Case No. 19-15835

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMPLOYERS MUTUAL CASUALTY COMPANY,
Plaintiff - Appellee,

vs.

DOREEN N. MCPAUL, 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 - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
No. 3:18-cv-08110-PCT-DWL

OPENING BRIEF OF THE APPELLANTS

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STATEMENT OF JURISDICTION

The District Court's jurisdiction was based on 28 U.S.C. § 1331, as, according to the United States Supreme Court, the scope of an Indian nation's authority over non-Indians is a federal question. *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985). The District Court issued an order on April 4, 2019 granting Appellee's motion for summary judgment and issuing a declaratory judgment that the Nation lacked jurisdiction over EMC. NNER004. The judgment arising from that order was issued on the same day. NNER003. The order and judgment are final and appealable under 28 U.S.C. § 1291. Appellants filed their Notice of Appeal on April 22, 2019. NNER001. Under FRAP 4(a)(1)(A), the appeal is timely.

STATEMENT OF THE ISSUES

The issues in the case are (1) whether District Court erred in concluding that the Nation lacks jurisdiction over EMC under the Nation's right to exclude, (2) whether the District Court erred in finding that the Nation lacks jurisdiction under the second exception of *Montana v. United States*, and (3) whether the District Court erred in concluding the nation's jurisdiction over EMC is not co-extensive with state jurisdiction over a foreign insurance company whose insured causes harm in that state.

STATEMENT ON ADDENDUM

Pursuant to 9th Cir. R. 28-2.7, a separately- bound addendum of pertinent provisions of the U.S. Constitution and the Navajo Nation Treaty of 1868 is filed concurrently with this brief. It is cited in this brief as "NNADD."

STATEMENT OF THE CASE

This case is about whether a sovereign Indian nation can join a non-Indian insurance company to a lawsuit filed in its courts, when that insurance company denied coverage to its insureds, who, among others, caused significant damage to that nation's lands.

The current appeal arises out of a complaint filed by the Navajo Nation (Nation) in the Chinle District Court of the Navajo Nation against a number of parties and their insurance companies. NNER026-40. The Nation as landowner and sovereign seeks damages for a catastrophic gas spill occurring in 2005 at the Pic-N-Run (PNR) gas station ("Site"), located on tribal trust land in the central part of Chinle, one of the largest communities on the Nation. *Id.*

In 1955, the Nation leased the Site to members of the Navajo Nation, who operated a gas and convenience store on the Site. NNER019. In 1997, PNR entered into a sublease for use of the Site. *Id.* PNR was the operator of the gas station and convenience store at the Site at the time of the accident in 2005. *Id.* The accident occurred while a construction company, Shiprock Construction ("Shiprock"), was

performing concrete work at the Site. NNER020. PNR had hired Milam Business Associates ("Milam") to do renovation work to replace PNR's underground storage tanks ("USTs") with an above ground petroleum storage tank system (AST). *Id.* Milam subcontracted Shiprock to do certain concrete work. *Id.* During its work, Shiprock breached a supply line that fed fuel from the AST to the fuel islands. *Id.* The incident went undetected until August 2005. *Id.* In the meantime, an estimated 15,633 gallons of unleaded premium gasoline leaked into the soil and ground water underneath the Site due to the breach in the supply line. *Id.* That spill is still not fully cleaned up, and petroleum material remains and is spreading under the Site and the surrounding Chinle community. NNER021.

Employers Mutual Casualty Company (EMC) is an insurance company that sold commercial general liability insurance policies[1] to Milam and another company, Service Station Equipment and Sales (SSES). NNER019. Pic-N-Run had hired SSES to remove the USTs and install the AST. NNER019. Both companies are non-Indian owned, and EMC is a non-Indian owned insurance company located outside the Nation. NNER018. Both Milam and SSES were physically present on

[1] A commercial general liability insurance policy is generally "[i]nsurance for liability and property risks for commercial business operations. Commercial general liability insurance provides coverage to business and commercial entities for specified categories of claim arising from injury to property and from liability for claims brought against an assured by a third party." The Wolters Kluwer Bouvier Law Dictionary Desk Edition, Commercial General Liability (C.G.L. or CGL) (2012).

tribal trust land within the Nation. NNER019. EMC was not physically present, as it has no offices on the Nation. NNER018. It issued the policy to Milam in Show Low, Arizona, and to SSES in Flagstaff, Arizona, communities in Northern Arizona near the Nation. NNER019. EMC denied coverage to both Milam and SSES for the spill, based on its determination that the spill was excluded from coverage under the policies' "pollution exclusion" clauses. NNER045, 046. The policies do not exclude the Nation from their territorial coverage. NNER043-052.

