

1 Michael J. Raymond – 0009272
2 mraymond@raymondgreerlaw.com
3 **Raymond, Greer & McCarthy, P.C.**
4 7373 N. Scottsdale Road, Suite D-210
5 Scottsdale, Arizona 85253
6 (602) 274-0500

Attorneys for Plaintiff Employers Mutual Casualty Company

7 **UNITED STATES DISTRICT COURT**

8 **DISTRICT OF ARIZONA**

9 Employers Mutual Casualty Company,
10 an Iowa corporation,

11 Plaintiff,

12 vs.

13 Ethel B. Branch, Attorney General of the
14 Navajo Nation, in her official capacity;
15 Judge Cynthia Thompson, in her official
16 capacity as tribal judge of the Navajo
17 Nation District Court, Judge Rudy
18 Bedonie, in his official capacity as
19 current tribal judge of the Navajo Nation
20 District Court;

21 Defendants.

No.

COMPLAINT

22 **General Description of the Action**

23 1. Plaintiff, Employers Mutual Casualty Company (EMC), is an Iowa
24 corporation with both its principal place of business and corporate headquarters
25 located in Des Moines, Iowa, and is thus considered a citizen of Iowa.

26 2. In this lawsuit, EMC seeks both declaratory and injunctive relief to
prevent the District Court of the Navajo Nation from adjudicating claims
asserted by the Navajo Nation against EMC due to the lack of subject matter
jurisdiction over EMC.

1 3. EMC engages in the business of insurance, having issued various
2 third-party liability insurance policies to two non-Indian insureds, Milam
3 Building Associates, a Texas corporation (Milam), and Service Station Equipment
4 and Sales, Inc. (SSES), an Arizona corporation.

5 4. In 2004-2005, Milam and SSES performed some work for Pic-N- Run,
6 Inc., an Arizona corporation that operates a gas station in Chinle, Arizona,
7 within federal land held in trust for the Navajo Nation (Site).

8 5. After discovering a leak in a fuel supply line in August 2005, Pic-N-
9 Run brought a lawsuit in the District Court of the Navajo Nation, Judicial
10 District of Chinle, Arizona, against a number of operators and contractors whom
11 it alleged were responsible for the spill, including EMC insureds Milam (and its
12 officers and related companies) and later SSES (and its officers and related
13 companies), via an amended complaint filed on December 14, 2011 (Pic-N-Run
14 suit).

15 6. Meanwhile, in August 2009, the United States Environmental
16 Protection Agency (EPA) issued an Administrative Order (EPA Order) directing
17 various "responsible parties," including Milam but not SSES, to clean-up the
18 Site. Other parties subject to the EPA Order included gas station operators
19 dating back several decades.

20 7. Milam tendered defense to EMC pursuant to separate commercial
21 general liability policies. EMC's policies contained pollution exclusions that
22 barred coverage for the claims asserted.

23 8. On September 17, 2009, EMC issued a coverage determination letter
24 to Milam at its office in Midway, Texas, advising there was no coverage under
25 EMC's policy for the EPA Order and continuing to provide a defense under a
26 reservation of rights for the Pic-N-Run suit.

1 9. SSES was sued in a separate federal court lawsuit, since dismissed,
2 brought by Daniel and Dorothy Felix, dba Shiprock Construction (Shiprock), one
3 of the contractors who had allegedly breached the supply line at the Site. The
4 Felixes allege they spent considerable sums for cleaning up the petroleum
5 contamination at the Pic-N-Run facility and sought reimbursement from
6 allegedly responsible parties.

7 10. After SSES tendered its defense of the Felix federal court lawsuit, on
8 August 17, 2009, EMC issued a coverage determination to SSES's counsel in
9 Flagstaff, Arizona, denying coverage based on a pollution exclusion in its policy
10 issued to SSES.

11 11. Thereafter, EMC brought a declaratory action in the Superior Court
12 of Arizona, Coconino County, Case No. CV 2010-00597 (EMC declaratory
13 action), seeking a determination of its rights and obligations under its liability
14 policies issued to Milam and SSES. EMC settled with SSES and obtained a
15 declaratory judgment declaring that EMC owed no coverage for Milam's
16 obligations under the EPA Order.

