because the Navajo Nation retains federally sanctioned governing authority over the Express Charter companies' commercial touring activities and the on-reservation highway collision that arose from those activities. The Navajo Nation's jurisdiction over the underlying lawsuit, filed in tribal court, is reserved by the

Navajo Treaty of 1868, and this implied, treaty-based governing authority has never been abrogated by Congress. On the contrary, the congressional acts and intergovernmental agreements that induced the Navajo Nation's consent to granting a limited right-of-way for the purpose of constructing a highway—eventually designated U.S. Highway 160—reserved to the Navajo Nation its pre-existing treaty rights and its derivative authority to regulate nonmember conduct, including commercial touring, over the roadway in question.

Moreover, apart from retained treaty rights, Indian tribes presumptively possess regulatory and adjudicatory authority over nonmember conduct occurring on land owned by the tribe or its members, unless the exercise of that authority conflicts with Supreme Court precedents or congressional acts. *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 814, 815 (9th Cir. 2011). Application of the relevant factors prescribed by the Supreme Court in *Strate* for determining the status of the roadway on which this collision occurred militates strongly *against* aligning it with non-Indian fee land and instead counsels *for* acknowledging the site of the collision is tribal land for the purpose of governing nonmembers engaged in a commercial enterprise, thereby triggering the *Montana-Strate* framework's presumption *in favor of* tribal jurisdiction over nonmember conduct on tribal lands. The tribal trust status of the land over which the right-of-way in this case runs, together with the undisputed tribal trust status of tribal roads

and other lands traversed by the Express Charter companies in the course of their on-reservation commercial touring activities (ER-3-4, 101-105, 116), reinforces the Nation's land ownership-based right to (1) regulate the Express Charter companies' on-reservation touring activity and (2) adjudicate lawsuits arising from that activity, including the underlying suit in this case.

Even if the roadway in question were deemed the equivalent of alienated, non-Indian fee lands for nonmember governance purposes, the Navajo Nation's residual inherent governing authority over commercial tourism plainly exists by virtue of either exception to the presumption *against* tribal authority over nonmember conduct on non-Indian fee lands developed in the *Montana* line of cases, *i.e.*, (1) the consensual relationship established through the Express Charter companies' commercial touring activities within the Navajo Reservation and (2) the demonstrably serious impacts imperiling the Navajo Nation's sovereign interests posed by on-reservation commercial touring activities unconstrained by Navajo governing authority. *See Montana*, 450 U.S. at 565-66 (delineating two exceptions to Court's presumption against tribal regulatory jurisdiction over nonmember conduct on non-Indian fee lands); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 635, 659 (2001) (discussing threshold for satisfying *Montana*'s second exception).

The Navajo Nation's authority to regulate the Express Charter companies' on-reservation commercial touring activities pursuant to *Montana*'s exceptions further validates the subject matter jurisdiction of the Nation's courts in adjudicating the Jensen/Johnson family's claims arising from those activities. *See Water Wheel*, 642 F.3d at 819 (observing "analysis of adjudicative jurisdiction applies once regulatory jurisdiction is established under *Montana*"); *Strate*, 520 U.S. at 453 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (alteration added by the *Strate* Court)) ("[W]here tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'").

VI. Standards of Review for a Federal Court's Determination of a Tribal Court's Jurisdiction over Nonmember Conduct

The following standards of review apply to all questions presented in this case. The United States Supreme Court has determined the question of tribal court jurisdiction is a federal question which is reviewed de novo. *See Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 852-53; *see also Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir. 2006) (en banc); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990).

The federal court reviews tribal court factual findings for clear error. *See FMC*, 905 F.2d at 1313 ("[A] deferential, clearly erroneous standard of review for factual questions . . . accords with the traditional judicial policy of respecting the

fact-finding ability of the court of first instance."). In addition, "because tribal courts are competent law-applying bodies, the tribal court's determination of its own jurisdiction is entitled to 'some deference.'" *Water Wheel*, 642 F.3d at 808, 817 n.9 (citation omitted); *see also FMC*, 905 F.2d at 1313-14 (quoting *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 857) ("As to legal questions, the *Farmers Union* Court stated that the fact that a tribal court reviews a question first is helpful because other courts might 'benefit [from] their expertise.'"). Federal appellate courts defer to the tribal court on questions of purely tribal law. *See Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988) ("[T]he [tribal] court's determination of tribal law is binding on this [C]ourt.").

VII. Argument

A. The applicable Treaty, statutes, and intergovernmental agreements authorize the Navajo Nation to entertain the civil suit in this case, which arose from a tour bus/auto collision occurring while the tour bus was engaged in commercial touring of the Navajo Nation.

In effectively ruling the Navajo Nation's grant of a limited right-of-way for a highway over tribal trust land stripped the Nation of jurisdiction and regulatory authority over any nonmember conduct occurring on the right-of-way, the District Court misapplied the analysis employed by the United States Supreme Court in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). On the erroneous belief that *Strate* stands for the proposition that once a tribe grants a right-of-way the tribal trust land underlying the corridor must automatically be aligned with alienated, non-Indian

fee land for nonmember governance purposes, the District Court disregarded the broader jurisdictional analysis required by the Supreme Court:

> [T]he existence and extent of a tribal court's jurisdiction [over nonmembers] will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Nat'l Farmers Union, 471 U.S. at 855-56 (footnote omitted), *quoted with approval in Strate*, 520 U.S. at 449.

An Indian tribe's authority to regulate the conduct of nonmembers within reservation boundaries, and to adjudicate disputes arising from such conduct, derives from several sources. Treaty provisions, interpreted in accordance with longstanding Indian law canons of construction prescribed by the Supreme Court, may reserve to the tribe authority to govern nonmember conduct. *See Montana*, 450 U.S. at 558-59. *Montana* and *Strate* provide a clear analytical framework for resolving tribal jurisdictional issues within which there exists a presumption *in favor of* tribal jurisdiction over nonmember conduct on tribal trust lands, *see, e.g.*, *id.* at 557 (showing Supreme Court "readily agree[ing]" Tribe may prohibit nonmembers from hunting or fishing on, and may condition their entry upon, lands belonging to Tribe or held by United States in trust for the Tribe). The *Montana* line of cases also has developed a presumption *against* tribal jurisdiction over nonmember conduct on non-Indian fee land or the equivalent thereof, *see Strate*,

520 U.S. at 446 (observing that "*Montana* . . . described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions"). Although the Jensen/Johnson family provided ample authority by way of Treaty and statutes that authorize the Navajo Nation to entertain highway-accident tort suits of the kind the family commenced against the Express Charter companies, the District Court ruled without considering the Navajo Nation's reserved rights under the 1868 Treaty, without applying established rules of treaty construction, and without undertaking a detailed study of relevant statutes as required by Supreme Court precedent.

i. Reserved Treaty Rights

This case implicates the Navajo Nation's sovereign on-reservation governing authority *as guaranteed by treaty*. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217, 221-22 (1959) (discussing Navajo Treaty of 1868 [hereinafter "Navajo Treaty"], art. II, 15 Stat. 667) ("Implicit in these treaty terms. . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."). Article II of the Navajo Treaty of 1868 recognizes that the Navajo Nation has authority to exclude all nonmembers, other than certain federal employees, from reservation lands. Addendum 1, Navajo Treaty, art. II (describing reserved lands as "set apart for the

use and occupation of the Navajo tribe of Indians"); *see also id.*, art. XIII (confirming reserved lands are "set apart for the exclusive use and occupation of the Indians").

The Navajo Nation Supreme Court held that this Treaty power to exclude is the basis for the Navajo Nation's sovereign authority to regulate the activities of non-Indians entering reservation lands, by conditioning their presence upon conformity with Navajo laws. ER-67-68, 84. ("Ancestors of the Navajo people understood that the Navajo Treaty terms provided that Navajo people would be free to handle all reservation affairs not expressly excepted in the document, and handle them according to their own laws."); *cf. South Dakota v. Bourland*, 508 U.S. 679, 688 (1993) (concluding that, pursuant to similar treaty provisions, "the Cheyenne River Sioux Tribe possessed both the greater power to exclude non-Indians from, and arguably the lesser included, incidental power to regulate non-Indian use of, the lands [set apart by the treaty for the tribe's use but] later taken for the Oahe Dam and Reservoir Project").

In the present case, the Navajo Nation Supreme Court correctly held that the Navajo Treaty, art. II, guaranteed the Navajo Nation's sovereign right to exercise jurisdiction over the Express Charter companies in the lawsuit brought against them in tribal court. ER-67-68, 84. It is hard to conceive a type of nonmember conduct that the Navajo Nation would have a stronger, more legitimate right to

regulate than the conduct of entering tribal lands for the purpose of engaging in the commercial enterprise of touring, visiting, and sightseeing where such lands were "set apart for the exclusive use and occupation" of the Navajo Indians under the 1868 Treaty. ER-67-68, 84; Addendum 1.

ii. Congressional Acts Strengthen Treaty Rights

The Navajo Nation thus retains governing power to regulate the Express Charter companies' touring within the Navajo Reservation, pursuant to rights reserved under the Navajo Treaty of 1868, provided these rights have not been abrogated by Congress. "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so. There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999) (internal citations omitted) (quoting *United States v. Dion*, 476 U.S. 734, 740 (1986)).

Applying the stringent standard established by the Supreme Court for finding an abrogation of treaty rights, it is clear that federal legislation that funded construction of the roadway (which eventually became U.S. Highway 160), and induced the Navajo Nation's consent to a limited grant of a right-of-way across its reservation, did not abrogate the Nation's pre-existing treaty-based governing

authority. Indeed, as the Supreme Court itself indicated in *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965), Congress funded construction of this same roadway in fulfillment of treaty obligations:

> Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run *the reservation and its affairs* without state control . . . . And *in compliance with its treaty obligations* the Federal Government has provided for roads, education and other services needed by the [Navajo] Indians.

Id. at 690 & n.17 (emphasis added) (citing Act of Apr. 19, 1950, c. 92, § 1, 64 Stat. 44, as amended, 25 U.S.C. §§ 631-640 (1958 ed.) [hereinafter "1950 Act"]). Addendum 2.

Importantly, the 1950 Act cited in *Warren Trading Post*, now codified at 25 U.S.C. §§ 631-40, is the same legislation that appropriated funds for construction of Navajo Indian Route #1 in this case, which was later designated U.S. Highway 160. The text of the 1950 Act states that the funds for road construction were appropriated "in order to *further the purposes of existing treaties with the Navajo Indians*" and specifies other objectives consistent with preserving those treaty rights, namely, (1) "to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes," Addendum 2, 25 U.S.C. § 631 (emphasis added); (2) "to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a

stable foundation on which these Indians can engage in diversified economic activities," *id.*, and (3) to facilitate "the fullest possible participation of the Navajos in the administration of their affairs," Addendum 2, 25 U.S.C. § 636. The 1950 Act is devoid of any congressional intent to strip the Navajo Nation of its pre-existing treaty-based authority; rather, it was passed by Congress in compliance with the Federal Government's obligations under the Navajo Treaty of 1868.

iii. Navajo Nation's Tourism Regulations

Congress's funding of improvements to the Navajo Nation's infrastructure, including construction of Navajo Indian Route #1, not only facilitated travel for Navajo people, but also made possible the commercial tourism that the Navajo Nation sought later to regulate by its enactment of the NNTGSA in 1972 (formerly denominated the Tourist Passenger Services Act), 5 N.N.C. § 2501, *et seq.*; *see* ER-l8-21; Addendum 4. By means of this Act, the Navajo Nation (1) exercises its retained treaty rights by defining the conditions upon which commercial touring businesses may enter and tour the Navajo Reservation and by asserting the Nation's treaty-based power to exclude those tour businesses that do not conform to its laws; (2) promotes economic development by raising revenue through the collection of permit fees and by regulating the commercial touring industry, an important component in the economic development plan of the Navajo Nation; (3) protects the health and welfare of Navajo people by prescribing safety rules for

the touring industry, requiring proper licensing and proof-of-insurance for drivers and vehicles traversing the Reservation, and requiring written acknowledgment of tribal jurisdiction; and (4) more fully participates in the administration of its own affairs by regulating commercial activities on tribal lands, by providing needed governmental services, and by establishing an effective and broad-based court system. ER-18-21; Addendum 4.

The Navajo Nation's enactment and implementation of the NNTGSA, under the auspices of congressional legislation funding the construction of roadways across the Navajo Reservation, reflects a broad joint tribal and federal commitment to promoting tribal self-government and encouraging economic development which cannot be interpreted as an abrogation of the Nation's pre-existing treaty rights. *Cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331, 335-36 (1983) (citations and internal quotation marks omitted) (observing that federal legislation embodying joint tribal and federal commitment to goal of promoting tribal self-government "encompasses far more than encouraging tribal management of disputes between members, but includes Congress's overriding goal of encouraging tribal self-sufficiency and economic development," giving rise to Supreme Court holdings recognizing "that tribes have the power to manage the use of its territory and resources by both members and nonmembers, to undertake and regulate economic activity within the reservation, and to defray the cost of

governmental services by levying taxes"). Accordingly, the Navajo Nation continues to enjoy regulatory authority, derived from the Nation's non-abrogated, treaty-based ownership of its reservation, over all the land traversed by the Express Charter companies in the course of their on-reservation commercial touring activities, which necessarily includes U.S. Highway 160, the site of the tour bus/auto collision in this case.

B. The stretch of highway within the Navajo Nation on which the collision occurred cannot be aligned with alienated, non-Indian fee land for purposes of governing a nonmember commercial touring company engaged in commercial touring of the Nation.

The District Court improperly searched for language expressly reserving authority to adjudicate highway-accident tort suits in a treaty over a century old (*i.e.*, in the Navajo Treaty of 1868), instead of ascertaining the rights that were reserved by the Navajo Nation in the Treaty and other intergovernmental instruments related to the right-of-way. Applying the correct analysis prescribed by the Supreme Court in *Strate*, the roadway on which the collision occurred in this case retains its status as tribal trust land, and the presumption *in favor of* tribal civil authority applies. Although the *Strate* Court required courts first to analyze treaties and statutes, no treaties or statutes were presented to the *Strate* Court to analyze:

> Petitioners and the United States refer to no treaty or statute authorizing the Three Affiliated Tribes to entertain highway-accident tort suits of the kind Fredericks commenced against A–1 Contractors and Stockert. Rather, petitioners and the United States ground their

> defense of tribal-court jurisdiction exclusively on the concept of retained or inherent sovereignty.

