**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*

# REPLY BRIEF OF APPELLANTS

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## I. Introduction

In their Answering Brief [hereinafter "AB"], Appellees [or alternatively hereinafter "Express Charter companies"] obscure and misrepresent the facts of this case and ignore instructions from this Court and the United States Supreme Court in arguing this case is "indistinguishable" from *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and that the Navajo Nation courts lack jurisdiction to adjudicate claims stemming from the on-reservation tour bus/auto collision at issue here. Contrary to Appellees' arguments, the facts of this case, viewed in light of relevant Ninth Circuit and Supreme Court precedents, amount to distinctions *with* a difference relative to *Strate*, in several dispositive respects.

First, unlike *Strate*, this case implicates the question of an Indian tribe's *impliedly reserved treaty-based* jurisdiction over the conduct of nonmembers on the reservation, a question the Supreme Court repeatedly has instructed must be addressed apart from, and antecedent to, the question of residual inherent tribal authority in the absence of controlling reserved treaty rights. Second, even if the common-law framework of *Montana v. United States*, 450 U.S. 544 (1981), were to be applied here, the factual and historic circumstances bearing on the status of the highway at issue in this case, U.S. Highway 160, within the boundaries of the Navajo Reservation require this Court, in accordance with Supreme Court decisions, to conclude that the highway retains its status as tribal trust land, for

nonmember governance purposes, giving rise to a presumption *in favor of* tribal jurisdiction in this case. Finally, even if this Court were to "align" the right-of-way at issue in this case with non-Indian fee land for nonmember governance purposes, the Navajo Nation's core sovereign interest in regulating commercial touring on the reservation and adjudicating a collision arising from such commercial activity requires a finding that both *Montana* exceptions are satisfied here, *i.e.*, (1) that a qualifying consensual relationship exists in this case between Express Charter companies, on the one hand, and the Nation and its members, on the other, and (2) that Express Charter companies' on-reservation commercial touring activities in this case, unconstrained by valid tribal regulations, seriously imperils the Navajo Nation's political integrity, economic security, and health and welfare, within the meaning of *Montana*'s second exception.

## II. The Navajo Nation retains jurisdiction to adjudicate the claims at issue in this case pursuant to the Nation's impliedly reserved rights under the Navajo Treaty of 1868.

In arguing that the Navajo Nation "has no 'reserved treaty rights' that are relevant here" and that "[t]he treaty of 1868 does not reserve to the Navajos any right to exclude non-members from state highways" (AB-28-29), Appellees ignore the rules prescribed by the Supreme Court for addressing a question of reserved Indian treaty rights. In *Montana*, the Supreme Court made clear that treaty language reserving an Indian reservation for a tribe's exclusive use and occupation

is a valid source of implied tribal jurisdiction to regulate the conduct of nonmembers unless such treaty rights subsequently have been abrogated by Congress, noting that the Ninth Circuit Court of Appeals below had properly "[relied] on the treaties of 1851 and 1868." 450 U.S. at 550. In its ruling:

> The Court of Appeals held that the 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*, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits.

*Id.* at 557 (citations omitted) (emphasis added); *accord Strate*, 520 U.S. at 445, 454 n.8 (quoting *Montana*, 450 U.S. at 557) (reiterating that in *Montana* the Supreme Court gave its "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'"). The *Montana* Court went on to hold that although treaty-based regulatory authority thus remained intact to authorize tribal regulatory jurisdiction over nonmember conduct on lands owned by the Crow Tribe or held in trust by the United States for the Tribe, the complete alienation of Indian title extinguished the Indian trust status of lands acquired by non-Indians pursuant to allotment legislation, and such alienation effectively abrogated the Tribe's pre-existing treaty-based jurisdiction to regulate the conduct of nonmembers on those alienated parcels. 450 U.S. at 559-60.

Likewise, in *South Dakota v. Bourland*, 508 U.S. 679, 688 (1993), the Supreme Court concluded, pursuant to similar treaty provisions, that "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]"). However, as in *Montana*, the Supreme Court in *Bourland* concluded that alienation of the Tribe's ownership, and extinguishment of the Indian trust status, of lands taken by Congress for the construction of a dam abrogated the Tribe's pre-existing treaty rights.

