UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EXC INCORPORATED, a Nevada corporation, DBA D.I.A. Express Incorporated, DBA Express Charters; et al., Plaintiffs/Appellees, vs. 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; et al., Defendants/Appellants,	No. 12-16958 District Court No. 3:10-cv-08197-JAT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs certify the following:

EXC Inc. and Conlon Garage, Inc. have no parent corporation and no publicly owned company owns 10% or more of their stock.

National Interstate Insurance Company is wholly owned by National Interstate Corporation, a publicly traded company.

Go Ahead Vacations, Inc., a Massachusetts corporation, is owned by EF Education First, Inc., a privately held company.

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JURISDICTIONAL STATEMENT

Plaintiffs do not disagree with Defendants' jurisdictional statement.

Jurisdiction in the district court

Plaintiffs filed this declaratory and injunctive action to challenge tribal court jurisdiction over a wrongful death case Defendants filed in tribal court. The district court had jurisdiction under 28 U.S.C. § 1331. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 324 (2008) ("[W]hether a tribal court has adjudicative authority over nonmembers is a federal question.").

Jurisdiction in this Court

The district court granted summary judgment to Plaintiffs, finding no tribal jurisdiction. [ER 2-14.] Final judgment for Plaintiffs was entered on August 9, 2012. [ER 1.] Defendants timely appealed on September 5, 2012. [ER 15-16.] Rule 4(a), F.R.A.P. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

Defendants (members of the Navajo tribe), sued Plaintiffs (non-Indians), for negligence and wrongful death in tribal court. The negligence/wrongful death case arose from the parties' vehicle accident, which occurred on a state right-of-way within the Navajo reservation.

Did the district court correctly rule that the tribal court lacks jurisdiction over the tort lawsuit?

STATEMENT OF THE CASE

Plaintiffs do not disagree with Defendants' Statement of the Case.

STATEMENT OF RELEVANT FACTS

The material facts are undisputed.

A. The accident.

On September 21, 2004, a tour bus traveling within the exterior boundaries of the Navajo reservation collided with a sedan carrying a Navajo family. [ER 101, ¶ 2; ER 102, ¶ 9.] The collision occurred on U.S. 160, a state right-of-way located on the Navajo reservation in Arizona. [ER 101, ¶ 3.] The driver of the sedan, Butch Corey Johnson, died of his injuries. His wife, passenger Jamien Rae Jensen (who was one month pregnant), and their minor child D. Jensen Johnson, were injured. [ER 101-102, ¶¶ 5-8; ER 103, ¶¶ 16-19.]

B. The highway.

In 1958, Congress appropriated $20 million to improve Routes 1 and 3 on the Navajo and Hopi reservations. [ER 61.] The Navajo Tribal Council granted the Bureau of Indian Affairs a right-of-way to construct these improvements, and consented to the BIA transferring the right-of-way to the State of Arizona. [*Id.*] In 1959, the State of Arizona entered into an agreement with the BIA. The United States agreed to (a) pay for and construct the roadways, and (b) upon completion, grant the State a right-of-way easement for a public highway. [ER 51, 52.] The State agreed to designate and maintain

those portions of the roads within Arizona as state highways in accordance with state law when the United States completed construction. [ER 53.] Today, U.S. 160 is a 1,465-mile federal highway that connects Arizona, New Mexico, Colorado, Kansas, and Missouri. [ER 103, ¶ 20.] 197.4 miles of that highway (thirteen percent) crosses the Navajo reservation. [*Id*., ¶ 21.]

C. The tour.

At the time of the accident, the tour bus was passing through the Navajo reservation on its way to the Grand Canyon as part of a 12-day tour of U.S. National Parks. [ER 38.] The tour began in Albuquerque, New Mexico and ended in Jackson, Wyoming. [ER 102, ¶ 14; Dkt. #58, ¶ 31.] Plaintiff Go Ahead Vacations organized the tour, provided a guide, and chartered the bus from Express Charters (EXC, Inc.). [ER 101, ¶ 1.] EXC provided the bus and the driver (Plaintiff Russell Conlon). [ER 102, ¶ 12.] Conlon Garage, Inc. owned the bus. [Dkt. #58, ¶ 10.]

The day before the accident, the tour bus had gone through Monument Valley (located on the Navajo reservation). It had stopped at the Monument Valley Visitors Center and stayed overnight at the Hampton Inn in Kayenta. [ER 103, ¶ 22-29.] Plaintiffs had not obtained a touring permit from the Navajo

Nation to make this stop. [ER 103-104, ¶¶ 22-31.][1] At the time of the crash, the bus was on U.S. 160 en route to the Grand Canyon. [ER 116.][2]

D. Defendants sue in tribal court.

Defendants filed a negligence suit against Go Ahead, EXC, Conlon, and Conlon Garage, Inc. in tribal court. [ER 102, ¶ 10.] Plaintiffs moved to dismiss based on lack of jurisdiction [*see* ER 4], which the tribal court denied. [*Id.*; Dkt. #58, ¶ 37.]

Plaintiffs then filed a Writ of Prohibition with the Navajo Supreme Court, raising the lack of jurisdiction issue. [Dkt. #58, ¶ 18.] The Navajo Supreme Court held that the tribal court had jurisdiction based on the Treaty of 1868. [ER 88-99.] Citing Navajo law and Barboncito,[3] the Navajo court (a) considered the state highway to be tribal land, despite the contrary ruling in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) [ER 90-95]; (b) refused to apply

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[1] Though immaterial, it is a bit of a stretch for the NCAI amici to suggest that Plaintiffs "marketed and sold a tribal land-based reservation experience as part of its package." [NCAI Brief, p. 14, n.3.] The portion of the website amici quote describes a guided tour in Mesa Verde National Park – a U.S. National Park. [*Id.*] The website description goes on to say that later in the day, the group will "pass through Monument Valley before arriving in Kayenta, Arizona, where you'll spend the night." [*Id.*]

[2] Monument Valley is not on the US 160. It lies on the border between Arizona and Utah. http://en.wikipedia.org/wiki/Monument_Valley

[3] Barboncito was a Navajo spiritual and political leader who signed the Treaty of 1868 that ended the Long Walk to Bosque Redondo.

the U.S. Supreme Court's mandate that tribal court jurisdiction does not exist unless expressly stated [ER 97-98], and ruled that the Treaty of 1868 reserves to the Navajos tribal court jurisdiction over non-Indians on state rights-of-way [ER 96]; and (c) disagreed with U.S. Supreme Court authority holding that tribal court jurisdiction over non-Indians is inconsistent with the tribe's dependent status. [ER 98.]

E. Plaintiffs file this declaratory action.

Having exhausted their tribal remedies, Plaintiffs filed this action for declaratory and injunctive relief in district court, again arguing that the tribal court lacked jurisdiction over the tort suit arising from an accident between Navajos and non-Navajos on a state highway within the boundaries of the reservation. [R. 1.]

