

## **Tribal Jurisdiction Over Non-Indian Lands Within Reservations**

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In *Atkinson Trading Co., Inc. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000), the United States Court of Appeals for the Tenth Circuit held that visitors to a hotel operated by non-Indians and located on land held in private fee simple ownership, but within the Navajo Reservation could be required to pay an 8% occupancy tax on hotel rooms. This decision clouds the rights of visitors to Indian lands and reservations, and is problematic for United States businesses doing business on or near Indian lands. However, the decision's impact (and validity) is uncertain because it appears inconsistent with recent United States Supreme Court case law on tribal jurisdiction.

Atkinson involved a number of businesses operated by the Atkinson Trading Company, Inc. ("Atkinson") on land owned in fee simple, including a hotel, restaurant, cafeteria, curio shop, retail store and RV park. Because the businesses were within the Navajo Reservation, the Navajo Nation sought to impose its Hotel Occupancy Tax, which requires persons to pay an 8% tax for hotel rooms located within the exterior boundaries of the Navajo Nation. Atkinson, 210 F.3d at 1249.

The basic issue addressed by Atkinson is whether the Navajo Nation has jurisdiction over the activities of non-members on private fee lands within the Navajo Reservation. Montana v. United States, 450 U.S. 544 (1981), established the general rule that the inherent sovereign powers of an Indian tribe do not extend to nonmembers' activities on non-Indian fee lands within a reservation. Montana also established two exceptions to the general rule which would support tribal jurisdiction. The first Montana exception permits a tribe to regulate the activities of nonmembers who enter consensual relationships within the tribe or with its members through commercial dealing, contracts, leases or other arrangements. Montana, 450 U.S. at 565. The second Montana exception allows tribes to regulate the conduct of non-Indians where that conduct threatens or has a direct effect on the political integrity, economic security, or the health or welfare of the tribe. Id. at 566.

In Strate v. A-1 Contractors, 520 U.S. 442 (1997), the Supreme Court reaffirmed this analytical framework, explaining that, "the civil authority of Indian tribes ..., with respect to non-Indian fee lands generally 'do[es] not extend to the activities of nonmembers of the tribe.'" Strate, 520 U.S. at 453, citing Montana, 450 U.S. at 565. In Strate, the Court considered a traffic accident on a portion of a North Dakota state highway running through the Fort Berthold Indian Reservation. Strate, 520 U.S. at 442. The highway was maintained under a right-of-way granted by the United States to North Dakota's Highway Department. Id. at 442-43. The Strate Court equated the right-of-way held by North Dakota to alienated, non-Indian fee land. Id. at 454-55. Finding that the traffic accident did not meet either of the Montana exceptions, the Court affirmed the Eighth Circuit's decision that the tribal court lacked jurisdiction. Id. at 459-60.

The Tenth Circuit in Atkinson misapplied the test stated in Montana and affirmed in Strate. Contrary to the United States Supreme Court's decisions in Montana and Strate, the Tenth Circuit in Atkinson discounted the effect that land status has on tribes' power to regulate nonmembers' activities. Atkinson stated that "the Supreme Court did not intend that fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation." Atkinson, 210 F.3d at 1247. To the contrary, as pointed out by Judge Briscoe's dissent, the status of the land in both Montana and Strate was a determining factor. In Montana, the Court held that the Crow Tribe could not regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the tribe. Montana, 450 U.S. at 564-65. The fee status of the land was clearly the determinative issue in Montana, as the Court stated it could "readily agree" that the Crow Tribe could prohibit nonmembers from hunting or fishing on land belonging to or held in trust for the Tribe. Id. at 557. Similarly, in Strate, the Court held that a tribal court lacked jurisdiction over an accident on a federal right-of-way because the right-of-way was analogous to alienated, non-Indian fee land. Strate, 520 U.S. at 454-55. Judge Briscoe's dissent in Atkinson notes that the decisions in Montana, Strate, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), and Brendale v. Confederated Tribes, 492 U.S. 408 (1989), were based on large part on the status of the land at issue as either trust lands or fee lands. See Atkinson, 210 F.3d at 1266-68.

Ignoring this Supreme Court jurisprudence, the Tenth Circuit's majority opinion in Atkinson chose instead to rely on a 95-year-old case from the Eighth Circuit, Buster v. Wright, 138 F. 947 (8<sup>th</sup> Cir. 1905), to argue that the "arbitrary" fee status of the land in Atkinson was irrelevant to the exercise of regulatory authority by the Navajo Nation. The majority opined that the analysis in Buster "clearly rebuts" the argument that a tribe's exercise of jurisdiction depends on the fee or trust status of the lands at issue. Atkinson, 210 F.3d at 1256. While Buster was cited in both Montana and Strate as an example of a consensual relationship between a tribe and non-tribal members supporting the exercise of jurisdiction there, the extension of Buster in Atkinson seems inappropriate and unsupported given the line of Supreme Court cases that have refused to state such a rule.