17 12. Two years later, on November 8, 2013, the Navajo Nation (Nation)
18 filed suit against EMC and other defendants in the District Court of the Navajo
19 Nation, Chinle Judicial District, Case no: CH-CV-166-13 (underlying complaint).

20 13. Though it lacks any contractual relationship with EMC, the Nation
21 seeks in part a declaration that EMC has a duty to defend and indemnify Milam/
22 SSES under the general liability policies issued to its insureds to determine
23 "...which parties should pay to clean up the petroleum contamination." In other
24 words, the Nation seeks to undermine the judgment EMC obtained in the State
25 Court of Arizona as against Milam as well as the settlement agreement and
26 release it negotiated with SSES.

1 14. According to the underlying complaint, tribal court jurisdiction over
2 EMC is based on the following:

3 EMC has done business within the Nation by selling insurance
4 policies that insure interests on trust land within the Nation.
5 Further, the conduct of its insured, Milam and SSES, threatens or
6 has a direct effect on the political integrity, economic security, and
the health and welfare of the Navajo Nation. *Montana v. United*
States, 450 U.S. 544 (1981).

7 15. EMC's liability policies issued to Milam and SSES insured their
8 respective liabilities to third parties. The policies do no insure interests on trust
9 land within the Nation

10 16. Because EMC did not engage in any conduct on tribal land, and
11 because EMC's conduct in enforcing its private contract with non-tribal members
12 Milam and SSES did not have a direct effect on political integrity, economic
13 security and the health and welfare of the the Nation, on January 27, 2014, EMC
14 filed a Motion to Dismiss the underlying complaint for lack of subject matter
15 jurisdiction.

16 17. On February 8, 2018, more than four years after EMC's motion was
17 filed, one of the two judges variously assigned to the case, Judge Thompson,
18 denied EMC's motion, holding that because the gasoline spill occurred on trust
19 land, the Court has jurisdiction over EMC. Judge Thompson further determined
20 that EMC's coverage denial threatens the health and welfare of the Nation as it
21 affects the ability of the Nation to remedy the damage done to its land and
22 groundwater, and thus meets the second *Montana* exception that recognizes
23 tribal court jurisdiction where the non-member's conduct threatens or has some
24 direct effect on the political integrity, economic security, or the health or welfare
25 of the tribe. *See Montana v. United States*, 450 U.S. 544 (1981).

1 18. Thereafter, EMC sought a writ of prohibition in the Navajo Supreme
2 Court and challenged the ruling that the Navajo tribal court had jurisdiction over
3 EMC. EMC filed the writ on March 9, 2018.

4 19. Although the Navajo Supreme Court has established rules for the
5 filing of extraordinary writs and has previously accepted writs challenging
6 jurisdiction, on March 23, 2018, the Navajo Supreme Court summarily denied
7 EMC's Petition for Writ of Prohibition, indicating that EMC "...has a remedy at
8 law by appeal after the merits of the case are fully determined in the Chinle
9 District Court. This Court will not usurp the authority of the lower court to
10 make determinations of merit at the district court level."

11 20. In this case, EMC seeks: (a) declaratory relief in the form of an order
12 declaring that Judge Thompson, current Judge Bedonie, and the Navajo tribal
13 courts lack subject matter jurisdiction as EMC has not engaged in any conduct
14 on tribal lands nor does its enforcement of its contract with two non-Indian
15 insureds have a direct effect on the Navajo Nation as required by *Montana*,
16 *supra*; and (b) injunctive relief to bar further prosecution of those claims in the
17 tribal court due to lack of jurisdiction.

18 21. EMC has exhausted its tribal court remedies since the Navajo
19 Supreme Court has denied a petition for discretionary interlocutory review. *See*
20 *Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1217 (9th Cir. 2007).

21 22. In the alternative, exhaustion of tribal remedies is not necessary in
22 this case, as jurisdiction in the tribal courts is "plainly lacking." *Strate v. A-1*
23 *Contractors*, 520 U.S. 438, 459 n.14 (1997) (exhaustion is not required "when...it is
24 plain that no federal grant provides for tribal governance of nonmembers'
25 conduct on land covered by *Montana's* main rule..."). *See also State of Montana*
26 *Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999).