Strate, 520 U.S. at 456.

i. Navajo Nation's Interests in this Case Distinguish *Strate*

In *Strate*, the Supreme Court announced that, only in the absence of controlling treaty or statutory provisions, a court may resort to a common-law, multi-factor analysis to determine whether the roadway in question retains its status as tribal land or can be deemed the equivalent of non-Indian fee land for nonmember governance purposes. *Id.* at 449-50. The *Strate* Court determined that while "tribes retain considerable control over nonmember conduct on tribal land," on the "particular matter" of tribal jurisdiction over an accident involving only non-Indian parties on a 6.59-mile on-reservation segment of a North Dakota highway, the Court concluded the short segment of the highway should be "align[ed]" with non-Indian fee lands. *Id.* at 454-56. The Court ruled that alignment was proper because (1) the purpose of the roadway was to facilitate public access to a federal water resource project; (2) the granting instrument detailed only one specific reservation to the tribe, *i.e.*, the right to construct crossings, with the tribe expressly reserving no other right to exercise dominion and control; (3) the tribe received payment for use of the land; (4) the highway formed a part of the state's highway system; and (5) the highway was open to the public. *See id.*

The facts of the present case are fundamentally different from those the Supreme Court confronted in *Strate*. To begin with, the incident in question here involves tribal members and implicates the Navajo Nation's exceptionally strong interest in regulating commercial tourism throughout the tribe's own reservation. Additionally, *Strate*'s multi-factor analysis militates strongly *against* judicially aligning the 197.4-mile-long highway at issue in this case with non-Indian fee land where (1) the congressionally declared purpose of the roadway was to serve distinctly *tribal* interests; (2) in the granting instruments, the Navajo Nation consented to the grant of a right-of-way for limited purposes; and (3) the Navajo Nation received no compensation for the grant of the right-of-way.

Three of the five conditions considered important by the *Strate* Court in aligning the roadway with non-Indian fee land are notably not present here. And while the highway in question forms part of the state's highway system and is open to the public, the Navajo Nation continues to exercise joint dominion and control over the roadway that Congress authorized and that the Nation expressly reserved to itself by the conditions of its consent to the granting of this limited right-of-way. In its truncated analysis, the District Court failed to apply the five factors the Supreme Court in *Strate* relied upon in determining the status of the roadway. *See Strate*, 520 U.S. at 455-56; ER-4-8, 12.

ii. Purpose of the Roadway

In *Strate*, the purpose of the right-of-way "was to facilitate public access to Lake Sakakawea, a federal water resource project under the control of the Army Corps of Engineers." *Id.* at 455. In sharp contrast, the congressionally declared purposes for funding construction of Navajo Indian Route #1 in this case (later designated a part of U.S. Highway 160) served distinctly *tribal* interests, namely:

(1) "to further the purposes of existing treaties with the Navajo Indians";

(2) "to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes";

(3) "to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities"; and

(4) to facilitate "the fullest possible participation of the Navajos in the administration of their affairs."

Addendum 2, 25 U.S.C. §§ 631-38.

iii. Granting Instruments Ceded No Rights Other Than a Limited Right-of-Way

Second, the intergovernmental agreements in this case granted a right-of-way for limited purposes, without ceding jurisdiction or relinquishing reserved treaty rights. Tribal Chairman Paul Jones indicated his approval on the signature line of the Map and Survey of the limited right-of-way, stating that such approval was being given "[p]ursuant to the provisions of the Act of February 5, 1948

(62 Stat. 17)" (Addendum 3) and, further, "[s]ubject to any prior valid existing right or adverse claim and subject to the provisions of the attached Resolution adopted on 04-16-59 by the Navajo Council." ER-32, 61-62. The Navajo Nation's treaty power to exclude nonmembers and to condition their presence on the Nation's lands upon their conformity to Navajo law are among the "prior valid existing right[s] or adverse claim[s]" upon which the Navajo Tribal Chairman conditioned his approval, as noted in the Map and Survey. ER-32.

Moreover, in Navajo Tribal Council Resolution CAP-25-59, referenced in the Map and Survey, the Chairman "may consent on behalf of the Navajo Tribe to the transfer of the rights of way for Routes 1 and 3 or of any parts of them to the State of Arizona," (ER-61) but is expressly restricted by the Council's command that he "attach any terms or conditions not inconsistent with this resolution to the Tribal consents he is hereby empowered to give." ER-62. Accordingly, nowhere in the Resolution is the Tribal Chairman authorized to waive treaty rights or to cede the civil jurisdiction of the Navajo Nation. Indeed, nothing in the several intergovernmental agreements indicates that the Navajo Nation intended or understood that its grant of a limited-right-of-way would have the effect of completely alienating tribal trust land and extinguishing the tribe's treaty rights with respect to that land. ER-30-32, 48-62; *see Mille Lacs Band of Chippewa Indians*, 526 U.S. at 174, 196, 202 (citations omitted) (instructing that Congress's

abrogation of treaty rights must be express and unambiguous and that treaties and agreements with tribes must be interpreted "to give effect to the terms as the Indians themselves would have understood them"). In addition, the State of Arizona's acceptance of the right-of-way was subject to the pre-existing treaty obligations of the Federal Government to the Navajo Nation. In *Warren Trading Post*, 380 U.S. 685 (1965), the Supreme Court construed the same Act that funded construction of Navajo Indian Route #1 in this case and concluded that "*in compliance with its treaty obligations* the Federal Government has provided roads . . . needed by the [Navajo] Indians." *Id.* at 690 & n.17 (emphasis added) (citing 25 U.S.C. §§ 631-638). Addendum 2. The State of Arizona accepted these obligations in receiving assignment of the right-of-way:

> *The Assignee*, *Arizona State Highway Commission*, in [the] above and foregoing assignment, acting through its Chief Engineer, hereby accepts all right, title, and interest to said right-of-way . . . formerly vested in the Bureau of Indian Affairs, and *agrees to be bound by and fulfill all the obligations, conditions, and stipulations in said right-of-way, and the rules and regulations of the Secretary of Interior applicable thereto.*

ER-59-60 (emphases added).

Manifestly, the treaty obligations of the Federal Government to the Navajo Nation are among the "obligations, conditions, and stipulations" to which the State of Arizona "agree[d] to be bound." ER-59-60. Yet the District Court disregarded the conditions and limitations of the right-of-way over Navajo Indian Route #1 as

expressed in the intergovernmental agreements, and instead treated the limited grant of a right-of-way as a complete alienation of the tribal trust land. The District Court held, erroneously, that "nothing the [*sic*] in the agreement [between the State Highway Commission, the Arizona Highway Department, and the United States of America, acting on behalf of the Bureau of Indian Affairs] in this case expressly reserved the Tribe's right to exercise dominion or control over the right-of-way," and that, therefore, "the stretch of U.S. Highway 160 within the Navajo reservation is equivalent, for nonmember governance purposes to alienated, non-Indian land . . . ." ER-6-7.

The District Court improperly searched for language expressly reserving authority to adjudicate motor-vehicle-related torts, which will not be found in a nearly century-and-a-half-old treaty, Congress having "outlawed any future treaties with Indian tribes" in 1871. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 161 & n.2 (1982) (discussing end-of-treatymaking statute, 25 U.S.C. § 71). The District Court thus failed to ascertain the rights that were reserved by the Navajo Nation in the Treaty and intergovernmental instruments related to the right-of-way. ER-2-12, 30-32, 48-62; Addendum 1. A proper inquiry shows that (1) only a limited right-of-way was granted, (2) all other pre-existing rights were preserved, and, accordingly (3) nothing in the grant of the right-of-way in any way suggests that the land should be treated as the equivalent of alienated non-Indian fee land for

nonmember governance purposes.

The Ninth Circuit has affirmed the necessity of determining the status of the land on which nonmember conduct occurs in ascertaining the scope of tribal civil authority over nonmembers, and hence has applied *Strate*'s multi-factor analysis. For example, in *McDonald v. Means*, 309 F.3d 530, 538 (9th Cir. 2002), this Court considered whether the Northern Cheyenne Tribal Court had jurisdiction to adjudicate claims against a nonmember defendant arising from an auto accident on Route 5, a Bureau of Indian Affairs ("BIA") road within the Northern Cheyenne Indian Reservation. This Court's analysis of the status of the BIA road in *McDonald* bears on the status of the roadway in this case because, according to the Acceptance by Assignee documents here, the right-of-way assigned to the Arizona State Highway Commission was "formerly vested in the Bureau of Indian Affairs" and was accepted by the State subject to "all the obligations, conditions, and stipulations in said right-of-way, and the rules and regulations of the Secretary of Interior." ER-59-60.

As this Court recognized in *McDonald*, such obligations of the Secretary of Interior, as well as pre-existing treaty rights, entail fiduciary duties that the BIA owes to Indian tribes: "It is well established that the BIA holds a fiduciary relationship to Indian tribes, and its management of tribal rights-of-way is subject to the same fiduciary duties." *McDonald*, 309 F.3d at 538. In light of the unique

features of BIA roads, this Court in *McDonald* applied the *Strate* factors in concluding that the "scope of rights and responsibilities retained by a tribe over a BIA road exceed those retained over the state highway in *Strate*, and that these additional retained rights suffice to maintain tribal jurisdiction over nonmember conduct on BIA roads." *Id*. In the present case, the right-of-way in question was formerly vested in the BIA, and Arizona accepted assignment of the right-of-way subject to "all the obligations, conditions, and stipulations" of the Secretary of Interior in said right-of-way. ER-59-60. As with other BIA roads, application of the multi-factor analysis in *Strate* to the highway on which the collision occurred in this case dictates that it retain its status as tribal land for nonmember governance purposes. *See McDonald*, 309 F.3d at 538.

iv. No Compensation Received

Third, in contrast to the circumstances in *Strate*, where the Three Affiliated Tribes of the Fort Berthold Reservation "consented to, and received payment for, the State's use of the 6.59-mile stretch for a public highway," *Strate*, 520 U.S. at 456, the Navajo Nation in the instant case expressly waived compensation for approving the grant of the right-of-way. ER-61-62. In waiving compensation the Nation demonstrated that the tribe was not agreeing to complete alienation of its trust lands: "All claim of the Tribe to compensation for use of its lands for highway purposes within such rights of way is hereby waived." ER-61-62.

Again, *McDonald v. Means* is instructive, for in aligning the BIA roadway in that case with tribal lands for nonmember governance purposes, this Court observed that "[n]o meaningful compensation was received by the Tribe in exchange for the right-of-way, presumably because the right-of-way is maintained, as all BIA properties are, for the benefit of the tribe." 309 F.3d at 539 (footnote omitted). Referring to the absence of compensation as a factor distinguishing *Strate*, this Court concluded that "under *Montana*, the Tribe retained enough of its gatekeeping rights that Route 5 cannot be considered non-Indian fee land, and that the Tribe thus maintains jurisdiction over Route 5." *Id.* at 540. As in *McDonald*, the absence of compensation for the tribe's limited grant of a right-of-way in the present case weighs *against* "aligning" the roadway at issue with non-Indian fee land.

v. Limited Right-of-Way for Nonmembers Passing Through

The Navajo Nation consented to the grant of a limited right-of-way for a roadway that is open to the public, thus prohibiting the Nation from blocking access to the roadway or barring entry by persons who are merely passing through the Reservation, which is a use consistent with the original grant of the right-of-way. This Court in *McDonald* clarified the meaning of a limited right-of-way, acknowledging that although the roadway in question in that case was open to the public, under federal regulations the Commissioner of Indian Affairs, on behalf of

the Tribe, could restrict use of the roadway. While the Northern Cheyenne Tribe "reserved no express right of dominion" in that case, the Court recognized that the Tribe had not given away all of its rights in granting a limited right-of-way:

> In granting the Route 5 right-of-way, the Northern Cheyenne Tribe relinquished some, but not all, of the sticks that form the landowner's traditional bundle of gatekeeping rights. The tribe has consented to public use of the road. However, traffic on the road remains subject to the authority of the tribe, both in rulemaking and enforcement.

Id. at 539.

Power is reserved to the Navajo Nation by Treaty, congressional statute, and intergovernmental agreement to exclude businesses conducting commercial tours that do not apply for a permit, pay the required permit fee, or otherwise abide by the NNTGSA. Addendum 4, 5 N.N.C. §§ 2501 *et seq*. This regulatory regime was duly enacted by the Navajo Nation in furtherance of the Federal Government's purposes in funding construction of roadways across the Reservation. *Cf. Merrion*, 455 U.S. at 144 ("When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry.").

Also, while the highway in question in this case forms part of the state's highway system and is open to the public, the Navajo Nation exercises joint maintenance and control in regulating commercial touring on the highway and in providing governmental services in the form of first responders in the event of

collision on the highway. As stipulated by the parties, and as recognized by the District Court, the Navajo Nation Emergency Medical Services, Navajo Police Department, Navajo Department of Criminal Investigations, and the Navajo Nation Department of Fire and Rescue Services, with the assistance of the Arizona Department of Public Safety, secured the scene, investigated the collision, cleared the scene of the collision, issued reports, and provided governmental services. ER-. Properly applying all the factors considered in *Strate*, the roadway in this case retains its status as tribal land for nonmember governance purposes, thus giving rise to a presumption *in favor of* tribal civil governing authority.

C. The Navajo Nation has the power to regulate and adjudicate the conduct of a nonmember bus company engaged in the business of commercial touring of the Nation on U.S. Highway 160.

In *Strate*, the Supreme Court noted that in "the pathmarking case" of *Montana* the Court had given "unqualified recognition . . . that 'the [Crow] Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe.'" *Strate*, 520 U.S. at 445, 454 n.8 (quoting *Montana*, 450 U.S. at 557). The existence of this land ownership-based source of tribal authority over the conduct of nonmembers on Indian reservations was recently affirmed in a unanimous decision of this Court. *Water Wheel* involved the question whether the judicial system of Colorado River Indian Tribes ("CRIT") had subject matter jurisdiction to adjudicate unlawful detainer and trespass claims

brought by CRIT against a closely held corporation and its non-Indian owner for conduct occurring on tribal land leased to the nonmember tribal court defendants. 642 F.3d 802 at 804. This Court held, outside the context of reserved treaty rights, that generally an Indian tribe has authority to adjudicate civil causes of action brought against nonmembers for conduct occurring on tribal lands within a reservation, as an incident of the tribe's ownership of its lands. *See id.*at 820.

