The Impact of *Atkinson* on "Treatment as States" Jurisdictional Determinations

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In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court articulated the general rule that, absent delegation by federal statute or treaty, Indian tribes lack inherent authority to regulate the conduct of non-tribal-members. The *Montana* Court recognized two exceptions to that rule. First, a tribe "may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id*. Second, a tribe may assert regulatory jurisdiction over non-members on fee lands "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*. In *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645 (2001), the Supreme Court refined the application of the *Montana* rule and its exceptions. In doing so, the Court also may have focused the inquiry concerning the jurisdictional scope of tribal environmental regulatory programs under the "treatment as state" ("TAS") provisions of two major federal environmental laws. Because air and water frequently cross jurisdictional boundaries between Indian reservations and other fee land, increasing scrutiny over TAS status ensues. A brief review of the TAS provisions from the Clean Water Act and the Clean Air Act sets the stage for discussion of *Atkinson's* impact concerning tribal TAS programs.

The TAS Provisions

The Clean Water Act and Clean Air Act contain provisions authorizing qualifying Indian tribes to be "treated as states" for delegating federal authority to implement environmental regulatory programs. Under the Clean Water Act, a federally recognized tribe may qualify for TAS status if: (1) it has a governing body carrying out substantial governmental duties and powers; (2) the tribe's functions will pertain to the management and protection of water resources which are held by a tribe, held by the United States in trust for Indians, held by a tribal member if such property interest is subject to a trust restriction on alienation, or otherwise within Indian reservation borders; and (3) the tribe is reasonably expected to be capable of carrying out the regulatory functions consistent with the Act and all applicable regulations. 33 U.S.C. § 1377(e). In its implementing regulations, the United States Environmental Protection Agency ("EPA") concluded that the Clean Water Act's TAS provision was neither a plenary delegation of authority to tribes to regulate all reservation waters, nor a standard precluding tribal regulation of any

non-member or any off-reservation activity. *See* Fed. Reg. 64877. Accordingly, EPA adopted a case-by-case approach to determining the jurisdictional scope of a tribe's authority which requires the tribe to show that it possesses inherent authority over the waters in light of evolving case law. 56 Fed. Reg. at 64,878.

To qualify for TAS status under the Clean Air Act, a federally recognized tribe similarly must demonstrate that it has a governing body carrying out substantial governmental duties and powers and that it can reasonably be expected to be capable of carrying out the regulatory functions consistent with the Clean Air Act. *See* 42 U.S.C. § 7601(d)(2)(B). However, the Clean Air Act's TAS provision declares that the tribal functions must "pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction . . . ." 42 U.S.C. § 7601(d)(2)(B). In its rule implementing this provision, EPA adopted a "territorial approach" permitting qualified tribes to assume jurisdiction to address "conduct relating to air quality on all lands, including non-Indian owned fee lands, within the exterior boundaries of a reservation." 63 Fed. Reg. at 7254. The rule's preamble further declares "EPA will consider lands held in fee by non-members within a Pueblo to be part of a 'reservation' . . . [and] will consider on a case-by-case basis whether other types of lands other than Pueblos and tribal trust lands may be considered 'reservations' under federal Indian law even though they are not formally designated as such." *Id*. EPA's case-by-case analysis "will depend on the particular status of the land in question and on the interpretation of relevant Supreme Court precedent." *Id*. EPA further declared that, in determining which non-reservation areas may be subject to tribal jurisdiction, it will rely upon the definition of "Indian country" contained in 18 U.S.C. § 1151, a statute defining criminal jurisdiction. *Id*. at 7259.

Thus, for all TAS applications under the Clean Water Act and for applications asserting jurisdiction over "non-reservation" land under the Clean Air Act, determinations of the scope of tribal jurisdiction will be made on a case-by-case basis considering "relevant Supreme Court precedent." *Atkinson's* discussion of the scope of inherent tribal authority over the non-Indian's conduct is relevant to such analysis.