The district court granted Plaintiffs summary judgment, ruling that (a) under *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), tribes cannot assert a landowner's "right to occupy and exclude" from a right-of-way so long as the state maintains the roadway as part of its highway system [ER 6]; (b) nothing in the right-of-way agreement here expressly reserved to the tribe a right to exercise dominion and control over the right-of-way [ER 6-7]; (c) no treaty or statute authorizes the Navajos to exercise jurisdiction over tort suits like the one here [ER 7]; (d) while tribal jurisdiction can exist where a non-Indian enters a

consensual relationship with the tribe, that precept did not apply here, because even if Plaintiffs had obtained a touring permit, the permit's language includes consent to tribal jurisdiction over "lands within the jurisdiction of the Navajo Nation"; and the state highway is not "land within the jurisdiction of the Navajo Nation" [ER 12];[4] and (e) while tribal jurisdiction can exist where the non-member's conduct threatens the political integrity, economic security or health and welfare of the tribe, that precept did not apply because while the tribe may regulate tourism on reservation lands, there is no difference between the *Strate* subcontractor driving carelessly on a state highway (for which there was no tribal jurisdiction) and a tour bus operator driving allegedly carelessly on a state highway. [ER 12-13.]

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[4] Thus, it is not quite accurate to broadly say, as Defendants have, that permittees were required to "consent to the jurisdiction of the Navajo Nation to adjudicate disputes arising out of activities covered under the Act." [OB, p. 8.] While Navajo regulations require permittees to sign "a contractual agreement" containing "consent to Navajo Laws and Courts" [ER 23], the Navajos' actual contractual agreement states: "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 28] (emphasis added).

SUMMARY OF THE ARGUMENT

1. An Indian tribe does not have inherent sovereign powers over the activities of nonmembers; thus efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are "presumptively invalid." *Plains Commerce Bank v. Long Family Land and Cattle Co*., 554 U.S. 316, 329 (2008). Defendants have the burden of overcoming that strong presumption and demonstrating that tribal court jurisdiction exists here. *Id*. at 330.

2. Defendants cannot overcome the strong presumption against tribal jurisdiction. In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the U.S. Supreme Court held that when an accident occurs on a state right-of-way within a reservation (as occurred here), the tribal court has no civil jurisdiction over the suit against the allegedly negligent non-member driver and his non-member employer absent specific congressional authority. The fact that the non-members in this case were driving a bus engaged in touring (which is governed by tribal regulations) instead of driving a truck engaged in a consensual subcontract with the tribe (as in *Strate*), is a distinction without a difference.

3. The Treaty of 1868 does not give the tribe specific congressional authority to exercise jurisdiction here. The power derived from the Treaty – to exclude from tribal land – gives the tribe the lesser power to tax business activities conducted on the reservation. *Merrion v. Jicarilla Apache Tribe*, 455

U.S. 130, 141-44 (1982). But the power to tax or regulate tourism activities on tribal land does not constitute the power to exclude non-members from a state roadway. *Burlington N. R. Co. v. Red Wolf*, 196 F.3d 1059, 1063 (9th Cir. 1999) ("The Tribe's power to tax the right-of-way does not create civil jurisdiction over non-members arising out of accidents occurring on the right-of-way). And it is tribe's lack of power to exclude non-members from the state roadway that makes jurisdiction here presumptively invalid. *Strate*; *Burlington Northern R.R. Co. v. Red Wolf*, *supra* (no tribal jurisdiction over tort claim arising from collision between train and automobile on railroad within congressionally-granted right-of-way; tribe failed to reserve its right to exercise "dominion or control over the right-of-way"). Because no Treaty or federal statute expressly grants the tribe jurisdiction over the tort suit here, the general rule of *Montana v. United States*, 450 U.S. 544, 563-65 (1981), applies (Indian tribes have no inherent sovereign powers over the activities of non-members like Plaintiffs) – as does the strong presumption against tribal jurisdiction. *Plains Commerce Bank*, *supra*.

4. *Montana*'s rule of no tribal jurisdiction has two exceptions, but neither applies here.

a. The first exception – authorizing tribal jurisdiction where the underlying suit arises out of the non-member's "consensual relationship"

with the tribe – does not apply. *Strate* already recognized that, "Measured against the [types of cases where a *Montana* consensual relationship does exist], a highway accident presents no 'consensual relationship' of the qualifying kind." 520 U.S. at 457. *Strate* held so even though the non-member truck driver involved in that accident was in the employ of a company that had a consensual relationship (a landscaping subcontract) with the tribe. Despite the employer's consensual relationship with the tribe, the requisite nexus between the accident and the subcontract was missing.

Here, too, the requisite nexus between the accident and the tribe's touring permit regulations (which would be the consensual relationship in this case) is missing. While the bus driver was employed by a non-member touring company, and Plaintiffs had not obtained a Navajo touring permit allowing them to stop at Monument Valley, the tort case does not arise from the tribal regulations over tourism. The tort case is not a dispute between Plaintiffs and the tribe over whether the tribe's tourism regulations can be imposed on Plaintiffs. Nor is there any evidence that obtaining a permit would have prevented the accident. The tort case is a negligence lawsuit between strangers arising out of a driving accident on a state roadway. As the *Strate* Court held, a simple negligence claim for damages does not have the requisite nexus to the employer's consensual relationship to fall under *Montana*'s first exception. *See*

also Nord v. Kelly, 520 F.3d 848, 856 (8th Cir. 2008) ("Nord was driving a semi-truck owned by Nord Trucking, a company that had a consensual commercial relationship with the Red Lake Band to haul and remove timber from the reservation, but the accident gave rise to a simple tort claim between strangers, not a dispute arising out of the commercial relationship.") The consensual relationship exception does not apply.

b. The second exception – authorizing tribal jurisdiction over non-member conduct on fee lands that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" – does not apply either. To fall under this exception, "tribal power must be necessary to avert catastrophic consequences." *Plains Commerce Bank*, 554 U.S. at 341. But tribal civil adjudicatory jurisdiction over a highway accident is not necessary to preserve the political or economic integrity of the tribe. *Strate*, 520 U.S. at 457-59; *Boxx v. Long Warrior*, 265 F.3d 771, 777 (9th Cir. 2001); *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998); *Wilson v. Marchington*, 127 F.3d 805, 813-15 (9th Cir. 1997). Allegedly careless driving on a highway simply does not endanger the political or economic integrity of the tribe.

5. Based on the foregoing, the strong presumption against tribal jurisdiction prevails. No federal statute or treaty authorizes tribal jurisdiction

here, and Defendants cannot meet their burden of overcoming the strong presumption and proving that tribal jurisdiction is appropriate under either *Montana* exception. The district court correctly held that tribal jurisdiction was lacking here.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

A. The Court's review is de novo.

Plaintiffs agree that this Court should review the question of tribal court jurisdiction, and the grant of summary judgment, *de novo*. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985) (tribal jurisdiction); *Continental Casualty Co. v. City of Richmond*, 763 F.2d 1076, 1078–79 (9th Cir. 1985) (summary judgment).[5]

B. The presumption is against tribal jurisdiction.

There is a presumption against tribal jurisdiction over nonmembers who come within the borders of Indian reservations. *See Plains Commerce Bank v. Long Family Land and Cattle Co*., 554 U.S. 316, 328 (2008) ("the tribes have, by virtue of their incorporation into the American republic, lost 'the right of governing ... person[s] within their limits except themselves.'"), and at 329 ("Given *Montana*'s "'general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,'" . . .