The Court pointed out that in the Supreme Court's most recent ruling on the issue of tribal jurisdiction over nonmembers in Indian country, the high court affirmed the broad authority tribes exercise over their lands "when it recognized the general rule that a tribe has plenary jurisdiction over tribal land until or unless that land is converted to non-Indian land." *Id.* at 816 (citing *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 328 (2008)). The Court reasoned that because the nonmember conduct in *Water Wheel* occurred on tribal land, and because no act of Congress or Supreme Court precedent contravened tribal jurisdiction, the CRIT had regulatory authority incidental to the Tribes' authority to exclude non-Indians from tribal land. *Id.* at 812; *see also id.* at 814 (concluding that "the tribe's status as landowner is enough to support regulatory jurisdiction").

In *Water Wheel*, this Court relied on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), in rejecting *Montana*'s presumption *against* tribal authority

concerning "the tribe's exercise of regulatory jurisdiction over non-Indians on *non-Indian land* within the reservation." *Water Wheel*, 642 F.3d at 809. This Court wrote:

> *Montana* limited the tribe's ability to exercise its power to exclude only as applied to the regulation of non-Indians on non-Indian land, not on tribal land. . . .
>
> In this instance, where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*.

Id. at 810, 814. Similarly, the Supreme Court in *Merrion* observed that the power to tax persons conducting business on the reservation derives as well from a tribe's power to exclude and that such taxation is a legitimate form of regulation:

> Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation.

Merrion, 455 U.S. at 144.

In the present case, the Navajo Nation's levy of a permit fee upon touring companies conducting business within the Navajo Nation, as authorized in the NNTGSA, is aimed at raising revenue to defray the cost of governmental services provided to these businesses. Moreover, in its Tour and Guide Services Act, the Nation asserts both its treaty-based authority and inherent power to exclude

businesses violating tribal law:

> Any person, firm, association, or corporation, who shall furnish, provide, or conduct any of the prescribed activities [passenger transportation for hire, for the purposes of touring, visiting, sightseeing . . . within the Navajo Nation] 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 17 NNC §1901 et seq. and with due process of law*.

Addendum 4, 5 N.N.C. § 2504 (emphasis added); ER-21. The Navajo Nation's authority to levy a permit fee upon companies conducting guided tours on tribal lands is amply supported by Supreme Court precedent. In *Merrion*, for instance, the Supreme Court reiterated that a "tribe's interest in levying taxes on nonmembers to raise 'revenues for essential governmental programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.'" *Merrion*, 455 U.S. at 138 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980)).

In this case, the tour bus took a route across almost 200 miles of pristine and scenic canyons and high desert. (ER-72). The Navajo Nation Supreme Court noted that the Monument Valley buttes "are considered 'the most enduring and definitive images of the American West,'" and that the Park view is "one of the most majestic—and most photographed—points on earth." ER-72 (citation omitted). The beauty of the high desert landscape of the Navajo Nation, the culture and

pastoral lifestyle of the Navajo people, and the crafts, curios, and Navajo artwork that tourists purchase while touring the Nation indisputably are manifestations of "value generated on the reservation by activities involving the Tribes" with respect to which nonmember tourists are "the recipient[s] of tribal services." *Cf. Colville*, 447 U.S. at 156-57. Based, therefore, on its retained treaty rights and its inherent authority over its reserved territory, the Navajo Nation has a legitimate and especially strong interest in levying permit fees upon, and otherwise regulating the activities of, companies that enter the Navajo Nation providing "passenger transportation for hire" for the purpose of "touring, visiting, and sightseeing." ER-18; Addendum 4, 5 & 6.

With respect to adjudicatory authority, this Court in *Water Wheel* held that the Tribes' valid *regulatory* authority in turn gave rise to valid tribal *adjudicatory* authority, since such authority was not contravened by Congress and did not conflict with any Supreme Court precedent, observing that "[a]ny other conclusion would impermissibly interfere with the tribe's inherent sovereignty, contradict long-standing principles the Supreme Court has repeatedly recognized, and conflict with Congress's interest in promoting tribal self-government." *Water Wheel*, 642 F.3d at 813-14; *accord Strate*, 520 U.S. at 453 ("[W]here tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'")

(quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (alteration added by the *Strate* Court). Likewise, the absence of countermanding congressional acts or judicial decisions in this case leads to the conclusion that the Navajo Nation's inherent sovereign authority to *regulate* Express Charter companies' commercial touring activity on the Navajo Reservation establishes its authority to *adjudicate* claims arising from that activity as well. *See Water Wheel*, 642 F.3d at 811-16 (discussing and applying proper course of analysis for determining tribal adjudicative jurisdiction over nonmember activity on an Indian reservation once tribal regulatory jurisdiction is established).

The District Court *agreed* that "[t]here is no question that the Navajo Nation has the right to regulate tourism on the reservation" based on the Nation's authority to exclude, and that this authority "includes the 'power to exclude nonmembers entirely or to condition their presence on the reservation.'" ER-10-11, District Court Order (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983), and citing *Water Wheel*, 642 F.3d at 808, 810). Further, the District Court correctly acknowledged that "[t]hese conditions necessarily include requiring any tourism company to obtain a license, enter into a Passenger Service Agreement, and to abide by the Nation's laws regulating tourism;" that "[i]f nonmembers do not agree to the conditions set by the Nation, the Nation may exclude" those nonmembers; and that the Express Charter companies "cannot claim that, by

ignoring the Nation's laws, they have not consented to the Nation's jurisdiction." ER-11.

The Navajo Nation's "plenary jurisdiction over tribal land," *Water Wheel*, 642 F.3d at 816, acknowledged repeatedly by the Supreme Court and this Court, clearly applies in this case to validate the Navajo Nation's authority to regulate the Express Charter companies' commercial touring activity occurring on roadways crossing tribal lands within the Navajo Reservation, including U.S. Highway 160, and to adjudicate disputes arising from that conduct.[2] The District Court, while affirming the Navajo Nation's power to regulate commercial tourism "on the reservation," concluded without much analysis that the highway in question is the equivalent of non-Indian fee land, stating that "[s]o long as the stretch is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude." ER-12 (citing *Strate*, 520 U.S. at 456). The District Court overlooked facts stipulated to by the Parties establishing that commercial tourism was occurring on indisputably tribal trust lands (ER-101-105, 116;

[2] The Navajo Nation's strong interest in regulating commercial touring within the Navajo Reservation would justify its governing authority over the conduct of the Express Charter companies in this case, based on the Nation's inherent power to exclude nonmembers from tribal lands, even if U.S. Highway 160 were deemed the equivalent of non-Indian fee lands for nonmember governance purposes. *See Brendale v. Confederated Tribe & Bands of the Yakima Indian Nation*, 492 U.S. 408, 446-47 (1989) (opinion of Stevens, J.) (concluding that the Yakima Nation had zoning authority, stemming from the Nation's power to exclude nonmembers from tribal land, over nonmember activity on parcel of non-Indian fee land within area of reservation predominantly owned by the tribe and its members).

Addendum 3), and thus the Nation's power to regulate Express Charter companies' commercial tourism was in full effect even before the collision on U.S. Highway 160 occurred. In doing so, the District Court disregarded clear guidance from decisions of the Supreme Court—including *Strate* itself—and this Court indicating that the Nation's tribal regulatory and adjudicative jurisdiction in this case *exists* as a matter of law.

D. A consensual relationship of the qualifying kind under *Montana*'s first exception applies in this case to validate the Navajo Nation's regulatory and adjudicatory jurisdiction.

A presumption *in favor of* tribal governing authority, as developed in the *Montana-Strate* analytical framework, applies in this case and tribal court jurisdiction exists by virtue of the reserved treaty and landownership-based rights that the Navajo Nation retains and exercises. But even if this Court were to hold that these rights do not validate tribal civil jurisdiction, and that an Indian tribe's granting a limited right-of-way like the one over U.S. Highway 160 is always the equivalent of non-Indian fee land, the factual circumstances specific to the instant case overcome *Montana*'s presumption *against* the Navajo Nation's inherent sovereign authority by application of either one of the two *Montana* exceptions.

The first *Montana* exception validates tribal regulatory authority over non-Indian fee land, or a right-of-way deemed the equivalent of non-Indian fee land,

based on the activities of nonmembers who enter consensual relationships with the tribe or its members:

> 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.

Montana, 450 U.S. at 565 (citations omitted). The District Court, in discussing the first *Montana* exception, noted that *Montana*'s "consensual relationships" exception was insufficient to support tribal court jurisdiction in *Strate* because (1) the dispute was "distinctly non-tribal in nature" to the extent it "arose between two non-Indians involved in [a] run-of-the-mill highway accident"; (2) the non-Indian tribal-court plaintiff, Gisela Fredericks, "was not a party to the subcontract" between the Three Affiliated Tribes and A-1 Contractors, the non-Indian defendant in tribal court; and (3) "the Tribes were strangers to the accident." ER-8-11(citing *Strate*, 520 U.S. at 457 (citations and some brackets omitted). However, the present case is factually different with respect to all three of these aspects of the lawsuit in *Strate* that led the Supreme Court to conclude that a qualifying consensual relationship was lacking in that case.

First, the fatal tour bus/auto collision in this case was *not* a "run-of-the mill highway accident" involving only non-Indian parties and implicating no tribal interests. As the Supreme Court observed in *Plains Commerce Bank*, *Montana* permits "tribal regulation of nonmember *conduct* inside the reservation that

implicates the tribe's sovereign interests." 554 U.S. at 332. The Court elaborated:

> Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations.

Id. at 335.

Second, in contrast to the facts in *Strate*, the collision in this case killed and severely injured citizens of the Navajo Nation and involved nonmember businesses engaged in a commercial touring subject to Navajo Nation licensing and safety regulations, and the Navajo Long-Arm Statute. ER-18-29; Addendum 4, 5, 6, & 7. The very purpose of these regulations and statute is to govern the risks posed by the commercial activities in which the Express Charter companies were engaged, resulting in devastating harm to the Jensen/Johnson family. Navajo tribal members are the intended beneficiaries of these regulations and statutes which protect individual members and are aimed at raising revenue for the entire tribe. Because of this, the individual enrolled Navajos injured in this case *were* "parties to" the consensual, commercial relationship between Express Charter companies and the Navajo Nation. As the Supreme Court observed in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), Indian tribes are comprised collectively of their individual members:

> To be sure when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. *But those*

> *entities are, after all, composed of individual Indians*, and the legislation confers individual rights.

Id. at 181 (emphasis added). In sharp contrast to *Strate*, the underlying lawsuit in this case is distinctly *tribal* in nature, a dispositive difference underscored in the Supreme Court's subsequent clarifications regarding the scope of the first *Montana* exception. *See, e.g.*, *Plains Commerce Bank*, 554 U.S. at 333, 335.

Third, in the present case, unlike in *Strate*, the Navajo Nation can hardly be dismissed as a "stranger[ ] to the accident," *Strate*, 520 U.S. at 457, where the Navajo Nation through its regulations requires proof of insurance and licensing, and enforces safety regulations aimed at protecting its members from the very risks posed by Express Charter companies' commercial touring activities. "Due 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." ER-70, 81-82; *see also Plains Commerce Bank*, 554 U.S. at 332 ("As our cases bear out, the tribe may quite legitimately seek to protect its members from noxious uses [to which land is put] that threaten tribal welfare or security, or from nonmember conduct on the land that does the same."). As the Navajo Nation Supreme Court observed, regulation of commercial touring is necessitated by the sheer size of the Navajo Nation (27,000 square miles), the assorted types and 10,000 miles of roadway traversing the Nation, the relative scarcity of police to patrol the Reservation (350

Navajo police officers with a police-officer-to-population ratio of 0.8:1,000), the 2.5 million tourists visiting the Nation in 2004, and the importance of tourism to the economic development plan of the Navajo Nation. ER-69, 78-81. The lawsuit in the underlying case clearly implicates the Navajo Nation's sovereign interest in protecting its own members and fostering economic development by regulating commercial tourism on the Reservation.

Nor does Express Charter companies' past evasion of Navajo Nation law render them immune from tribal regulatory jurisdiction. With respect to their activities on the Navajo Nation on September 20-21, 2004, the Express Charter companies have admitted that they did not (1) apply for and secure a touring permit, (2) pay an annual permit fee of $3,000.00, (3) provide proof of liability insurance, (4) execute a Tourist Passenger Service Agreement, or (5) follow any other requirement of the NNTGSA, 5 N.N.C. § 2501, *et seq*., and its associated regulations. ER-8-11, 104; Addendum 4, 5, & 6. But they have argued that by virtue of their violation of the NNTGSA they "did not consent to jurisdiction" and "had not entered into any commercial dealing, contracts, leases or other arrangements' with the Navajo Nation. ER-9-11.

The District Court soundly rejected this argument, ruling that the Express Charter companies "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.'" ER-10, 76; *see also Elliot v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 850 (9th Cir. 2009) (holding tribal jurisdiction "colorable" and "plausible" under both *Montana* exceptions, thereby requiring exhaustion of tribal court remedies, where nonmember violated tribal regulations prohibiting destruction of natural resources and requiring a fire permit); *see also Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce Bank*, 554 U.S. at 337) (emphasis added) (rejecting argument that tribe lacked jurisdiction over trespassing, non-Indian holdover tenant for alleged lack of a consensual relationship and reiterating that "[f]or purposes of determining whether a consensual relationship exists under *Montana*'s first exception, 'consent may be established expressly *or by [the nonmember's] actions*'").

Moreover, the Navajo Nation itself has proclaimed jurisdiction over the conduct engaged in by Express Charter companies in this case in its Long-Arm Statute, 7 N.N.C. § 253a(C), which provides:

> A Court of the Navajo Nation may exercise personal and subject matter jurisdiction over any non-member who consents to jurisdiction by commercial dealings, . . . written or implied consent, or any action or inaction which causes injury which affects the health, welfare, or safety of the Navajo Nation or any of its members located within the territorial jurisdiction of the Navajo Nation . . . .

ER-66-69, 73-74; Addendum 7. The Navajo Nation Supreme Court held that the Long-Arm Statute "codif[ies] the authority of the Navajo Nation as affirmed in Article II of the [Navajo] Treaty of 1868"; that "when the collision occurred and also regularly in the 2004 tourist season, the [Express Charter companies'] activities within the Navajo Nation constituted tour business activities within the meaning" of the NNTGSA; and that "the [Express Charter companies] knew or should have known that their activities would subject them to Navajo Nation jurisdiction over their tour-related activities." ER-45-47, 68-74; *see Water Wheel*, 642 F.3d at 817-18 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)) (other citations omitted) (instructing that "courts should consider the circumstances to determine whether a defendant should "reasonably anticipate being haled into court" in the forum state"); *see also* Coach Service Agreement, ER-36 ("The Coach Company agrees and undertakes to follow any and all laws, regulations … and agrees to acquire and be in possession of all legal permits, licenses…").

