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

Attorneys for Employers Mutual Casualty Company (EMC)

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Employers Mutual Casualty Company, Plaintiff, vs. Ethel B. Branch, Attorney General of the Navajo Nation, in her official capacity; Judge Cynthia Thompson, in her official capacity as tribal judge of the Navajo Nation District Court, Judge Rudy Bedonie, in his official capacity as current tribal judge of the Navajo Nation District Court; Defendants.	**No. 3:18-cv-08110-DJH** **EMC'S MOTION FOR SUMMARY JUDGMENT** Oral Argument Requested

Pursuant to Fed.R.Civ.P. 56 and the Scheduling Order [Doc. 13], EMC submits its motion for summary judgment. Here, the tribal court unduly expanded the circumstances under which it may exercise subject matter jurisdiction over non-tribal members. Properly applied, neither the Navajo Nation's power to exclude non-members nor the holding in *Montana v. United States* preserves tribal court jurisdiction over EMC – the liability insurer of two non-tribal contractors. As such, EMC, who neither engaged in any activity on tribal land nor insured any interests on tribal land, is entitled to injunctive relief precluding the Navajo tribal court from exercising jurisdiction over it in the

underlying action. Further, the Navajo Nation's suit conflicts with an existing EPA Order and is thus barred under federal law.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Factual Background: After a petroleum spill on the Navajo Reservation spawned lawsuits and an EPA Order, EMC—the liability insurer for two non-tribal companies—is sued in tribal court by the Navajo Nation.

1. EMC insured two non-tribal contractors who performed work at a gas station operated on tribal land.

EMC, an Iowa insurer, issued commercial general liability policies to two non-tribal insureds, Milam Building Associates, a Texas corporation, (Milam) and Service Station Equipment and Sales, Inc., an Arizona corporation (SSES). [Doc. 1 ¶¶ 1, 3; Doc. 8 ¶¶ 1, 3]

Since 1955, the Navajo Nation (Nation) has leased land to the Baldwin family (Baldwin) who as citizens of the Nation operated a gas station and convenience store (Site). [See Stipulated Facts re Subject Matter Jurisdiction, Doc. 1-2 at 93-101, specifically at ¶ 6] The Site is located in Chinle, Arizona, on tribal lands within the boundary of the formal Navajo Indian Reservation. [*Id.* at ¶ 5]

In 1997, David Flores (Pic-N-Run) assumed responsibility for operating the gas station [*Id.* at ¶ 7] and in 2004 contracted with Milam to perform certain improvements. Pic-N-Run also engaged SSES to remove underground storage tanks and oversee installation of an above-ground storage tank (AST). [*Id.* at ¶ 3, ¶ 11; Doc. 1 ¶ 26; Doc. 8 ¶ 26]

2. A subcontractor breached a fuel supply line.

In March 2005, an employee of Daniel and Dorothy Felix (Shiprock)—a subcontractor hired by Milam—breached a fuel supply line [Doc. 1-2 at 96, ¶ 13] which, when discovered, resulted in over 15,000 gallons of gasoline being released into the ground. [*Id.*] And when consultants investigated, they

discovered gasoline contamination dating back to the 1940's. [*Id.* at 96, ¶ 16]

3. The breach and resulting spill resulted in five actions relevant to the instant injunctive relief request.

a. Pic-N-Run files suit.

On August 1, 2007, Pic-N-Run filed a lawsuit against Milam, et al. in tribal court, later adding SSES. [Doc. 1 ¶ 5; Doc. 8 ¶ 5] The suit sought to determine who should pay to clean up the petroleum contamination at the Site. [Doc. 1-2 at 66-67, ¶ 19]

b. The EPA issues an Administrative Order.

The EPA issued an Administrative Order (EPA Order), effective September 11, 2009, under Section 7003 of the Solid Waste Disposal Act, aka the Resource Conservation and Recovery Act (RCRA). [See EPA Order attached as Exhibit 1 at 1] The EPA Order identifies potentially responsible parties (PRPs) including Milam but excluding SSES or any of the PRPs' insurers. [Doc. 1-2 at 96, ¶ 17; Ex. 1 at 1] Noting that the petroleum release has resulted in contamination, the PRPs, who are jointly and severally responsible under Section 7003, are directed to remediate the Site. [Doc. 1-2 at 97, ¶¶ 19-20; Ex. 1 at 15-21]

c. Shiprock's federal lawsuit is dismissed as an improper attempt to circumvent RCRA.