After a 2009 U.S. Environmental Protection Agency order failed to result in clean-up of the site, the Nation filed suit in Chinle District Court in November of 2013, seeking damages against the responsible parties and their insurance companies. NNER026-040. The Nation sued Milam and SSES for their role in the spill under several theories, including negligence, nuisance, and statutory trespass. NNER034-036. The Nation also sued EMC, contending EMC breached its duty to Milam and SSES under its insurance policies to defend and indemnify them for the incident. NNER036-038. The Nation sought declaratory judgment that EMC was obligated to defend and indemnify its insured and for damages to satisfy *nályéél* (a Navajo damages concept). NNER036-39.

EMC filed a Motion to Dismiss with the Chinle District Court. NNER007. That court denied the motion. *Id.* EMC then filed a petition for a writ of prohibition with the Navajo Nation Supreme Court. *Id.* That court denied the petition. *Id.*

Subsequently, on May 25, 2018, EMC filed a Complaint in the Federal District Court for the District of Arizona ("District Court"). *Id.* EMC named as defendants the Nation's Attorney General Ethel Branch,[2] and the two judges of the Chinle District Court who presided over the case, the Honorable Rudy Bedonie and the Honorable Cynthia Thompson (hereinafter collectively referred to as "the Nation"). NNER053-054. On October 4, 2018, EMC filed a Motion for Summary Judgment. NNER056. On November 9, 2018, the Nation filed its own Motion for Summary Judgment. *Id.*

On April 3, 2019, the District Court 1) granted EMC's Motion, 2) denied the Nation's Motion, and 3) granted in part and denied in part EMC's request for declaratory and injunctive relief as follows: "The Court declares that the Navajo tribal courts lack jurisdiction over EMC in Navajo Nation v. Pic-N-Run, Inc., et al., Case No. CH-CV-166-13, and any related actions[.]" NNER016. This appeal followed. NNER001-002.

SUMMARY OF THE ARGUMENT

The District court erred in concluding the Nation lacks jurisdiction over EMC under the Nation's right to exclude non-members. Under its Treaty of 1868, the Nation has a right to exclude non-members from tribal trust land, and the corollary

[2] During the pendency of this case, Ethel Branch ended her tenure as Attorney General for the Nation. Doreen McPaul is the current Attorney General, and is substituted for Ms. Branch in the caption for the appeal. *See* FRAP 43(c)(2).

right to regulate their activities. This Court and other courts have broadly construed the Treaty to recognize the Nation's exclusive sovereignty over all activities that affect tribal trust land. Under the facts of this case, the Nation's courts indisputably have jurisdiction over EMC's insureds, who were present on tribal trust land within the Nation, and whose acts and omissions on that trust land, among those of other parties, led to the catastrophic gasoline spill at issue. The only remaining question is then whether the Nation's jurisdiction extends to their insurance company, when that company's policy does not exclude the Nation's territory, and whose off-reservation decision to deny coverage affects the Nation's on-reservation ability to remedy the spill. Under the broad federal court interpretation of the Treaty, the Nation's jurisdiction extends not only to those non-members physically present on tribal trust lands, but also to those non-members who are legally present by virtue of their contractual obligation to indemnify.

The District Court also erred in finding that the Nation lacked subject matter jurisdiction under the second exception of *Montana v. United States*, 450 U.S. 544 (1981). Indisputably a 15,000-gallon gas-spill on and under tribal trust land that seeps into ground water threatens the political integrity, economic security, and health and welfare of the tribe, and therefore those responsible for the spill are within the Nation's jurisdiction. The only question remaining, therefore, is whether that jurisdiction extends to an insurer, whose off-reservation decision to deny coverage

to its insured affects the ability of the Nation to remedy the spill. The District Court erred in finding that it was not "necessary" to exercise jurisdiction over EMC. The District Court incorrectly concluded that EMC did not engage in "conduct" within the Nation, and that the Nation failed to allege in its complaint that EMC's insurance proceeds were absolutely necessary to clean up the spill. EMC's off-reservation conduct in denying coverage to its insured directly affected the ability of the Nation to clean up the spill, and the Nation was not required to allege in its complaint anything beyond that.