In its decision below, the District Court correctly acknowledged that, as a general matter, by carrying on commercial touring activity within the Navajo Reservation, and in light of the Nation's own valid, codified regulation of that on-reservation activity, Express Charter companies had engaged in conduct requiring their "consent" within the meaning of the NNTGSA. ER-11-12; Addendum 4, 5 &

6. The District Court then quoted from a provision of the Act requiring tour operators within the reservation "to sign a contract with the Navajo Nation that stated '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*.'" ER-11-12 (quoting Tourist Passenger Service Agreement) (emphasis added). However, the District Court then reasoned, erroneously, that because the court deemed the site of the tour bus/auto collision, U.S. Highway 160, the equivalent of non-Indian fee land for nonmember governance purposes (since "the Nation's right to occupy and exclude does not extend to that stretch of land"), "the contents of that Agreement do not give rise to an implication of consent by [Express Charter companies] to the tribal court exercising jurisdiction over them . . . ." ER-11-12. Accordingly, in the District Court's view, "the highway accident at issue in this case does not fall within a consensual relationship as required by *Montana*'s first exception." ER-11-12.

The error in the District Court's analysis of the applicability of *Montana*'s first exception in this case is threefold. First, and most egregiously, the District Court erred in presuming that *Montana*'s consensual relationships exception simply cannot apply to establish tribal jurisdiction where the nonmember conduct occurs on lands over which the tribe "cannot assert a landowner's right to occupy and exclude." ER-12 (citing *Strate*, 520 U.S. at 456). Indeed, *Montana*'s

consensual relationships exception generally is relevant *only* in cases where the nonmember conduct occurs on such lands—*i.e.*, on non-Indian fee lands, or on a highway deemed to be the equivalent of non-Indian fee lands for nonmember governance purposes. In such cases *only* does the *Montana-Strate* framework's general presumption *against* tribal authority arise. *See, e.g.*, *Water Wheel*, 642 F.2d at 809 (emphasis added) ("Since deciding *Montana*, the Supreme Court has applied those [two *Montana*] exceptions almost exclusively to questions of jurisdiction arising *on non-Indian land or its equivalent*."). It is a fundamental error that the District Court purported to rely on *Strate* in ruling that the consensual relationship exception cannot apply to nonmember conduct occurring on a highway, deemed the equivalent of non-Indian fee land, where the Supreme Court in *Strate* instructed that determining whether a highway is equivalent to non-Indian fee land is an indispensable *prerequisite* for applying *Montana* and its exceptions. *See Strate*, 520 U.S. at 456 ("We therefore align the right-of-way, for the purpose at hand, with land alienated to non-Indians. Our decision in *Montana*, accordingly, governs this case.").

Second, the District Court erred in reading the codified proclamation of tribal regulatory authority "on lands within the jurisdiction of the Navajo Nation" within the NNTGSA (ER-11-12) as, in effect, a *disclaimer* of authority over nonmember commercial touring activity on lands over which the tribe is deemed to

lack "a landowner's right to occupy and exclude." The District Court's narrow construction of the jurisdictional language in the NNTGSA as reflecting the Navajo Nation's assertion of regulatory authority over commercial touring *on tribal land only* is directly contradicted by the Navajo Nation Supreme Court's decision and reasoning in the tribal court proceedings in this very case, notwithstanding the District Court's acknowledgment that the Navajo Nation's determination of its own jurisdiction in this matter is "entitled to some deference." ER-5.

More specifically, the Navajo Long-Arm Statute, which the Navajo Supreme Court discussed at length, clearly and unambiguously manifests the Navajo Nation's assertion of governing authority over persons transacting business or causing tortious injury in the Navajo Nation, regardless of the ownership status of the land on which activity happens to occur. ER-66-69, 73-74; Addendum 7. The District Court's disregard of the plain language and import of the Long-Arm Statute's assertion of expansive tribal jurisdiction throughout the reservation, together with the Court's failure to give deference to the Navajo Nation Supreme Court's broad construction of the Nation's assertion of governing authority on the reservation, renders the District Court's narrow interpretation of the phrase "lands within the jurisdiction of the Navajo Nation" in the NNTGSA clearly erroneous.

A third error in the District Court's disposal of the question of the applicability of *Montana*'s consensual relationship exception derives from the other two errors. Because the District Court erroneously concluded (1) that the exception cannot apply to nonmember conduct on land judicially deemed the equivalent of non-Indian fee land and (2) that the Navajo Nation itself effectively disclaimed authority to regulate commercial touring activity on such land in any event, the Court failed to address whether the conduct of the Express Charter companies in this case otherwise establishes "a consensual relationship of the qualifying kind" within the meaning of *Montana*'s first exception. Proper judicial analysis of this question leads to the conclusion that the Express Charter companies' on-reservation conduct in this case is precisely "the qualifying kind" under Supreme Court and Ninth Circuit precedents. In contrast to the circumstances in *Strate*, the Express Charter companies' commercial touring implicates the Navajo Nation's core sovereign interests in managing its own land and territory, regulating relations among tribal members, and exercising its right to "make [its] own laws and be ruled by them." *Williams*, 358 U.S. at 220; *see also Plains Commerce Bank*, 554 U.S. at 332 (explaining *Montana*'s reliance on *Williams* as exemplifying the first exception's applicability in cases involving "regulation of non-Indian activities on the reservation that ha[ve] a discernible effect on the tribe or its members").

E. The Express Charter companies' commercial touring of the Navajo Nation directly affects and threatens the political integrity, economic security, and health and welfare of the Navajo Nation under *Montana*'s second exception.

The Supreme Court articulated the second exception to the presumption against tribal governing authority over nonmember conduct on non-Indian lands as follows:

> 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.

Montana, 450 U.S. at 566 (1981) (citations omitted). The second *Montana* exception "authorizes the tribe to exercise civil jurisdiction when non-Indians' 'conduct' menaces the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Plains Commerce Bank*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566). "The second *Montana* exception stems from the same sovereign interests that give rise to the first," namely, the tribe's sovereign "interests in protecting internal relations and self-government" and its sovereign "power to superintend tribal land." *Id.* at 336, 341. The Supreme Court has indicated further that to satisfy the second *Montana* exception, "[t]he impact of the nonmember's conduct 'must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe.'" *Atkinson Trading Co.*, 532 U.S. at 659 (quoting *Brendale*, 492 U.S. at 431 (opinion of White, J.)).

The conduct of the Express Charter companies in carrying on commercial touring on the Navajo Reservation, resulting in a collision on U.S. Highway 160 that killed and seriously injured Navajo tribal members, directly implicates the core sovereign interests. The Supreme Court has acknowledged these interests give rise to tribal governing authority over nonmembers pursuant to *Montana*'s second exception. The District Court failed to address the link between the Express Charter companies' conduct in this case and these core sovereign tribal interests, viewing the facts instead as indistinguishable from *Strate* because *Strate* also involved a nonmember defendant sued in tribal court for "driving carelessly on a public highway running through a reservation." ER-12-13. But in *Strate* the Supreme Court did not suggest that negligent driving by nonmembers can *never* give rise to tribal court jurisdiction under *Montana*'s second exception. Rather, the Supreme Court clarified that consideration of core tribal interests is "[k]ey to [the exception's] proper application." *Strate*, 520 U.S. at 459. Because such core tribal interests are strongly implicated in this case, the District Court clearly erred in failing to conduct the analysis prescribed by the Supreme Court for applying *Montana*'s second exception.

As the Supreme Court further instructed in *Strate*, "the character of the tribal interest" asserted must be evaluated when determining whether tribal governance is justified under *Montana*'s second exception. *Id.* at 458. Where the exercise of

state authority, rather than tribal authority, "would trench unduly on tribal self-government," state jurisdiction would be an "impermissible intrusion" and tribal jurisdiction, therefore, would be warranted. *Id.* Accordingly, *Montana*'s second exception requires inquiry into whether tribal authority over the conduct of nonmembers "'is necessary to protect tribal self-government or to control internal relations,'" or otherwise "is needed to preserve 'the right of reservation Indian to make their own laws and be ruled by them.'" *Id.* at 459 (quoting *Williams*, 358 U.S. at 220).

In this case, upholding the Navajo Nation's authority over commercial touring throughout the Navajo Reservation, and over legal claims stemming from that activity, is necessary for preserving the Nation's ability to govern itself and control internal relations. As the District Court recognized, "the Navajo Nation's power to exclude certainly gives the Nation the ability to regulate touring activity within the Reservation and protect tribal self-governance through those means . . . ." ER-12. But because the District Court believed, erroneously, it was "bound by" *Strate* to deny Navajo jurisdiction over conduct occurring on the limited right-of-way, it did not distinguish between nonmembers merely passing through on U.S. Highway 160, and nonmembers conducting a commercial enterprise involving the use of tribal land. Collaterally, the District Court did not recognize the Supreme Court's *validation* of tribal authority over nonmember

conduct on non-Indian fee land in analogous circumstances in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

In *Brendale*, the Supreme Court held, *inter alia*, that the Yakima Nation had authority to apply its zoning laws to nonmembers' use of non-Indian fee land in that part of the reservation dominated by tribally owned parcels. While the *Brendale* Court "could not agree on a rationale," *Plains Commerce Bank*, 554 U.S. at 334 (citing *Brendale*, 492 U.S. at 443-44 (opinion of Stevens, J.), and *id.* at 458-59) (opinion of Blackmun, J.)), since deciding the case the Supreme Court has referred to it as an application of the *Montana-Strate* framework. *See Plains Commerce Bank*, 554 U.S. at 334 (stating that in *Brendale* "five Justices concluded that *Montana* did permit the Tribe to impose different zoning restrictions on nonmember fee land" in the so-called "closed" part of the reservation).

In his opinion explaining *Montana*'s application to produce this result, Justice Blackmun reasoned that an Indian tribe's ability to comprehensively regulate land use on its own reservation was a core sovereign interest that justified tribal authority over use and development of the interspersed non-Indian parcels of land as well. *See Brendale*, 492 U.S. at 457-58 (opinion of Blackmun, J.); *cf. id.* at 411-12 (opinion of Stevens, J.) ("[T]he Tribe has authority to prevent the few individuals who own portions of the closed area in fee from undermining its general plan to preserve the area's unique character by developing their isolated

parcels without regard to an otherwise common scheme."). More specifically, Justice Blackmun adverted to the language of *Montana*'s second exception in affirming the Yakima Nation's substantial interest in enforcing unitary zoning regulations:

> *Montana* explicitly recognizes that tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." . . .
>
> Under this approach, once the tribe's valid regulatory interest is established, the nature of land ownership does not diminish the tribe's inherent power to regulate in the area. . . .
>
> It would be difficult to conceive of a power more central to "the economic security, or the health or welfare of the tribe" than the power to zone.

Id. at 457-58 (opinion of Blackmun, J.) (citations omitted).

Like *Brendale*, this case implicates an Indian tribe's exceptionally strong interest in applying a unitary, comprehensive regulatory regime with respect to a subject matter—here, commercial touring on the reservation—that is distinctly tribal in nature and that is intimately connected with the use of tribally owned lands. *See, e.g.*, *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, No. 12-15634, slip op. at 16-17 (9th Cir. Apr. 26, 2013) (discussing importance of tribal management of on-reservation tourism activity and nonmembers' "access to . . . valuable tribal land"). While conceding "[t]here is no question that the Navajo Nation has the right to regulate tourism on the reservation," ER-10, the District Court's misreading of *Strate* prevented it from acknowledging further that the

strength of this tribal interest requires affirming the Navajo Nation's authority to regulate the commercial touring activity of nonmembers on U.S. Highway 160 even if that right-of-way is deemed the equivalent, for nonmember governance purposes, of non-Indian fee land. *See Plains Commerce Bank*, 554 U.S. at 318, 334-35 (acknowledging tribes' continuing sovereign interest in "managing tribal land" and explaining that "[t]he logic of *Montana* is that certain activities on non-Indian fee land . . . may intrude on the internal relations of tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated."); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1131 (9th Cir. 2006) (en banc) ("Our own cases . . . suggest that whether tribal courts may exercise jurisdiction over a nonmember may turn on how the claims are related to tribal lands."); *see also Water Wheel*, 642 F.3d at 817 (reasoning that even if *Montana*'s presumption against tribal authority applied in the case, the second *Montana* exception would justify tribal jurisdiction over nonmember corporation's activity "considering that the business also involved the use of tribal land and that the business venture itself constituted a significant economic interest for the tribe").

Application of *Montana*'s second exception is further compelled by the serious impact denial of Navajo governing authority over the nonmember conduct in this case would have on the Nation's ability to control its internal relations and govern itself. *See, e.g.*, *Plains Commerce Bank*, 554 U.S. at 318, 331, 336 (noting

tribal regulations justified by *Montana*'s second exception "must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations"). Denying Navajo civil jurisdiction to adjudicate the claims brought by the Jensen/Johnson family against the Express Charter companies in this case would seriously imperil the Nation's development of its own common law, including its ability to determine:

(1) the qualified beneficiaries of a wrongful death estate entitled to share wrongful death proceeds, *compare In re Estate of Tsinahnajinnie*, No. SC-CV-80-98 (Navajo Sup. Ct. 2001) (holding that under Navajo law, all members of decedent's "immediate family" are qualified as beneficiaries of wrongful death estate), *and In re Estate of Apachee*, 4 Nav. R. 178 (Navajo Sup. Ct. 1983) (determining that "immediate family" in Navajo wrongful death action means persons closely related by blood, living in same residence group or camp, who provided mutual assistance and support to decedent), *with* A.R.S. § 12-612 (stating wrongful death action may be brought only "by or in the name of the surviving husband or wife, children or parents" and wrongful death proceeds can be distributed only to these named heirs) ER-39-44;

(2) the circumstances under which injury to or death of a Navajo child *in utero* is compensable, *compare Jensen*, No. SC-CV-07-10, slip op. ER-81-82 (finding injury or death to unborn child *in utero* compensable under Navajo law), *with Summerfield v. Superior Court*, 698 P.2d 712, 722 (Ariz. 1985) (en banc) (holding Arizona does not recognize right of recovery for wrongful death of unborn child who is not viable); and

(3) the conditions under which joinder of an insurer in a lawsuit against its insureds is permitted, an issue that, in contrast to Arizona law, *see, e.g.*, *Bryan v. Southern Pac. Co.*, 286 P.2d 761 (Ariz. 1955) (holding joinder of insurer as real party in interest where action is brought *by insured* is neither procedurally necessary nor desirable), is unsettled under Navajo law.