Appellees concede that "Article II of the [Navajo] Treaty of 1868 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.'" AB-24 n.15. Despite this acknowledgment, Appellees fail to engage the abrogation question crucial to the Supreme Court's analysis of reserved treaty rights in both *Montana* and *Bourland*, never examining whether tribal regulatory authority over their commercial touring, presumptively reserved by the Navajo Treaty of 1868, was abrogated by the relevant statutes and intergovernmental agreements by which the right-of-way was assigned and construction of the roadway was funded. Instead, Appellees only proffer in conclusory fashion that "the tribe has no 'reserved Treaty

rights' that are relevant here and this renders ineffective Defendants' arguments that . . . no federal statute has 'abrogated' those Treaty rights." (AB-28). Appellees' omission is magnified by the fact that *Strate*, upon which Appellees purport to heavily rely, pointedly reiterated that the reserved treaty rights question, when asserted, must be addressed *before* addressing the issue of inherent tribal sovereign authority over nonmembers as a matter of federal common law:

> In *Montana* itself, the Court examined the treaties and legislation relied upon by the Tribe and explained why those measures did not aid the Tribe's case. *Only after and in light of that examination* did the Court address the Tribe's assertion of "inherent sovereignty," and formulate, in response to that assertion, *Montana*'s general rule and exceptions to it.

*Strate*, 520 U.S. at 449-50 (citation omitted) (emphasis added).

As demonstrated at length previously in the Brief of Appellants [hereinafter "Opening Brief" or "OB"] at 14-22, the Navajo Nation retains treaty-based authority to adjudicate the tour bus/auto collision at issue in this case. Far from effecting an abrogation of treaty rights, legislation that funded construction of Navajo Indian Route #1 on the Navajo Reservation, *see* Addendum 2, 25 U.S.C. §§ 631, 636 [hereinafter "1950 Act"], states specifically that Congress's intent in funding construction of the roadway was "to further the purposes of existing treaties with the Navajo Indians." Addendum 2; *see also Warren Trading Post Co. v. Ariz. St. Tax Comm'n*, 380 U.S. 685, 690 & n.17 (1965) (observing that

Congress had funded construction of this same roadway "*in compliance with its treaty obligations*") (emphasis added) (citing 1950 Act).

Further, the Nation expressly specified, in the relevant intergovernmental agreements, that its consent to the assignment of the right-of-way was "[s]ubject to any prior valid existing right or adverse claim," including its treaty-based power to exclude and to condition the presence of nonmembers conducting commercial activities on the Nation's lands upon their conformity to Navajo law. OB-24-25. As the Supreme Court made clear in the leading modern case articulating and applying the rules for construing Indian treaties, Congress's abrogation of treaty rights must be express and unambiguous, and treaties and agreements with tribes must be interpreted "to give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 174, 196, 202 (1999) (citations omitted); *see also United States v. Winans*, 198 U.S. 371, 381 (1905) (articulating the Reserved Rights Doctrine, that a treaty is "not a grant of rights to the Indians, but a grant of right from them, a reservation of those not granted").

Appellees thus err, as had the District Court, in asserting that treaty-based tribal jurisdiction is lacking in this case because "no Treaty or federal statute expressly grants the tribe jurisdiction over the tort suits here." (AB-10). Appellees' errors of omission related to treaty-based authority are compounded by their

purported reliance on cases that have little or nothing to do with Indian treaty rights. Unable to refute Appellants' argument that tribal regulatory authority over commercial touring activities is reserved by the Navajo Treaty of 1868 and has never been abrogated, Appellees misconstrue a number of Supreme Court and Ninth Circuit cases, managing only to obscure and confuse the treaty issue.[1] For example, Appellees cite *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-144 (1982), for the proposition that "the power derived from the Treaty . . . gives the tribe the lesser included power to tax business activities conducted on the Reservation" (AB-9-10), not recognizing that this lesser included power to tax recognized by the Supreme Court in *Merrion* was not treaty-based but rather was based on the Tribe's land ownership and inherent tribal sovereignty, the Jicarilla Apache Reservation having been created by Executive Order, not by Treaty. *See Merrion*, 455 U.S. at 133-34 & n.1. Appellees cite *Burlington Northern R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), for a proposition—*i.e.*, "the power to tax or regulate tourism activities on tribal land does not constitute the power to exclude non-members from a state roadway" (AB-25)—that (1) is out of context in this

[1] Appellees cite *Babbitt Ford v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), for the principle that: "tribal jurisdiction exists over action to enjoin enforcement of tribal vehicle repossession regulations against nonmembers transacting business with the tribe" (AB-24-25), a principle that actually supports the District court's holding, and Appellants' contention, that "the Navajo Nation has power to regulate tourism on the reservation". ER-10.

case, which does not deal principally with the power to tax; (2) is inaccurately stated where the power to exclude does not derive from the power to tax, as Appellees suggest, but rather as the *Merrion* Court states, *includes* lesser powers "such as a tax on business activities conducted on the reservation," *Merrion*, 455 U.S. at 144; and (3) is irrelevant since *Red Wolf*, like *Merrion*, is not a treaty case.

