No. 00-454

IN THE
Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,
v.
JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner has argued that a tribal government closed to nonmembers may not impose a tax on a transaction occurring wholly between nonmembers on fee land. The Navajo Nation and its amici have responded with an array of theories, often in tension with one another, and certainly in conflict with the governing framework prescribed by this Court in *Montana v. United States*, 450 U.S. 544 (1981), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

Remarkably, neither the Navajo Nation nor most of its amici defend the reasoning of the Tenth Circuit. Indeed, some are openly critical of the court of appeals' "sliding scale" test. *See, e.g.*, United States Brief at 15 ("U.S. Br.").

The Navajo Nation contends that it can impose the tax based on "inherent" authority that "did not have its origin in an act of Congress, treaty, or agreement of the United States." Resp. Br. at 25. However, the Navajo Nation makes no effort to satisfy the requirements of *Montana* with respect to inherent authority. The United States, on the other hand, concedes that *Montana* limits a tribe's inherent authority, but asserts that the Navajo Nation has obtained the power to tax the hotel as a result of Indian trader regulations adopted by the Department of the Interior. However, neither those regulations nor the Indian trader statutes contain the kind of express congressional delegation required by *Montana* and *Strate* for an expansion of tribal powers over nonmembers.

In the end, none of the responses provides an explanation as to why the nonmember *guests* of petitioner's hotel are subject to tribal sovereignty. The guests do not engage in consensual economic activity with the Tribe or its members. The rental of hotel rooms by the guests poses no threat to tribal self-governance. The tax imposed here does not comport with the framework established in *Montana*.

I. *MONTANA* PROVIDES THE RULE OF DECISION FOR THIS DISPUTE

Because nonmembers are wholly excluded from participation in tribal government, Pet. Br. at 16-17 & nn. 3-5, fundamental notions of fairness dictate that the reach of tribal power should ordinarily be limited to tribal members. Accordingly, *Montana* recognized "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565.

Certain amici attempt to downplay the significance of the closed nature of tribal governments, arguing that federal or state "government entities regularly impose taxes on persons or entities who are not represented before them." Brief of *Amici Curiae* Confederated Tribes of the Umatilla Indian Reservation at 12 n.5 ("Umatilla Br."). However, under our constitutional scheme, the federal and state governments are recognized to possess the attributes of full sovereigns. "A basic attribute" of this "full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." *Duro v. Reina*, 495 U.S. 676, 685 (1990). This Court has specifically recognized that "the tribes can no longer be described as sovereigns in this sense." *Id.* at 685. Rather, "the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order." *Id.* at 685-86. Thus, reliance on the full sovereign powers of other governments under our constitutional scheme is unavailing.[1]

[1] Equally important, federal and state governments are constrained by a constitutional framework that mandates equal voting rights and equal protection of the laws. Given these constraints, federal and state sovereigns have full authority over all persons who come within their borders. Tribal governments are not accorded the same status, at least in part because, from the outset, they were not subject to the same constitutional constraints. *See Duro*, 495 U.S. at 693 ("It is significant that the Bill of Rights does not apply to Indian tribal governments."). Thus, the problem with the exercise of tribal sovereignty over a nonmember is not simply that the particular nonmember cannot vote, but more generally that tribes do not permit the kind of full and democratic participation of all citizens on an equal basis that is the predicate for the recognition of full sovereignty within our constitutional framework.

Notwithstanding these inherent limitations on a tribe's authority to regulate its external relations, the Navajo Nation suggests that tribal taxation is a "fundamental attribute" of tribal sovereignty that may be exercised over nonmembers and that an Indian tribe may tax anyone who enters the reservation. This proposed rule, which admits of no limiting principle, rests on a territorial concept of tribal sovereignty that has been rejected repeatedly by this Court. *See* Pet. Br. at 14-18; *accord* U.S. Br. at 12 ("This is not to say, of course, that a Tribe has plenary power to tax non-Indians on its reservation, at least on lands owned in fee by non-Indians.").