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[5] While Defendants note that tribal court findings of fact are entitled to deference unless clearly erroneous, and that tribal court rulings on tribal law are entitled to complete deference [OB, p. 13-14], neither of these precepts applies here. The facts are undisputed; and the determination of tribal jurisdiction is an issue of federal law, not tribal law. *Big Horn Cnty. Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 949 (9th Cir. 2000) (Questions about tribal jurisdiction over non-Indians is an issue of federal law reviewed *de novo*).

efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are "presumptively invalid."). "This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians—what we have called 'non-Indian fee land.'" *Id*.[6] Defendants thus bear a heavy burden of overcoming that strong presumption and demonstrating that tribal court jurisdiction exists here. *Plains Commerce Bank*, *supra* at 330.[7]

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[6] "[W]hen the tribe or tribal members convey a parcel of fee land 'to non-Indians, [the tribe] loses any former right of absolute and exclusive use and occupation of the conveyed lands.' This necessarily entails 'the loss of regulatory jurisdiction over the use of the land by others.' As a general rule, then, 'the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.' . . . Given *Montana*'s "'general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,'" efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.' The burden rests on the tribe to establish one of the exceptions to *Montana*'s [*v. U.S.*, 450 U.S. 544 (1981)] general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. These exceptions are 'limited' ones, and cannot be construed in a manner that would 'swallow the rule,' or 'severely shrink' it." *Id*. at 329 (citations omitted).

[7] Defendants err in suggesting that a presumption <u>in favor</u> of tribal jurisdiction applies here because the Navajos have "governing authority over . . . commercial touring activities and the on-reservation highway collision that arose from those activities." [OB, p. 10, 15, 40.] While they cite *Montana v. U.S.*, 450 U.S. 544 (1981), for the idea, *Montana* did not even address a presumption in favor or against tribal jurisdiction. The existence of the presumption actually rests on the identity of the purported defendant (Indian or non). *See Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659 (2001) ("Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory,' but their dependent status

"To this day, the Supreme Court has 'never held that a tribal court had jurisdiction over a nonmember defendant.' This speaks volumes." *Rolling Frito-Lay Sales LP v. Stover*, 2012 WL 252938 (D. Ariz. 2012) (citing *Nevada v. Hicks*, 533 U.S. 353, 358, n.2 (2001)).

II. THE DISTRICT COURT WAS CORRECT. *STRATE* APPLIES AND TRIBAL JURISDICTION IS LACKING.

A. *Strate*'s facts.

The district court was correct in ruling that tribal jurisdiction is lacking under *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). The question posed in *Strate* was this: "When an accident occurs on a portion of a public highway maintained by the State under a federally granted right-of-way over Indian reservation land, may tribal courts entertain a civil action against an allegedly negligent driver and the driver's employer, neither of whom is a member of the tribe?" The Supreme Court said no, the tribal courts could not entertain the civil action. *Id*. at 442:

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generally precludes extension of tribal civil authority beyond these limits.'"); *Nevada v. Hicks*, 533 U.S. 353, 381 (2001) (Souter, J., concurring) ("After *Strate*, it is undeniable that a tribe's remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted."). And where, as here, Defendants attempt to exert tribal authority over non-Indians on a state roadway, that strong presumption against tribal authority described in *Plains Commerce Bank* applies.

> Such cases, we hold, fall within state or federal regulatory and adjudicatory governance; tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question.

Id. The three facts on which the Court relied were these:

(1) The accident occurred on a state roadway: The state roadway ran through the Indian reservation, was open to the public, and afforded access to a federal water resource project; though the right-of-way ran over Indian trust land, the state maintained the road under a right-of-way that the United States granted to the State Highway Department. *Id*. at 442-443;

(2) The defendant was a non-Indian. The non-member truck driver worked for A–1 Contractors, a non-Indian-owned business that had a subcontract with a tribal company to do landscaping work on a tribal community building on the reservation. *Id*. at 443;[8]

(3) The document granting the right-of-way to the state did not reserve to the tribes any right of dominion or control over the state roadway. The document grating the state right-of-way detailed only one specific reservation

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[8] The plaintiff other driver, while a non-member herself, was the widow of a deceased tribal member and had five tribal member adult children, each of whom was also a plaintiff in the case. *Id*. at 443-44. Thus, Defendants are not quite accurate in asserting that *Strate* did not involve any tribal members. [OB, p. 24.]

of authority to Indian landowners, and that was the right to construct crossings necessary for the tribal landowners to use their land. *Id*. at 455. Apart from this, the tribes did not reserve any right to exercise dominion or control over the right-of-way. *Id*.

B. ***Strate*'s legal reasoning.**

On the foregoing facts, the *Strate* Court found no tribal jurisdiction over the civil lawsuit, based on this reasoning:

(1) Absent specific congressional authority, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to the two exceptions outlined in *Montana v. U.S.*, 450 U.S. 544 (1981). *Strate,* 520 U.S. at 446, 453;[9]

(2) For jurisdictional purposes, the state's right-of-way was the equivalent to alienated, non-Indian fee land. *Id*. at 454;[10]

(3) The road formed part of the state's highway, was open to the public, and traffic on it was subject to the state's control. The tribes received payment for the state's use of the highway and retained no gate-keeping right. So long

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[9] "Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally "do[es] not extend to the activities of nonmembers of the tribe."

[10] The Court rejected the argument that the case involved tribal land because trust land was underneath the right-of-way. *Id.*

as the state maintained the stretch as part of the state's highway, the tribes could not assert a landowner's right to occupy and exclude. *Id*. at 456; and

(4) As the parties had not cited any treaty or statute specifically authorizing the tribes to entertain highway-accident tort suits, *Montana*'s analysis applied. *Id*. at 456.

(a) *Montana*'s first exception (recognizing tribal jurisdiction when non-Indian enters consensual relationship with tribe) did not apply, because although the truck driver was working on the reservation pursuant to a consensual relationship between his employer and the tribes, the other driver was not a party to that subcontract, and the tribes were strangers to the accident (even though tribal members were plaintiffs). *Id*. at 457. The highway accident presented no "consensual relationship" of the qualifying kind, said the Court, considering that the cases recognizing tribal jurisdiction involve lawsuits over things like: on-reservation sales transactions; the viability of tribal permit taxes on nonmembers; and tribal authority to tax on-reservation cigarette sales to nonmembers. *Id*.