Recognition of the Nation's jurisdiction is entirely consistent with a state's jurisdiction over foreign insurance companies whose insured enter into a state's territory and cause harm. Under the analogous personal jurisdiction standard for state courts, an insurance company whose policy does not exclude coverage in that state and whose insured travels to that state has the required minimum contacts with that forum to be subject to the authority of that state's courts. Similarly, EMC is subject to the Nation's jurisdiction when its insured entered onto tribal trust land, and when it did not exclude the Nation from the insurance policy's territorial coverage. The District Court erred when it declined to apply personal jurisdiction cases to the Nation's subject matter jurisdiction. The result is the same under both; an insurance company whose insured enters into a state or tribal jurisdiction and causes harm is appropriately subject to that jurisdiction's courts to adjudicate policy

issues when it did not exclude that jurisdiction from the territorial scope of the policy.

ARGUMENT

Under this Court's precedent, an Indian nation has jurisdiction over non-members under either of two independent frameworks. *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 903 (9th Cir. 2019). If that nation can exclude the non-member from tribal trust land, it generally can regulate or adjudicate that non-member's activities that affect that trust land. *Id.* at 902; *see also Window Rock Unified School Dist. v. Reeves*, 861 F.3d 894, 902-03 (9th Cir. 2019). Alternatively, an Indian nation has jurisdiction if its establishes one of two exceptions under *Montana v. United States*, 450 U.S. 544 (1981). *Knighton*, 922 F.3d at 903. Contrary to the holding of the District Court, both are met here, when EMC's insureds were present on tribal trust lands within the Nation, their acts and omissions contributed to the gas spill, EMC denied coverage for the spill, and EMC's policies lacked any territorial exclusion of the Nation from coverage.

I. STANDARD OF REVIEW

The question whether an Indian nation's courts have jurisdiction over a non-member is a legal one this Court reviews *de novo*. *Smith v. Salish-Kootenai Coll.*, 434 F.3d 1127, 1130 (9th Cir. 2006) (en banc).

II. THE DISTRICT COURT ERRED IN CONCLUDING THE NATION LACKS JURISDICTION OVER EMC UNDER THE RIGHT TO EXCLUDE.

In its order, the District Court rejected the Nation's jurisdiction under its "right to exclude" non-members. The Nation asserted that right under Article II of its 1868 treaty with the United States ("Treaty"). The District Court engaged in no analysis of the text or prior interpretation of the Treaty, but interpreted the Nation's jurisdiction as only applicable when a non-member is physically present on tribal trust lands. *See* Order, at 6-7, NNER009-010.[3] As EMC never physically entered such lands, and its sale of the policies occurred outside the Nation, the District Court believed the Nation lacked jurisdiction. Order, at 7, NNER010 ("[I]t's difficult to fathom how the right-to-exclude framework could be construed to confer jurisdiction over a lawsuit against EMC."). The District Court erred, as the right recognized by the Treaty applies not only to non-members physically present on tribal trust land whose acts and omissions cause harm, such as the gas spill here, but also to a non-

[3] In ignoring the treaty-based nature of the Nation's right to exclude, the District Court also conflated cases interpreting the Nation's treaty with cases applying a federal common law right to exclude held by non-treaty tribes. *See* Order, at 6-7, NNER009-010 (discussing case law on right to exclude); *see also Knighton*; *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013); *Water Wheel Camp Rec. Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011). While those cases generally support the Nation's right to exclude, they do not limit the scope of the Nation's treaty-based authority under Article II of the Treaty of 1868. As discussed more fully below, the Nation's authority is properly interpreted through the unique context of the Treaty and case law applying the Treaty.

member insurance company which is legally present on such lands through its contractual obligation to indemnify for that harm.

Treaties with Indian nations are the "supreme law of the land" recognized by the United States Constitution. U.S Const. Art. VI, Cl. 2, NNADD 1. A treaty is not a grant of rights to an Indian nation, but a grant of rights from that nation to the United States, and therefore all rights not surrendered are preserved. *United States v. Winans*, 198 U.S. 371, 381 (1905); *see United States v. Wheeler*, 435 U.S. 313, 327 n. 24 (1978) (applying rule to Navajo treaty); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 596 (9th Cir. 1983) (same). A treaty must be interpreted as tribal leaders would have understood them. *Minnesota v. Mille Lac Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). Further, any ambiguities must be resolved in favor of the Indian nation. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973) (stating in context of Navajo treaty that "any doubtful expressions . . . should be resolved in the Indians' favor").