These grave impediments to the Navajo Nation's ability "to preserve 'the right of reservation Indians to make their own laws and be ruled by them,'" *Strate*, 520 U.S. at 459 (quoting *Williams*, 358 U.S. at 220), through the development of Navajo common law, considered cumulatively with the equally severe deleterious impact of denying Navajo regulatory authority over commercial touring activities on limited rights-of-way crossing tribal trust land on the Navajo Reservation, satisfy the threshold of *Montana*'s second exception specified by the Supreme Court. *See Atkinson Trading Co.*, 532 U.S. at 659 (indicating second *Montana* exception is satisfied by a showing of "demonstrably serious" impacts on a tribe's sovereign interest posed by the activity of nonmembers).

In *Water Wheel*, this Court provided crucial guidance for determining when an Indian tribe will be held to have authority to *adjudicate* civil claims brought against nonmembers, once valid tribal authority to *regulate* the nonmembers' on-reservation conduct has been established, pursuant to *Montana*'s exceptions or otherwise. This Court intimated that unless acknowledging tribal court jurisdiction in such instances would conflict with Supreme Court precedents or congressional statutes, sound principles counsel in favor of affirming the existence of tribal adjudicatory jurisdiction. *See Water Wheel*, 642 F.3d. at 814-16, 819. Because the Navajo Nation's regulatory authority over Express Charter companies in this case has been demonstrated, and because no Supreme Court precedents or acts of

Congress would conflict with this Court's further recognition of the Navajo Nation's authority to adjudicate the Jensen/Johnson family's claims against those companies, the *Water Wheel* guidelines compel such recognition here.

VIII. Conclusion

Defendants-Appellants request that the Order and Judgment of the District Court granting Plaintiffs-Appellees' Motion for Summary Judgment, entering a declaratory judgment that the Kayenta District Court lacks jurisdiction to hear the Jensen/Johnson family's claims relating to the September 21, 2004 tour bus/auto collision, permanently enjoining the Jensen/Johnson family from proceeding with their claims in Kayenta District Court, and denying their Motion for Summary Judgment be reversed and vacated, that this case be remanded for entry of judgment upholding the Navajo Nation District Court's jurisdiction, and that costs be awarded to Defendants-Appellants.

Respectfully submitted,

MICHAEL J. BARTHELEMY, ATTORNEY AT LAW, P.C.

May 15, 2013 s/ Michael J. Barthelemy
Michael J. Barthelemy, Esq.
Counsel for Defendants-Appellants

LAW OFFICES OF GEOFFREY R. ROMERO

May 15, 2013 s/ Geoffrey R. Romero
Geoffrey R. Romero, Esq.
Counsel for Defendants-Appellants

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 13,993 words.

Respectfully submitted,

MICHAEL J. BARTHELEMY, ATTORNEY AT LAW, P.C.

May 15, 2013 s/ Michael J. Barthelemy
Michael J. Barthelemy, Esq.
Counsel for Defendants-Appellants

LAW OFFICES OF GEOFFREY R. ROMERO

May 15, 2013 s/ Geoffrey R. Romero
Geoffrey R. Romero, Esq.
Counsel for Defendants-Appellants

STATEMENT OF RELATED CASES

There is no known related case pending in this Court.

ADDENDUM

Treaty between the United States of America and the Navajo Tribe of Indians; Concluded June 1, 1868; *Ratification advised July* 25, 1868; *Proclaimed August* 12, 1868.

ANDREW JOHNSON,

June 1, 1868.

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Preamble.

WHEREAS a treaty was made and concluded at Fort Sumner, in the Territory of New Mexico, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant-General W. T. Sherman and Samuel F. Tappan, commissioners, on the part of the United States, and Barboncito, Armijo, and other chiefs and headmen of the Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit: —

Contracting parties.

Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo nation or tribe of Indians, represented by their chiefs and headmen, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness: —

Peace and friendship.

ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

Offenders among the whites to be arrested and punished;

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

among the Indians, to be given up to the United States, or, &c.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner

Rules for ascertaining damage.

Addendum 1

of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

Reservation boundaries.

ARTICLE II. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Cañon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30′ west of Greenwich, provided it embraces the outlet of the Cañon-de-Chilly, which cañon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

Who not to reside thereon.

Buildings to be erected by the United States

ARTICLE III. The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter shop and blacksmith shop, not to cost exceeding one thousand dollars each; and a school-house and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

Agent to make his home and reside where

ARTICLE IV. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

His duties.

Heads of families desiring to commence farming may select lands, &c.

ARTICLE V. If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Effect of such selection.

Persons not heads of families

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

Certificate of selection to be delivered, &c.;

to be recorded.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo Land Book."

Survey.

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

Alienation and descent of property.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

Children between six and sixteen to attend school.

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

Duty of agent.

School-houses and teachers.

The provisions of this article to continue for not less than ten years.

Seeds and agricultural implements.

ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

Delivery of articles in lieu of money and annuities.

ARTICLE VIII. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit:

Clothing, &c.

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian — each Indian being encouraged to manufacture their own clothing, blankets, &c.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

Indians to be furnished with no articles they can make.

Census.

Annual appropriations in money for ten years,

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

may be changed.

Army officer to attend delivery of goods, &c.

Stipulations by the Indians

ARTICLE IX. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United

as to outside territory; States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

railroads; 1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2nd. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

residents, travellers, wagon trains, 3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

women and children; 4th. That they will never capture or carry off from the settlements women or children.

scalping; 5th. They will never kill or scalp white men, nor attempt to do them harm.

roads or stations; 6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be

damages; ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe.

military posts and roads. 7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

Cession of reservation not to be valid, unless, &c. ARTICLE X. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article —— of this treaty.

Indians to go to reservation when required. ARTICLE XI. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

Appropriations how to be disbursed. ARTICLE XII. It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any conditions provided in the law, to wit:

Removal. 1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

Sheep and goats. 2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

Cattle and corn. 3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

Remainder. 4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

Removal, how made. 5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mex-

ico, and when completed, the management of the tribe to revert to the proper agent.

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

Reservation to be permanent home of Indians.

Penalty for leaving reservation.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

Execution.

W. T. SHERMAN,
Lt. Gen'l, Indian Peace Commissioner.
S. F. TAPPAN,
Indian Peace Commissioner.

BARBONCITO, Chief.	his x mark.
ARMIJO.	his x mark.
DELGADO.	
MANUELITO.	his x mark.
LARGO.	his x mark.
HERRERO.	his x mark.
CHIQUETO.	his x mark.
MUERTO DE HOMBRE.	his x mark.
HOMBRO	his x mark.
NARBONO.	his x mark.
NARBONO SEGUNDO.	his x mark.
GAÑADO MUCHO.	his x mark.

Council.

RIQUO.	his x mark.
JUAN MARTIN.	his x mark.
SERGINTO.	his x mark.
GRANDE.	his x mark.
INOETENITO.	his x mark.
MUCHACHOS MUCHO.	his x mark.
CHIQUETO SEGUNDO:	his x mark.
CABELLO AMARILLO.	his x mark.
FRANCISCO.	his x mark.
TORIVIO.	his x mark.
DESDENDADO.	his x mark.
JUAN.	his x mark.
GUERO.	his x mark.
GUGADORE.	his x mark.
CABASON.	his x mark.
BARBON SEGUNDO.	his x mark.
CABARES COLORADOS.	his x mark.

Attest:
GEO. W. G. GETTY,
Col. 37th Inf'y, Bt. Maj. Gen'l U. S. A.
B. S. ROBERTS,
Bt. Brg. Gen'l U. S. A., Lt. Col. 3d Cav'y.
J. COOPER MCKEE,
Bt. Lt. Col. Surgeon U. S. A.
THEO. H. DODD,
U. S. Indian Ag't for Navajos.
CHAS. MCCLURE,
Bt. Maj. and C. S. U. S. A.
JAMES F. WEEDS,
Bt. Maj. and Asst. Surg. U. S. A.
J. C. SUTHERLAND,
Interpreter.
WILLIAM VAUX,
Chaplain U. S. A.

Ratification. And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-fifth day of July, one thousand eight hundred and sixty-eight, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:—

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES, July 25, 1868.

Resolved, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the treaty between the United States and the Navajo Indians, concluded at Fort Sumner, New Mexico, on the first day of June, 1868.

Attest:
GEO. C. GORHAM,
Secretary,
By W. J. MCDONALD,
Chief Clerk.

Proclamation. Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-fifth of July, one thousand eight hundred and sixty-eight, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the City of Washington, this twelfth day of August, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

[SEAL.]

ANDREW JOHNSON.

By the President:
W. HUNTER,
Acting Secretary of State.

Treaty between the United States of America and the Eastern Band of Shoshonees and the Bannack Tribe of Indians; Concluded, July 3, 1868; Ratification advised, February 16, 1869; Proclaimed, February 24, 1869.

ANDREW JOHNSON,

PRESIDENT OF THE UNITED STATES OF AMERICA, July 3, 1868.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Preamble.

WHEREAS a treaty was made and concluded at Fort Bridger, in the Territory of Utah, on the third day of July, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Nathaniel G. Taylor, William T. Sherman, William S. Harney, John B. Sanborn, S. F. Tappan, C. C. Augur, and Alfred H. Terry, commissioners, on the part of the United States, and Wash-a-kie, Wau-ni-pitz, and other chiefs and headmen of the Eastern Band of Shoshonee Indians, and Tag-gee, Tay-to-ba, and other chiefs and headmen of the Bannack tribe of Indians, on the part of said band and tribe of Indians respectively, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

Articles of a Treaty with the Shoshonee (Eastern Band) and Bannack Tribes of Indians, made the third Day of July, 1868, at Fort Bridger, Utah Territory.

Contracting parties.

Articles of a treaty made and concluded at Fort Bridger, Utah Territory, on the third day of July, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and headmen of and representing the Shoshonee (eastern band) and Bannack tribes of Indians, they being duly authorized to act in the premises:

War to cease and peace to be kept.

ARTICLE I. From this day forward, peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.

Offenders against the Indians to be arrested, &c.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

Wrong-doers against the whites to be punished.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other

mittee on Indian Affairs as the Committee on Indian Affairs.

§ 622. Exchange of tribal lands; title to lands

For the purpose of consolidation of Indian lands the Secretary of the Interior is authorized, under such regulations as he may prescribe, to exchange any lands or interests therein, including improvements and water rights with the consent of the Pueblo or Navajo tribal authorities for other lands, water rights, and improvements of similar value in the area set apart for the Pueblos and Canoncito Navajos or in the areas declared to be public domain or within any public domain within New Mexico. Title to all lands acquired under the provisions of this subchapter shall be taken in the name of the United States in trust for the respective Pueblo Indians and the Navajo Canoncito group.

(Aug. 13, 1949, ch. 425, § 2, 63 Stat. 605.)

§ 623. Disbursement of deposits in the United Pueblos Agency

The funds now on deposit in the United Pueblos Agency in "special deposits" which have accrued from issuance of livestock-crossing permits and fees collected for grazing permits on the lands which have been under the jurisdiction of the Department of the Interior shall be expended or disbursed for the benefit of the Indians under such rules and regulations as the Secretary of the Interior may prescribe.

(Aug. 13, 1949, ch. 425, § 3, 63 Stat. 605.)

§ 624. Exchange of lands

(a) Authorization of Secretary; manner and place

For the purpose of improving the land tenure pattern and consolidating Pueblo Indian lands, the Secretary of the Interior is authorized, under such regulations as he may prescribe, to acquire by exchange any lands or interests therein, including improvements and water rights, within the Pueblo land consolidation areas, and to convey in exchange therefor not to exceed an equal value of unappropriated public lands within the State of New Mexico, or, with the consent of the Pueblo authorities any Pueblo tribal lands or interest therein, including improvements and water rights.

(b) Reservation of minerals, easements, or rights of use

Either party to an exchange under this section may reserve minerals, easements, or rights of use.

(c) Execution of title documents

The Secretary may execute any title documents necessary to effect the exchanges authorized by this section.

(d) Title to lands

Title to all lands acquired under the provisions of this section shall be taken in the name of the United States in trust for the respective Pueblo Indian tribes.

(Pub. L. 87–231, § 10, Sept. 14, 1961, 75 Stat. 505.)

CODIFICATION

Section was not enacted as part of act Aug. 13, 1949, ch. 425, 63 Stat. 604, which comprises this subchapter.

SUBCHAPTER XXI—NAVAJO AND HOPI TRIBES: REHABILITATION

§ 631. Basic program for conservation and development of resources; projects; appropriations

In order to further the purposes of existing treaties with the Navajo Indians, to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes, to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities and ultimately attain standards of living comparable with those enjoyed by other citizens, the Secretary of the Interior is authorized and directed to undertake, within the limits of the funds from time to time appropriated pursuant to this subchapter, a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians, the more productive employment of their manpower, and the supplying of means to be used in their rehabilitation, whether on or off the Navajo and Hopi Indian Reservations. Such program shall include the following projects for which capital expenditures in the amount shown after each project listed in the following subsections and totaling $108,570,000 are authorized to be appropriated:

(1) Soil and water conservation and range improvement work, $10,000,000.

(2) Completion and extension of existing irrigation projects, and completion of the investigation to determine the feasibility of the proposed San Juan-Shiprock irrigation project, $9,000,000.

(3) Surveys and studies of timber, coal, mineral, and other physical and human resources, $500,000.

(4) Development of industrial and business enterprises, $1,000,000.

(5) Development of opportunities for off-reservation employment and resettlement and assistance in adjustments related thereto, $3,500,000.

(6) Relocation and resettlement of Navajo and Hopi Indians (Colorado River Indian Reservation), $5,750,000.

(7) Roads and trails, $40,000,000; of which not less than $20,000,000 shall be (A) available for contract authority for such construction and improvement of the roads designated as route 1 and route 3 on the Navajo and Hopi Indian Reservations as may be necessary to bring the portion of such roads located in any State up to at least the secondary road standards in effect in such State, and (B) in addition to any amounts expended on such roads under the $20,000,000 authorization provided under this clause prior to amendment.