The Tribe and its amici, relying on this Court's statement of *Montana's* first exception, attempt to confine the reach of *Montana* in the tax realm to so-called "regulatory" taxes. *See, e.g.*, Resp. Br. at 23; Umatilla Br. at 14-23. They argue that taxes designed to raise revenue do not fall within *Montana*'s scope. This argument finds no support in *Montana* or any subsequent decision of this Court.

First, this Court has made clear that *Montana* was intended to apply to *all* exercises of tribal civil authority over nonmembers. "Regarding activity on non-Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise 'forms of civil jurisdiction over non-Indians.'" *Strate*, 520 U.S. at 453. The blanket statements of the Court in this regard are not qualified by the purpose that a tribe seeks to achieve in exercising its civil authority.

Second, *Montana* itself did not accept this artificial distinction based on the tax's purpose. The cases cited by *Montana* and *Strate* to illustrate the consensual relationship exception included *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), where this Court characterized the taxes at issue as solely revenue-raising in nature. *See id.* at 158; Umatilla Br. at 18-19.[2]

Finally, the distinction simply makes no sense. Under this view, a tribe could not impose a $15 hunting license fee on a non-Indian hunting on his fee land, but could impose a 15% income tax on the same non-Indian on the same land. The regulatory/revenue-raising distinction is even more specious here because the Tribe invokes regulatory power to enforce the collection and payment of the tax, going so far as to claim the right to close down non-compliant businesses. *See* 24 Navajo Tribal Code § 117. Under analogous circumstances, this Court has held that a state may not impose taxes on reservation Indians where it lacks civil and criminal jurisdiction to enforce the tax. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 178-79 (1973).

As the United States recognizes, *Montana* applies to all forms of civil authority, including taxation. *See* U.S. Br. at 12-13. This Court should reject the attempts by the Navajo Nation and its amici to limit the scope of *Montana*.

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[2] The Umatilla amici cite a passage of *Colville* in which the Court made a distinction between purely regulatory taxes and revenue-raising taxes. *See* Umatilla Br. at 19. In that passage, however, the Court was conducting a preemption analysis to determine whether a state tax law and a tribal tax law could coexist. The Court reasoned that it was only where both governments' tax laws were designed to regulate conduct that they might conflict so seriously as to require invalidation of one or both. *Colville*, 447 U.S. at 158-59. This distinction is irrelevant in a case such as this, where the issue is not whether a tribal law conflicts with state law, but rather whether the tribe had the jurisdiction to enact the law in the first instance.

II. *MONTANA* LIMITS TRIBAL AUTHORITY OVER NON-INDIANS ON FEE LAND

Over a century of case law culminating in *Montana* holds that tribes possess sovereignty over tribal trust lands, but not over nonmembers on their own fee lands. *See* Pet. Br. at 15-16; Brief of *Amicus Curiae* Association of American Railroads at 10-13. The Navajo Nation and its amici argue that this historic limitation has been modified by two cases: *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In the circumstances presented here, neither case provides an exception to the rule of *Montana*.

A. *Brendale* Does Not Provide the Governing Standard in This Case.

The Navajo Nation, echoed by the United States, argues that the Navajo Reservation is essentially a "closed reservation," in which fee land is an anomaly, so that taxes may be imposed on nonmembers on fee land. Respondents seek to invoke the plurality opinion in *Brendale*, which concluded that the Confederated Tribes had the authority to zone nonmember fee land within the portion of the Yakima Reservation that was closed to the general public. *See* Resp. Br. at 11-14. This *Brendale* argument has never been raised in the federal proceedings in this case; the Navajo Nation did not even cite *Brendale* in its briefs in the Court of Appeals.