(b) *Montana*'s second exception (recognizing tribal jurisdiction over non-member conduct that threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe) did not apply because "Neither regulatory nor adjudicatory authority over the state

highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them." *Id*. at 459.[11]

C. **Our facts are the same as *Strate*'s.**

For jurisdictional purposes, this case is factually indistinguishable from *Strate*:

Strate	This case
Non-Indian truck driver gets into accident on state highway with another car, resulting in injuries to enrolled members and a non-member.	Non-Indian bus driver gets into accident on state highway with another car, resulting in injuries to enrolled members.
Truck driver is on the state roadway pursuant to a consensual relationship between his employer and the tribes, though unclear whether he is driving for work at the time of the accident.	Bus driver is on the state roadway pursuant to what Defendants argue should have been a consensual relationship between his employer and the tribe.
The other driver is not a party to that consensual relationship.	The other driver is not a party to that would-be consensual relationship.
The state controls and maintains the roadway pursuant to a right-of-way grant over tribal trust land.	The state controls and maintains the roadway pursuant to a right-of-way grant over tribal trust land.[12]

[11] "Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule. Again, cases cited in *Montana* indicate the character of the tribal interest the Court envisioned." *Id*. at 457-58.

[12] Defendants err in arguing that the Navajos "exercise joint maintenance and control" over the state roadway. [OB, pp. 24, 32.] They cite nothing in the record to support this assertion. Their only argument – that Navajo emergency personnel may respond to emergencies on the state roadway – is irrelevant, as that does not give the Navajos ownership and exclusion rights over the state roadway. *See Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 655 (2001)

The only factual differences between the two cases are minor: (1) here the other driver was a tribal member rather than *Strate*'s non-member widow of tribal member; (2) rather than affording access to a federal water resource project, the state roadway here is part of a 1,465 mile long east–west United States highway connecting Arizona to New Mexico, Colorado, Kansas and Missouri; and (3) the tribe here waived any claim to compensation rather than being paid for the right-of-way.

These distinctions make no difference to the outcome. First, the identity of the tribal court plaintiff (the other driver) is not material. The *Strate* Court's analysis did not turn on the identity of the plaintiff in the tribal court negligence suit; it turned on the attempt to assert tribal jurisdiction over a non-Indian *defendant* – the same as we have here. *Id*. at 442 ("This case concerns the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members.")[13]

(mere presence of non-members within a reservation and their actual or potential receipt of tribal police, fire, and medical services does not constitute consent to Tribe's adjudicatory authority). Indeed, the "receipt of tribal services" argument made no difference in *Strate*. 520 U.S. at 456, n. 11 (tribal jurisdiction did not exist; "We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law.").

[13] *See also Nord v. Kelly*, 520 F.3d 848, 859 (8th Cir. 2008) ("The dispute in *Strate* arose out of an accident between two non-Indians, whereas here, one

Second, it is irrelevant that the state roadway here does not "afford access to a federal water resource project," as in *Strate*. [*See* OB, p. 25.] U.S. 160 is still the equivalent of non-Indian fee land because the road forms part of the State's highway, is open to the public, and traffic on it is subject to the State's control. It is also irrelevant to this analysis that the federal government's improvement of the roads helps the tribe to be self-supporting. [OB, p. 25.] Like the tribes in *Strate*, the Navajo tribe, in granting the right-of-way to the United States (and agreeing to its further assignment to the State of Arizona), did not retain a landowner's right to occupy and exclude persons from using the state roadway.[14]

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party was a member. We find this to be a distinction without a difference, however, because in either case, the question is whether the tribe has jurisdiction over the nonmember.")

[14] The Navajo Resolution reflects only one limitation to the grant, not relevant here. That is, the tribe reserved the right to obtain compensation for use of its land within the right-of-way "if after such transfer said routes or any part of them are made controlled access highways." [ER 61-62.] That has not happened. A controlled access highway is a high-speed roadway like an interstate that has no traffic controls. Defendants thus err in suggesting that this was something less than the right-of-way in *Strate*, and in citing to *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002). [OB, p. 24-25, 28, 29-30, 31-33.] *McDonald* involved an accident on a BIA road, not a state road. A BIA road is not like a state road, because the BIA specifically holds lands in trust for tribes, for the direct benefit of tribes, and has a fiduciary relationship with tribes. *Id*. at 537-38. In fact, the *McDonald* Court distinguished *Strate* on this very basis. *Id*. at 538 ("[T]he scope of rights and responsibilities retained by a tribe over a BIA road exceed those retained over the state highway in *Strate*, and . . . these additional retained rights suffice to maintain tribal jurisdiction over nonmember

Third, that the tribe waived compensation for granting the right-of-way to the United States does not make *Strate* inapplicable, as Defendants suggest. [OB, pp. 30-31.] Defendants do not explain how the tribe's affirmative waiver of compensation takes the state roadway out of *Strate*'s analysis. [OB, pp. 24, 30.] Truthfully, Defendants do no more than cite *McDonald v. Means*, *supra* [OB, p. 31], which is inapposite as already noted. *See* n. 14, *supra*.

In short, the facts of *Strate* are virtually indistinguishable from the facts presented here. Therefore, not only does presumption of no tribal authority come into play (no tribal authority subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*), but also the tribe's exercise of jurisdiction is presumptively invalid. *Plains Commerce Bank*, 544 U.S. at 329.

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conduct on BIA roads.") Nor did the State of Arizona obligate itself to take on the BIA's fiduciary duties to the tribes when it accepted assignment of the rights-of-way, as Defendants argue. [OB, p. 27, 29-30.] The acceptance documents say the State agreed to be bound by the stipulations in the right-of-way (discussed above), and "the rules and regulations of the Secretary of the Interior applicable thereto." Defendants cite no federal rule or regulation dictating that right-of-way holders owe a fiduciary duty to the tribes like that of the BIA or that they hold rights-of-way in trust for the tribes. In fact, the rules and regulations applicable to these rights-of-way contain no such requirement. *See* 25 C.F.R. § 169.5 (setting forth right-of-way applicants' duties and obligations, which do not include holding the right-of-way in trust for Indian tribes).

Defendants have not and cannot meet their burden of overcoming the strong presumptive invalidity of tribal court jurisdiction. No controlling treaty or statute grants express authority for tribal jurisdiction; and the facts do not implicate either *Montana* exception.

D. The Treaty of 1868 does not supply tribal jurisdiction.

Defendants err in arguing that Article II of the Treaty of 1868 grants express authority for tribal jurisdiction here. [OB, pp. 16-18.][15] The Treaty does not reserve to the Navajos civil jurisdiction over tort claims against non-members stemming from an accident on non-Indian land. Defendants' argument in this regard is conclusory. They say the Treaty gives the Navajos authority to exclude non-members from reservation lands [*id*. at 16]; the Navajo Supreme Court said there was tribal jurisdiction [*id*. at 17]; and the Navajos have a strong interest in regulating "the conduct of [persons] entering tribal lands for the purpose of engaging in" tourism. [*Id*., at 17-18.]

These arguments are unavailing. The power derived from the Treaty – to exclude from tribal land – does give the Navajos the lesser power to tax business activities conducted on tribal property. *See, e.g*., *Babbitt Ford, Inc. v.*

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[15] Article II of the Treaty of 1868 delineates the boundaries of the reservation, sets apart that land "for the use and occupation of the Navajo tribe," and provides that "no persons except those herein so authorized to do, . . . shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." [*See* OB Addendum 1.]