Meanwhile, Daniel and Dorothy Felix brought a federal lawsuit in the District of Arizona, [Shiprock litigation] seeking reimbursement for clean-up efforts from various parties, including Milam, Pic-N-Run, SSES and the Nation. [Doc. 1 ¶ 9; Doc. 8 ¶ 9; Nation Motion to Dismiss Shiprock litigation, Exhibit 2]

Noting that the EPA was responsible for implementing RCRA in Indian country, the Nation moved to dismiss. [*Id.*] The Nation argued that RCRA prohibits citizen suits when EPA has issued a compliance order and a

responsible party is proceeding with remedial action. [*Id.* at 13-16] Further, Shiprock's request to apportion liability to the Nation "seeks an invalid pre-enforcement review of the EPA Order." [*Id.* at 13-14] Judge Teilborg agreed and dismissed all claims arising under RCRA because the court lacked subject matter jurisdiction to entertain claims seeking pre-enforcement review of the EPA Order. [See Shiprock litigation Order entered May 4, 2010, attached as Exhibit 3] He then dismissed Shiprock's common law claims:

> [T]he Court finds it would be ill-advised to continue exercising supplemental jurisdiction over the common law claims, since the federal RCRA claims were dismissed. Continued exercise of supplemental jurisdiction over the common law claims could result in inconsistent outcomes depending on the EPA's potential enforcement of the § 7003 Order, and the parties' ability to raise their federal RCRA claims in a subsequent action following any such enforcement.

[Shiprock litigation Order entered August 10, 2011, attached as Exhibit 4, 11:6-11]

d. EMC obtained declaratory relief in Arizona state court that it owed no coverage to Milam for the EPA Order; as to SSES, EMC settled its coverage dispute in exchange for a release.

EMC issued a general liability policy to Milam at its office in Show Low, Arizona. [Doc. 1-2 at 95, ¶ 10] EMC denied coverage for the EPA Order but furnished a defense to Milam in the Pic-N-Run litigation under a reservation of rights. [Doc. 1 ¶¶ 7, 8; Doc. 8 ¶¶ 7, 8] EMC also issued a general liability policy to SSES at its office in Flagstaff, Arizona. [Doc. 1-2 at 95, ¶ 12] EMC denied coverage for the Shiprock litigation principally due to a pollution exclusion. [Doc. 1 ¶ 10; Doc. 8 ¶ 10]

EMC then brought a declaratory judgment action in Coconino County Superior Court (EMC suit), and named Milam, SSES and Pic-N-Run as defendants. [Doc. 1 ¶ 11; Doc. 8 ¶ 11; Doc. 1-2 at 2-24] EMC sought a

declaration–consistent with the vast majority of courts–that its pollution exclusion bars coverage for gasoline spills such as occurred at the Site. [Doc. 1-2 at 35-40] The state court agreed and with respect to Milam entered judgment in EMC's favor.

> EMC has no obligation to defend or indemnify Milam Building Associates, Inc. or Vernon Eldridge and Stella Jeanette Eldridge with respect to the Environmental Protection Agency's Administrative Order number, EPA Docket Number RCRA 7003-09-2009-0002.

[Doc. 1-2 at 58-59; Doc. 1 ¶ 39; Doc. 8 ¶ 39]

Shortly before the ruling, EMC and SSES settled. [Doc. 1 ¶ 38; Doc. 8 ¶ 38; Doc. 1-2 at 44-56, particularly 47-48] The settlement: 1) resolved all claims pertaining to the EMC declaratory action [Doc. 1-2 at 47]; 2) released EMC from any obligation to defend/indemnify SSES relating to the Shiprock litigation [*Id.* at 47-48]; and 3) released EMC from any obligation to defend/indemnify SSES from claims for petroleum contamination at the Site. [*Id.* at 48]

e. Navajo Nation brings a separate lawsuit in tribal court against parties alleged to be responsible, including their insurers.