Brendale involved both a different set of facts and a different issue. Justice Stevens, joined by Justice O'Connor, found that the power of the Confederated Tribes to zone each area of the reservation "depends on the extent to which the Tribe's virtually absolute power to exclude has been either diminished by federal statute or voluntarily surrendered by the Tribe itself." 492 U.S. at 433. In the closed area of the reservation, this power had been preserved. There were

"no permanent inhabitants of the Yakima County portion of the closed area." *Id.* at 438. The tribes strictly limited access to "selected groups of visitors" under a "'courtesy permit system'" for limited purposes, such as hiking and sightseeing. *Id.* at 439. The closed area was monitored by tribal officials, who maintained "four guard stations" and patrolled the interior of the closed area. *Id.* It was only under those circumstances that the plurality concluded that the tribes retained the right to zone fee land.

The record in this case shows that the area of the Navajo Reservation encompassing the Cameron Trading Post could not be more different. The Navajo Nation Director of Tourism testified that the Reservation is "open to the general public," with only "certain areas" of the Reservation (not relevant here) controlled by a permit system. J.A. 61. Thousands of nonmembers live and operate businesses on fee land within the Navajo Reservation. *See* J.L.M. 182. It is traversed by state and federal highways. J.A. 63-64. In addition to hotels, it has gas stations, shopping centers, fast food restaurants and movie theatres. *See, e.g.*, J.A. 119. Nothing limits non-Indian guests from travelling to and staying at the Trading Post. *Id.* at 29, 63-64. Consequently, the analogy to the closed portion of the Yakima Reservation is unavailing.[3]

[3] The Navajo Nation asserts, without any citation to the record, that "99.74% of the 13.5 million acre Navajo Reservation is held in trust for the Navajo Nation or individual tribal members by the United States." Resp. Br. at 13. The only record evidence regarding land holdings on the Reservation, however, shows that a more significant portion of the reservation is controlled by state or federal government entities, without even counting fee lands. See J.L.M. 183. Respondents overlook the fact that the federal government maintains five monuments and parks on the Reservation. *See* J.A. 64-65; *see also* Navajo Tax Commission Record, Taxpayers' Trial Ex. 5, at 127 (Navajo Nation Fax 93).

At the same time, the nature of the governmental power at issue here is quite different than in *Brendale*. In a zoning case like *Brendale*, there is a special need for a unitary solution: "[Z]oning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually —or more often unilaterally—destructive." 492 U.S. at 433. Such a consistent solution, however, is not necessary to preserve the efficacy of a tax scheme. It is quite possible to differentiate in tax treatment between differently situated taxpayers, and in fact, governments regularly make such distinctions. Indeed, in tribal tax cases, this Court has often permitted different tax treatment of differently situated individuals. *See, e.g., Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (upholding state tax, only to the extent applied to non-Indians). None of the facts or reasons supporting Justice Stevens' plurality opinion are present here.

B. Merrion Does Not Apply to Fee Land.

The Tribe and its amici also rely heavily upon *Merrion* and its predecessor, *Colville*, to justify the imposition of a tax on non-Indian fee land. But neither case can be so divorced from its context. As petitioner has noted, each case quotes the same language identifying both the status of the land and the nature of the transactions as critical to its delineation of tribal sovereignty: "The power to tax transactions *occurring on trust lands and significantly involving a tribe* or its members is a fundamental attribute of sovereignty. . . ." *Colville*, 447 U.S. at 152 (emphasis added); *see also Merrion*, 455 U.S. at 137. This language immediately precedes and qualifies *Merrion*'s references to the tribe's "general authority" to control economic activity and require tax payments. *Merrion*, 455 U.S. at 137.

This limitation of tribal taxing authority to tribal trust lands and to transactions involving the tribe makes sense. A tribe has an interest in assuring the economic development of its own lands and in promoting its transactions with

nonmembers. The tribe can be expected to balance these interests with the need to raise revenue whenever its seeks to impose a tax on nonmembers in either of these circumstances. The same dynamic does not apply, however, where the tribe seeks to impose a tax on non-Indians doing business with other non-Indians on their own land.