The Defendant Parties

23. Ethel B. Branch is the current attorney general for The Navajo Nation and as such is the chief legal officer of the Navajo Nation, a federally-recognized Indian tribe that covers 27,000 square miles that extend into the states of Arizona, New Mexico and Utah. The land on, beneath and around the Pic-N-Run gas station site is Navajo trust land within the boundaries of the Navajo Reservation and the Chinle Chapter, located in Chinle, Arizona. The Nation is the real party-in-interest since EMC challenges the right of the Nation to bring suit against it in Navajo tribal court.

24. Judge Cynthia Thompson and Judge Rudy Bedonie are tribal court judges of the Navajo Nation District Court, Chinle District, who have either rendered decisions adverse to EMC concerning jurisdiction or are currently presiding over the pending proceedings against EMC.

Additional Defendants to the Underlying Litigation

25. EMC-insured Milam Building Associates, Inc. is a non-Indian Texas corporation that engages in contracting services. Neither Milam nor its officers, Stella Jeanette Eldridge or Vernon W. Eldridge, are members or member entities of the Navajo Nation.

26. EMC-insured Service Station Equipment and Sales, Inc. is a non-Indian Arizona corporation that performs consulting services. Neither SSES nor its officer, Spencer Riedel, are members or member entities of the Navajo Nation.

27. Daniel and Dorothy Felix, dba Shiprock Construction, are enrolled citizens of the Navajo Nation and performed certain concrete work for Milam and Pic-N-Run in March 2005 at the Site.

28. Pic-N-Run, Inc. is an Arizona corporation that operates a gas station at the Site pursuant to a sublease between itself and Baldwin and with approval

1 by the Bureau of Indian Affairs.

2 29. The Estate of Sybil Baldwin and Walter Baldwin (Baldwin) represent
3 the interests of Sybil Baldwin who was an enrolled citizen of the Navajo Nation.
4 Walter Baldwin is an enrolled member of the Navajo Nation. Baldwin is the
5 owner and one-time operator of the gas station at the Site and leases the Site
6 from the Navajo Nation.

7 30. Neither Milam, SSES, Shiprock, Pic-N-Run nor the Baldwins
8 participated in or took an active role in the jurisdictional issues raised by EMC in
9 the underlying litigation.

10 31. Auto-Owners Insurance Company (Auto-Owners), Ohio Casualty
11 Insurance Company (Ohio Casualty), and Zurich American Insurance Company
12 (Zurich) are insurers who issued liability policies to Baldwin, Shiprock, and Pic-
13 N-Run, respectively. Ohio Casualty and Zurich raised similar jurisdictional
14 issues in the underlying litigation.

15 **Jurisdiction and Venue**

16 32. The Nation's underlying complaint seeks monetary relief against
17 several tenants, subtenants, contractors and insurers arising out of: 1) historical
18 contamination at the Site, and 2) a March 2005 gasoline spill that occurred on
19 Navajo trust land, specifically at the Pic-N-Run gas station.

20 33. EMC disputed subject matter jurisdiction and filed a motion to
21 dismiss the Nation's underlying complaint.

22 34. This Court has jurisdiction to hear this request for an injunction and
23 for declaratory relief pursuant to 28 U.S.C. § 1331 because the action arises under
24 the Constitution, laws, or treaties of the United States, *National Farmers Union Ins.*
25 *Co. v. Crow Tribe*, 471 U.S. 845 (1985); and under 28 U.S.C. § 2201 because it
26 involves an actual controversy. The District Court reviews determinations of a

1 tribal court's exercise of jurisdiction as a matter of federal law. *Plains Commerce*
2 *Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 324 (2008).

3 35. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2),
4 because most or all of the defendants reside in this District and the events giving
5 rise to the claim occurred in this District.

6 **Further Factual Background**

7 36. After Pic-N-Run filed suit and after the EPA issued its
8 Administrative Order, EMC sought to have its rights and obligations under its
9 commercial general liability policies issued to Milam and SSES determined by a
10 state court judge in Coconino County, Arizona. A copy of the Coconino County
11 declaratory action is attached as Exhibit 1.

12 37. In connection with EMC's declaratory action in Coconino County
13 Superior Court, EMC filed a motion for summary judgment seeking a
14 determination that the pollution exclusion contained in its policies precluded
15 coverage for both Milam and SSES. A copy of EMC's Motion for Summary
16 Judgment is attached as Exhibit 2.