Navajo Indian Tribe, 710 F.2d 587, 592-93 (9th Cir. 1984) (tribal jurisdiction exists over action to enjoin enforcement of tribal vehicle repossession regulations against nonmembers transacting business with the tribe) (*citing Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-44 (1982)). Such regulation is a necessary tool of self-government and control. *Id*. But the power to tax or regulate tourism activities on tribal land does not constitute the power to exclude non-members from a state roadway. *Burlington N. R. Co. v. Red Wolf*, 196 F.3d 1059, 1063 (9th Cir. 1999) ("The Tribe's power to tax the right-of-way does not create civil jurisdiction over non-members arising out of accidents occurring on the right-of-way. The power to tax is not equivalent to the right to exercise civil jurisdiction over tribal land.") Yet Defendants' case (and the arguments of their amici) rest entirely on the faulty premise that the power to regulate tourism on tribal land constitutes automatic adjudicative jurisdiction over a state roadway accident involving non-members.

Contrary to Defendants' assertion [OB, p. 35], *Merrion* rejected the theory that a tribe's taxation power was co-extensive with its right to exclude non-members. 455 U.S. at 144 ("[T]he Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government.") Further, tribal adjudicative jurisdiction is confined by the bounds of a tribe's regulatory jurisdiction. *Water Wheel Camp*

Recreational Area, Inc. v. LaRance, 642 F.3d 802, 814 (9th Cir. 2011). A change in land status from Indian to non-Indian abrogates the tribe's power to exclude and eliminates the incidental regulatory jurisdiction formerly enjoyed by the tribe. *S. Dakota v. Bourland*, 508 U.S. 679, 689 (1993). *See also Plains Commerce Bank*, 554 U.S. at 328 (once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it).

The tribe's lack of power to exclude non-members from the state roadway is thus a determinative factor dictating the application of the *Montana* test, and ultimately, the lack of tribal jurisdiction over the tort suit. *See, e.g., Strate, supra*; *Burlington Northern R.R. Co. v. Red Wolf*, *supra* (no tribal jurisdiction over tort claim arising from collision between train and automobile on railroad within congressionally-granted right-of-way; consistent with *Strate*, Court finds decisive that tribe failed to reserve its right to exercise "dominion or control over the right-of-way"); *Wilson v. Marchington*, 127 F.3d 805, 814 (9th Cir. 1997) (*Strate* precluded tribal civil adjudicatory jurisdiction over a suit brought by a tribal member against a non-member driving for non-member carnival company on state right-of-way); *Montana v. King*, 191 F.3d 1108 (9th Cir. 1999) (tribe had no regulatory or civil adjudicatory jurisdiction over state employment practices for work performed on a state-owned highway right-of-way within reservation boundaries); *Austin's Express, Inc. v. Arneson*, 996 F.

Supp. 1269, 1271 (D. Mont. 1998) (no tribal jurisdiction over Indian's wrongful death suit against non-member arising from accident on state roadway; the 1868 Treaty provides no support for the exercise of tribal adjudicatory authority over nonmember conduct on state right of way within reservation).[16]

Based on the foregoing, Defendants' argument that the tribe has an "exceptionally strong interest" in regulating tourism is of no moment. [OB, pp. 23, 37, 55.] The power to regulate tourism on tribal land does not constitute the power to exclude non-members from a state roadway or to adjudicate a tort suit stemming from an accident between strangers on a state roadway. The tribe may certainly enforce its tourism regulations ways that do not violate the precepts in *Strate*: for example, by excluding tour operators without permits and their passengers from the Navajo Tribal Park at Monument Valley; prohibiting such tour buses from traversing the tribal roads to the park or elsewhere; or conducting spot checks of tour buses traveling over tribal roads.[17] But a tribe cannot use its tourism permit regulations to justify the exercise of tribal jurisdiction over a tort case stemming from a non-member's state

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[16] The district court did not agree with Defendants that the tribe's right to regulate tourism "includes the power to exclude," as Defendants assert. [OB, p. 38.] The district court said the tribe has the right to regulate tourism on tribal land *because of* its authority to exclude. [ER 10.]

[17] *See* OB, p. 36 (citing tribal law providing that those who do not obtain permits shall be subject to exclusion).

roadway accident when the tribe has no dominion or control over the state roadway. In short, the Treaty does not provide Defendants a "retained" right to assert tribal jurisdiction over this case.[18]

Finally, as the tribe has no "reserved Treaty rights" that are relevant here, this renders ineffective Defendants' arguments that (a) no federal statute has "abrogated" those Treaty rights, and (b) the tribe's tourist regulations were enacted pursuant to those "retained treaty rights." [OB, pp. 18-22, 25-28.] In

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[18] The Navajo Nation thus also errs in arguing that it "regulates tour operators by adjudicating tort claims" like this [NN Brief, pp. 4, 17]; and by citing *Plains Commerce Bank* and *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127 (9th Cir. 2006), for the proposition that a "tort claim filed by tribal members against a non-Indian band [is] a type of tribal regulation." [NN Brief, pp. 8, 17.] The tort case in *Plains Commerce Bank* was a type of tribal regulation because the goal of the tort suit was to stop a non-Indian bank's sale of its fee land to non-Indians, and to regulate the substantive terms on which the bank could offer its fee land for sale. *Plains Commerce Bank*, 554 U.S. at 331-32. The Court held that tribal jurisdiction over the suit was lacking because "*Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land." *Id*. at 332.

Smith is also unhelpful to the tribe. There, a non-Indian *plaintiff* was deemed to consent to the tribal court's civil jurisdiction by affirmatively filing claims against an *Indian defendant* who allegedly injured the non-Indian plaintiff. That was the context in which this Court said, "Smith asked the . . . tribal court to discipline one of their own and order a tribal entity . . . to compensate him for the damages he suffered allegedly at its hands. The Tribes have a strong interest in regulating the conduct *of their members*; it is part of what it means to be a tribal member. The Tribes plainly have an interest in compensating persons injured by their own. . . . If Smith has confidence in the tribal courts, we see no reason to forbid him from seeking compensation through the Tribes' judicial system." *Id*. at 1140-41 (emphasis added). That, of course, is not the situation here.

other words, because the Treaty of 1868 does not reserve to the Navajos any right to exclude non-members from state highways, neither Congress's appropriation of funds to create those state highways "to further the purposes of existing treaties" [OB, pp. 19, 24], nor the Navajos' enactment of tourism regulations to promote tribal economic development [OB, pp. 23], is relevant to the issue at hand.[19]

E. *Water Wheel* does not provide tribal jurisdiction here.

Defendants also err in arguing that *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), grants the tribe "inherent authority" to exercise jurisdiction over the tort suit here. [OB, pp. 33-40, 58.] *Water Wheel* involved a tribe's inherent authority to exclude from tribal land a private non-Indian person/company whose consensual relationship with the tribe had gone sour. 642 F.3d at 805. Indeed, the case involved the tribe's attempt to physically evict the non-Indians from tribal land, after the non-members allegedly breached their lease with the tribe and were therefore

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[19] Thus, this case is not at all like *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), which Defendants cite. [OB, p. 21.] There, the Supreme Court held that the state could not enforce its hunting and fishing laws against non-members on the reservation. Because the enforcement of state law would interfere with the tribe's comprehensive regulatory scheme (developed in cooperation with the federal government) and threaten tribal self-sufficiency and economic development, the state law was pre-empted by the operation of federal law.

trespassing on tribal land without paying rent. *Id*. The Court held that under those circumstances, the tribe had the inherent authority to exclude the private non-Indians. *Id*. at 814. Thus, the tribe's status as landowner played a vitally important role in the jurisdictional outcome. *Id*. at 807, 811, 812, n.7, 814, 818-19. The tort suit at issue is simply not like the tribe's attempt to evict a trespassing non-Indian from tribal land. This is a *Strate* case, not a *Water Wheel* case.