Both the Tribe and the United States argue that *Merrion* is applicable here because Atkinson Trading receives the "privilege" of conducting its business on the Reservation, to which the Tribe can attach its tax. *See* Resp. Br. at 15; U.S. Br. at 12. Both misconstrue the relevance of this Court's reference to "privileges" in *Merrion*. There, the non-Indian businesses benefited from a privilege *granted by the tribe*—that is, the right to enter *tribal lands* and to remove valuable minerals. Under those circumstances, it was reasonable for the tribe to have the power to place conditions relating to a privilege which it had granted. Thus, the Court concluded that the "tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax." 455 U.S. at 141-42. When, however, a nonmember does business on its own fee land, the right to do business is not a "privilege" granted by the Tribe, but is rather a right which flows from ownership of the land.[4]

[4] This is especially true here, where the Trading Post was originally established on land *outside the Reservation*. The Trading Post was established in 1916, on non-reservation land south of the Little Colorado River. *See* J.A. 21. When Congress extended the Reservation eight miles further south to include the Trading Post in 1934, it guaranteed that "[a]ll valid rights . . . under the public land laws prior to the approval hereof . . . shall not be affected by this Act." Act of Congress of June 14, 1934, ch. 521, 48 Stat. 960. *See* Pet. App. 83a (1934 Act preserves "proprietary rights of fee holders"). Thus, the Trading Post has always had the right to conduct its business on its fee land.

Perhaps more to the point, these "privilege" arguments lose sight of the fact that it is the nonmember guests of the hotel who are responsible for paying the tax. Those guests are not granted any "privileges" from the Tribe by virtue of their overnight stay in the Trading Post's hotel. The guests have a right to traverse the Reservation on federal rights-of-way, to stay on fee land owned by non-Indians, and to purchase goods and services from those non-Indians. These activities cannot be controlled or limited by the Tribe. Thus, there is no privilege exercised by these nonmembers to which a tax may be attached as a condition. The "privilege" language of *Merrion* does not modify the basic framework of *Montana*, which requires a consensual relationship or a threat to tribal self-government for the exercise of sovereignty over non-Indians on fee land.

III. *MONTANA*'S EXCEPTIONS DO NOT APPLY

The Navajo Nation makes no attempt to fit this dispute within either of the *Montana* exceptions. In fact, neither exception applies in this case.

A. The Tax is Not Imposed on a "Consensual Relationship" with the Tribe.

Non-Indian Guests: The non-Indian guests at the hotel have no actual consensual relationships with the Tribe or its members. The guests do not enter into any contractual agreements with the Tribe in order to rent rooms at the hotel. As the district court properly concluded, "[N]o explicit consensual relationship was created between the Tribe and the guests, such as would be present if the guests engaged in commercial transactions with the Tribe or its members." Pet. App. 65a.

The Navajo Nation argues that the tax can be justified because non-Indian guests at the Trading Post "voluntarily put themselves in the position of possibly needing assistance

from Navajo government personnel." Resp. Br. at 15. As a practical matter, the record does not reflect a single instance of any guest at the hotel receiving assistance from Navajo Nation personnel. In any event, this Court has repeatedly rejected the notion that a nonmember enters any kind of relationship with a tribe simply by virtue of its presence on the reservation and the incumbent "possibility" of tribal services. *See* Pet. Br. at 34-36. Indeed, in *Strate*, nonmember traffic accidents on the reservation made likely the prospect of tribal services, including tribal police, but such a likelihood was not sufficient to support tribal jurisdiction. *See Strate*, 520 U.S. at 456-59 & n.11.[5]

The Navajo Nation and its amici rely on this Court's due process cases, which address when a state, which exercises fully territorial sovereignty, can tax an enterprise doing business within its territorial borders. *See* Resp. Br. at 21-22; Shakopee *Amici* Br. at 14. The due process cases have no application to the question of how an Indian tribe, a dependent sovereign whose governmental authority is limited to self-government, may gain power over nonmembers in the first instance. Moreover, *Montana*'s first exception makes no mention of principles of due process. If the Court had intended to apply that concept, it would have done so explicitly.