(8) Telephone and radio communications systems, $250,000.

(9) Agency, institutional, and domestic water supply, $2,500,000.

(10) Establishment of a revolving loan fund, $5,000,000.

(11) Hospital buildings and equipment, and other health conservation measures, $4,750,000.

Addendum 2

(12) School buildings and equipment, and other educational measures, $25,000,000.

(13) Housing and necessary facilities and equipment, $820,000.

(14) Common service facilities, $500,000.

Funds so appropriated shall be available for administration, investigations, plans, construction, and all other objects necessary for or appropriate to the carrying out of the provisions of this subchapter. Such further sums as may be necessary for or appropriate to the annual operation and maintenance of the projects herein enumerated are also authorized to be appropriated. Funds appropriated under these authorizations shall be in addition to funds made available for use on the Navajo and Hopi Reservations, or with respect to Indians of the Navajo Tribes, out of appropriations heretofore or hereafter granted for the benefit, care, or assistance of Indians in general, or made pursuant to other authorizations now in effect.

(Apr. 19, 1950, ch. 92, §1, 64 Stat. 44; Pub. L. 85–740, Aug. 23, 1958, 72 Stat. 834.)

AMENDMENTS

1958—Pub. L. 85–740 substituted $108,570,000 for $88,570,000 in opening par., and, in cl. (7), increased from $20,000,000 to $40,000,000 the amount authorized for roads and trails, of which not less than $20,000,000 shall be available for contract authority to bring routes 1 and 3 on the Navajo and Hopi Indian reservations up to secondary road standards in the State.

CONTRACT AUTHORITY; APPROPRIATIONS

Pub. L. 85-740 provided in part that the contract authority and appropriations authorized by the amendment to clause (7) of this section shall be in addition to sums apportioned to Indian reservations or to the State of Arizona under the Federal Highway Act, as amended and supplemented.

§ 632. Character and extent of administration; time limit; reports on use of funds

The foregoing program shall be administered in accordance with the provisions of this subchapter and existing laws relating to Indian affairs, shall include such facilities and services as are requisite for or incidental to the effectuation of the projects herein enumerated, shall apply sustained-yield principles to the administration of all renewable resources, and shall be prosecuted in a manner which will provide for completion of the program, so far as practicable, within ten years from April 19, 1950. An account of the progress being had in the rehabilitation of the Navajo and Hopi Indians, and of the use made of the funds appropriated to that end under this subchapter, shall be included in each annual report of the work of the Department of the Interior submitted to the Congress during the period covered by the foregoing program.

(Apr. 19, 1950, ch. 92, §2, 64 Stat. 45.)

§ 633. Preference in employment; on-the-job training

Navajo and Hopi Indians shall be given, whenever practicable, preference in employment on all projects undertaken pursuant to this subchapter, and, in furtherance of this policy may be given employment on such projects without regard to the provisions of the civil-service and classification laws. To the fullest extent possible, Indian workers on such projects shall receive on-the-job training in order to enable them to become qualified for more skilled employment.

(Apr. 19, 1950, ch. 92, §3, 64 Stat. 45.)

§ 634. Loans to Tribes or individual members; loan fund

The Secretary of the Interior is authorized, under such regulations as he may prescribe, to make loans from the loan fund authorized by section 631 of this title to the Navajo Tribe, or any member or association of members thereof, or to the Hopi Tribe, or any member of association of members thereof, for such productive purposes as, in his judgment, will tend to promote the better utilization of the manpower and resources of the Navajo or Hopi Indians. Sums collected in repayment of such loans and sums collected as interest or other charges thereon shall be credited to the loan fund, and shall be available for the purpose for which the fund was established.

(Apr. 19, 1950, ch. 92, §4, 64 Stat. 45.)

INDIAN REVOLVING LOAN FUND

Certain funds to be administered as a single Indian Revolving Loan Fund after Apr. 12, 1974, see section 1461 of this title.

§ 635. Disposition of lands

(a) Lease of restricted lands; renewals

Any restricted Indian lands owned by the Navajo Tribe, members thereof, or associations of such members, or by the Hopi Tribe, members thereof, or associations of such members, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, or business purposes, including the development or utilization of natural resources in connection with operations under such leases. All leases so granted shall be for a term of not to exceed twenty-five years, but may include provisions authorizing their renewal for an additional term of not to exceed twenty-five years, and shall be made under such regulations as may be prescribed by the Secretary. Restricted allotments of deceased Indians may be leased under this section, for the benefit of their heirs or devisees, in the circumstances and by the persons prescribed in section 380 of this title. Nothing contained in this section shall be construed to repeal or affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law.

(b) Lease, sale, or other disposition of lands owned in fee simple by Navajo Tribe

Notwithstanding any other provision of law, land owned in fee simple by the Navajo Tribe may be leased, sold, or otherwise disposed of by the sole authority of the Navajo Tribal Council, in any manner that similar land in the State in which such land is situated may be leased, sold, or otherwise disposed of by private landowners, and such disposition shall create no liability on the part of the United States.

(c) Transfer of unallotted lands to tribally owned or municipal corporations

The Secretary of the Interior is authorized to transfer, upon request of the Navajo Tribal Council, to any corporation owned by the tribe and organized pursuant to State law, or to any municipal corporation organized under State law, legal title to or a leasehold interest in any unallotted lands held for the Navajo Indian Tribe, and thereafter the United States shall have no responsibility or liability for, but on request of the tribe shall render advice and assistance in, the management, use, or disposition of such lands.

(Apr. 19, 1950, ch. 92, §5, 64 Stat. 46; Pub. L. 86–505, §1, June 11, 1960, 74 Stat. 199.)

AMENDMENTS

1960—Pub. L. 86-505 designated existing provisions as subsec. (a) and added subsecs. (b) and (c).

§ 636. Adoption of constitution by Navajo Tribe; method; contents

In order to facilitate the fullest possible participation by the Navajo Tribe in the program authorized by this subchapter, the members of the tribe shall have the right to adopt a tribal constitution in the manner herein prescribed. Such constitution may provide for the exercise by the Navajo Tribe of any powers vested in the tribe or any organ thereof by existing law, together with such additional powers as the members of the tribe may, with the approval of the Secretary of the Interior, deem proper to include therein. Such constitution shall be formulated by the Navajo Tribal Council at any regular meeting, distributed in printed form to the Navajo people for consideration, and adopted by secret ballot of the adult members of the Navajo Tribe in an election held under such regulations as the Secretary may prescribe, at which a majority of the qualified votes cast favor such adoption. The constitution shall authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary of the Interior and shall become effective when approved by the Secretary. The constitution may be amended from time to time in the same manner as herein provided for its adoption, and the Secretary of the Interior shall approve any amendment which in the opinion of the Secretary of the Interior advances the development of the Navajo people toward the fullest realization and exercise of the rights, privileges, duties, and responsibilities of American citizenship.

(Apr. 19, 1950. ch. 92, §6, 64 Stat. 46.)

§ 637. Use of Navajo tribal funds

Notwithstanding any other provision of existing law, the tribal funds now on deposit or hereafter placed to the credit of the Navajo Tribe of Indians in the United States Treasury shall be available for such purposes as may be designated by the Navajo Tribal Council and approved by the Secretary of the Interior.

(Apr. 19, 1950, ch. 92, §7, 64 Stat. 46.)

§ 638. Participation by Tribal Councils; recommendations

The Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by this subchapter. In the administration of the program, the Secretary of the Interior shall consider the recommendations of the tribal councils and shall follow such recommendations whenever he deems them feasible and consistent with the objectives of this subchapter.

(Apr. 19, 1950, ch. 92, §8, 64 Stat. 46.)

§ 639. Repealed. Pub. L. 104–193, title I, § 110(u), Aug. 22, 1996, 110 Stat. 2175

Section, acts Apr. 19, 1950, ch. 92, §9, 64 Stat. 47; Oct. 30, 1972, Pub. L. 92-603, title III, §303(c), 86 Stat. 1484; Dec. 31, 1973, Pub. L. 93-233, §19(a), 87 Stat. 974, related to additional Social Security contributions to States for State expenditures for aid to dependent children to Navajo and Hopi Indians.

EFFECTIVE DATE OF REPEAL

Repeal effective July 1, 1997, with transition rules relating to State options to accelerate such date, rules relating to claims, actions, and proceedings commenced before such date, rules relating to closing out of accounts for terminated or substantially modified programs and continuance in office of Assistant Secretary for Family Support, and provisions relating to termination of entitlement under AFDC program, see section 116 of Pub. L. 104-193, as amended, set out as an Effective Date note under section 601 of Title 42, The Public Health and Welfare.

§ 640. Repealed. Pub. L. 93–531, § 26, Dec. 22, 1974, 88 Stat. 1723

Section, act Apr. 19, 1950, ch. 92, §10, 64 Stat. 47, established Joint Committee on Navajo-Hopi Indian Administration, with function of making a continuous study of programs for administration and rehabilitation of Navajo and Hopi Indians.

EFFECTIVE DATE OF REPEAL

Section 26 of Pub. L. 93-531 provided that the repeal is effective as of the close of business December 31, 1974.

§ 640a. Diné College; purpose

It is the purpose of sections 640a to 640c–3 of this title to assist the Navajo Nation in providing education to the members of the tribe and other qualified applicants through a community college, established by that tribe, known as Diné College.

(Pub. L. 92–189, §2, Dec. 15, 1971, 85 Stat. 646; Pub. L. 110–315, title IX, §946(a), Aug. 14, 2008, 122 Stat. 3468.)

CODIFICATION

Section was not enacted as part of act Apr. 19, 1950, ch. 92, 64 Stat. 44, which comprises this subchapter.

AMENDMENTS

2008—Pub. L. 110-315 substituted "Navajo Nation" for "Navajo Tribe of Indians" and "Diné College" for "the Navajo Community College".

SHORT TITLE OF 2008 AMENDMENT

Pub. L. 110-315, title IX, §945, Aug. 14, 2008, 122 Stat. 3468, provided that: "This subpart [subpart 2 (§§945, 946)

ernment Organization and Employees, effective July 1, 1979, pursuant to Ex. Ord. No. 12142, §1–101, June 21, 1979, 44 F.R. 36927, set out as a note under section 719e of Title 15, Commerce and Trade. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

§ 323. Rights-of-way for all purposes across any Indian lands

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

(Feb. 5, 1948, ch. 45, §1, 62 Stat. 17.)

EFFECTIVE DATE

Section 7 of act Feb. 5, 1948, provided that sections 323 to 328 should not become operative until 30 days after Feb. 5, 1948.

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of the Interior relating to compliance with rights-of-way across Indian lands, issued under section 321 et seq. of this title with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(e), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees, effective July 1, 1979, pursuant to Ex. Ord. No. 12142, §1–101, June 21, 1979, 44 F.R. 36927, set out as a note under section 719e of Title 15, Commerce and Trade. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

§ 324. Consent of certain tribes; consent of individual Indians

No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended [25 U.S.C. 461 et seq.]; the Act of May 1, 1936 (49 Stat. 1250) [25 U.S.C. 473a, 496]; or the Act of June 26, 1936 (49 Stat. 1967) [25 U.S.C. 501 et seq.], shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

(Feb. 5, 1948, ch. 45, §2, 62 Stat. 18.)

REFERENCES IN TEXT

Act of June 18, 1934, referred to in text, popularly known as the Indian Reorganization Act, is classified generally to subchapter V (§461 et seq.) of chapter 14 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

Section 496 of this title, referred to in text, was repealed by Pub. L. 94–579, title VII, §704(a), Oct. 21, 1976, 90 Stat. 2792.

Act of June 26, 1936, referred to in text, popularly known as the Oklahoma Welfare Act, is classified generally to subchapter VIII (§501 et seq.) of chapter 14 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 501 of this title and Tables.

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of the Interior relating to compliance with rights-of-way across Indian lands, issued under section 321 et seq. of this title with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(e), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees, effective July 1, 1979, pursuant to Ex. Ord. No. 12142, §1–101, June 21, 1979, 44 F.R. 36927, set out as a note under section 719e of Title 15, Commerce and Trade. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

§ 325. Payment and disposition of compensation

No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

(Feb. 5, 1948, ch. 45, §3, 62 Stat. 18.)

Addendum 3

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of the Interior relating to compliance with rights-of-way across Indian lands, issued under section 321 et seq. of this title with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(e), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees, effective July 1, 1979, pursuant to Ex. Ord. No. 12142, §1-101, June 21, 1979, 44 F.R. 36927, set out as a note under section 719e of Title 15, Commerce and Trade. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

§ 326. Laws unaffected

Sections 323 to 328 of this title shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838) [16 U.S.C. 791a et seq.], nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed.

(Feb. 5, 1948, ch. 45, §4, 62 Stat. 18.)

REFERENCES IN TEXT

The Federal Water Power Act, referred to in text, is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended, now known as the Federal Power Act, which is classified generally to chapter 12 (§791a et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Tables.

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of the Interior relating to compliance with rights-of-way across Indian lands, issued under section 321 et seq. of this title with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(e), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees, effective July 1, 1979, pursuant to Ex. Ord. No. 12142, §1-101, June 21, 1979, 44 F.R. 36927, set out as a note under section 719e of Title 15, Commerce and Trade. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

§ 327. Application for grant by department or agency

Rights-of-way for the use of the United States may be granted under sections 323 to 328 of this title upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

(Feb. 5, 1948, ch. 45, §5, 62 Stat. 18.)

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of the Interior relating to compliance with rights-of-way across Indian lands, issued under section 321 et seq. of this title with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(e), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees, effective July 1, 1979, pursuant to Ex. Ord. No. 12142, §1-101, June 21, 1979, 44 F.R. 36927, set out as a note under section 719e of Title 15, Commerce and Trade. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

§ 328. Rules and regulations

The Secretary of the Interior is authorized to prescribe any necessary regulations for the purpose of administering the provisions of sections 323 to 328 of this title.

(Feb. 5, 1948, ch. 45, §6, 62 Stat. 18.)

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of the Interior relating to compliance with rights-of-way across Indian lands, issued under section 321 et seq. of this title with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(e), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees, effective July 1, 1979, pursuant to Ex. Ord. No. 12142, §1-101, June 21, 1979, 44 F.R. 36927, set out as a note under section 719e of Title 15, Commerce and Trade. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

CHAPTER 9—ALLOTMENT OF INDIAN LANDS

Chapter 13. Regulation of Tourist Passenger Services

SECTION

1995 Code

§ 2501. Permits

A. 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 Division of Economic Development of the Navajo Nation to perform such activities within the Navajo Nation.