F. Neither *Montana* exception applies to authorize tribal jurisdiction.

Because no Treaty or federal statute expressly grants the tribe jurisdiction over a tort suit against a non-member stemming from a state highway accident, the general rule of *Montana v. United States*, 450 U.S. 544, 563-65 (1981), applies: Indian tribes have no inherent sovereign powers over the activities of non-members like Plaintiffs. The two exceptions to the general rule are these: (1) a tribe may regulate "the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 564; and (2) a tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 566.

The burden rests on the tribe to establish that one of the Montana exceptions applies. *Plains Commerce Bank*, 554 U.S. at 330.

1. ***Montana*’s first exception (consensual relationship) does not apply.**

Strate outlined the types of cases involving consensual relationships over which the tribal courts have jurisdiction: a lawsuit stemming from an on-reservation sales transaction between a member and non-member; cases upholding a tribal permit tax on non-member livestock or business dealings on the reservation; and a case upholding tribal authority to tax on-reservation cigarette sales to non-members. 520 U.S. at 457. “Measured against these cases,” said the Court, a highway accident “presents no ‘consensual relationship’ of the qualifying kind.” *Id*. The district court correctly applied the same analysis here.

Defendants err in arguing this accident is different because here (a) tribal members were injured; (b) Plaintiffs were engaged in touring at the time; and (c) the Navajo regulations governing commercial touring activities were enacted for the benefit of the entire tribe (including Defendants). [OB, p. 42-43; *see also* NN Brief, pp. 16-18.] These points do not distinguish this case from *Strate*. First, the *Strate* accident also resulted in injury to tribal members (though the actual driver was the widow of the tribal member and not the tribal

member herself). That is a distinction without a difference.[20] Second, the *Strate* Court did not hinge its analysis on whether or not the non-member was driving in the course and scope of his employer's consensual relationship with the tribe at the time of the accident; it recognized the existence of the consensual relationship. 520 U.S. at 443. So the purpose of the truck driver's travel was not important to the Court's analysis.[21] And third, in *Strate*, clearly tribal statutes and regulations would have governed the employer's business dealings with the tribe. But these factors did not turn the tort lawsuit involving the employee's highway accident into a suit over the consensual relationship. The requisite nexus between the accident and the employer's consensual relationship (*i.e.* its subcontract) with the tribe was missing. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001); *Philip Morris USA, Inc. v. King*

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[20] *See, e.g., Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997) ("If the possibility of injuring multiple tribal members does not satisfy the second *Montana* exception under *Strate*, then, perforce, Wilson's status as a tribal member alone cannot."); *Nord v. Kelly*, 520 F.3d 848, 859 (8th Cir. 2008) ("The dispute in *Strate* arose out of an accident between two non-Indians, whereas here, one party was a member. We find this to be a distinction without a difference, however, because in either case, the question is whether the tribe has jurisdiction over the nonmember.")

[21] Nor would the existence of jurisdiction hinge on the vagaries of whether or not the bus driver happened to drive slowly the previous day allowing passengers to admire the view, or whether he drove quickly through without stopping, as the NCAI amici seem to posit. [NCAI Brief, p. 14: "EXC did not merely drive hastily across the reservation to get from one off-reservation site to another."]

Mountain Tobacco Co., Inc., 569 F.3d 932, 942 (9th Cir. 2009) (a nonmember's consensual relationship in one area does not trigger civil authority in another).

The same is true here. Even had a consensual relationship existed between the bus driver's employer and the tribe by virtue of the permit Plaintiffs should have obtained, the requisite nexus between that would-be consensual relationship and the accident is still missing. The underlying tort case is not a dispute between Plaintiffs and the tribe over whether the tribe's tourism regulations can be imposed on Plaintiffs. Nor is there any evidence that obtaining a permit here would have "help[ed] prevent the precise situation that happened," as the Navajo Nation asserts. [NN Brief, p. 17.] This is a tort case between strangers arising out of a driving accident on a state roadway. The tort case does not arise out of the tribe's authority to regulate tourism on tribal property or the permit that Plaintiffs did not obtain. *Strate*, 520 U.S. at 457; *Nord v. Kelly*, 520 F.3d 848, 856 (8th Cir. 2008) ("Nord was driving a semi-truck owned by Nord Trucking, a company that had a consensual commercial relationship with the Red Lake Band to haul and remove timber from the reservation, but the accident gave rise to a simple tort claim between strangers, not a dispute arising out of the commercial relationship.").[22] The district court

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[22] So the NCAI amici err in arguing that jurisdiction should exist because had Plaintiffs obtained a permit, they would have consented to tribal court

correctly concluded that this case does not fall within Montana's consensual relationship exception.[23]

The district court did not hold that *Montana*'s consensual relationship exception can "never" apply to non-Indian fee lands, as Defendants argue. [OB, p. 47.] The court simply noted that the Navajo permit agreement speaks of consent to tribal jurisdiction on "lands within the jurisdiction of the Navajo Nation"; and because U.S. 160 has been alienated, it is not within the jurisdiction of the Navajo Nation. Thus the outcome would be the same even if Plaintiffs had signed the agreement. [ER 12.] The point is not that the tribe, by this permit language, "surrendered its otherwise inherent authority to regulate EXC's conduct," as the Navajo Nation argues. [NN Brief, pp. 10-12.] The point is that the tribe has no jurisdiction over non-members, especially on non-member land, to begin with; and the way the language of the permit is worded,

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jurisdiction "for disputes relating to the tourism permit and agreement." [NCAI Brief, p. 19.] The tort case does not relate to the tourism permit and agreement.

[23] Thus, it does not matter that the language of the district court's decision seems to use the character of the land (Indian or non-Indian) as defining whether or not there was a consensual relationship rather than whether or not *Montana* applies. [NCAI Brief, p. 11.] *United States v. State of Wash*., 641 F.2d 1368, 1371 (9th Cir. 1981) ("We may uphold correct conclusions of law even though they are reached for the wrong reason or for no reason, and we may affirm a correct decision on any basis supported by the record.").