Nor is there anything unfair in concluding that the guests are not required to pay the tax. *See* Brief *Amici Curiae* of Assinboine and Sioux Tribes of the Fort Peck Indian Reservation *et al.* at 18 (tribal members "would be forced to pay the non-Indians' share"). The Navajo Nation provides services primarily to its own members. For example, the

[5] The Tribe has the ability to charge a fee when it provides a specific service to a nonmember upon request, such as emergency ambulance services. *See* J.A. 127-29. It does not need to impose a tax based on the possibility of such services.

largest single use of general funds is its legislative fund. J.A. 121. In some cases, nonmembers are not even eligible for tribal programs, such as health programs. J.A. 112. If a nonmember guest at the hotel needs medical attention, the guest is referred outside the Reservation, because the Indian Health Service Facility in nearby Tuba City "is limited as to what they can do for nonmembers." J.A. 26.

Moreover, nonmembers already provide significant funding for services on the Reservation, by virtue of their status as state and federal taxpayers. They pay for the state and federal highways. They pay for state and local police and fire departments that serve portions of the Reservation, such as Cameron. *See* Pet. App. 57a-58a. They pay for the local elementary school in Cameron. J.A. 26, 50.

Even where the Tribe provides services, nonmembers are the source of vital funding. In the year in which the administrative record was compiled in this case, more than $174,000,000 (or nearly 62%) of the Navajo Nation's funding came from federal and state/private funding. J.A. 121. The federal government funds over 76% of the Navajo Nation Division of Health's budget, and over 81% of its Department of Public Safety (police services) budget. *Id.* In those limited circumstances where medical services are provided by the Tribe to nonmembers, "there is state and federal funding to cover the costs of providing those services . . . ." J.A. 112. It is thus hard to conclude that nonmembers do not pay their fair share of tribal expenses.

The absence of consensual relationships between the non-Indian guests and the Tribe determines this case. It is undisputed that the incidence of the tax falls on these guests. *See* 24 Navajo Tribal Code § 102. Indeed, the United States concedes this point in its brief. U.S. Br. at 19. Nevertheless, without a single supporting precedent, it invites this Court to disregard the legal incidence of the tax. That invitation is misguided. This Court has stated that the "dispositive

question" in Indian tax cases is who bears the legal incidence of the tax. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995).[6] This "focus on a tax's legal incidence accommodates the reality that tax administration requires predictability." *Id.* at 459-60.[7]

The government argues that the Tribe *could have* written the law differently, to place the legal incidence of the tax upon the hotel. U.S. Br. at 20. This argument ignores this Court's guidance that it will give full effect to the legislatively-declared legal incidence of the tax. *See First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 347-48 (1968) ("For our purposes . . . [legislative] intent is controlling."). Incidence is as important here as in other contexts. As the district court here acknowledged, "[b]y its very focus on the actions of the nonmembers over whom the tribe seeks jurisdiction, the *Montana* test seems to require application of the legal-incidence test." Pet. App. 59a. By disregarding incidence, the United States effectively asserts that the Tribe can tax nonmembers who have consensual relationships with other nonmembers who themselves have a purported consensual relationship with the Tribe. This is plainly not the holding of *Montana* and would work a vast and unjustified expansion of the rule of that case.

The Hotel: Even if the incidence of the tax fell upon the hotel, the record in this case demonstrates that the hotel also does not have a consensual relationship of the qualifying kind. The hotel purchases its electric, gas and telephone

[6] *Accord Moe v. Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 481-82 (1976); *see Colville*, 447 U.S. at 151 (describing holding of *Moe*); *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985).

