UNITED STATES SUPREME COURT CONFIRMS NARROW SCOPE OF TRIBAL AUTHORITY OVER ACTIVITIES ON NON-INDIAN-OWNED FEE LANDS WITHIN RESERVATION BOUNDARIES

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EXECUTIVE SUMMARY

On May 29, 2001, the United States Supreme Court held in *Atkinson Trading Co. v. Shirley* that the Navajo Nation did not have inherent sovereign power to impose a tax on a nonmember engaged in business on non-Indian owned fee lands within the exterior boundaries of the Navajo Nation. The unanimous opinion, authored by Chief Justice Rehnquist, represents a setback for tribal efforts to assert jurisdiction over nonmember property and activities on non-Indian lands, rights-of-way, and perhaps other lands within reservation boundaries, not only in the area of taxation, but also in other civil regulatory and adjudicatory contexts.

INTRODUCTION

On May 29, 2001, in a case in which this firm filed a brief *amicus curiae* [(1)] on behalf of the Association of American Railroads, the United States Supreme Court issued its unanimous decision in *Atkinson Trading Co., Inc v. Shirley, et al.*, Supreme Court Cause No. 00-454 (May 29, 2001). *Atkinson* presented the question whether the Navajo Nation had the power to impose its 8% Hotel Occupancy Tax on guests of Atkinson Trading Company at Atkinson's Cameron Trading Post (and hotel) located on non-Indian-owned fee lands within the Navajo Reservation in northeastern Arizona, near the eastern entrance to Grand Canyon National Park. The legal incidence of the tribal hotel tax fell on the hotel guests, but the Navajo Nation sought to impose the duty to collect the tax on Atkinson.

Both lower courts, a federal district court sitting in New Mexico and the United States Court of Appeals for the Tenth Circuit, had upheld the application of the tax to Atkinson's hotel operations. *See* 210 F.3d 1247 (10th Cir. 2000), *Tribal Jurisdiction Over Non-Indian Lands Within Reservations*, describes the Tenth Circuit's opinion). The Tenth Circuit relied in part on an earlier Supreme Court decision concerning tribal power to tax, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), where the Court upheld the tribe's power to tax oil and gas operations on lands held in trust for the tribe and leased to non-member oil and gas producers. The lower courts sought to graft elements of the Court's analysis in *Merrion* onto the standard the Court announced in *Montana v. United States*, 450 U.S. 544 (1981), concerning the exercise of tribal jurisdiction over non-member activities on fee lands.

THE COURT'S OPINION

The Supreme Court, in an opinion authored by Chief Justice William Rehnquist, rejected the lower courts' analysis and reaffirmed a narrow statement of the powers of Indian

tribes over non-member activities on fee lands (and other lands, such as federally-granted rights-of-way, over which tribes have lost their "gate-keeping right," *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997)). [(2)] The Court began its analysis with the now well-recognized statement that "[t]ribal jurisdiction is limited: For powers not expressly conferred them by federal statute or treaty, [(3)] Indian tribes must rely upon their retained or inherent sovereignty." Slip op. at 3. Describing *Montana* as "the most exhaustively reasoned of our modern cases addressing" the scope of inherent tribal authority, the Court reiterated the view espoused in that case that tribal "power over nonmembers on non-Indian fee land is sharply circumscribed." Slip Op. at 3-4 (emphasis added).

The Court in *Atkinson* then described *Montana* and the precedent on which that decision rested, and confirmed "'the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,'" [(4)] unless one of two narrow exceptions apply. Slip Op. at 5, *quoting Montana*, 450 U.S. at 565. The exceptions were described in *Montana* as follows:

First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." Second, [a] tribe may...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., *quoting Montana*, 450 U.S. at 565-66.

Members of the Navajo Nation's Tax Commission had argued to the Court that *Montana* and *Strate* "do not restrict an Indian tribe's power to impose revenue-raising taxes." [(5)] The Court rejected that argument, stating that its prior opinion in Merrion "was careful to note that an Indian tribe's inherent power to tax only extended to 'transactions occurring on *trust lands* and significantly involving a tribe or its members.'" Slip Op. at 7, *quoting Merrion*, 455 U.S. at 137 (emphasis in *Atkinson*). According to Justice Rehnquist, *Merrion* "is...easily reconcilable with the *Montana-Strate* line of authority, which we deem to be controlling." Slip Op. at 7. "An Indian tribe's sovereign power to tax - whatever its derivation - reaches no further than tribal land." *Id.* [(6)] In summary, the Court concluded that the scope of tribal taxing powers are controlled by *Montana*. "Accordingly, as in *Strate*, we apply *Montana* straight [no pun intended, we believe] up." Slip Op. at 8.