## III. If the *Montana-Strate* common-law framework applied here, U.S. Highway 160 within the boundaries of the Navajo Reservation retains its status as tribal trust land for nonmember governance purposes.

In *Strate v. A-1 Contractors*, the Supreme Court made clear that with respect to the question of an Indian tribe's inherent sovereign authority—in the absence of impliedly reserved treaty rights—over the conduct of nonmembers occurring on a federally granted right-of-away across tribal trust land within a reservation, courts must apply a multifactor analysis to determine whether the roadway should be "aligned" with non-Indian fee land, thereby triggering the presumption *against* tribal regulatory jurisdiction over nonmembers on non-Indian fee land articulated in *Montana*. Adhering to guidance from *Strate*, *Montana*, and *Merrion*, this Court in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), held that where the land at issue retains its status as tribal trust land, there arises an *opposite* presumption *in favor of* tribal jurisdiction over the conduct of nonmembers occurring on that land. *Strate* and *Water Wheel* require

courts, in the absence of controlling treaty or statutory provisions, to conduct a fact-intensive inquiry to determine which of the two presumptions applies.[2]

In arguing that "the facts of *Strate* are virtually indistinguishable from the facts presented here," (AB-23), Appellees present a chart of facts (AB-20) which is faulty in conflating two distinct issues and muddling the analysis prescribed by the Supreme Court in *Strate* for determining (1) the status of the roadway in question and (2) whether the two *Montana* exceptions apply. In their chart and elsewhere, Appellees misstate the facts of this case, emphasize facts that are irrelevant or misleading, and disclose only sparse facts related to their September 2004 commercial tour of the Navajo Nation, with an apparent aim toward playing down their contacts with the Nation. Following is a chart that accurately delineates the facts that distinguish this case from the facts in *Strate* and that bear on the threshold issue of the status of the roadway *only*:

| *Strate* | This Case |
|---|---|
| The purpose of the roadway is to facilitate public access to a federal water resource project. | The purpose of the roadway is to serve tribal interests. |

[2] Appellees' assertion that there exists a unitary "presumption against tribal jurisdiction over nonmembers who come within the borders of Indian reservations" (AB-14) reflects their refusal to accept this Court's conclusion to the contrary in *Water Wheel*, 642 F.3d at 810 (holding that the presumption against tribal regulatory jurisdiction over nonmembers on non-Indian fee land articulated in *Montana* does not apply to nonmember conduct occurring on tribal trust land within a reservation).

| | |
|---|---|
| The granting instrument detailed only one specific reservation to the tribe. | The Navajo Nation reserved all treaty rights and inherent sovereign authority to exclude and to regulate nonmember conduct, consenting to the assignment of a right-of-way for limited purposes only. |
| The Tribes received payment for their grant of the right-of-way and public use of the land. | The Navajo Nation received no compensation for its consent to assignment of a BIA right-of-way, having waived such compensation. |
| The state maintains the roadway pursuant to a right-of-way grant over tribal trust land and the roadway is open to the public. | The State of Arizona maintains the roadway, but the Navajo Nation jointly maintains and controls the highway. |

These factual differences between the present case and *Strate* are crucial for understanding why applicable precedents require this Court to conclude that the right-of-way at issue here retains its status as tribal trust land for nonmember governance purposes.

**A. Purpose of the roadway**

In *Strate*, the Supreme Court noted that an important factor in determining the status of the roadway at issue in that case was the *purpose* for which it was constructed, *i.e.*, to "facilitate public access to . . . a federal water resource project." 520 U.S. at 455. In contrast, Congress's construction of the roadway in this case 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…Tribe[];" (3) "to promot[e] a self-supporting

economy and self-reliant communities, and . . . diversified economic activities;" and (4) to facilitate "the fullest possible participation of the Navajos in the administration of their affairs." Addendum 2. In trying to equate the purpose of the roadway in this case with the purpose of the roadway in *Strate*, Appellees assert that "the state roadway here is part of a 1,465 mile long east-west United States highway . . . ." However, the *Strate* Court examined the purpose of the roadway *at the time the grant of the right-of-way involved in that case was made*. *See Strate*, 520 U.S. at 455 ("The grant [of the right-of-way] involved in this case was made, pursuant to the federal statute, in 1970.")

In this case, at the time the right-of-way underlying Navajo Indian Route #1 was assigned to the State of Arizona, U.S. Highway 160 did not extend into the Navajo Nation or the State of Arizona. U.S. 160 was extended from Poplar Bluff, Missouri, to Tuba City, Arizona, but not until 1970. The original status of this roadway as a BIA right-of-way, only later incorporated into U.S. 160, and the scope of the limited grant of that right-of-way, were established at the time the right-of-way was assigned to the State of Arizona, as reflected in the intergovernmental agreements. ER-55-62.