[7] Courts have applied the legal incidence test in other contexts apart from tribal taxation. *See, e.g., United States v. State Tax Comm'n*, 421 U.S. 599 (1975); *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985).

services from non-Navajo sources. Pet. App. 93a.[8] It has contracted with a non-Navajo company for the disposal of its solid waste. *Id.* It does not purchase goods from the Tribe or its members. *Id.* In short, it does not have the commercial relationship necessary to support tribal taxation.[9]

Of course, given its location, the hotel does employ members of the Navajo Nation. But the tax at issue has nothing to do with that relationship. It is not a tax on employment of Indians, but a tax on the renting of rooms by non-Indians. In order to find a consensual relationship of the "qualifying kind" under *Montana* and *Strate*, however, there must not only be a relevant relationship between the nonmember and the tribe, but the tribal regulation or tax *must arise out of that specific relationship*. *See* Pet. Br. at 32-33. Even if the tax is viewed as imposed on the hotel, the tax does not meet that test.[10]

For the same reason, the United States' attempt to fit this dispute within *Montana*'s first exception must fail. The United States contends that Atkinson Trading has the

[8] The hotel obtains its water from its own wells, operates its own sewer plant and returns the water in potable form to the Little Colorado River. J.A. 24-25, 39.

[9] Respondents seek to convert a statement that the Tribe is the primary provider of police services to the Cameron area into a finding that it is the primary provider of government services to the hotel. There is no such finding. The hotel depends upon the State of Arizona for a variety of functions, including highways, schools, utilities, fire protection and law enforcement. J.A. 21, 24, 26, 27, 49, 50. To the extent that law enforcement against tribal members in the Cameron area is necessarily handled by tribal police, *Strate* already holds that this is not a sufficient basis for the assertion of tribal sovereignty over nonmembers.

[10] Certain "relationships" pointed out by tribal amici are not relationships at all. It is implausible to suggest, for instance, that a consensual relationship with the Tribe exists merely by virtue of the fact that the Cameron Trading Post reflects Navajo culture or serves Navajo foods.

necessary consensual relationship with the Tribe by virtue of "accepting" its status as an Indian Trader under federal regulations. U.S. Br. at 17-18. Putting aside the fact that the license comes from the United States (and not the Tribe), this argument rests on a fundamental misunderstanding of the scope of the federal Indian trader statutes. Those statutes do not address the type of business conduct at issue in this case—trade wholly between nonmembers—but instead are limited in scope to on-reservation trade *with Indian tribes*. For instance, the Indian trader statutes grant authority to the Commissioner "to appoint traders *to the Indian tribes*." 25 U.S.C. § 261 (1994) (emphasis added). Again, in defining who must obtain a trading license, the statute limits its scope to "[a]ny person desiring to trade with the Indians . . . ." 25 U.S.C. § 262 (1994). Similarly, the implementing regulations relating to the Navajo Nation define their purpose as the "protection of Indian consumers" in their dealings with traders on the Reservation. 25 C.F.R. § 141.1.

Consequently, courts that have considered the issue have concluded that a business is an "Indian trader" only when conducting business with the tribes. *See, e.g., Arizona Dep't of Revenue v. Dillon*, 826 P.2d 1186, 1192 (Ariz. Ct. App. 1992) (on-reservation business "is not functioning as an 'Indian trader' within the federal licensing scheme when he sells cigarettes to non-Indians and nonmembers"). Thus, this Court has held that the preemptive scope of the regulatory scheme will preclude state taxes when an Indian trader is making sales to Indians, *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), but has no effect when the Indian trader is making sales to non-Indians. *Moe*, 425 U.S. at 482; *Department of Taxation & Fin. of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 74-75 (1994).

Given this limited scope of an Indian trader license, any taxes imposed on that basis must be commensurately limited. In *Strate*, this Court expressly refused to permit an exercise of

tribal jurisdiction where the non-Indian enterprise had a commercial contract with the tribe for work on tribal facilities. The Court held that the claim did not arise out of that contract. *Strate*, 520 U.S. at 457. Similarly, any taxes based on Atkinson Trading's Indian trader status must, at a minimum, arise out of its trade with the Indians. Thus, for instance, the Tribe might impose a tax on the Trading Post's sales to or purchases from the Tribe—transactions that relate to the purpose of the license. But those taxes may not be applied to transactions outside of the scope of the license, *i.e.*, transactions with nonmembers. The record here shows that less than 1% of the Trading Post's business involves transactions with tribal members. J.A. 50. These sales do not justify tribal taxes on the remaining 99% of sales to nonmembers.