17 38. Shortly before the trial court heard oral argument on EMC's
18 dispositive motion, EMC and SSES settled the lawsuit resulting in EMC
19 obtaining a release from SSES for any liability SSES may have in the future
20 pertaining to the Pic-N-Run site. A copy of the EMC-SSES settlement agreement
21 and release is attached as Exhibit 3.

22 39. The trial court eventually ruled that the pollution exclusion in
23 EMC's policy precluded coverage for Milam relative to the EPA Administrative
24 Order. A copy of the judgment entered in favor of EMC is attached as Exhibit 4.
25 Even so, EMC continued to defend Milam under a reservation of rights as it
26 pertained to the Pic-N-Run suit filed against Milam.

1 40. Two years after receiving that declaratory judgment, the Navajo
2 Nation filed the underlying complaint in tribal court, alleging as against EMC
3 various claims for relief, even though the Nation has no direct contract with
4 EMC. A copy of the underlying complaint is attached as Exhibit 5.

5 41. EMC moved to dismiss the Nation's claims for lack of subject matter
6 jurisdiction. A copy of the Motion to Dismiss is attached as Exhibit 6. Zurich,
7 who insured Pic-N-Run, filed a similar motion challenging subject matter
8 jurisdiction.

9 42. Although EMC and Zurich's motions were heard by Judge
10 Thompson in May 2014, she failed to rule for well over three years. Judge
11 Bedonie took over the case and directed the parties to submit an agreed
12 statement of facts which they did, attached as Exhibit 7.

13 43. Judge Bedonie also referred the matter back to Judge Thompson
14 who again refused to rule. Judge Bedonie then invited the parties to submit
15 proposed orders to him. The parties complied. But, it was Judge Thompson, not
16 Judge Bedonie, who decided to rule—some 45 months after she heard oral
17 argument and after the case had been transferred to Judge Bedonie for further
18 proceedings.

19 44. Judge Thompson, who was no longer assigned to the case, ruled
20 that because the gasoline spill occurred on trust land, the Navajo tribal court has
21 jurisdiction to hear the matter, presumably without regard to whether EMC
22 entered Navajo land or engaged in any conduct on Navajo land. A copy of
23 Judge Thompson's order denying EMC's Motion to Dismiss is attached as
24 Exhibit 8.

25 45. Judge Thompson further ruled that Navajo courts have expanded
26 the jurisdictional analysis to require consideration of the principles set forth in

1 *Montana*. Here, the judge properly determined that the first exception to
2 *Montana* was inapplicable as neither the Nation nor a member of the Nation had
3 any consensual relationship with EMC.

4 46. But Judge Thompson determined that the Nation's courts have
5 jurisdiction under the second *Montana* exception, ruling that EMC's alleged
6 denial of coverage (more properly its seeking of a declaration of coverage in
7 Coconino County Superior Court) "...clearly threatens the health and welfare of
8 the Nation, as it affects the ability of the Nation to remedy the damage done to
9 its land and groundwater and to protect the Navajo community by cleaning up
10 the Pic-N-Run site."

11 47. On March 9, 2018, EMC filed a writ of prohibition with the Navajo
12 Supreme Court, seeking an order prohibiting the tribal court from exercising
13 jurisdiction over EMC. The writ of prohibition is attached as Exhibit 9.

14 48. On March 23, 2018, the Navajo Supreme Court denied EMC's writ.
15 A copy of the Supreme Court order is attached as Exhibit 10.

16 49. Defendants Thompson and Bedonie, acting as tribal court judges of
17 the Navajo Nation, exceeded their tribal court jurisdiction by purporting to
18 adjudicate the Navajo Nation's claim against EMC.

19 **Count One: Declaratory Judgment**

20 50. Paragraphs 1-49 are incorporated herein by reference.

21 51. Plaintiff EMC is an "interested party" within the meaning of 28
22 U.S.C. § 2201. EMC seeks a declaration of its rights and legal relations
23 concerning whether it is subject to the Navajo Nation's purported adjudication
24 of the above-described claims against it.

25 52. There is an actual controversy within the jurisdiction of this Court
26 because declaratory and injunctive relief will effectively adjudicate the rights of

1 the parties.