The Treaty is appropriately interpreted within the context of the Nation's unique relationship with the United States and the negotiations between the parties leading to its execution. The Treaty was negotiated in 1868 by General William Tecumseh Sherman and Navajo leaders at Bosque Redondo, where the Navajos had been forcibly taken by United States troops with the intention they be permanently

exiled from their homeland. *See Williams v. Lee*, 358 U.S. 217, 221-22 (1959). Through the negotiations, the United States abandoned its intended exile of the Navajo and agreed the Navajo would return to the newly created Navajo Reservation to exercise exclusive sovereign authority over their lands. *Id.* The Navajo leaders sacrificed much in securing a return to their homeland, as they agreed to cede their right to a large area outside the bounds of the Reservation. *See* Treaty between the United States of America and Navajo Tribe of Indians, June 1, 1868, art. IX, 15 Stat. 667, 669-70, NNADD 4-5.

However, as a result of their negotiation, Article II of the Treaty secures the right of the Nation to exclude all outside persons except a narrow subset of federal officials:

> [T]he United States agrees that no persons except those herein so authorized to do, and *except such officers, soldiers, agents and employees of the government*, or of the Indians, *as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President*, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

Treaty, art. II, 15 Stat. 667, 668, NNADD 3 (emphasis added).

However, as the United States Supreme Court has recognized, Article II is broader than a simple right to exclude non-members physically present on tribal trust lands. That provision affirms the Nation's exclusive sovereignty over the Navajo Reservation. *McClanahan*, 411 U.S. at 175. It also bars state jurisdiction

over those lands without the Nation's consent. *Id.* (Treaty precludes authority to impose Arizona state income tax to Navajo tribal member on Reservation); *see also Williams v. Lee*, 358 U.S. 217, 221-22 (1959) (state court jurisdiction over contract claim against Navajo citizen would infringe on right of self-government recognized in the Treaty). The U.S. Supreme Court reiterated this effect on state authority in *Nevada v. Hicks*, identifying the Treaty as an exception to the general rule that state sovereignty no longer ends at the reservation boundary. *See* 533 U.S. 353, 361 n.4 (2001) (citing *Williams*). Indeed, Article II exempts the Nation from even federal regulation in some circumstances, including application of the Occupation Safety and Health Act to its tribal enterprises. *See Donovan v. Navajo Forest Products Industry*, 692 F.2d 709, 711-12 (10th Cir. 1982).

This Court recently applied Article II in *Window Rock*. Though applied there to the threshold question whether the Nation's jurisdiction was "plainly lacking," this Court recognized Article II as an absolute source of authority over non-members present on tribal trust land, including state-organized school districts. 867 F.3d at 905. ("Thus, as the treaty makes clear, the land at issue here is 'within the exclusive sovereignty of the Navajos,' and from this sovereignty, regulatory and adjudicative authority follow." (quoting *McClanahan*, 411 U.S. at 175)). As the districts were operating schools on trust lands pursuant to leases with the Nation, they could be excluded under the Treaty, and therefore the Nation could adjudicate employment

disputes brought by employees of those schools. *Id.* at 905.[4]

Under *Window Rock*, and precedent recognizing a federal common law right to exclude for other Indian nations, *Knighton*; *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013), *Water Wheel Camp Rec. Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011); *see supra*, at 9, n. 3, it is indisputable that the Nation's courts have jurisdiction over EMC's insureds, Milam and SSES. Both were present and engaged in business activities on tribal trust lands. As they can be excluded from the Nation's trust land, they can be regulated by the Nation. The tort claims the Nation filed against them are a form of regulation. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 323–24, (2008) (characterizing a tort claim as a form of regulation). As alleged in the Nation's complaint, their acts and omissions on that land contributed to the gas-spill the Nation seeks to clean up. As such, even under the narrow view of the District Court, they can be sued in the Nation's courts for such acts and omissions.