Finally, respondents and their amici rely on older opinions such as *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), to argue that the mere privilege of doing business with the Tribe gives rise to the ability to tax. As already pointed out, much of the analysis in these cases is inconsistent with more modern principles of this Court. *See* Pet. Br. at 28-29 & n.19. Moreover, these cases are simply inapposite here. *Morris*, for instance, involved tribal power to charge a fee for the grazing of cattle on tribal lands. 194 U.S. at 384, 390. It has no application to a question of tribal authority over non-Indian fee land.

In *Buster*, the Tribe was also in a position to demand a licensing fee, due to specific congressional authorization. Consistent with an 1897 treaty, Congress had authorized the Creek Nation to enact ordinances dealing with a variety of subjects, with the proviso that any such ordinance could be valid only if approved by the President of the United States. 30 Stat. 495, 514, 518 (1898). The license fee at issue was

submitted to the President pursuant to that statute and approved in 1900. 135 F. at 949. "This law of the Creek Nation was in legal effect a law of the United States, because it was authorized by treaties, acts of Congress, and judicial decisions of this nation." *Id.* at 956.[11] In addition, the federal government had permitted the licensing fee to continue in a second treaty with the tribe that opened its lands to permanent settlement. *Id.* at 954. Nonmembers thus opened their businesses on the reservation with a federally-approved license fee in place.

Under those circumstances, where the tribal ordinance had already been authorized by act of Congress and the specific fee approved by the President, the tribe had retained its right to compel payment of the licensing fee, even from settlers who purchased their own lands. Those circumstances are clearly not present here. The Trading Post operated on fee land for decades before passage of the tax. No act of Congress authorized the Navajo Nation to enact its 1992 ordinance, nor was the specific tax approved by the Executive. Thus, even if the tax had been imposed on the hotel—which it plainly was not—cases like *Morris* and *Buster* would not provide a basis for it.

B. Montana's Second Exception Is Not Implicated in this Case.

Montana's second exception is designed to allow tribal regulation and taxation where nonmember conduct raises some threat to the tribe's ability to govern itself, *Strate*, 520 U.S. at 458-59, and where that threat is "demonstrably serious," *Brendale*, 492 U.S. at 431 (White, J.). In this case, it is telling that the Navajo Nation itself has not invoked the second exception.

[11] *Cf.* 23 Op. Att'y Gen. 528, 528 (1901) ("By act of Congress, these [Cherokee] laws are first approved by the President. When so approved, they have, in all respects, the force and effect of laws.").

The Tribe argues instead that "[i]t simply does not make sense to expect the tribes to carry out governmental functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes, severance taxes, or hotel occupancy taxes." Resp. Br. at 16. If the need for tax revenues were sufficient to satisfy *Montana*'s second exception, then the tribes would have unfettered authority to tax non-Indians on their own lands, an "exception [that] would effectively swallow *Montana*'s main rule." *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000). But, more importantly, the Tribe's statement highlights the fact that it has numerous other sources of tax revenue, such as severance and leasehold taxes, that could appropriately be imposed on companies that do business with the Tribe. The necessity argument thus rings hollow.

The United States does not bother to argue necessity at all. It simply says that the hotel constitutes a valuable resource on the Reservation, which the Tribe is entitled to leverage and support by taxing its activities. However, the same rationale would have justified the exercise of tribal authority in *Montana* and *South Dakota v. Bourland,* 508 U.S. 679 (1993), since the use of the lands for hunting and fishing in those cases similarly was a valuable resource and may have caused some incremental costs for the tribes. What is missing here is any showing that these activities create a "demonstrably serious" threat to tribal survival or interfere directly with tribal self-government.[12]

In any event, this focus on taxation of the hotel avoids the question at hand, since the tax is imposed on the guests. No

[12] The United States also argues that a "direct effect" on the Tribe is evidenced by the applicability of the Indian trader regulations. U.S. Br. at 22-23. Of course, transactions with Indians affect Indians as consumers—an impact that is regulated by the federal scheme. But this says nothing about the impact on a tribe of trading with non-Indians.

serious contention can be made that the renting of hotel rooms by those guests gives rise to a demonstrable threat to the Navajo Nation's power to govern itself. *Montana*'s second exception is not implicated here.