Six years after the spill, the Nation filed suit in Navajo Tribal Court against Milam, SSES and others (Nation tribal suit). [Doc. 1-2 at 61-80] The Nation contends that Milam was negligent in hiring/supervision of Shiprock [Doc. 1-2 at 74 ¶ 59] and that SSES was negligent in installing the AST's. [*Id.* at 74-75 ¶ 61] Claims include negligence, nuisance, trespass and *nalyéeh*, a Navajo common-law claim requiring parties resolve disputes "so that there will be no hard feelings." [*Id.* at 79 ¶¶ 83-86]

And while the Nation concedes that it has no direct contract with EMC, [Doc. 1 ¶ 40; Doc. 8 ¶ 40; Doc. 1-2 at 94 ¶ 3], the Nation sued EMC as well contending EMC "ha[s] disputed and/or refused to honor in full [its] obligations

under the Policies to defend [Milam/SSES] in connection with the PNR Site, PNR Suit and EPA Order." [*Id.* at 76-77 ¶ 71]

Count Eight seeks declaratory relief "as to the duty to defend," specifically EMC's "obligations to provide full and unconditional defense coverage in connection with the PNR Site, PNR Suit, and EPA Order." [*Id.* at 77 ¶¶ 74-75] Count Nine seeks declaratory relief "as to the duty to indemnify," so as to maximize insurance funds to investigate conditions and perform any remediation. [*Id.* at 78 ¶ 79] Finally, Count Ten alleges *nalyéeh* in that EMC is a "relative" of Milam/SSES, and therefore must "provide money to compensate parties injured by [its insureds]," as it is one of the "holders of the 'money bag'." [*Id*. at 79 ¶¶ 83-86]

On January 27, 2014, EMC filed a motion to dismiss based in part on lack of subject matter jurisdiction. [*Id.* at 82-87; Doc. 1 ¶ 41; Doc. 8 ¶ 41] Judge Thompson heard oral argument in May 2014 but did not issue a ruling. [Doc. 1 ¶ 42; Doc. 8 ¶ 42] Judge Bedonie was assigned to the case and required the parties submit a joint statement of facts. [*Id.*; Doc. 1-2 at 93-97] An attempt to submit the issue to the Navajo Supreme Court resulted in an order directing the district court to "render a decision in the first instance." [Doc. 1-2 at 103]

Judge Thompson then denied EMC's motion to dismiss. [*Id.* at 103-115] After that, EMC filed a Petition for Writ of Prohibition with the Navajo Supreme Court seeking review of the order. [*Id.* at 120-139] But on March 23, 2018, four years after filing its motion, the Navajo Supreme Court denied the Petition. [*Id.* at 141-42]

B. Argument: To enjoin the defendants from exercising jurisdiction, EMC must demonstrate that it has exhausted its tribal court remedies and that the tribal court cannot properly exercise jurisdiction.

1. Navajo Supreme Court's refusal to hear this matter demonstrates that EMC has exhausted its tribal court remedies.

Non-tribal members may bring a federal common law cause of action under 28 U.S.C. § 1331 to challenge tribal court jurisdiction. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985). Since federal law defines the boundaries of a tribe's power over non-Indians, the question of whether a tribe retains such power to compel a non-Indian to submit to the jurisdiction of a tribal court is a "federal question" under § 1331. *Id*. Because EMC is a non-tribal entity, § 1331 provides subject matter jurisdiction over its federal common law challenge to the Navajo court's jurisdiction to determine the Nation's claims.

But before federal courts may entertain such a claim, the tribal court, as a matter of comity, must have a full opportunity to determine its own jurisdiction. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S 9, 16-17 (1987). As such, EMC is compelled to exhaust tribal court remedies save for certain exceptions. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001).

Here, however, EMC has in fact exhausted its tribal court remedies. After denial of its motion to dismiss, EMC immediately filed a Writ of Prohibition with the Navajo Supreme Court. But that court declined to hear the interlocutory appeal. Accordingly, the Navajo Supreme Court's denial of a petition for interlocutory review is deemed to be an exhaustion of remedies that triggers federal review. *See, e.g., Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1217 (9th Cir. 2007). Even the Nation now concedes that EMC has exhausted tribal court remedies and is therefore no longer challenging that issue. [Doc. 1-2, 4:3-6]

2. The Navajo Nation cannot meet its burden of demonstrating that the tribal court can properly exercise jurisdiction under either *Montana* exception.

a. The Navajo Nation has the burden of demonstrating that EMC's conduct falls within two exceptions set forth in *Montana*.