The only real question then presented by this case is whether EMC, which insured Milam and SSES, is also within the Nation's jurisdiction, and therefore can be joined to the lawsuit seeking to remedy the spill caused, in part, by those insured

[4] This Court dismissed the case to allow the Navajo Labor Commission to decide whether any later congressional act abrogated the right to exclude the school districts, an issue not relevant in this case. 861 F.3d at 906-07.

parties. Neither this Court nor the U.S. Supreme Court has answered that question. Prior cases involving insurance companies and tribal jurisdiction, as the District Court noted, involved policies that insured tribal members on a reservation. *See, e.g.*, *Allstate Indem. Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999) (car insurance); *see also State Farm Ins. Co. v. Turtle Mt. Fleet Farm, LLC*, 2014 WL 1883633 (D.N.D. 2014) (homeowners insurance); *but see Admiral Ins. Co. v. Blue Lake Rancheria Tribal Ct.*, 2012 WL 1144331 (N.D. Cal. 2012) (commercial general liability policy issued to non-Indian construction company). However, nothing in those cases state that an Indian nation lacks jurisdiction under the facts of this case.

Even if the Nation's authority was as limited as understood by the District Court, the Nation can exclude EMC's legal presence through the exclusion of its insured's physical presence. EMC has never disputed that its policies lack any territorial exclusion of the Nation from their coverage. EMC's legal presence therefore followed Milam and SSES's physical entry onto the Nation. As the Nation could have excluded Milam and SSES, it also could have excluded EMC's policy coverage from its territory. With that ability to exclude Milam and SSES's physical presence comes the ability to regulate EMC's legal presence. The Nation therefore can adjudicate EMC's contractual obligations to Milam and SSES arising out of their activities on trust land through joinder in the Nation's lawsuit in tribal court.

Even so, under the broad reading of Article II by the U.S. Supreme Court and other federal courts, the Nation's jurisdiction extends to EMC by virtue of its exclusive sovereignty over its territory. As EMC was legally present on the Nation through its contractual obligations to its insureds, and its insured caused harm to tribal trust land, its acts and omissions relating to such obligations affect tribal trust land. The Nation's exclusive authority over that trust land means EMC can be joined in the Nation's courts to resolve the harm. It is immaterial that EMC's sale of the policies and its decisions to deny coverage were done outside the Nation. The effect was felt on the tribal trust land where the spill occurred. *See Turtle Mtn. Fleet*, 2014 WL 1883633, at *10 (stating bad faith insurance claim reasonably "took place within the reservation boundaries" where harm was felt despite decision to deny coverage occurring outside reservation). The broad sovereign powers recognized in Article II therefore encompass EMC's legal role, as well as the physical role of its insureds, at the site of the spill.

The District Court's view of the Treaty right ultimately reflects a narrow, antiquated view of tribal jurisdiction, as only applying when a non-member physically sets foot onto tribal lands. As discussed more fully below, this is in sharp contrast to the corollary authority of states over insurance companies in similar situations, which is not similarly circumscribed to only those companies with physical offices in the state. *See infra,* Section IV. As state jurisdiction has

evolved to fit technological advances, *see, e.g. South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2093 (2018) (state may tax internet-based retailer with no physical presence within the state if there is a "substantial nexus" to that jurisdiction), so too has tribal jurisdiction. This is not 1868, and the means by which non-members are "present" on tribal trust lands has greatly expanded beyond mere physical presence. Given the expansion of telecommunications and other technology, and the cross-jurisdictional nature of insurance policies and other contracts, individuals and entities outside tribal territory can have significant, and even greater, impact within that jurisdiction without ever setting foot there. It cannot be that tribal leaders negotiating the creation of a sovereign homeland would have limited the Nation's authority over its territory to the technological realities at the time. *See Washington State Department of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1007, 1017-18 (2019) (holding 1855 treaty right to travel on public highways created exemption from state fuel tax for gasoline distribution by tribal business); *Washington v. United States*, 853 F.3d 946, 966 (9th Cir. 2017) (holding 1854 and 1855 treaty right to fish to require the state to maintain culverts under state highways to allow fish passage). As such, EMC cannot escape the Nation's broad and exclusive jurisdiction over its sovereign territory recognized in a Treaty merely because EMC lacks an office within the Nation.

III. THE DISTRICT COURT ERRED IN CONCLUDING THE NATION LACKS JURISDICTION OVER EMC UNDER THE SECOND *MONTANA* EXCEPTION.

Similar to its treatment of the right to exclude, the District Court found EMC's lack of a physical presence on the Nation dispositive under the second *Montana* exception. Order, at 10-11, NNER013-014. It also concluded the Nation did not adequately establish that EMC's conduct threatened its health and welfare, allegedly because the Nation did not state clearly in its complaint that EMC's policy proceeds were absolutely necessary to pay for the spill. *Id.*, at 11-12, NNER014-015. The District Court erred.