IV. CONGRESS HAS NOT EXPRESSLY AUTHORIZED THE NAVAJO TAX

Finally, the United States relies on specific provisions of the federal Indian trader regulations to suggest that the federal government has authorized the taxes at issue. However, the United States does not even address *Montana*'s requirement that any exercise of tribal sovereignty over nonmembers falling outside its exceptions must have "express authorization by federal statute or treaty." *Strate*, 520 U.S. at 445.

In *Montana*, this Court stated the basic principle that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without *express congressional delegation*." 450 U.S. at 564 (emphasis added). The Court defended this requirement of express congressional authorization in *Brendale*, 492 U.S. at 426 (Opinion of White, J.); emphasized this standard in *Bourland*, 508 U.S. at 695 n.15; and repeatedly invoked it in *Strate*, 520 U.S. at 445, 446. This standard assures that any exercise of tribal sovereignty over nonmembers in circumstances outside of the *Montana* rule will result from the express direction of an institution—Congress—that represents both members and nonmembers and has a constitutional role in dealing with the Indian tribes.

The regulations cited by the United States do not meet the "express congressional delegation" standard. In the first place, they are only regulations. They do not constitute a congressional delegation. The statutes pursuant to which they were promulgated make no delegation of any power to tribes, and therefore necessarily make no delegations to tribes of any

powers over nonmembers. They are easily contrasted with those statutes found to effect an express delegation. *See, e.g., United States v. Mazurie*, 419 U.S. 544, 547 (1975); *Arizona Pub. Serv. v. EPA*, 211 F.3d 1280 (D. C. Cir. 2000).

In addition, the regulations themselves do not make an express delegation to the Navajo Nation of a power to tax the transactions of Indian traders with nonmembers on fee lands. The most pertinent regulation says only that these regulations are not intended "to preclude . . . such fees or taxes as [the Tribe] may deem appropriate," 25 C.F.R. § 141.11(a). This is a savings clause. It does not expressly authorize tribal taxes where they are not otherwise validly promulgated. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 162 (1920) ("usual function of a saving clause is to preserve something from immediate interference—not to create" new rights).[13] The regulations fail to meet the standard of clarity required for such "extraordinary" delegations. *See generally Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1217-20 (9th Cir. 2000).

In relying on insufficient regulations and irrelevant federal statutes, the United States "shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation . . . .'" *Bourland*, 508 U.S. at 695 n.15 (quoting *Montana*, 450 U.S. at 564). The United States attempts to shoehorn its regulatory scheme into the consensual

[13] The other regulations similarly fall short of an express authorization of the exercise of tribal sovereignty over sales to non-Indians. For example, a provision subjecting a license to "any clearance or tribal council approval *required by tribal or Federal regulations*," 25 C.F.R. § 141.6(b), contains no authorization of its own, but rather requires tribal approval only where otherwise required by other valid regulations. Even if it were self-executing, however, it would only require approval *to trade with the Tribe*.

relationship exception because it cannot meet the underlying requirement of express congressional delegation.

Of course, Congress retains the power to make a delegation of the power to tax non-Indians on fee lands. As this Court reasoned with respect to tribal sovereign immunity: "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area." *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 759 (1998) (citations omitted). Similarly, here, Congress can address the competing considerations and even place specific numerical limits on tribal taxes. Without that congressional approval, however, a closed tribal government should not be permitted to tax transactions among nonmembers on fee land.

CONCLUSION

For the reasons stated herein and in the Brief for Petitioner, the decision of the Tenth Circuit should be reversed.

Respectfully submitted,

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