EXC would not have otherwise consented to jurisdiction here even had it signed the agreement.

On this point, the NCAI amici err in seeming to argue that Plaintiffs "actually consented" to tribal jurisdiction by virtue of the permit they did not obtain, and in citing to *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006), for the proposition. [NCAI Brief, pp. 16-20.] As is noted earlier (n. 18, *supra*), *Smith* is inapposite. There, a non-Indian plaintiff actually consented to tribal court jurisdiction by affirmatively filing claims in tribal court against an Indian defendant. Plaintiffs here did not affirmatively file any claims or counterclaims against Defendants in tribal court. They only affirmatively entered reservation land and stopped at Monument Valley. But presence on the reservation does not constitute a consensual relationship, and certainly not the kind of consent to tribal jurisdiction that existed in *Smith*. *See Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 655 (2001) (mere presence of non-members within a reservation and their actual or potential receipt of tribal police, fire, and medical services does not constitute consent to Tribe's adjudicatory authority). The NCAI amici actually seem to argue that the Court should impose tribal jurisdiction here as a punishment for Plaintiffs' having "tak[en] advantage of tribal resources" [NCAI Brief, p. 23] without obtaining a permit. [*Id.*, p. 20

("EXC's failure to obey the law should not be rewarded with this Court's failure to apply it."] That is not how jurisdiction is decided.[24]

Finally, Defendants' citations to the Navajo long arm statute and the Navajo Supreme Court ruling [OB, pp. 45-49], and the Navajo Nation's citation to tribal statutes [NN Brief, pp. 12-15], are unavailing. The issue of whether a non-member is subject to tribal jurisdiction is an issue of federal law, not tribal law. *Big Horn Cnty. Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 949 (9th Cir. 2000). The Navajo Supreme Court's decision refused to apply this precept. [*See* ER 75 ("Our purpose is to resolve tribal court jurisdiction pursuant to the entirety of Navajo Nation law."); ER 80-81 ("the grant of a right-of-way on U.S. Highway 60 had no effect on Navajo Nation regulatory control".] *Montana*'s first exception does not provide tribal jurisdiction here.

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[24] Indeed, the NCAI amici seem to assume that Plaintiffs will not be held "account[able] for [their] actions" if the Court affirms the lack of tribal jurisdiction here. [NCAI Brief, p. 22.] The *Strate* Court rejected this idea. 520 U.S. at 459 ("Gisela Fredericks may pursue her case against A–1 Contractors and Stockert in the state forum open to all who sustain injuries on North Dakota's highway. Opening the Tribal Court for her optional use is not necessary to protect tribal self-government; and requiring A–1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes].'"). *See also Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997) (""It is difficult to argue that these important interests will be diminished, much less jeopardized, if Wilson must present her individual tort claims in state or federal court, where she has plain, speedy, and adequate remedies.").

2. ***Montana*'s second exception (conduct that threatens tribal integrity) does not apply.**

Under *Montana*'s second exception, a tribe may exercise civil authority over non-Indian conduct on fee land 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. This exception envisions situations where the non-member conduct poses a direct threat to tribal sovereignty. *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 943 (9th Cir. 2009) (finding no tribal jurisdiction). To fall under this exception, "tribal power must be necessary to avert catastrophic consequences." *Plains Commerce Bank*, 554 U.S. at 341. In fact, *Strate* put this exception in its proper context:

> Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.... But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations."

520 U.S. at 459 (*quoting Montana*, 450 U.S. at 564).

One example of a direct threat to tribal sovereignty appeared in *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the*

Mississippi in Iowa, 609 F.3d 927, 938-39 (8th Cir. 2010) (tribal jurisdiction existed under *Montana*'s second exception where tribe claimed that agents of non-member company entered onto tribal trust land without permission, stormed buildings vital to the Tribe's economy and self government, committed violent torts against tribal members, forcibly seized sensitive information related to the Tribe's finances and gaming operations, and damaged tribal property; conduct threatened the political integrity and economic security of the Tribe). Another example is *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 848, 849-850 (9th Cir. 2009), where the tribe brought a civil action in tribal court against the individual who set Chedeski forest fire, seeking civil penalties and an order of restitution against her. The fire destroyed hundreds of thousands of tribal forest acres representing millions of dollars of tribal resources. The Court found plausible tribal jurisdiction over that case, since "the tribe seeks to enforce its regulations that prohibit, among other things, trespassing onto tribal lands, setting a fire without a permit on tribal lands, and destroying natural resources on tribal lands."

In comparison, tribal civil adjudicatory jurisdiction over a highway accident is simply not necessary to preserve the political or economic integrity of the tribe. *Strate*, 520 U.S. at 459 ("Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the

right of reservation Indians to make their own laws and be ruled by them.").

The *Strate* Court reasoned:

> Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule. Again, cases cited in *Montana* indicate the character of the tribal interest the Court envisioned [a tribal adoption proceeding; and a non-member's claim against tribe members for payment for goods bought on credit at an on-reservation store.]

Id. at 457-58.

Courts in this Circuit have agreed many times. *See, e.g.*:

* *Boxx v. Long Warrior*, 265 F.3d 771, 777 (9th Cir. 2001) (no tribal jurisdiction over accident between member and non-member on non-Indian fee land within reservation; rejecting argument that *Montana*'s second exception applies because alcohol-related accidents are of great concern to the Tribe; "[T]his is not what is at issue here. The action in tribal court does not seek to enforce or control the distribution or consumption of alcohol on the reservation. Rather, it seeks damages for negligence."),[25] *disapproved on other grounds by*

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[25] The *Boxx* Court stated "Even assuming that the Tribe possesses some regulatory and adjudicatory power over the sale and consumption of alcohol, the Tribe is not prevented in any way from exercising such authority by being denied the right to adjudicate this garden variety automobile accident. If we were to find jurisdiction here, "the exception would swallow the rule because

Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1137 (9th Cir. 2006) ("Our holding in *Boxx* – that the tribal courts lack jurisdiction over a suit by an Indian plaintiff against a non-Indian defendant arising out of an automobile accident on non-Indian lands within the reservation – is not in question.");

* *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1063 (9th Cir. 1999) (no tribal jurisdiction over Indians' wrongful death claim arising out of accident on railroad's right-of-way; rejecting argument that members' deaths damaged the community by depriving the tribe of potential council members, teachers and babysitters; "the Supreme Court has declined to employ this logic in conjunction with the second *Montana* exception. Indeed, it has specifically rejected it.");

* *State of Montana Department of Transp. v. King*, 191 F.3d 1108, 1111, 1114 (9th Cir. 1999) (*Montana*'s second exception did not provide tribal jurisdiction over state highway maintenance crew's employment practices on reservation, even though "poverty stalks the reservation," seventy percent of the tribe's members were unemployed, and the high levels of unemployment on the reservation harmed the tribe; tribe had consented to the right-of-way so the state could construct the public highway at its own expense);

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virtually every act that occurs on the reservation could be argued to have some ... welfare ramification to the tribe." We hold, therefore, that the tribal court lacks jurisdiction over Long Warrior's personal injury action." *Id*. at 777-78.