The Nation does have jurisdiction under *Montana's* second exception.[5] That exception recognizes the Nation's jurisdiction if the non-member's "conduct threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 56. The U.S. Supreme Court has described the exception as applying when it is "necessary to protect tribal self-government or to control internal relations." *Atkinson Trading Post v. Shirley*, 532 U.S. 645, 658 (2001). It has further described the exception, in dicta, as applying when the non-member's conduct "imperils the subsistence of the tribal community."

[5] As noted by the District Court, the Nation does not claim jurisdiction over EMC under the first *Montana* exception, as EMC has no "consensual relationship" with the Nation or its members relevant to the gas spill. NNER018.

Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., 554 U.S. 316, 341 (2008).[6]

It is indisputable that the gasoline spill itself has the necessary effect on the political integrity, economic security, and health and welfare of the Nation. This Court has held that "contamination of a tribe's water quality . . . [is] sufficient to sustain tribal jurisdiction" under the second *Montana* exception. *Rincon Mushroom Corp. of Am. v. Mazzetti*, 490 F. App'x 11, 13 (9th Cir. 2012) (citing *Montana v. EPA*, 137 F.3d 1135, 1139-40 (9th Cir. 1998)). As parties that contributed to the spill, both of EMC's insureds, Milam and SSES, are then within the Nation's jurisdiction. The only question is whether an insurance company whose policies cover those who caused such harm is within the Nation's jurisdiction when a dispute arises whether it appropriately denied coverage for the spill.

Contrary to the conclusion of the District Court, EMC's conduct 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 and to protect the Chinle community by cleaning up the site. The provision of clean water is vital to the Nation's economy, particularly in the Nation's arid desert environment. Given the

[6] The U.S. Supreme Court's discussion of the second exception in *Plains Commerce Bank* was unnecessary to its decision. Prior that discussion, the Court had already concluded the sale of non-Indian owned fee land to another non-Indian was not "conduct," and therefore the tribal court lacked jurisdiction. 554 U.S. at 332. It was then unnecessary to decide whether either *Montana* exception applied.

nature of the damage, pollution to ground water in one of the most populous communities on the Nation, EMC's denial of coverage also "imperils" the Nation's subsistence, as it affects the Nation's health and welfare. It is therefore "necessary" for the Nation's self-government for its courts to adjudicate whether EMC had a duty to defend and to indemnify its insureds.

The District Court's conclusion that the Nation did not adequately establish in its complaint that EMC's policy proceeds were necessary is unsupported by any legal precedent. *See* Order, at 11-12, NNER014-015. No prior case interpreting *Montana's* second exception has required that level of specificity in a tribal court complaint. As shown above, the spill itself fulfills the exception, and EMC's actions in denying coverage do as well. As both were discussed in detail in the Nation's tribal court complaint, the Nation fulfilled its responsibility to allege adequate facts. See NNER026-040. The District Court therefore erred in requiring the Nation to have alleged more in its complaint.

IV. THE DISTRICT COURT ERRED IN CONCLUDING THE NATION'S JURISDICTION OVER EMC IS NOT CO-EXTENSIVE WITH STATE JURISDICTION OVER A FOREIGN INSURANCE COMPANY WHOSE INSURED CAUSES HARM IN ITS JURISDICTION.

The result in this case, that a foreign insurance company is subject to the jurisdiction of a court where its insured caused damage, is not unique or unusual. The only difference here is that EMC is subject to an Indian nation's courts instead of a state's courts. That is insufficient to require a different outcome.

In similar circumstances, this Court has recognized state jurisdiction over a foreign insurance company when it insured a party that then entered into a state and caused harm. *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911 (9th Cir. 1990). As the Canadian insurance company did not exclude the State of Montana from its policy coverage, this Court concluded it was appropriately within Montana's jurisdiction to adjudicate issues related to policy coverage when its insured had an accident in that state. *Id*. at 914 (stating that if an insurance company fails to include a territorial exclusion in its policy, it will be subject to suit in "any forum where the insured risk traveled.")

The District Court rejected any parallel between state personal jurisdiction and tribal subject matter jurisdiction, stating, without elaboration, that "[t]he tests for tribal jurisdiction and personal jurisdiction are significantly different." Order, at 10, n.4, NNER013. However, this Court has favorably compared the two principles, and applied concepts of foreseeability adapted from the minimum contacts analysis relevant to states to an Indian nation's jurisdiction under *Montana*. *See Salish-Kootenai Tribal College*, 434 F.3d at 1138-39.

