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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Zurich American Insurance Company, a New York corporation, Plaintiff, 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 tribal judge of the Navajo Nation District Court, Defendants.	No. CV-19-8227-PCT-SPL **PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

THROUGH COUNSEL undersigned, and pursuant to Rule 56, Federal Rules of Civil Procedure, Plaintiff Zurich American Insurance Company, Inc.

("Zurich"), submits herewith its Reply to Defendants' Response to Plaintiff's Motion for Summary Judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

The Navajo Nation incorrectly suggests that further resort to tribal remedies should occur. Unlike *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9 (1987), tribal remedies have been exhausted because the Navajo Supreme Court was given a full opportunity to consider the jurisdiction issues and to rectify any errors in the lower court proceedings but elected to deny relief. "We begin by noting that whether a tribal court has adjudicative authority over nonmembers is a federal question. If the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void." *Plains Commerce Bank v. Long Family Land & Cattle Company*, 554 U.S. 316, 324 (2008). "The question of whether an Indian Tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under [28 U.S.C.] §1331." *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852-853 (1985). *National Farmers* and *Iowa Mutual* do not establish tribal jurisdiction over nonmembers, but instead "enunciate only an exhaustion requirement, a 'prudential rule,'" that is "based on comity." Ninth Circuit precedent holds that a party "will be deemed to have exhausted its tribal remedies once the Navajo Nation Supreme Court either resolves the jurisdiction issue *or denies a petition for discretionary*

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interlocutory review pursuant to Navajo Nation Code tit. 7, §303. . ." *Ford Motor Company v. Todecheene*, 488 F.3d 1215, 1217 (9th Cir. 2007) (emphasis added.)

This conclusion is not altered simply because jurisdictional and merit-based facts might intersect in resolving the jurisdictional issue. The existence or nonexistence of tribal court jurisdiction over nonmembers thus being a federal question of subject matter jurisdiction, the court may "inquire into the facts as they really exist." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 184 (1936). "In ruling on a challenge to subject matter jurisdiction, the district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary. However, where jurisdiction is so intertwined with the merits that its resolution depends on the resolution of the merits, the trial court should employ the standard applicable to a motion for summary judgment." *Careau Group v. United Farm Workers of America,* 940 F.2d 1291, 1293 (9th Cir. 1991). "Under this standard, the moving party should prevail only if the material jurisdiction facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Trentacosta v. Frontier Pacific Aircraft Industries, Inc.,* 813 F.2d 1553, 1558 (9th Cir. 1987).

Under this standard, the jurisdiction facts are not disputed, and Zurich is entitled to summary judgment as a matter of law. Contrary to the Navajo Nation's belief, this case does not involve, touch, or concern tribal trust land. To the contrary, the claims involve contractual relations between nonmembers occurring outside of

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reservation boundaries. Zurich did NOT cause the leak, did NOT operate the site, and was NOT present on the Nation's land when the leak occurred. Zurich's sole involvement is that it issued an insurance policy to a nonmember outside of the Navajo Nation's land; a policy to which the Navajo Nation is not a party. Issued in Illinois and delivered to Pic N Run's ("PNR") Flagstaff, Arizona, office, that policy concerned only a personal obligation of indemnity to PNR, not the Navajo Nation or any other nonparty to the insurance contract. Whatever PNR's obligation to the Navajo Nation may be under the sublease for the Chinle site, payment of any covered loss would be paid to PNR, not the Navajo Nation, at its Flagstaff, Arizona, offices just as Zurich's denial of PNR's claim, unchallenged by PNR for over a decade, was transmitted to PNR at its Flagstaff, Arizona, office.

Limited to the period from September 9, 2003, to June 9, 2004, for the Chinle site, Zurich's policy was not present on tribal land in any sense of that term when, in March 2005 Shiprock pierced the fuel line, SSES failed to install the AST piping system prior to use, and 15,000 gallons of gasoline was released at the Chinle site. Other than speculation and conjecture, no evidence establishes any covered loss at the Chinle site during the nine-month policy period when Zurich's policy included it along with PNR's other off-reservation property. Tribal jurisdiction cannot be asserted over Zurich in the conjectural hope that some covered loss might be found or discovered. "The presumption is that the court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists."

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Charles Alan Wright, *Handbook on the Law of Federal Courts*, ¶7, p. 17 (1976). Jurisdiction will not be allowed, where the claim is based on "little more than a hunch that it might yield jurisdictionally relevant facts," *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2018), or where the claimant "states only that they 'believe' discovery will enable them to demonstrate sufficient [forum] business contacts to establish the court's personal jurisdiction," *Butcher's Union Local No. 498 v. SDC Investment, Inc.,* 788 F.2d 535, 540 (9th Cir. 1986).