2 53. Specifically, EMC requests a declaration that:

3 a. Defendant Ethel Branch, in her official capacity as attorney
4 general for the Navajo Nation, is prohibited from pursuing or asserting claims
5 against EMC in either the Navajo District Court or Navajo Supreme Court;

6 b. That defendant members of the Navajo District Court have
7 exceeded their jurisdiction and the jurisdiction of the Navajo Nation in
8 purporting to adjudicate the claims of the Navajo Nation against EMC;

9 c. That defendant members of the Navajo District Court are
10 prohibited from adjudicating any claims by the Navajo Nation against EMC;

11 d. Any judgment, order, decision, decree, or the like that the
12 Navajo Nation might procure from the Navajo Nation tribal courts, or which
13 such courts may issue in the future with respect to the Navajo Nation's claims
14 against EMC are null, void, and of no force and effect;

15 e. The efforts of the Navajo Nation to pursue its claims against
16 EMC would violate EMC's rights, privileges, and immunities guaranteed by the
17 Constitution, treaties, and laws of the United States and the State of Arizona; and

18 f. The efforts of the members of the Navajo District Court to
19 adjudicate the claims of the Navajo Nation against EMC would violate EMC's
20 rights, privileges, and immunities guaranteed EMC under the Constitution,
21 treaties, and laws of the United States and the State of Arizona.

22 **Count Two: Injunction**

23 54. Plaintiff incorporates paragraphs 1-53 herein by reference.

24 55. Unless preliminarily and permanently enjoined, the Navajo Nation
25 and the defendant members of the Navajo District Court will proceed with their
26 actions to adjudicate the claims of the Navajo Nation against EMC without

1 jurisdiction over the subject matter of the claims against EMC.

2 56. The actions and threatened actions of the Navajo Nation and
3 defendant members of the Navajo District Court will cause EMC irreparable
4 injury.

5 57. EMC lacks an adequate remedy at law, other than by this suit.

6 **WHEREFORE**, Plaintiff EMC respectfully requests this Court grant
7 judgment as follows:

8 1. For a declaratory judgment decreeing that:

9 a. Defendant Ethel Branch, in her official capacity as attorney
10 general for the Navajo Nation, is prohibited from pursuing or asserting claims
11 against EMC in either the Navajo District Court or Navajo Supreme Court;

12 b. That defendant members of the Navajo District Court have
13 exceeded their jurisdiction and the jurisdiction of the Navajo Nation in
14 purporting to adjudicate the claims of the Navajo Nation against EMC;

15 c. That defendant members of the Navajo District Court are
16 prohibited from adjudicating any claims by the Navajo Nation against EMC;

17 d. Any judgment, order, decision, decree, or the like that the
18 Navajo Nation might procure from the Navajo Nation tribal courts, or which
19 such courts may issue in the future with respect to the Navajo Nation's claims
20 against EMC is null, void, and of no force and effect;

21 e. The efforts of the Navajo Nation to pursue its claims against
22 EMC would violate EMC's rights, privileges, and immunities guaranteed by the
23 Constitution, treaties, and laws of the United States and the State of Arizona; and

24 f. The efforts of the members of the Navajo District Court to
25 adjudicate the claims of the Navajo Nation against EMC would violate EMC's
26

1 rights, privileges, and immunities guaranteed EMC under the Constitution,
2 treaties, and laws of the United States and the State of Arizona.

3 2. For a preliminary and permanent injunction, independent and in
4 furtherance of the requested declaratory judgment, enjoining:

5 a. Ethel Branch, in her official capacity as Attorney General of
6 the Navajo Nation, from prosecuting or pursuing the Nation's claims against
7 EMC in tribal court or any other Navajo Nation court or forum;

8 b. The defendant members of the Navajo District Court from
9 continuing to adjudicate the claims of the Navajo Nation against EMC;

10 c. For EMC's costs incurred in this matter; and

11 d. For such further relief as the Court deems just and proper in
12 the circumstances.

13 DATED this 25th day of May 2018.

14 RAYMOND, GREER & McCARTHY, P.C.

15
16 By s/ Michael J. Raymond
17 Michael J. Raymond
18 7373 N. Scottsdale Road, Suite D-210
19 Scottsdale, Arizona 85253
20 Attorneys for Plaintiff
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23
24
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26