The same result applies here as if the Nation was a state, particularly under the unique and serious damage caused by the gas spill. Both state and Indian nations have a strong sovereign interest to adjudicate a foreign insurance company's obligations to its insured, and those injured by its insured. This is particularly

appropriate when the injured party is, as here, the sovereign itself.

Further, the assertion of jurisdiction in such circumstances is entirely foreseeable, and therefore appropriate. *See Portage*, 907 F.2d at 914 (stating the contractual obligation to indemnify and defend "foreseeably require[s] litigation in any forum where the insured risk traveled"). EMC issued insurance policies to Milam and SSES without a territorial exclusion for the Nation, and they entered the Nation's sovereign territory and caused severe harm on tribal trust land. Had EMC wished to exclude the Nation from its coverage, it could have done so. *See Rossman v. State Farm Mutual Automobile Ins. Co.*, 832 F.2d 282, 287 (4th Cir. 1987) (stating if an insurance company wished to avoid suit in a particular jurisdiction "it could have excluded [it] from the 'policy territory' defined in the policy"). As it did not, it reasonably could have expected to be subject to the Nation's Courts. *See id.*

EMC cannot credibly suggest it was unaware of the possibility of its insured operating on tribal trust land within the Nation. Its Milam policy was issued in Show Low, Arizona, and the SSES policy was issued in Flagstaff, Arizona. NNER018. Both communities are in Northern Arizona, near the Navajo Reservation, and where several other Indian nations reside. It reaped the financial benefits but also the risks of issuing policies with no territorial exclusion. It cannot now disclaim any connection with the Nation to avoid having to answer in the Nation courts when its insureds caused damage to the Nation's lands. Indeed, "litigation requiring the

presence of [EMC] is not only foreseeable, but it was purposefully contracted for . . . an insurer has the contractual ability to control the territory into which its 'product'—the indemnification and defense of claims—will travel." *Portage*, 907 F.2d at 914.

CONCLUSION

WHEREFORE, the Nation respectfully requests that this Court reverse the decision of the District Court and find that the Chinle District Court has jurisdiction over EMC in the underlying matter.

Respectfully submitted this 30th day of August, 2019.

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STATEMENT OF RELATED CASES

Counsel for Appellant states there are no related cases pending in the Ninth Circuit.

Date: August 30, 2019

By: /s/ Paul Spruhan
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Navajo Nation Department of Justice

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,301 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Version 2016 Times New Roman 14-point font.

Date: August 30, 2019

By: /s/ Paul Spruhan
Paul Spruhan, Assistant Attorney General
Navajo Nation Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, the original of this motion was filed electronically with the Clerk of the Court through the CM/ECF system, with registered counsel receiving notice:

/s/ Paul Spruhan

Case No. 19-15835

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMPLOYERS MUTUAL CASUALTY COMPANY,
Plaintiff - Appellee,

vs.

DOREEN N. MCPAUL, 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 - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
No. 3:18-cv-08110-PCT-DWL

NAVAJO NATION ADDENDUM

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Counsel for the Navajo Nation Appellants

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SUPREMACY CLAUSE

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. Constitution, art. VI, cl. 2

Treaty between the United States of America and the Navajo Tribe of Indians; Concluded June 1, 1868; Ratification advised July 25, 1868; Proclaimed August 12, 1868.

ANDREW JOHNSON,

June 1, 1868.

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Preamble.

WHEREAS a treaty was made and concluded at Fort Sumner, in the Territory of New Mexico, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant-General W. T. Sherman and Samuel F. Tappan, commissioners, on the part of the United States, and Barboncito, Armijo, and other chiefs and headmen of the Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit: —

Contracting parties.

Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo nation or tribe of Indians, represented by their chiefs and headmen, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness: —

Peace and friendship.

ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

Offenders among the whites to be arrested and punished;

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

among the Indians, to be given up to the United States, or, &c.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner

Rules for ascertaining damage.

of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

Reservation boundaries.

ARTICLE II. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Cañon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30′ west of Greenwich, provided it embraces the outlet of the Cañon-de-Chilly, which cañon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

Who not to reside thereon.

Buildings to be erected by the United States

ARTICLE III. The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter shop and blacksmith shop, not to cost exceeding one thousand dollars each; and a school-house and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

Agent to make his home and reside where

ARTICLE IV. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

His duties.