For over 35 years, the leading case defining the scope of tribal inherent civil authority is *Montana v. United States* 450 U.S. 544 (1981). The Nation concedes and the order from the tribal court reflects that even under Navajo law, the Nation must comport with one of the two *Montana* exceptions in order to meet the required jurisdictional inquiry. [Doc. 1-2 at 107-108] And federal law holds that the party seeking tribal jurisdiction bears the burden of showing that one of the *Montana* exceptions applies. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008). And the exceptions cannot be construed so as to "swallow the rule." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655.

In *Montana*, the Supreme Court held that, in general, 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." *Montana,* 450 U.S. at 564. But the court carved out two limited exceptions. First, "Indian tribes retain inherent sovereign power … to regulate … the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." *Id.* at 565. Second, "[a] tribe may … exercise civil authority over the conduct of non-Indians … within its reservations 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.* at 566. By definition, then, the exceptions pertain to regulation of "the *activities* of nonmembers."

b. The Navajo Nation cannot demonstrate that jurisdiction is appropriate under the first *Montana* exception.

It is undisputed that EMC has no consensual relationship with either the Nation or its members. EMC's liability policies were issued to two non-Indian entities. EMC did not issue the policies on tribal land. And neither policy covered any specific tribal property. As such, the first *Montana* exception does not apply. *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir. 2002) (Navajo district court lacked jurisdiction over an insurer to a medical clinic being sued in Navajo court). And the Nation does not argue otherwise. [Doc. 1-2, 93, 94:14-21]

c. The second *Montana* exception does not apply–EMC's enforcement of its private insurance contract with a non-member does not have a direct effect on the health or welfare of the Navajo Nation.

As to the second exception, however, the Nation contends that EMC engaged in conduct on tribal land and that such conduct threatens the health or welfare of the Nation. But that argument begs the question: in what conduct did EMC engage and did such conduct take place on tribal land?

It may be easier to analyze the conduct that the tribal court attributed to EMC. The tribal court judge held that the gasoline spill itself:

> has the necessary effect on the political integrity, economic security and health and welfare of the Nation to meet *Montana's* second exception, and all those responsible to remediate that spill are therefore properly under the Court's jurisdiction, including insurers.

[Doc. 1-2, 109]

Further, the tribal court held that EMC's "denial [of coverage] clearly threatens the health and welfare of the Nation, as it affects the ability of the Nation to remedy the damage done to its lands and groundwater." [Id. at 108]

But the Nation's argument, and the Court's conclusion, are flawed. EMC did not cause the gasoline spill. It did not issue its policies on tribal lands. It did not issue its policies to tribal members. It did not insure any property interests of the Nation. It did not enter onto the Site or even the Navajo Reservation. It merely issued general liability policies to two non-Indian insureds who are alleged to be potentially responsible for their work on tribal land. Plainly, though, EMC's conduct did not occur on tribal land.

Moreover, EMC's "denial" does not threaten the political integrity, economic security and health and welfare of the Nation. As a result of the spill, Pic-N-Run sued Milam/SSES and the EPA issued its Order. EMC issued a coverage determination concerning a defense and indemnity for any liability incurred by its insureds. EMC also filed suit seeking declaratory relief. A state court judge determined EMC's pollution exclusion operated to bar coverage for Milam's obligations under the EPA Order. And during the course of that declaratory action, EMC settled with SSES. Such "actions" do not have a "direct effect" on the welfare of the Nation. EMC merely enforced its contract with its non-tribal insureds concerning defense and indemnity–the latter of which has yet to occur.

The Nation equates a remote insurance policy with a "resource" it deems necessary to help pay for the spill. But the need for resources does not establish or otherwise expand tribal court jurisdiction. Indeed, no court can exercise jurisdiction over a party simply because of its alleged need for resources. To do so would surely "swallow the rule."