### B. Reservation of rights to exercise dominion and control over the highway

In *Strate*, the granting instrument detailed only one specific reservation to the tribe, *i.e.*, the right to construct crossings, *see* 520 U.S. at 455, and no treaty

rights or statutes were presented in support of tribal jurisdiction in *Strate*. Here the Navajo Nation's consent to assignment of the BIA right-of-way was made subject to the Nation's pre-existing treaty rights and inherent sovereign authority to exclude, together with the lesser included power to regulate nonmember conduct. The Navajo Treaty of 1868, Congress's funding legislation, and the Navajo Nation Tour and Guide Services Act [hereinafter "NNTGSA"] all support tribal civil jurisdiction according to the broad jurisdictional analysis prescribed by the *Strate* Court. *See Strate*, 520 U.S. at 449-50 (citing with approval *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855-56 (1985)).

**C. Compensation for grant of the right-of-way**

The *Strate* Court noted that "[t]he Tribes have consented to, and received payment for, the State's use of the 6.59-mile stretch for a public highway." 520 U.S. at 455. In contrast, the Navajo Nation waived compensation consistent with the Nation's view that the BIA right-of-way was being assigned and the roadway was being constructed for the benefit of the Nation, as in *McDonald v. Means*, 309 F.3d 530, 539 (9th Cir. 2002).

**D. Joint maintenance and control of U.S. Highway 160**

The State of Arizona agreed to maintain the highway constructed on tribal trust land when construction was completed by the United States, pursuant to intergovernmental agreements. Regarding those portions of Route 1 and Route 3

within the State of Arizona, the Navajo Nation consented to the assignment of a limited BIA right-of-way, reserving in the intergovernmental agreements its treaty rights and its inherent sovereign authority to exclude and to regulate commercial activities of nonmembers. By its provision of governmental services the Navajo Nation undeniably *does* control and maintain the highway: in the tour bus/collision in question, Navajo EMS, Police, Coroner, and Fire and Rescue Services secured the scene, investigated the collision, cleared the scene of the collision, and issued reports. ER-101. [3] The Navajo Nation granted a limited right-of-way that is open to the public and thus it permits free passage to persons merely "passing through" on U.S. 160, but the Navajo Nation retains the authority to detain and exclude tour operators conducting commercial activities in violation of the Nation's laws.

In arguing that the right-of-way in this case should be aligned with land alienated to non-Indians, Appellees cite *Burlington Northern R. Co. v. Red Wolf*,

[3] In *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 654-55 (2001), the Navajo Nation argued unsuccessfully that nonmember business Cameron Trading Post entered into a consensual relationship with the Nation, justifying the imposition of a hotel occupancy tax, where it benefited from the numerous services provided by the Navajo Nation. Here, in contrast, Appellants demonstrate that the Navajo Nation, by the grant of a limited right-of-way only, understood that it relinquished no treaty rights, ceded no jurisdiction, and would continue to exercise joint maintenance and control of the highway which was constructed for its benefit. Under these exceptional circumstances the Nation's provision of services weighs more heavily as a factor than the mere temporary detention function provided by tribal police patrolling the roadway at issue in *Strate*. *See* 520 U.S. at 456 n.11, and considered cumulatively with other factors, indicates that U.S. Highway 160 retains its status as tribal trust land for nonmember governance purposes within the common-law *Montana-Strate* analytical framework

wherein this Court held that there was no tribal jurisdiction over a tort claim arising from a train/auto collision on a railroad within a congressionally granted right-of-way. AB-10, 25-26. Appellees ignore the obvious factors that distinguish the right-of-way in *Red Wolf* from that in the instant case, just as they ignore the factors that distinguish the right-of-way in *Strate*. In *Red Wolf* the court held that "the congressional right-of-way grant to the Railroad's predecessor in interest was absolute," recognizing that "[c]ongressional power over tribal lands is plenary." *Red Wolf*, 196 F.3d at 1063. The purpose of the railway right-of-way in *Red Wolf* was to provide for interstate commerce across the Nation's railroads, whereas here, Congress funded construction of a roadway on the right-of-way assigned in this case "in order to further the purposes of existing treaties with the Navajo Indians" and to advance distinctly tribal interests. OB-19-20, 25.