Heads of families desiring to commence farming may select lands, &c.

ARTICLE V. If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Effect of such selection.

Persons not heads of families

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

Certificate of selection to be delivered, &c.

to be recorded.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo Land Book."

Survey.

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

Alienation and descent of property.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

Children between six and sixteen to attend school.

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

Duty of agent.

School-houses and teachers.

The provisions of this article to continue for not less than ten years.

Seeds and agricultural implements.

ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

Delivery of articles in lieu of money and annuities.

ARTICLE VIII. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit:

Clothing, &c.

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian — each Indian being encouraged to manufacture their own clothing, blankets, &c.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

Indians to be furnished with no articles they can make.

Census.

Annual appropriations in money for ten years,

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

may be changed.

Army officer to attend delivery of goods, &c.

Stipulations by the Indians

ARTICLE IX. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United

as to outside territory; States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

railroads; 1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2ad. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

residents, travellers, wagon trains, 3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

women and children; 4th. That they will never capture or carry off from the settlements women or children.

scalping; 5th. They will never kill or scalp white men, nor attempt to do them harm.

roads or stations; 6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe.

damages;

military posts and roads. 7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

Cession of reservation not to be valid, unless, &c. ARTICLE X. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article —— of this treaty.

Indians to go to reservation when required. ARTICLE XI. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

Appropriations how to be disbursed. ARTICLE XII. It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any conditions provided in the law, to wit:

Removal. 1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

Sheep and goats. 2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

Cattle and corn. 3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

Remainder. 4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

Removal, how made. 5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mex-

ico, and when completed, the management of the tribe to revert to the proper agent.

Reservation to be permanent home of Indians.

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

Penalty for leaving reservation.

Execution.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. SHERMAN,
Lt. Gen'l, Indian Peace Commissioner.
S. F. TAPPAN,
Indian Peace Commissioner.

BARBONCITO, Chief.	his x mark.
ARMIJO.	his x mark.
DELGADO.	
MANUELITO.	his x mark.
LARGO.	his x mark.
HERRERO.	his x mark.
CHIQUETO.	his x mark.
MUERTO DE HOMBRE.	his x mark.
HOMBRO	his x mark.
NARBONO.	his x mark.
NARBONO SEGUNDO.	his x mark.
GAÑADO MUCHO.	his x mark.

Council.

RIQUO.	his x mark.
JUAN MARTIN.	his x mark.
SERGINTO.	his x mark.
GRANDE.	his x mark.
INOETENITO.	his x mark.
MUCHACHOS MUCHO.	his x mark.
CHIQUETO SEGUNDO.	his x mark.
CABELLO AMARILLO.	his x mark.
FRANCISCO.	his x mark.
TORIVIO.	his x mark.
DESDENDADO.	his x mark.
JUAN.	his x mark.
GUERO.	his x mark.
GUGADORE.	his x mark.
CABASON.	his x mark.
BARBON SEGUNDO.	his x mark.
CABARES COLORADOS.	his x mark.

Attest:
GEO. W. G. GETTY,
Col. 37th Inf'y, Bt. Maj. Gen'l U. S. A.
B. S. ROBERTS,
Bt. Brg. Gen'l U. S. A., Lt. Col. 3d Cav'y.
J. COOPER MCKEE,
Bt. Lt. Col. Surgeon U. S. A.
THEO. H. DODD,
U. S. Indian Ag't for Navajos.
CHAS. MCCLURE,
Bt. Maj. and C. S. U. S. A.
JAMES F. WEEDS,
Bt. Maj. and Asst. Surg. U. S. A.
J. C. SUTHERLAND,
Interpreter.
WILLIAM VAUX,
Chaplain U. S. A.

Ratification. And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-fifth day of July, one thousand eight hundred and sixty-eight, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:—

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES, July 25, 1868.

Resolved, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the treaty between the United States and the Navajo Indians, concluded at Fort Sumner, New Mexico, on the first day of June, 1868.

Attest:
GEO. C. GORHAM,
Secretary,
By W. J. MCDONALD,
Chief Clerk.

Proclamation. Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-fifth of July, one thousand eight hundred and sixty-eight, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the City of Washington, this twelfth day of August, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

[SEAL.]

ANDREW JOHNSON.

By the President:
W. HUNTER,
Acting Secretary of State.