Federal courts agree that a generalized threat of harm against tribal members does not comport with the second *Montana* exception. *See Phillip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 943 (9th Cir. 2009),

citing *Atkinson*, 532 U.S. at 657 n.12. Most recently, in *McKesson Corp. v. Hembree*, 2018 WL 340042 (N.D. Okla., filed Jan. 9, 2018), the court relied on a string of federal cases to find that a lawsuit filed by the Cherokee Nation against several pharmacies/wholesale distributors of prescription opioids did not meet the second *Montana* exception, despite evidence of an escalating public health burden:

> While noting Defendants' evidence of the harm opioid abuse has caused to individual tribal members and families, and costs borne by the tribe, the Court cannot plausibly find that such harm is "catastrophic for tribal self-government." *Plains Commerce Bank*, 554 U.S. at 341. Accordingly, the Court finds that even if the alleged conduct occurred within Indian country, the second *Montana* exception does not confer tribal jurisdiction in the Tribal Court Action.

Hembree, 2018 WL 340042 at 8.

In our case, as in *Hembree*, the Nation no doubt seeks to impose itself upon EMC's private contract with its non-member insureds to solve an important problem. But whether EMC's policies operate to provide a defense/indemnity to a non-member is not "catastrophic for tribal self-government." *Plains Commerce Bank*, 554 U.S at 341. Nor does it "endanger all in the vicinity, and … jeopardize the safety of tribal members." *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997).

In another recent case, the flaring of natural gas suggestive of "environmental degradation" did not support tribal jurisdiction under the second *Montana* exception. *See Kodiak Oil & Gas (USA) Inc. v. Burr*, 303 F. Supp. 3d 964 (N.D. 2018). While recognizing that the flaring of natural gas may jeopardize the health of tribal members, the court did not interpret *Montana* to apply to a claim to recover royalties. *Id*. at 982. So, if flaring natural gas on tribal

land is insufficient to maintain tribal jurisdiction, surely EMC's securing a declaratory judgment does not satisfy the second *Montana* exception.

Further instructive is *Stifel v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 2014 WL 12489707 (W.D. Wis. 2014). There, a bond transaction involving a tribal entity helped fund a gaming casino. Upon default, the tribe sued in tribal court. The defaulting parties challenged jurisdiction. Faced with an argument similar to the case at hand—one that equates insurance funds with money and economic security—the court reasoned:

> While a large sum of money is undoubtedly at stake here, *Montana's* second exception requires that the harm "do more than injure the tribe, it must "imperil the subsistence" of the tribal community. [Citation omitted.] The elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences…Here, defendants are unlikely to meet such a high standard. In particular…defendants have not even attempted to demonstrate that the commercial dispute at the center of the tribal court action requires regulation to preserve the tribe's right to *self-governance*.

Id. at 16-17.

In sum, EMC's enforcement of its contract with non-member insureds has no "direct" impact on tribal sovereignty. While it is unfortunate that the Site suffers from historical contamination, this circumstance does not imbue the tribal courts with jurisdiction as to EMC. The Nation has failed to meet its burden demonstrating that the second *Montana* exception applies.

d. Recent Ninth Circuit authority–holding a tribe's right to exclude non-members enables tribal courts to regulate non-Indian activities on trust land–does not confer jurisdiction over EMC.

Although not part of the tribal court's order, EMC anticipates the Nation will argue that *Montana* is not applicable here in light of the Ninth Circuit decision in *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894 (9th Cir. 2017).

> Our caselaw has long recognized two distinct frameworks for determining whether a tribe has jurisdiction over a case involving a non-tribal member defendant: (1) the right to exclude, which generally applies to nonmember conduct on tribal land; and (2) the exceptions articulated in Montana [citation omitted], which generally apply to nonmember conduct on non-tribal land.

Id. at 898.

But *Window Rock* is readily distinguishable. First, *Window Rock* determined whether two school districts operating on land leased from the Navajo Nation had properly exhausted tribal remedies. Because the employment-related claims against the district arose from conduct on tribal land, the Ninth Circuit held that tribal jurisdiction was colorable or plausible. Therefore, exhaustion in the tribal forum was required. Here, however, there is no exhaustion issue. Thus, the Nation does not prevail here by claiming tribal jurisdiction is plausible. It must actually prove that jurisdiction exists.