Further, unlike the absolute right-of-way in *Red Wolf*, the right-of-way in the instant case had been previously vested in the Bureau of Indian Affairs and later was assigned to the State of Arizona. Considering the unique features of BIA roads, this Court in *McDonald*, applied the *Strate* factors in determining that the "scope of rights and responsibilities retained by a tribe over a BIA road exceeds 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.* at 538. Appellants did not state that the State "obligate[d] itself to take

on the BIA's fiduciary duties," as Appellees assert (AB-23 n.14), but only (1) that the State "agreed to be bound by and fulfill all the obligations, conditions, and stipulations" by which the BIA right-of-way was defined and limited, and (2) that in assigning the BIA right-of-way, the Secretary of Interior could transfer no greater rights in the right-of-way than the Bureau of Indian Affairs already possessed. ER-59-60.

## IV. Even if the roadway in question were deemed the equivalent of non-Indian fee land for nonmember governance purposes, the Navajo Nation's adjudicative jurisdiction over the tour bus/auto collision would exist because of a qualifying consensual relationship under *Montana*'s first exception.

Appellees argue *Montana*'s first exception—the "consensual relationships" exception—does not apply in this case, asserting that "the facts of *Strate* are virtually indistinguishable from the facts" of the present case (AB-23), but in doing so, Appellees truncate and distort the facts of both cases. Actually, the facts of this case that are relevant to application of *Montana*'s first exception are precisely the type the Supreme Court has said comprise a consensual relationship "of the qualifying kind," *Strate*, 520 U.S. at 457. The chart below accurately contrasts the facts of this case with the facts of *Strate* relative to *Montana*'s first exception:

| *Strate* | This Case |
|---|---|
| Collision "arose between two non-Indians." | Nonmember tour bus driver collided head-on with an auto driven and occupied by enrolled members, all of whom were either injured or killed. |

| | |
|---|---|
| Truck driver was employed by a company that had a landscape contract with the Tribes. | Tour operators entered and traversed tribal lands conducting commercial touring activities regulated by the NNTGSA which tour operators violated, having failed to meet any of the requirements of the Act. |
| It was not established that truck driver was even engaged in subcontract work at the time of the accident. | Tour operators entered tribal lands to engage in commercial touring of the Navajo Nation and were engaged in such activity at the time of the tour bus/auto collision. |
| Non-tribal member Fredericks "was not a party to the subcontract" between the Tribes and the truck drivers' employer. | Enrolled Navajos injured and killed in the collision were the intended beneficiaries of the NNTGSA and its associated regulations and were the very object of the commercial tour. |
| The dispute was "distinctly non-tribal in nature" and involved a "run-of-the-mill highway accident." | Collision in this case killed and severely injured citizens of the Navajo Nation and implicated vital tribal interests in regulating on-reservation commercial tour operations. |
| The "Tribes were strangers to the accident." | The Navajo Nation enacted the NNTGSA whose purposes include preventing such a collision and ensuring compensation for Navajos and others injured by tour operators. |

**A. Tour bus/auto collision involved tribal members**

Appellees claim, disingenuously, that "the *Strate* accident also resulted in injury to tribal members" (AB-31); but in reality the adult children of nonmember Gisela Fredericks, who were tribal members, were not involved in or injured in the collision, were never parties to the *Strate* appeal, and their claims had no bearing whatsoever on *Strate*'s analysis of tribal jurisdiction, as the Court expressly clarified. *See Strate*, 520 U.S. at 444 n.3 (noting that "the Tribal Court declined to

address [Gisela Frederick's] adult children's consortium claim; thus, no ruling on that claim is here at issue"). In like manner, Appellees assert that in *Strate*, "Truck driver is on the state roadway pursuant to a consensual relationship between his employer and the tribes . . . " (AB-20); but as Appellees only intimate and as the *Strate* Court observes, "The record does not show whether Stockert was engaged in subcontract work at the time of the accident." *Strate*, 520 U.S. at 442. In contrast, here Express Charter companies toured the Navajo Nation Tribal Park at Monument Valley, traversed almost 200 miles of pristine and scenic canyons and high desert on the Nation, came to witness the culture and pastoral lifestyle of the Navajo people and to purchase Navajo crafts, curios, and artwork, and stayed overnight at a Navajo Nation hotel. AB-101-105; OB-36-37.

**B. Basis for a "consensual relationship" of the qualifying kind**

Appellees point out that in *Strate* the Supreme Court held that "[t]he highway accident presented no 'consensual relationship' of the qualifying kind" (AB-19); but Appellants do not assert the tour bus/auto collision as the sole basis for the consensual relationship in this case. Rather, the consensual relationship between Express Charter companies and the Navajo Nation and its individual members arises principally from Express Charter companies' commercial touring activities in which they were engaged both as they entered the Navajo Reservation and when the tour bus/auto collision occurred. ER-3, 38, 102-105, 116. The *Strate*

Court found that "A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore did have a 'consensual relationship' with the Tribes," but again not "of the qualifying kind." 520 U.S. at 457. However, in contrast to this case, there was no extensive regulation of landscape work by the Tribes in *Strate*; landscape work was not shown to have a significant impact on the economic development of the Tribes; no tribal laws governing landscape work were ever argued or cited (if any existed). Moreover, a contract for landscape work binds a single company and pertains to a single job, as in *Strate*, while the Navajo Nation's Tour and Guide Services Act this case comprehensively regulates the entire tourism industry.