* *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998) (second exception does not apply simply because tribe has an interest in its members' safety);[26]

* *Wilson v. Marchington*, 127 F.3d 805, 813-15 (9th Cir. 1997) (rejecting member's argument that "a traffic accident [with non-member] injuring a tribal member sufficiently affects the economic security, political integrity, or health and welfare of the tribe, thus satisfying the second *Montana* exception.")[27];

* *Chiwewe v. Burlington N. and Santa Fe Ry Co.*, 239 F. Supp. 2d 1213 (D. N.M. 2001) (no tribal jurisdiction over wrongful death suit arising from accident on railroad's right-of-way; *Montana*'s second exception does not apply).

The Navajo Nation thus errs in arguing that the second *Montana* exception applies because "tour buses are a potential public safety menace."

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[26] "That simply begs rather than answers the question. Under the tribe's analysis, the exception would swallow the rule because virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe. The exception was not meant to be read so broadly."

[27] "It is difficult to argue that these important interests will be diminished, much less jeopardized, if Wilson must present her individual tort claims in state or federal court, where she has plain, speedy, and adequate remedies." *Id*. at 815.

[NN Brief, pp. 18-25.] *Strate* and the cases cited above have specifically rejected that argument, as the second exception is simply not read that broadly. Nor is this case distinguishable from *Strate* on the ground that it involved a tour bus as opposed to a truck, as the Nation argues. [NN Brief, p. 22.][28] The point is that allegedly careless driving on a highway simply does not endanger the political or economic integrity of the tribe.

Defendants and the NCAI amici are also incorrect in arguing that this case is different because it involves "core tribal interests." [OB, pp. 51-58; NCAI Brief, pp. 21-23.] The tort case does not question the tribe's power to enforce tourism regulations against non-members. The tort case does not seek to enforce the requirement that non-member touring companies obtain permits. Thus, the tort case is not about "the tribes' ability to enforce their own laws in tribal courts," as the NCAI amici suggest. [NCAI Brief, pp. 22-23.] It is a negligence case for damages against non-members arising out of a vehicle accident on a state roadway. As *Strate* held, adjudicating liability for a car accident between strangers occurring on a state roadway does not involve "core

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[28] Indeed, the federal Department of Transportation Federal Motor Carrier Safety Administration has *hundreds* of regulations governing the safety of tour bus operations and operators – many more than the few the Navajo Nation cites in its brief. [NN Brief, p. 22.] *See, e.g.*, 49 C.F.R. Parts 40, 374, 379, 380, 382, 383, 384, 390, 392, 393, 395, 399; http://www.fmcsa.dot.gov/rules-regulations/bus/driver/bus-driver.htm.

tribal interests" – regardless of why the non-member was driving along the highway.[29]

The NCAI amici err in arguing that affirming the lack of tribal jurisdiction here will "imperil" the tribe's ability to regulate tourism on the

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[29] Defendants (and the NCAI amici) thus misplace reliance on *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), and *Grand Canyon Skywalk Dev., LLC v. "Sa' Nyu Wa Inc*., 715 F.3d 1196 (9th Cir. 2013). [OB, pp. 39, n.2, 54-55; NCAI Brief, p. 15.] *Brendale* involved a dispute over who – the county or the tribe – had the right to zone non-member fee land interspersed in a checkerboard with tribal lands on a reservation. Four Justices held the tribe had no authority to zone fee land at all, as the tribe's original treaty rights had to be read in light of subsequent alienations. 492 U.S. at 422, 424, 428. Any exceptions to the rule of "no tribal authority" had to meet one of the two *Montana* exceptions. *Id*. at 430-32. Two more Justices believed the tribe had authority to zone the small amount of fee land located in the reservation area closed to the public (to prevent undermining the tribe's overall zoning scheme to preserve the area's unique character), but not the fee land in the reservation area open to the public. *Id*. at 444-47. In other words, as is relevant here, a majority of the Court believed the tribe had no regulatory authority over non-Indian fee lands in an area of reservation open to the public (as we have here), unless the tribe could prove that the county's zoning there would imperil the tribe's political integrity, economic security, or health and welfare. And the tribe did not prove that for the open land. This is the same analysis *Strate* applied in finding no tribal jurisdiction under virtually identical facts as here. Thus, if *Brendale* applied to this case, it would support Plaintiffs' position, not that of Defendants.

Grand Canyon Skywalk is similarly inapposite. It asked whether tribal jurisdiction was plausible over a dispute involving a tribe's attempt to exercise eminent domain to condemn a Nevada corporation's intangible property rights in a contract to build and operate the Grand Canyon Skywalk on remote tribal land. Jurisdiction was plausible because the tribe had the inherent authority to exclude the Nevada corporation and thus condemn the contract rights to that property. 715 F.3d at 1204-05. Here the tribe has no right to exclude the public from the state roadway.

reservation [NCAI Brief, pp. 21-22] or "destabilize its entire regulatory scheme in this area." [*Id*., p. 23; *see also* OB, p. 58; NN Brief, p. 25 (arguing that the tort case serves to "deny[] Navajo regulatory authority over commercial touring activities").] Adjudicatory jurisdiction of this case is not necessary to the tribe's enforcement of its regulations. As is noted above, the tribe can spot check for touring permits on tribal land, and issue fines to those who are not compliant, thus ensuring plenty of "practical enforcement" of the regulations. [NCAI Brief, p. 15.] Fining or prohibiting permit-less tour operators from traveling or stopping on tribal roads allows the tribe to "uniformly and consistently regulate touring," as the Navajo Nation wishes. [NN Brief, p. 14.] Affirming the lack of tort jurisdiction here would certainly not render those regulations "wholly ineffective," as the NCAI amici assert. [NCAI Brief, p. 15.]

Finally, the lack of tribal jurisdiction here does not "seriously imperil the Nation's development of its own common law," as Defendants suggest. [OB, p. 57.] The tribe can develop its common law in those cases where it has jurisdiction – for example, cases between members stemming from conduct on tribal land. We do not need to create a battle of state vs. tribal law in order for the tribe to develop its own common law. [*See* OB, pp. 57-58.] The district

court was correct in ruling that *Montana*'s second exception does not provide tribal jurisdiction here.

CONCLUSION

Based on the foregoing, the strong presumption against tribal jurisdiction prevails. No federal statute or treaty authorizes tribal jurisdiction here, and Defendants cannot meet their burden of proving that tribal jurisdiction is appropriate under either *Montana* exception. The district court correctly held that tribal jurisdiction was lacking here. Plaintiffs respectfully request the Court to affirm the summary judgment in their favor.

RESPECTFULLY SUBMITTED this 12th day of July, 2013.

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STATEMENT OF RELATED CASES

There are no known related cases pending in the Ninth Circuit Court of Appeals.

CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NUMBER 12-16958

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Attorney for Plaintiffs/Appellees

Date July 12, 2013

CERTIFICATE OF SERVICE

I hereby certify that 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 on July 12, 2013.

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