Second, although noting "the general rule in *Montana* applies to both Indian and non-Indian land," *Nevada v. Hicks*, 533 U.S. at 360, the Ninth Circuit requires a separate framework for determining whether a tribe has jurisdiction over a non-tribal-member's conduct on tribal land. Known as the "right to exclude," if a tribe has a right to exclude a nonmember from its lands, then tribal court jurisdiction will apply to nonmember conduct on its lands, regardless of the *Montana* exceptions. *Window Rock*, 861 F.3d at 898.

True, the right to exclude non-members from tribal land is part of the tribe's regulatory powers derived from their sovereign powers and as reflected in the Treaty of 1868. *Id*. at 904. But the "right to exclude" only presupposes the right or power to govern *conduct* on tribal land. And this is where *Window Rock* or any of the Navajo authority cited by the tribal court is of little help to the

Nation. In *Window Rock*, the School District not only leased property on tribal lands but its actions directly impacted tribal member teachers making it: "at least plausible that the Tribe has adjudicative jurisdiction here because the conduct occurred on tribal land, where the Navajo Nation has the right to exclude." *Id.* at 905.

But here, EMC undertook no activity on tribal lands. EMC issued insurance policies to two non-tribal-members at the insureds' offices in Show Low and Flagstaff, Arizona. EMC did not insure property that sits on tribal land. And in seeking declaratory relief, EMC filed suit in state court. Its conduct simply did not occur on tribal land.

So even the Ninth Circuit's narrow interpretation of *Montana* is of no consequence here. As such, this case is more akin to *Phillip Morris*, 569 F.3d at 932 (tribal stores' passing off through worldwide internet sales of cigarette company's Marlboro brands occurred beyond the reservation boundaries and thus, beyond tribal jurisdiction.) Indeed, even the court in *Window Rock* conceded that *Phillip Morris* "did not involve a question related to the tribe's authority to exclude or its interest in managing its own land. To the contrary, the activity in question occurred off reservation." *Window Rock*, 861 F.3d at 914 fn. 9.

In sum, nothing about EMC's insurance policy with non-tribal insureds impedes upon or otherwise relates to the Nation's right to exclude. So even under *Window Rock*, the tribal court lacks jurisdiction over EMC.

3. Federal RCRA law preempts the Navajo Nation's attempts to allocate responsibility to investigate/clean up the Site.

Assuming that the tribal court has jurisdiction over EMC, the Court should consider whether the Nation's claims interfere with RCRA. Indeed, the EPA Order is a source of confusion among the parties and the tribal court.

Under RCRA, "citizen suits" must be brought in federal court. 42 U.S.C. § 6972(a)(2). The overwhelming majority of courts have found that Section 6972(a)(2) confers jurisdiction on federal courts to resolve claims under RCRA. *See, e.g., Litgo New Jersey Inc. v. Comm. of New Jersey Dept. of Envtl. Prot.*, 725 F.3d 369, 393 (3rd Cir. 2013); *Blue Legs v. U.S. Bur. Of Ind. Affairs*, 867 F.2d 1094, 1098 (8th Cir. 1989) (RCRA precludes suit against tribe in tribal court).

As noted, the PRPs are under an EPA Order directing them to "remediate the contamination at the Site." [Ex. 1 at 18 ¶ 94] So when Shiprock sued to seek an allocation of fault, the Nation successfully defeated that claim as an improper end-run around RCRA. Indeed, under 42 U.S.C. § 6972(b)(2)(B), no person may bring a citizen suit after an order under § 7003 and while a PRP is proceeding with remedial action. [Ex. 3 at 8-9]

But after obtaining this ruling in federal court, the Nation switched gears, filed suit in tribal court, and now asserts claims for trespass, negligence, nuisance and declaratory relief. Such claims, though, are thinly-disguised attempts to require the PRPs, SSES and their insurers to pay for the clean-up–all in contravention of RCRA's exclusive authority. Indeed, the Nation's claims are remarkably similar to what Judge Teilborg held was an improper attempt by Shiprock to apportion liability among the parties. [*Id.* at 10]

If there were any doubt, the Nation's own tribal court Complaint is revealing:

> This action concerns which party or parties must pay to investigate and clean up the petroleum contamination that still remains at the PNR Site.