**C. Individual Navajos are parties to the "consensual relationship"**

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, making the individual enrolled Navajos "parties to" the consensual, commercial relationship between Express Charter companies and the Navajo Nation. The NNTGSA was enacted to serve the interests of individual Navajos. OB-20-21, 25. The culture and pastoral lifestyle of the Navajo people, such as those injured and killed in the collision, is the very focus of Express Charter companies' commercial tour, further reflecting a "consensual relationship"

between the tour operators and individual Navajos under the first *Montana* exception.

**D. The fatal tour bus/auto collision is distinctly tribal in nature**

The fatal tour bus/auto collision in this case is *not* a "run-of-the mill highway accident," it having killed and severely injured citizens of the Navajo Nation and implicated vital tribal interests. As the Supreme Court has observed, *Montana* permits "tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests." *Plains Commerce Bank v. Long Family Land & Cattle Co. Inc.*, 554 U.S. 316, 332 (2008) (emphasis in original). In sharp contrast to *Strate*, the underlying lawsuit in this case is *distinctly tribal* in nature where the collision involved nonmember businesses which at the time of the collision were actively engaged in commercial touring subject to Navajo Nation licensing and safety regulations as well as the Navajo Long-Arm Statute. ER-3, 18-29, 101-105, 116; Addendum 7.

**E. The Navajo Nation is no "stranger" to the accident**

Appellees argue that in *Strate* the "requisite nexus between the accident and the subcontract was missing" and that in this case "the requisite nexus between the accident and the tribe's touring permit regulations (which would be the consensual relationship in this case) is missing." (AB-11). That nexus is thoroughly established in this case where the NNTGSA (1) governs the risks posed and seeks

to prevent accidents caused by tour buses, by requiring proper licensing of drivers and vehicles, (2) ensures that persons injured in collisions with tour buses have a ready source of compensation by requiring proof of insurance, and (3) requires written acknowledgment of tribal jurisdiction, all in contemplation of tour bus accidents and the need to protect tribal members and nonmembers from the dangers associated with commercial touring. The Navajo Nation, therefore, cannot be dismissed as a "stranger[ ] to the accident," in contrast to the tribes in *Strate*. 520 U.S. at 457.

**F. Lower federal court decisions Appellees rely on are distinguished**

Appellees argue that "in *Strate*, clearly tribal statutes and regulations would have governed the employer's business dealings with the tribe" (AB-32), but tribal statutes or regulations governing landscape work or other business dealings were never argued in support of tribal jurisdiction in *Strate.* Appellees incorrectly assert that the facts of *Strate* are indistinguishable from the instant case by virtue of "tribal statutes and regulations" that simply do not exist in the *Strate* record. Appellees' repeated citation to *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *see, e.g.*, AB-32 n. 20, 41, is unavailing because the facts of that case differ in crucial respects from the case at hand: (1) non-tribal member Marchington, who was a driver for an Idaho carnival company, was merely "passing through" the Blackfeet Reservation on U.S. Highway 2 when the collision occurred, had not

entered the reservation for the purpose of engaging in business activity, and the Blackfeet Reservation was not his destination; (2) the language of the 1855 Blackfeet Treaty was argued by the carnival company in its defense where, consistent with the Reserved Rights Doctrine, but in contrast to the instant case, the Tribe *granted to the federal government* the right to "construct roads of every description"; (3) there was no congressional legislation funding construction of the roadway that advanced impliedly reserved tribal treaty rights and no intergovernmental agreements that showed the grant of a limited right-of-way only; and (4) there was no extensive regulation of carnival shows that was shown to be a core sovereign interest of the tribe.

The facts of *Nord v. Kelly*, 520 F.3d 848 (8th Cir. 2008), cited by Appellees (AB-32 n.20, 33) are similar to *Wilson v. Marchington* and distinguishable from the instant case: (1) Appellees represent that Nord Trucking "had a consensual commercial relationship with the Red Lake Band" (AB-12, 33), but it was uncertain in the case "whether Nord was driving in connection with a contract with the Red Lake Band or on a personal errand," *Nord*, 520 F.3d at 856; (2) in *Nord* there was "no assertion that any statute or treaty grants or retains tribal authority over nonmembers in this situation," *id.* at 854; (3) same as in *Marchington* above; and (4) no regulation of timber hauling was shown.