The Navajo Nation wrongly asserts that the second exception stated in *Montana v. United States,* 540 U.S. 544 (1981) does not apply when Indian trust land is involved. The Supreme Court rejected this view in *Plains Commerce Bank v. Long Family Land & Cattle Company, Inc.,* 554 U.S. (2008) where it held that Indian "tribes do not, as a general matter, possess authority over non-Indians who come within their borders: '[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.' *Montana v. United States*, 450 U.S. 544, 565." 554 U.S. at 328. The Court made it clear that this rule applies to nonmember "activities" regardless of whether or not the nonmember's activities occur on tribal land or non-Indian fee land:

> This general rule restricts tribal authority over non-member activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians—what we have called "non-Indian fee land." *Strate v. A-1 Contractors,* 520 U.S. 438, 446 (1997). 554 U.S. at 328.
>
> We have recognized two exceptions to this principle, circumstances in which tribes may exercise civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Montana,*

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450 U.S., at 565. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Ibid.* Second, a tribe may exercise "civil authority over the conduct of non-Indians on fee lands within the reservation 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. These rules have become known as the *Montana* exceptions, after the case that elaborated them. By their terms, the exceptions concern regulation of "the *activities* of nonmembers" *or* "the *conduct* of non-Indians on fee land." 554 U.S. at 329-330.

Given *Montana*'s "'general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'" *Atkinson [Trading Co. v. Shirley,* 532 U.S. 645 (2001)], *supra,* at 651 (quoting *Montana, supra,* at 565), efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are "presumptively invalid." *Atkinson, supra,* at 659. The burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. *Atkinson.* 532 U.S. at 654. These exceptions are "limited" ones, *id.,* at 647, and cannot be construed in a manner that would "swallow the rule," *id.,* at 655, or "severely shrink" it, *Strate,* 520 U.S. at 458.

The Bill of Rights does not apply to Indian tribes. Indian courts differ from traditional American courts in a number of significant respects. And nonmembers have no part in tribal government —they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. 554 U.S. at 337 (citations and internal quotation marks omitted).

The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe." *Montana.* 450 U.S. at 566. The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community. *Ibid.* One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences." Cohen §4.02[3][c], at 232, n. 220. 554 U.S. at 341.

In *Plains Commerce Bank,* the Court cited *Strate v. A-1 Contractors*, 52 U.S. 438 (1997), where the court rejected the contention "that *National Farmers* and *Iowa Mutual* broadly confirm tribal-court civil jurisdiction over claims against

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nonmembers arising from occurrences on any land within the reservation," holding that: "We read our precedent differently." The Court concluded that "*National Farms* and *Iowa Mutual,* we conclude, are not at odds with and do not displace *Montana*." 520 U.S. at 448.

In *Plains Commerce Bank,* the Court determined that "the status of the land is relevant 'insofar as it bears on the application of *Montana*'s exception to [this] case." 554 U.S. at 331 (citation omitted). Consequently, *Montana*'s second exception applies, even where tribal trust land is involved, and defeats tribal jurisdiction in this case. A contract of indemnity between nonmembers, executed, delivered, and performed outside of the reservation, is factually and legally distinct from a nonmember insured's conduct on the reservation, whatever obligations the insured assumed under its sublease to which Zurich was not a party. Confined to the period September 9, 2003, to June 9, 2004, Zurich's policy cannot possibly apply to the March 2005 spill. Only speculation and conjecture, not admissible evidence, puts a covered loss within the Zurich's policy period. If such a loss had been established, Zurich would have paid the loss to PNR outside of the reservation, not the Navajo Nation, just as it sent its October, 2009, denial of coverage, uncontested for over a decade by the insured, to PNR's off-reservation offices in Flagstaff, Arizona. Pure conjecture that something might have happened during that period does not support tribal jurisdiction because such a fishing expedition is not essential to tribal self-government or internal relations. The Navajo Nation's appeal to economic

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disadvantage that might result from failing to allow it to regulate insurance companies whose policies might have some 'injurious' effect on tribal land or tribal members does not, as Plains Commerce Bank puts it, "imperil the subsistence" of the tribal community" in the sense "that tribal power must be necessary to avert catastrophic consequences." 554 U.S. at 341-342 (2008). *Evans v. Shoshone-Bannock Land Use Policy Commission*, 736 F.3d 1298 (9th Cir. 2013) ("The Tribes fail to show that Evans' construction of a single-family house poses catastrophic risks. The Fort Hall Reservation has long experienced groundwater contamination, and the Tribes proffer no evidence showing that Evans' construction would meaningfully exacerbate the problem."); *Stifel, Nicolaus & Company, Inc. v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 203 (7th Cir. 2015) (tribal court lacked jurisdiction over tribal entities' suit against purchasers of bonds sold to finance the entities' casino and hotel, because the claim did "not address any on-reservation actions by the Financial Entities, much less actions that threaten tribal self-rule," and rejecting the tribal entities contention "that the second *Montana* exception applies whenever the economic effects of its commercial agreements affect a tribe's ability to provide services to its members.")