Since there is no federal statute or treaty that authorized the tax in question, and since the incidence of the tax falls on nonmembers on non-Indian fee lands, the Court stated that "it is incumbent on the Navajo Nation to establish the existence of one of *Montana's* exceptions." *Id.* The Navajo Tax Commissioners sought to argue that both exceptions apply.

First, the Commissioners argued that Atkinson and its hotel guests had entered into a consensual relationship with the Navajo Nation. With respect to the Trading Post itself,

the Commissioners argued that the Trading Post operation benefits from numerous tribal services, including tribal police, medical and fire protection. In addition, the Commissioners argued that the hotel guests availed themselves of tribal services by traveling to the Trading Post, thereby creating the necessary consensual relationship. The Court held these were not consensual relationships that would support the exercise of tribal jurisdiction. "The consensual relationship must stem from 'commercial dealing, contracts, leases, or other arrangements,' *Montana*, 450 U.S. at 565, and a non-member's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection." Slip Op. at 9. Further, Chief Justice Rehnquist noted that the "consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself....A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another - it is not 'in for a penny, in for a Pound.' E. Ravenscroft, "The Canterbury Guests; or A Bargain Broken," act v., sc. 1." Slip op. at 10-11.

Second, the Commissioners argued that the Hotel Occupancy Tax was warranted under *Montana's* second exception given "the direct effects the Cameron Trading Post has upon the Navajo Nation." *Id.* at 11. Rejecting that argument, the Court failed "to see how [Atkinson's] operation of a hotel on non-Indian fee land 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* at 12, *quoting Montana*, 45 U.S. at 566.[(7)]

CONCLUSION (AND THE CONCURRING OPINION)

Having found that neither of the two *Montana* exceptions applied to save the asserted tribal tax, the Court held that the Navajo Nation lacked the power to impose the Hotel Occupancy Tax on Atkinson Trading Company or its guests. The Court reversed the decisions below.

In a one paragraph concurring opinion in which Justices Kennedy and Thomas joined, Justice Souter suggested that the *Montana* analysis should be the touchstone for the assertion of tribal powers over nonmembers "regardless of whether the land at issue is fee land, or land owned by or held in trust for an Indian tribe." Souter, J. concurring. Undoubtedly, this statement will yield a great amount of commentary. And, it invites practitioners to present arguments in the federal courts that *Montana* should define all tribal powers over nonmembers' activities and property interests anywhere on Indian Reservations.

Lawyers in Modrall Sperling's Indian Law practice welcome questions regarding the potential impact of *Atkinson Trading*.

1. Past successes do not imply future successes.

2. In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Court "likened the public right-of-way [a state highway in that case] to non-Indian fee land because the [Three Affiliated] Tribes lacked the power to 'assert a landowner's right to occupy and exclude'

[people from the lands subject to the right-of-way]." Slip Op. at 5-6, *quoting Strate*, 520 U.S. at 456.

3. Congress has provided for express delegations of federal power to Indian tribes. *See, e.g.,* Clean Water Act, 33 U.S.C. § 1377. Discussion of this subject is beyond the scope of this article. Nevertheless, both treaties and federal statutory schemes can be a source of tribal power over non-member activities independent of inherent tribal sovereignty.

4. Later, the Court indicated that the exercise of tribal power over nonmember activities on non-Indian fee lands (or similar lands) is "presumptively invalid." Slip Op. at 13.

5. Apparently, the Navajo Tax Commission conceded that "regulatory taxes" fell within the *Montana* framework. The Court did not seek to describe any potential difference between "revenue-raising" and "regulatory" taxes.

6. In yet another footnote -- sometimes the Court's footnotes are as interesting as the body of the opinion -- addressing the import of the definition of "Indian country" that appears in 18 U.S.C.§ 1151, "a statute conferring upon Indian tribes jurisdiction over certain criminal acts occurring in 'Indian country'," slip op. at 7, the Court stated: "Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land." *Id.* This statement should provide some useful, corrective guidance to lower courts, at least one of which has suggested that Section 1151 is a delegation of tribal civil jurisdiction over non-member activities in Indian country, including on non-Indian lands. *See Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1542 (10th Cir. 1995).

7. In a footnote, Justice Rehnquist left open the possibility that under some circumstances a nonmember's conduct could result in such a severe drain on tribal services or resources as to imperil the political integrity of a tribe, and therefore, justify assertion of tribal taxing authority. *Id.* at 12, n. 12.