The *Atkinson* Decision

In *Atkinson,* the Court considered whether *Montana* general rule applied to the Navajo Nation's attempt to impose a hotel occupancy tax on a non-Indian owned hotel located on fee land within the Navajo reservation. The Court began its analysis by noting

> tribal jurisdiction is limited: for powers not expressly conferred them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty. In *Montana*, the most exhaustively reasoned of our modern cases addressing this latter authority, we observed that Indian tribe power over non-members on non-Indian fee land is sharply circumscribed.

532 U.S. at 649-50. Citing *Montana*, the Court explained that "inherent sovereignty of Indian tribes was limited to 'their members and their territory: '[E]xercise 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.'" *Id*. at 650-51. Thus, because "Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty or statute, and because the incidence of the tax falls upon non-members on non-Indian fee land," it was "incumbent upon the Navajo Nation to establish the existence of one of *Montana*'s exceptions." *Id*. at 654.

The *Atkinson* Court rejected Navajo Nation's argument that generally providing police, fire, and emergency medical services created a qualifying consensual relationship under *Montana*'s first exception. "The consensual relationship must stem from 'commercial dealing, contracts, leases, or other arrangements,' . . . and a non-member's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection." *Id*. at 655. Moreover, "*Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Id*. at 656. A non-Indian'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.'" *Id.*

The Court also dismissed the lower court's reliance upon 18 U.S.C. § 1151 as a basis for the Nation's exercise of civil jurisdiction over fee lands. 532 U.S. 653 n.5. The Court explained that while § 1151 has been relied upon "to demarcate state, federal and tribal jurisdiction over criminal and civil matters, . . . we do not here deal with a claim of statutorily conferred power. Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land." *Id*.

The Court further rejected the argument that Indian tribes enjoy broad authority over non-members whenever non-Indian fee land acreage is miniscule in relation to surrounding tribal land. "Irrespective of the percentage of non-Indian fee land within a reservation, *Montana*'s second exception grants Indian tribes nothing 'beyond what is necessary to protect tribal self-government or to control internal relations' . . .." *Id*. at 658-59. *Montana's* second exception "is only triggered by *nonmember conduct* that threatens the Indian tribe, it does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government. Thus, unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands." *Id*. at 658 n. 12 (emphasis in original). Atkinson Trading's "hotel has no such adverse effect upon the Navajo Nation." *Id*. Because neither of *Montana's* exceptions were satisfied, the Court held that the Navajo Nation's tax was invalid.

Atkinson **and TAS Jurisdictional Determinations**

*Atkinson*emphasizes that tribes' inherent sovereignty is limited to "their members and

their territory." Absent express delegation by federal statute or treaty, a must demonstrate applicability of one of *Montana's* exceptions to support jurisdiction over non-Indians. *Atkinson* further instructs that *Montana's* second exception is only implicated by nonmember conduct that threatens the Indian tribe, but does not broadly permit the exercise of civil authority whenever it might be considered "necessary" to self-government. *See* 532 U.S. at 657 n. 12. This raises questions about EPA's regulations implementing the Clean Water Act's TAS provision declaring that it is usually proper to grant authority to a tribe because "water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government." 56 Fed. Reg. 64879. However, in a recent post-Atkinson decision, the Supreme Court declined to review a 7th Circuit decision affirming EPA's grant of TAS status (noting TAS determinations are "fact-specific" and that non-Indian members do not own fee land within the reservation). *See Wisconsin v. EPA*, 266 F.3d 741 (2001), *cert. denied*, *Wisconsin v. EPA*, __ S. Ct. __ (Mem.), 2002 WL *341627 (U.S.).

Beyond that, *Atkinson* may deter EPA's reliance upon the definition of "Indian country" in 18 U.S.C. § 1151 to confer tribal regulatory jurisdiction over non-Indian activities or non-Indian lands in areas outside of reservation boundaries. The *Atkinson* Court declared that while § 1151 has been relied upon to "demarcate state, federal, and tribal jurisdiction over criminal and civil matters . . . we do not here deal with a claim of statutorily conferred power. Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land." *Id*.