B. Any person, firm, association or corporation desiring to obtain such permit shall deliver to the Division of Economic Development 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.

C. At the time of filing a statement under subsection (B) of this section, each person, firm, association or corporation shall pay the Office of the Controller of the Navajo Nation a fee in accordance with the following schedule:

1. A Daily permit: (1 to 5 days) at $5.00 per day-Educational,
2. Student and Charitable Groups Only:

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

D. The fee requirement of subsection (C) of this section shall not apply to any person, firm, association or corporation owned by an enrolled member of the Navajo Nation for the first year such enrolled member shall engage in such passenger tourist services, if it shall be determined by the Division of Economic Development 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

Addendum 4

fee shall not extend beyond the first year of operation of such services by such enrolled member.

E. Nothing in this section shall relieve any applicant from any other requirements of this chapter.

F. Upon payment of the required fee and upon satisfaction of the Division of Economic Development of the quality of the activity, the Division of Economic Development 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 the fee as referred to, and the filing of the copy and verified statement referred to, in subsections (B) and (C) of this section.

HISTORY

CN-82-72, Exhibit A, §§1-3, 5, November 2, 1972. .

Notes. 1. References to the "Commerce Department" are referred to as the Division of Economic Development for the purposes of this chapter.

2. "Treasurer's Office" was repealed by CF-5-73, February 1, 1973. References to the "Treasure's Office" to have been changed the Office of the Controller. See generally 12 NNC §201 *et seq.*

§ 2502. Adoption of regulations

The Division of Economic Development is authorized and directed to adopt, publish and enforce such reasonable rules, regulations and directives as are necessary or convenient to implement this chapter 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 discredit the Navajo Nation. The Division of Economic Development is granted such authority as is necessary to insure compliance with this chapter and with the rules, regulations and directives adopted and published pursuant to this chapter.

HISTORY

CN-82-72, Exhibit A, §4, November 2, 1972.

Notes. 1. "Commerce Department" was discontinued by the 1981 Budget and Organization chart. References to the "Commerce Department" are referred to the "Division of Economic Development" for the purposes of this chapter.

2. "Treasurer's Office" repealed by CF-5-73, February 1, 1973. References to the "Treasurer's Office" have been changed to the "Office of the Controller." See generally 12 NNC §201 *et seq.*

§ 2503. Revocation of permit

A. If, during the period of any permit, the Division of Economic Development shall determine that any person, firm, association, or corporation holding a permit shall have failed to abide by the reasonable rules, regulations or directives adopted and published by the Division of Economic Development, a notification of such discrepancy shall be forwarded by the Division of Economic Development to such person, firm, association or corporation, requiring correction of the discrepancy within the 10 days. If such discrepancy is not corrected within 10 days, then, upon adequate notice and fair hearing in accordance with rules of procedures to be established by the Division of Economic Development, 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.

B. Upon denial or revocation of license, an aggrieved party may appeal such denial or revocation, within 15 days, to the Supreme Court of the Navajo Nation for review, which Court is hereby specifically granted jurisdiction to hear such appeals. Review by the Supreme Court of the Navajo Nation shall be limited to questions of abuse of discretion and lack of reasonable basis for denial or revocation. After hearing the appeal, the Supreme Court of the Navajo Nation may either affirm or remand for further hearings by the Division of Economic Development in accordance with the decision of the Supreme Court of the Navajo Nation. Evidence or information not presented to the Division of Economic Development shall not be admissible before, or considered by the Supreme Court of the Navajo Nation. Appeals taken to the Supreme Court of the Navajo Nation found to be frivolous or not based on reasonable grounds shall be considered in bad faith, and any party found by the Supreme Court of the Navajo Nation to have made an appeal in bad faith shall be subject to a fine not exceeding $500. Appeals found to be in bad faith shall not be heard by the Supreme Court of the Navajo Nation.

C. All decisions of the Division of Economic Development shall be final and binding unless such appeal as hereinabove allowed is taken within 15 days of the decisions of the Division of Economic Development.

HISTORY

CN-82-72, Exhibit A, §§6-8, November 2, 1972.

Notes. 1. Navajo "Court of Appeals" is referred to as the Supreme Court of the Navajo Nation. See generally 7 NNC §201 *et seq.*

2. Division of Economic Development, see 2 NNC Subchapter 21.

§ 2504. Operation without permit

A. 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 17 NNC §1901 *et seq.* and with due process of law.

B. Irrespective of any exclusion proceedings, the Division of Economic Development is hereby authorized to initiate an action in the District Court of the Navajo Nation, at the discretion of the Division of Economic Development and when circumstances warrant, to recover on behalf of the Navajo Nation an amount not exceeding $500 for each separate occurrence. Jurisdiction over such actions is hereby specifically granted to the District Court of the Navajo Nation.

HISTORY

CN-82-72, Exhibit A, §§9, 10, November 2, 1972.

Note. References to "Trial Court" have been changed to the appropriate District Court of the Navajo Nation. See generally 7 NNC §201 *et seq.*

§ 2505. Separability clause

If any provision of this chapter or the application of such provision to any person, firm, association or corporation or circumstances shall be held invalid, the remainder of the chapter 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.

HISTORY

CN-82-72, Exhibit A, §11, November 2, 1972.

THE NAVAJO NATION

RULES AND REGULATIONS

12/1/2003

NAVAJO NATION TOURIST PASSENGER SERVICE ACT

Navajo Nation Law (Title 5, Navajo Nation Code, §2501 *et seq.*) provides for the regulation of tour operations within the jurisdictional limits of the Navajo Nation. This law gives the Navajo Nation specific authority to issue reasonable rules and regulations to implement this Act, and which rules and regulations are herein prescribed.

PURSUANT TO:

CHAPTER 1: PERMITS

A. Application

Any person(s) desiring to obtain a Tour Permit to conduct Tourist Passenger Services on the Navajo Nation must first apply to the Navajo Nation by submitting a complete application along with the listed supporting documents and permit fees in accordance with the Navajo Nation Tourist Passenger Service Act rules and regulations. The requirements are listed below.

B. Copy of Business License or Article of Incorporation

Each applicant shall furnish the Navajo Nation a true and correct copy of the Articles of Incorporation or Business License of company, or any other documented proof of business establishment and operation such as a Navajo Preference Certification, Internal Revenue Service Employer Identification Number, or Navajo Tax Commission Form 100.

C. Commercial General Liability Insurance

Upon application, proof of possession of a Commercial General Liability Insurance Policy which carries a minimum amount of $750,000 combined single limit coverage listing the Navajo Nation as Additional Insured. The certificate or copy of the policy shall be furnished to the Navajo Nation and the Insurance Agent's name, address and telephone number shall be included for verification purposes.

D. Automobile Liability Insurance

Upon application, proof of possession of an Automobile Liability Insurance Policy which carries a minimum amount coverage as required by state law. The certificate or copy of the policy shall be furnished to the Navajo Nation and the Insurance Agent's name, address and telephone number shall be included for verification purposes.

Addendum 5

E. Verified Statement of Fees – Schedule of Routes, Distance and Times of Tours

Each applicant shall furnish the Navajo Nation a verified statement showing rates to be charged for each tour, a description of routes, distances, times and a map showing tour routes, shall accompany the verified statement. The Navajo Nation shall review the application with attached documents and upon complete satisfaction that all prerequisites of obtaining a tour permit are met, a permit will be issued in permittee's company name.

F. Agreement between the Tour Company and the Navajo Nation

A contractual agreement shall be executed between the parties involved which will serve as the regulatory control. The agreement shall contain at a minimum the following information:

1. Terms and conditions of the Agreement and Permitted Area
2. Indemnification
3. Consent to Navajo Laws and Courts
   a. Preference in Employment
   b. Navajo Business Preference
4. Any special arrangements as negotiated between Permittee and Navajo Nation

G. Fee Schedule

At the time of approval of the application and prior to the issuance of the tour permit, a fee will be payable in the form of money order or cashier's check to the Navajo Nation (no personal checks), as follows:

1.	Annual – Navajo	$1,000.00
2.	Administrative – Navajo	$ 50.00
3.	Annual – Non-Navajo	$3,000.00
4.	Administrative – Non-Navajo	$ 50.00

H. Permit Renewal

Upon expiration of a permit, the permittee may apply for a renewal pursuant to this section.

CHAPTER 2. OPERATION OF TOUR SERVICE ON NAVAJO NATION

Upon issuance of Tour Permit, Permittee is subject to all applicable Navajo, Federal and State rules and regulations, and to the terms and conditions on the contractual agreement. Permittee shall comply with terms and conditions in the operation of tour services and must adhere strictly to same.

A. Permittee shall conduct business in an orderly, professional and accountable manner not to the detriment of the Navajo Nation, and to make reports regarding the tour operation monthly.

B. This permit shall allow strictly for the transportation of passengers between points and places and within locations as particularly described on the map submitted with the verified fee schedule. Any deviations from the submitted and approved routes and schedules, as filed with the Navajo Nation, must be approved prior to taking new routes or implementing new schedules.

C. Each tour operation/business shall possess a valid tour permit that shall be kept in possession at all times during tour operation and shall not be transferable or re-assigned. Copies of the original permit issued by the Navajo Nation shall be made and said copies shall accompany each insured vehicle used for tour purposes by a permitted tour operator.

D. Brochures, Tour Guides, First Aid

1. Dissemination of Information

Permittee and its employees will disseminate only accurate information and distribute to all its passengers any informative brochures or pamphlets to supplement the tour service.

2. Trained employees

Permittee shall further insure that all tour guides or other persons conducting tours, giving lectures, or other informational talks or otherwise issuing information about the Navajo Nation or its people, are properly trained and orientated before conducted tour services.

3. Non-Navajo Guides

All non-Navajo guides and Permittees, where applicable, shall first be licensed and pay such fees pursuant to Title 5, Navajo Nation Code, §3001 *et seq*.

4. Tour Attendance by Officials

Officials and employees of the Navajo Nation on official business related to the tour services may at any time attend, free of charge, tours or lectures given by Permittee or its employees in the course of conducting its operation within the Navajo Nation for quality assurance purposes.

5. First Aid

All Permittees, employees, or persons, whom serve as tour guide, shall have had prior training in first aid and possesses a first aid certification. Employees who conduct tour services shall have additional certification in CPR.

E. Vehicles Insured, Driver's License, Park Rules and Regulations, Employment Preference

1. Vehicles and Vehicles Insured

Permittee and employees shall utilize only those passenger vehicles which are insured for such purposes and which vehicles are listed on the insurance certificate and filed with the application. Navajo Tribal Park employees and the Navajo Police and Rangers are authorized to question operators and/or owners of vehicles being used to transport tour passengers to insure that the vehicles are properly insured.

2. Driver's License

The tour vehicle operator shall be the holder of a valid Driver's License issued by the state in which the individual resides and shall have such license in his possession at all times when he is operating a motor vehicle in the conduct of tour operations or services, and shall upon request or demand, display the same to any tribal official, Navajo Police or Ranger.

3. Transportation of Tourists

Permittee agrees to transport only the number of passengers as there are manufactured seats in tour vehicles and not to allow any passengers to stand in vehicles or sit on bumpers or other vehicle parts not designed for passenger seating.

4. Park Boundaries; Park Rules and Regulations

Navajo Tribal Parks may develop, implement and enforce additional rules and regulations applicable to tour activities and services. Failure to abide by and comply with such rules and regulations after being notified by Park officials shall constitute a breach of contractual agreement.

5. Employment Preference

Permittee shall give preference in employment in its Navajo Nation operations to members of the Navajo Nation and shall further pay said employees not less than the prevailing minimum wage as may be set by the Navajo Nation Office of Navajo Labor Relations.

6. Employee Status

Permittees are encouraged to provide fringe benefits to their employees, including workmen compensation, social security and health coverage. Employees on at-will status shall agree to and sign a contractual agreement which specifically informs them of their employment status.

CHAPTER 3. CONDITIONS FOR SANCTIONS AND OPERATION WITHOUT PERMIT

A. Conditions for Sanctions

1. Any inaccuracies about the Navajo Nation or its people, or failure to follow prescribed guidelines, shall result in the issuance of a written notice to Permittee and shall require correction within ten working days.

2. Roads and Trails

All tour vehicles shall remain on established roads at all times and Permittee shall adhere to routes filed with the application. Anyone found in violation of this section by making new roads and trails that are adversely damaging or defacing Navajo Nation or Navajo Tribal Park resources shall be just cause for suspension and/or revocation of privilege to conduct such activities within the jurisdictional limits of the Navajo Nation.

3. Tribal Parks

Permittee shall abide by and comply with the rules and regulations as developed, implemented and enforced by individual Navajo Tribal Parks. Violation of said rules and regulations shall be considered a breach of contractual agreement with the Navajo Nation.

4. Cultural and Scientific Resources

The unauthorized possession, buying, holding for sale, or encouraging illicit trade of objects of cultural, historical, archaeological, paleontological or scientific value by persons or employees shall be good cause for withdrawing a business license privilege pursuant to Navajo Nation law.

5. Unlawful activities

Permittee shall not offer for sale or gift any intoxicating liquors or controlled substances, or promote or condone any activity unlawful under Navajo Nation law.

B. Operation without Permit

1. Any non-Navajo person, who shall furnish, provide or conduct any of the prescribed activities without first obtaining and without having in its possession a valid permit; therefore, shall be directed to cease and desist such service and may be subject to exclusion from the Navajo Nation under Navajo Nation law.

2. Notwithstanding any exclusion proceedings, the Navajo Nation is hereby authorized to initiate an action in the District Court of the Navajo Nation, at the discretion of the Navajo Nation and when circumstances warrant, to recover on behalf of the Navajo Nation an amount not exceeding $500 for each separate occurrence. Jurisdiction over such actions is hereby specifically granted to the District Courts of the Navajo Nation.

3. Any Navajo person who shall furnish, provide and conduct any tour activities without first obtaining a valid permit; therefore, shall be subject to citation for Operating Without a Permit, and to impoundment of equipment or property upon repeated willful violations of this section. The Navajo Police and/or Resource Enforcement Agency (Tribal Rangers) shall withhold the violating equipment or property until fees equal to those which would have been payable if such persons had been duly permitted, are paid to the Navajo Nation; provided, however, that whenever any seized equipment has been held in custody by a court of the Navajo Nation for one full year, and the owner has not been located and has not come forward of his own initiative to reclaim the equipment, the equipment shall be forfeited pursuant to Navajo Nation law.