In fact, as noted by Judge Briscoe's dissent, numerous Supreme Court cases contradict this rule. See Atkinson, 210 F.3d at 1266-68, citing Montana, 459 U.S. at 557 ("the Tribe [could] prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe"); Strate, 520 U.S. at 454 ("tribes retain considerable control over nonmember conduct on tribal land," in the context of rejecting tribal jurisdiction over an accident on a state highway); Merrion, 455 U.S. at 137 ("power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty"); Brendale, 492 U.S. at 423-24 (Yakima Indian Nation lacked authority to zone nonmembers' fee land within an area of the reservation open to the general public); South Dakota v. Bourland, 508 U.S. 679, 689 (1993) (when Congress acquired tribal land for a dam and reservoir project, it "eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe").

Rather than applying the test established in Montana and applied by numerous other Supreme Court decisions, the Atkinson majority adopts a new test, described as a "balancing test" in which the impact of nonmembers' activity on the tribe is balanced with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction. Atkinson, 210 F.3d at 1255. Among the factors to be considered in this "balancing test" are whether the tribe provides service to the nonmembers and whether the nonmembers benefit from the advantages of a civilized society that are assured by the existence of tribal government. Atkinson, 210 F.3d at 1270. As noted by Judge Briscoe's dissent, the Atkinson majority improperly draws these factors from Merrion, which addressed the tribe's authority on tribal land, rather than relying on Montana itself, which addressed the tribe's authority on nonmember fee land. Id. at 1268-69. <sup>(1)</sup>

After concluding that the new "balancing test" derived from Montana applied with respect to nonmember activities on fee land, Atkinson went on to apply the test to the businesses run by the Atkinson Trading Company, which included a hotel, restaurant, cafeteria, curio shop, retail store, and RV park. Atkinson, 210 F.3d at 1261. The majority opinion discusses consensual relationships between the Atkinson Trading Company and the Navajo Nation, although the 8% occupancy tax is actually assessed against the non-Indian guests patronizing the Atkinson Trading Company businesses. Id. at 1261, note 12.

The factors relied on in Atkinson to support a consensual relationship included: (1) Atkinson's use of the privilege of carrying on business within the Navajo Nation; (2) Atkinson's use of "a Navajo Indian environment," including culture, employees, crafts, and other trappings to "lure" tourists to its facility; (3) Atkinson's hiring of Navajo employees; (4) travel over Navajo Nation land to provide supplies to Atkinson; (5) purchase and sale of items from tribal members; and (6) use of Navajo Nation governmental services. Id. at 1270. The dissent points out that a number of these factors are irrelevant because the occupancy tax was not imposed on Atkinson, but rather was imposed on Atkinson's guests, who do not have the same consensual relationships as Atkinson. Id. Moreover, the other factors also do not demonstrate a consensual relationship between Atkinson's guests and the Navajo Nation; in particular, Atkinson's guests in fact used few Navajo Nation services. As a result, even the modified "balancing test" was misapplied by the Tenth Circuit in Atkinson, as few, if any, of the factors discussed suggest any consensual relationship.

In Atkinson Trading Co. v. Shirley, 210 F.3d 1247 (10<sup>th</sup> Cir. 2000), the Tenth Circuit took a significant step backwards in the development of federal Indian law. Rather than following established Supreme Court precedent in Montana and Strate, the Tenth Circuit's reliance on Buster has sent the states within its jurisdiction through a time warp back to 1905. It remains to be seen whether Atkinson will remain good law, as the Atkinson Trading Company may file a petition for Writ of Certiorari with the United States Supreme Court to appeal the Tenth Circuit's decision. Atkinson's Petition for Rehearing was denied on June 26, 2000, but was done so by an evenly divided court, suggesting that a significant number of Tenth Circuit judges had problems with the opinion. A Petition for Writ of Certiorari would need to be filed 90 days after the Tenth

Circuit's decision on rehearing, or September 25, 2000. If filed, there seems to be a fair chance that the United States Supreme Court would grant certiorari, as the Atkinson decision appears to conflict with precedent in the Supreme Court and in other circuits. Until then, however, companies doing business on non-Indian fee lands within a reservation need to be prepared for the possibility that tribes may attempt to assert broad jurisdiction over nonmember activities on such lands. In addition, until Atkinson is overturned, federal district courts in New Mexico, Colorado, Utah, Wyoming, Kansas, and Oklahoma may feel compelled to permit tribal exercise of such jurisdiction.

1. Note that both Buster v. Wright, 135 F. 947 (8<sup>th</sup> Cir. 1905), and Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), addressed and approved taxation by Indian tribes. One possible interpretation of this authority (although not argued by the majority in Atkinson), is that a different analysis should apply to Indian taxation schemes than to other Indian regulatory schemes. Such a distinction would partially explain the result in Atkinson as well. There does not, however, appear to be any principled reason for such a distinction in the Supreme Court case law, including Montana and Strate.