*Austin's Express, Inc. v. Arneson*, 996 F. Supp. 1269 (D. Mont. 1998) (AB-27), is also distinguishable from the instant case: (1) the courier business in that case was merely "passing through" the reservation; (2) the court confused issues of impliedly reserved treaty rights with common law concepts of inherent tribal sovereignty, thus misapplying the reasoning of *Montana*, 450 U.S. 565, *see* 996 F. Supp. at 1271; the court concluded "the Tribe possessed no such regulatory rights under the 1868 treaty," 996 F. Supp. at 1272, but made no inquiry whether reserved treaty rights were abrogated so as to divest the Crow Tribe of jurisdiction over the vehicle/pedestrian accident in the case; (3) same as in *Marchington* above; and (4) no regulation of courier businesses was shown. This Circuit has never followed *Austin's Express.*

**G. Appellees' challenge to the Navajo Nation's interpretation of Navajo law is misplaced**

Appellees challenge amici Navajo Nation's extensive reference to Navajo Nation law and the opinion of the Navajo Nation Supreme Court (Navajo Nation Brief at 12-15) in interpreting the consent provision of the Passenger Services Agreement (ER-28-29), which the District Court interpreted without reference to tribal law. The District Court thus reached the erroneous conclusion that *Montana*'s consensual-relationships exception could not apply because in the court's view, the consent provision does not encompass lands over which the Nation "cannot assert a landowner's right to occupy and exclude." ER-12 (citation

and internal quotation marks omitted). The District Court failed to recognize that *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. ER-11-12; OB-47-49. Appellees assert that amici Navajo Nation's extensive references to tribal law are not legitimate because the "issue of whether a non-member is subject to tribal jurisdiction is an issue of federal law, not tribal law" (AB-14 n. 5, 36), but in its discussion amici Navajo Nation does not purport to define the limits of its jurisdiction—a federal question—solely by reference to tribal law. Rather, the Nation articulates what should be the proper interpretation of the consent provision and the scope of tour operators' required written consent to jurisdiction according to Navajo law, observing that the District Court is bound to 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.").

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

The Supreme Court has indicated 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., Inc. v. Shirley*, 532 U.S. 645, 659 (2001) (quoting *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989) (opinion of White, J.)).[4] Appellees argue that "tribal civil adjudicatory jurisdiction *over a highway accident* is simply not necessary to preserve the political integrity of the tribe" (AB-38) (emphasis added), failing, as did the District Court, to address the nexus between Express Charter companies' conduct in this case and the Navajo Nation's core sovereign tribal interests in regulating commercial tourism. ER-12-13. 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 engaged in commercial activity involving the use of tribal land.

*Montana*'s second exception requires a showing that tribal authority over the conduct of nonmembers "'is necessary to protect tribal self-government or to

[4] Appellees cite a standard for satisfying *Montana*'s second exception proffered in dicta in *Plains Commerce Bank*—that "tribal power must be necessary to avert catastrophic consequences." AB-37 (quoting *Plains Commerce Bank*, 554 U.S. at 341). However, the source from which *Plains Commerce Bank* purports to derive this standard—*Cohen's Handbook of Federal Indian Law*—actually *disapproves* of both this elevated threshold and the comparable one suggested in *Atkinson*—*i.e.*, that "unless the drain of the nonmembers' conduct . . . is so severe that it actually 'imperils[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands," 532 U.S. at 657 (quoting *Montana*, 450 U.S. at 566); *see* Cohen's Handbook of Federal Indian Law § 4.02[3][c], at 232 n.220 (2005 ed.).

control internal relations,'" or otherwise "is needed to preserve 'the right of reservation Indian to make their own laws and be ruled by them.'" *Strate*, 520 U.S. at 459 (quoting *Williams v. Lee*, 358 U.S 217, 220 (1959)). Proving that the conduct of nonmembers imperils such core "sovereign interests," *Plains Commerce Bank*, 554 U.S. at 338, is "[k]ey to [*Montana*'s second exception's] application," *Strate*, 520 U.S. at 459. As explained in detail previously, *see* OB-53-58, the on-reservation tour operations of Express Charter companies in this case, unlike the nonmember conduct discussed in *Strate*, seriously imperils the very "sovereign interests" the Supreme Court has indicated must be jeopardized for the second *Montana* exception to apply, namely, "the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, [and] control internal relations." *Plains Commerce Bank*, 554 U.S. at 337.