CHAPTER 4. SUSPENSION; REVOCATION OF PERMIT

If during the period of any permit, the Navajo Nation shall determine that any permittee or his employee shall have failed to abide by the reasonable rules and regulations or directives adopted and published by the Navajo Nation, said Permit may be suspended or revoked depending on the seriousness of the violation. A written notification of any discrepancy or violation shall be issued by the Navajo Nation to such permittee requiring correction of the discrepancy within five working days. Failure to make correction in five working days shall be result in the Permit being suspended or revoked and the applicable person shall not be permitted to conduct such activities within the Navajo Nation until such discrepancies are corrected. If after thirty days, such required correction has not been made, the Permit shall be revoked.

CHAPTER 5. ADMINISTRATIVE HEARING PROCEDURE

Upon denial, suspension or revocation of a permit, an aggrieved party shall have the right to file an appeal with the Navajo Nation. An aggrieved party may appeal such denial, suspension or revocation within five working days to the issuing authority. If the aggrieved party is not satisfied with the decision, they may appeal within seven working days to the Navajo Nation Office of Hearings and Appeals in accordance with established procedures. Review by the Office of Hearings and Appeals Hearing Officer shall be limited to questions of abuse of discretion and lack of reasonable basis for denial, suspension or revocation. After hearing the appeal, the Hearing Officer may either affirm or remand for further negotiation. Evidence or information not presented to the Navajo Nation shall not be admissible before or considered by the Hearing Officer. Any decision by the Hearing Officer requiring correction or reconsideration shall be corrected within seven working days.

THE NAVAJO NATION
PARKS AND RECREATION DEPARTMENT
P.O. Box 2520
Window Rock, AZ 86515

TOURIST PASSENGER SERVICE AGREEMENT
VEHICLE TOURS

This Agreement is made and entered into this _____ day of _____, 200__, by and between the Navajo Nation, hereinafter called Permittor, and _____, hereinafter called Permittee.

WITNESSETH:

1) In consideration of the mutual covenants, terms and conditions herein set, and payment of fees pursuant to established schedules, Permittor does hereby grant Permittee authorization to operate a Tourist Passenger Service at prescribed locations on the Navajo Nation, beginning on January 1, 2004 or the date when Permit requirements have been satisfactorily met, whichever occurs later, and expiring on December 31, 2004, inclusive.
2) Permittee agrees to be bound by the provisions set forth in the Navajo Nation Code, Title V, § 2501 et seq., and any rules, regulations, directives and guidelines promulgated in accordance to such law by the Navajo Nation. 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.
3) Permittee agrees to hold harmless and release the Permittor against any and all losses, costs, damages, claims, expenses or other liability arising out of or connected with Permittee's Tourist Passenger Service activities on and within the Navajo Nation.
4) Permittee agrees to indemnify the Permittor in the event of any loss, cost, damage, claim, expense or other liability incurred by the Permittor as a result of Permittee's Tourist Passenger Service activities on and within the Navajo Nation.
5) Permittee agrees to operate and conduct the authorized Tourist Passenger Service in an orderly, professional and ethical manner and to comply fully and in a timely manner with the directives and instructions issued by the Permittor.
6) Permittee agrees to obtain and maintain at all times appropriate liability insurance to cover and protect the Permittee and Permittor as additional insured.
7) This Agreement authorized the Permittee to provide and conduct Tourist Passenger Services on the Navajo Nation but does not confer authorization to occupy or remain on lands without appropriate clearances, permits or leases from the Navajo Nation.
8) Permittee agrees to comply fully with any and all federal, state and tribal laws, including but not limited to, the Navajo Nation Business Opportunity Act, the Navajo Preference in Employment Act, the Navajo Environmental Policy Act, the Navajo Criminal and Traffic Codes, the Navajo Historic Preservation Act, et al.
9) Permittee agrees to comply fully with the following terms and conditions, non-compliance of which will result in permit suspension or revocation:
    a. Not to offer, use or allow the possession or consumption of alcoholic beverages or other controlled substances;
    b. Not to allow or participate in any activity unlawful by federal, state or Navajo Nation law;
    c. To provide and conduct business in a manner which does not bring discredit or disparagement to the Navajo Nation;

Addendum 6

d. To make written reports of its service activities on a monthly basis on forms to be made available;
e. To comply fully with the requirements of the Navajo Tourist Passenger Service Act and implementing regulations at all times, and to report any non-compliance;
f. To possess a copy of the Permit at all times within authorized tour vehicles operating on and within the Navajo Nation and on the business premises;
g. To insure that all authorized tour vehicles are in good mechanical condition, that safety equipment is provided and available, and that tour vehicles individually meet all applicable state laws, including title, registration and liability insurance;
h. To insure that tour drivers and guides possess the necessary required vehicle operator license of the state in which they permanently reside, and a first-aid certification issued by a competent government agency;
i. To insure that information provided to the visitor is accurate, unbiased and reflects favorably to the Navajo Nation;
j. To comply fully with the policies, regulations, guidelines and other management controls established at individual tribal parks, monuments, recreation areas and backcountry; and
k. Permittee agrees to operate and conduct Tourist Passenger Services only in areas and locations authorized pursuant to the Permit application.

10) This Agreement and Permit issued commensurate thereto are not transferable, severable, or assignable and is subject to revocation or suspension for cause.

11) This Agreement constitutes the entire agreement between the parties and any modification or amendment of said Agreement by the Permittor shall grant to Permittee adequate time for implementation and/or adjustment of its operation to reflect the modification or amendment.

PERMITTEE		PERMITTOR	
_____		_____	
Signature	Date	The Navajo Nation	Date

Return documents to:

Navajo Parks and Recreation Department
P.O. Box 2520
Window Rock, AZ 86515

Citation/Title
7 N.N.C. Sec. 253a, Long-Arm Civil Jurisdiction and Service of Process Act

***3161 7 NAVAJO CODE § 253a**

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

Current through December 2009.

§ 253a. Long-Arm Civil Jurisdiction and Service of Process Act

A. Definitions. As used in this Act, the term "person" includes an individual, executor, administrator, or other personal representative, or a corporation, partnership, association or any other legal or commercial entity, whether or not a citizen or domiciliary of the Navajo Nation and whether or not organized under the laws of the Navajo Nation. The term includes all persons, natural or fictitious, of any kind.

B. Personal jurisdiction based on enduring relationship or status. A Court of the Navajo Nation may exercise personal and subject matter jurisdiction over a person domiciled in, organized under the laws of, or maintaining his, her, or its place of business in the Navajo Nation as to any cause of action or claim for relief. A Court of the Navajo Nation may exercise personal jurisdiction over any member of the Navajo Nation regarding that person's status as a member of the Navajo Nation for activities outside this jurisdiction which affect any other member of the Navajo Nation. A Court of the Navajo Nation may exercise civil jurisdiction over any person who assumes tribal relations with Navajos and the Navajo Nation by marriage, adoption, guardianship or other enduring relationship with Navajos.

C. Personal jurisdiction based on conduct. A Court of the Navajo Nation may exercise personal and subject matter jurisdiction over any non-member who consents to jurisdiction by commercial dealings, residence, employment, written or implied consent, or any action or inaction which causes injury which affects the health, welfare, or safety of the Navajo Nation or any of its members located within the territorial jurisdiction of the Navajo Nation, or any other act which constitutes the assumption of tribal relations and the resulting express or implied consent to jurisdiction. A Court of the Navajo Nation may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action for relief arising from the person's:

1. Transacting any business in the Navajo Nation;
2. Contracting at any place to supply services or things within the Navajo Nation;
3. Causing tortious injury by any act or omission within the Navajo Nation;
***3162** 4. 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 engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the Navajo Nation;
5. Having an interest in, using, or possessing real property in the Navajo Nation, including the actual occupancy or lease of trust land, allotted land, fee land, or any other land within Navajo Indian country;
6. Contracting to insure any person, property or risk located within the Navajo Nation;
7. Causing an act which creates an environmental hazard or degradation of the air, waters, flora, fauna, cultural artifact, or other resource of the Navajo Nation;
8. Selling alcohol to any person who enters the Navajo Nation and who causes an injury in the Navajo Nation under the influence of alcohol; or
9. 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.

Addendum 7

D. Service of process outside the Navajo Nation. When the exercise of personal jurisdiction is authorized by this Act, service of process may be made outside the Navajo Nation, and where such service is not reasonably feasible, service may be made by any means which is likely to give the defendant actual notice of the pendency of an action.

E. Inconvenient forum. When a Navajo Nation Court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any condition that may be just.

F. Other basis of jurisdiction unaffected. A Court of the Navajo Nation may exercise jurisdiction on any other basis authorized by law, including the inherent and treaty jurisdiction of the Navajo Nation.

G. Manner and proof of service.

1. When the law of the Navajo Nation authorizes service outside the Navajo Nation, the service, when calculated to give actual notice, may be made:

a. By personal delivery in the manner prescribed for service within the Navajo Nation;

b. In the manner prescribed by the law of the place in which service is made in an action in any of its courts of general jurisdiction;

c. By any form of mail addressed to the person to be served and requiring a signed receipt;

d. As directed by a foreign authority in response to a letter rogatory; or

e. As directed by the Court.

2. Proof of service outside the Navajo Nation may be made by affidavit of the individual who made the service or in the manner prescribed by the law of the Navajo Nation, the order pursuant to which service is made, or the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction. When service is made by mail, proof of service shall include a receipt signed by the addressee satisfactory to the court and showing that the service was reasonably calculated to give actual notice.

Effective:[See Text Amendments]

Arizona Revised Statutes Annotated Currentness
Title 12. Courts and Civil Proceedings
Chapter 6. Special Actions and Proceedings by Individual Persons
Article 2. Death by Wrongful Act (Refs & Annos)
§ 12-612. Parties plaintiff; recovery; distribution

A. An action for wrongful death shall be brought by and in the name of the surviving husband or wife, child, parent or guardian, or personal representative of the deceased person for and on behalf of the surviving husband or wife, children or parents, or if none of these survive, on behalf of the decedent's estate.

B. Either parent may maintain the action for the death of a child, and the guardian may maintain the action for the death of the guardian's ward.

C. The amount recovered in an action for wrongful death shall be distributed to the parties provided for in subsection A in proportion to their damages, and if recovery is on behalf of the decedent's estate the amount shall be an asset of the estate.

D. For the purposes of subsection A, “personal representative” includes any person to whom letters testamentary or of administration are granted by competent authority under the laws of this or any other state. The personal representative may maintain the action for wrongful death without the issuance of further letters or any other requirement or authorization of law.

CREDIT(S)

Amended by Laws 1956, Ch. 46, § 1, eff. July 14, 1956; Laws 1973, Ch. 75, § 2; Laws 1973, Ch. 172, §§ 17, 18, eff. Jan. 1, 1974; Laws 2000, Ch. 182, § 1.

HISTORICAL AND STATUTORY NOTES

Source:

Civ.Code 1901, § 2765.

Civ.Code 1913, § 3373.

Addendum 8

(Pub. L. 102–486, title XXVI, § 2606, as added Pub. L. 109–58, title V, § 503(a), Aug. 8, 2005, 119 Stat. 777.)

PRIOR PROVISIONS

A prior section 3506, Pub. L. 102–486, title XXVI, § 2606, Oct. 24, 1992, 106 Stat. 3118, related to tribal government energy assistance program, prior to the general amendment of this chapter by Pub. L. 109–58.

CHAPTER 38—INDIAN TRIBAL JUSTICE SUPPORT

§ 3601. Findings

The Congress finds and declares that—

(1) there is a government-to-government relationship between the United States and each Indian tribe;

(2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;

(3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;

(4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;

(5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;

(6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights;

(7) traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this chapter;

(8) tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation; and

(9) tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals of this chapter.

(Pub. L. 103–176, § 2, Dec. 3, 1993, 107 Stat. 2004.)

SHORT TITLE

Section 1 of Pub. L. 103–176 provided that: "This Act [enacting this chapter] may be cited as the 'Indian Tribal Justice Act'."

§ 3602. Definitions

For purposes of this chapter:

(1) The term "Bureau" means the Bureau of Indian Affairs of the Department of the Interior.

(2) The term "Courts of Indian Offenses" means the courts established pursuant to part 11 of title 25, Code of Federal Regulations.

(3) The term "Indian tribe" means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native entity, which administers justice under its inherent authority or the authority of the United States and which is recognized as eligible for the special programs and services provided by the United States to Indian tribes because of their status as Indians.

(4) The term "judicial personnel" means any judge, magistrate, court counselor, court clerk, court administrator, bailiff, probation officer, officer of the court, dispute resolution facilitator, or other official, employee, or volunteer within the tribal justice system.

(5) The term "Office" means the Office of Tribal Justice Support within the Bureau of Indian Affairs.

(6) The term "Secretary" means the Secretary of the Interior.

(7) The term "tribal organization" means any organization defined in section 450b(*l*) of this title.

(8) The term "tribal justice system" means the entire judicial branch, and employees thereof, of an Indian tribe, including (but not limited to) traditional methods and forums for dispute resolution, lower courts, appellate courts (including intertribal appellate courts), alternative dispute resolution systems, and circuit rider systems, established by inherent tribal authority whether or not they constitute a court of record.

(Pub. L. 103–176, § 3, Dec. 3, 1993, 107 Stat. 2004.)

SUBCHAPTER I—TRIBAL JUSTICE SYSTEMS

§ 3611. Office of Tribal Justice Support

(a) Establishment

There is hereby established within the Bureau the Office of Tribal Justice Support. The purpose of the Office shall be to further the development, operation, and enhancement of tribal justice systems and Courts of Indian Offenses.

(b) Transfer of existing functions and personnel

All functions performed before December 3, 1993, by the Branch of Judicial Services of the Bureau and all personnel assigned to such Branch as of December 3, 1993, are hereby transferred to the Office of Tribal Justice Support. Any reference in any law, regulation, executive order, reorganization plan, or delegation of authority to the Branch of Judicial Services is deemed to be a reference to the Office of Tribal Justice Support.

(c) Functions

In addition to the functions transferred to the Office pursuant to subsection (b) of this section, the Office shall perform the following functions:

Addendum 9

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 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/ Stephen Moore