[Doc. 1-2 at 66 ¶ 17]

Adding to the confusion, the tribal court specifically relied upon the EPA Order when it held that the Nation had standing to enforce the EPA Order. [Doc

1-2 at 111] But it later suggests that none of the Nation's claims are under RCRA. [Doc 1-2 at 112] Both cannot be true. The Nation cannot sue to enforce the EPA Order to give it "standing" over EMC in tribal court yet argue it is not suing to enforce the EPA order when it seeks to avoid RCRA's exclusivity.

The tribal suit concerns investigation and clean-up of the contamination. As such, it is an improper end-run around RCRA and should be enjoined.

4. **Permanent injunctive relief is warranted**.

A party that shows actual success on the merits is entitled to permanent injunctive relief by also showing (1) an irreparable injury; (2) an inadequate remedy at law to compensate the injury; (3) an injunction is warranted after balancing the hardships between the parties; and (4) the public interest would not be harmed by granting the injunction. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

EMC will suffer irreparable injury if subject to an award of damage that cannot later be recovered for reasons of sovereign immunity. *See Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770-771 (10th Cir. 2010); *UNC Res. v. Benally*, 518 F. Supp. 1046, 1053 (D. Ariz. 1981) (plaintiff would be faced with possible irreparable injury if it were forced to appear and defend in Tribal Court that "very probably" lacked jurisdiction). And because the tribal court plainly lacks jurisdiction, EMC has no adequate remedy other than injunctive relief, there is no hardship to defendants who lack jurisdiction and the public interest would be served, not harmed by granting an injunction enforcing federal common law. *See Hembree*, 2018 WL 340042 at 10-11.

C. Conclusion

To a large extent, the tribal court found jurisdiction by association. That is, both the Nation and the tribal court point to EMC's relationship with its

insureds as a basis for jurisdiction over EMC. But while EMC's insureds may have caused damage on tribal land, EMC did not. Jurisdiction by association does not meet the narrow exceptions carved out by *Montana*. It does not even meet the broader framework of tribal jurisdiction set forth in *Window Rock*.

The tribal court also bases its jurisdictional analysis on need. That is, the tribal court viewed EMC as a source of funds to pay for the clean-up. But while the desire to secure funds to clean up the Site is understandable, that desire—even need—is insufficient. EMC does not have a relationship with the tribe or its members to qualify under the first *Montana* exception. EMC did not do anything on tribal land that would allow jurisdiction under the second *Montana* exception or the right-to-exclude test articulated in *Window Rock*. And EMC's denial of coverage, although potentially affecting the Nation's ability to recover from Milam/SSES, does not truly threaten "the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

Because the facts are undisputed, this Court can proceed to a final judgment, i.e., the issuance of a permanent injunction. EMC asks that this Court: 1) grant this Motion for Summary Judgment; 2) declare that EMC has exhausted its tribal court remedies; 3) declare that the Navajo tribal court cannot properly exercise jurisdiction over EMC; 4) enjoin the Navajo Nation, its agents, employees and successors from further pursuing the claims against EMC asserted in the District Court of the Navajo Nation, Chinle Judicial District, CH-CV-166-13; and 5) enjoin the defendant judges from adjudicating the claims against EMC in Navajo Nation District Court, CH-CV-166-13.

DATED this 4th day of October 2018.

RAYMOND, GREER & MCCARTHY, P.C.

By s/Michael J. Raymond
Michael J. Raymond
7373 N. Scottsdale Road, Suite D-210
Scottsdale, Arizona 85253
Attorneys for Plaintiff

Certificate of Service

I hereby certify that on October 4, 2018, I electronically transmitted the foregoing document to the Clerk's office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Paul Spruhan
Navajo Nation Department of Justice
Post Office Drawer 2010
Window Rock, Arizona 86515-2010

Colin Bradley
Colin Bradley Law, PLLC
4450 S. Rural Rd., Suite C-220
Tempe, Arizona 85282

s/ Ann E. Blacketer

Table of Contents