Appellees inexplicably object to the focus of Appellants and their *amici* on the Navajo Nation's core sovereign interest in *regulating* commercial touring on the reservation when explaining the application of *Montana*'s second exception in this case, insisting that "[t]he tort case does not seek to enforce the requirement that non-member touring companies obtain permits." AB-42.[5] The Supreme Court, however, has made clear that in order for an Indian tribe to have authority to

[5] Appellees make a similarly misplaced objection when discussing *Montana*'s first exception: "The tort case is not a dispute . . . over whether the tribe's tourism regulations can be imposed on Plaintiffs." AB-11.

*adjudicate* claims against nonmembers, it first must be established that the tribe has authority to *regulate* those nonmembers, pursuant to the *Montana-Strate* framework. *Nevada v. Hicks*, 533 U.S. 353, 357-358 (2001); *see also Plains Commerce Bank*, 554 U.S. at 330 (holding tribe cannot adjudicate claims because it would not have been able to regulate the matter implicated in those claims). *Cf. Water Wheel*, 642 F.3d at 805 ("Because regulatory jurisdiction exists, we also consider whether adjudicatory jurisdiction exists.").

Because regulating commercial tour operations on the reservation implicates the Navajo Nation's core sovereign interests, and because Express Charter companies' conduct in this case, unconstrained by Navajo regulatory law, seriously imperils those core sovereign interests, the Nation's authority to regulate the companies' on-reservation business activity is justified by application of *Montana*'s second exception. The facts of the cases cited by Appellees for the proposition that "tribal civil adjudicatory jurisdiction over a highway accident is simply not necessary to preserve the political or economic integrity of the tribe" (AB-38-41) are clearly distinguished. In *Boxx v. Long Warrior*, 265 F.3d 771 (9th Cir. 2001), for instance, a non-Indian drunk driver injured a Crow tribal member. The defendant had not entered the reservation to engage in a commercial activity heavily regulated by the tribe; nor were any core sovereign tribal interests implicated in the lawsuit. Similarly, in *State of Montana Dept. of Transp. v. King*,

191 F.3d 1108 (9th Cir. 2001), tribal jurisdiction was denied in a suit against the State of Montana in connection with the State's employment practices on a highway right-of-way. The case concern no core tribal interests and implicated issues that were wholly different than a tribe's interest in regulating private business enterprises that enter a reservation to engage in commercial activity heavily regulated by the tribe. The same was true in *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 2001), where it was held a tribal member's suit against the county's law enforcement officials, viewed in light of a law enforcement agreement between the Nez Perce Tribe and State of Idaho, implicated issues of state sovereignty not at issue here, and the plaintiff's status as tribal member along with the tribe's asserted "interest in the safety of its members" did not rise to a level justifying application of the second *Montana* exception. And, *Chiwewe v. Burlington N. and Santa Fe Ry. Co.*, 239 F. Supp. 2d 1213 (D.N.M. 2001) involved claims of a tribal member's wrongful death on a railroad right-of-way. Again, in this case, there was no tribal regulation of the railroad business activity asserted, and an accident resulting in the death of a tribal member alone was held not rise to level of a core tribal sovereign interest.

Finally, Appellees misconstrue *Brendale* by citing the opinion of a majority of Justices who ruled with respect to the "open area" of the Yakima Reservation where "about half of the open area land is owned by nonmembers." 492 U.S. at

412; *see* AB-43 n. 29. More appropriately, Appellants cite the opinion of a *different* majority of Justices who held that the Yakima Nation had authority to apply its zoning laws to nonmembers' use of non-Indian fee land in the "closed" part of the reservation dominated by tribally owned parcels. *See Plains Commerce Bank*, 554 U.S. at 334. The area of the Navajo Reservation where the collision in this case occurred is overwhelmingly comprised of tribal trust land. ER-3-4, 101-105, 116. Therefore, even if commercial touring is conducted on non-Indian lands as in *Brendale*, or lands deemed the equivalent of non-Indian fee lands, the Navajo Nation has an exceptionally strong interest in applying a unitary, comprehensive regulatory regime to commercial touring, an activity that is distinctly tribal in nature and that, like zoning, is intimately connected with the use of tribally owned lands. *Cf. Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1204-05 (9th Cir. 2013).[6]

[6] Appellants cite *Grand Canyon Skywalk* solely for this Court's recognition of "the importance of tribal management of on-reservation tourism activity and nonmembers' 'access to . . . valuable tribal land.'" OB-55. Appellants strenuously contest Appellees' suggestion (AB-43 n.29) that *Grand Canyon Skywalk* is distinguishable because the Nation "has no right to exclude the public from the state roadway."

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 6,998 words inclusive of tables, certificates and the signature block.

## CERTIFICATE OF SERVICE

I hereby certify that on August 23, 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/ Kirstin Largent