The Navajo Nation also wrongly asserts that *Employers Mutual Casualty Company v. Branch*, 381 F.Supp.3d 1144 (D. Ariz. 2019), appeal pending, No. 19-15835 (9th Cir. 2019) is distinguishable from this case. Here, as there, the insurance contract was issued by a nonmember insurer to a nonmember insured outside of the

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boundaries of the Navajo Nation. Here, as there, any covered loss would be paid by the nonmember insurer to the nonmember insured, not the Navajo Nation, outside of the Navajo Nation's boundaries. The fact that Zurich's policy covered the Chinle site for a nine-month period, and was not a general commercial liability policy, does not undermine the applicability of *Employers Mutual* because no evidence exists that any covered loss occurred on that site during the policy period. The existence of a sublease between PNR and the Navajo Nation requiring PNR to have insurance also does not differentiate this case from *Employers Mutual* because the Navajo Nation was not a named insured under Zurich's policy, that policy involved a strictly personal obligation between PNR and Zurich. As in *Employers Mutual,* the Navajo Nation here has failed to prove that Zurich's acts or omissions "imperiled the subsistence of the tribal community" in the sense that tribal court jurisdiction "must be necessary to avert catastrophic consequences."

The Navajo Nation incorrectly invokes *Farmers Insurance Exchange v. Portage La Prarie Mutual Insurance Co.,* 907 F.2d 911 (9th Cir. 1990), because the Ninth Circuit's expansive concept of foreseeability and purposeful direction was rejected by the Supreme Court in *Walden v. Fiore*, 571 U.S. 277 (2014) and *Bristol-Myers Squibb v. Superior Court,* 582 U.S., 137 S.Ct. 1773 (2017). In *Walden,* jurisdiction could not constitutionally exist in Nevada courts even though the plaintiffs were Nevada residents and "suffered foreseeable harm in Nevada" because the mere fact that [defendant's] conduct affected plaintiffs with connections to the

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forum state d[id] not suffice to authorize jurisdiction." 571 U.S. at 284-285. In *Bristol-Myers Squibb,* the Supreme Court followed *Walden* to hold that the plaintiff's residence in the forum and the fact that plaintiff "suffered foreseeable harm" there was insufficient evidence to confer jurisdiction, 137 S.Ct. at 1782, and that "the bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State." 137 S.Ct. at 1783. Under *Walden*, constitutionally permissible jurisdiction must be based on "the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there," 571 U.S. at 285, and "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." 571 U.S. at 286. *Walden* holds that "due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of a plaintiff or third parties" and rejects attempts to establish jurisdiction "by demonstrating contacts between the plaintiff (or third parties) and the forum State." 571 U.S. at 284. The Navajo Nation cannot deprive Zurich of its liberty interest not to be subjected to a tribal forum based on any act or omission of PNR, or on PNR's relationship to the Navajo Nation or trust land because "'closely associated' is not the requisite test for jurisdiction." *In Re Boon Global Limited,* 923 F.3d 643, 652 (9th Cir. 2019). As the Court held in *Lexington Insurance Company v. Hotai Insurance Company, Ltd.*, 938 F.3d 874, 884 (7th Cir. 2019):

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> Zurich and Taian had a relationship with Trek, not Wisconsin. That relationship may have made it foreseeable that Trek would sue them in Trek's home state or another forum it found convenient. But it is the defendant's actions, not his expectations, that empower a [foreign state] to subject him to judgment. And Zurich and Taian did not make any purposeful contact with Wisconsin by promising to indemnify Trek for liability and defense costs that it incurred anywhere in the world. 938 F.3d at 884.

So too here, Zurich made no purposeful contact with the Navajo Nation by promising to indemnify PNR for liability or defense costs that PNR incurred on any of its Arizona properties, be it Chinle or elsewhere in Arizona. PNR, a nonmember, purchased an insurance policy from Zurich, a nonmember, outside the Navajo Nation, covering a number of PNR's properties in Arizona, including the Chinle site, for the period between September 2003, and June 2004. No evidence exists that any covered loss occurred on the Chinle site or that PNR ever challenged Zurich's October 2009, denial of coverage. Again, Zurich did not cause the leak, did not operate the site, was not present on the Navajo Nation's land when the March 2005 leak occurred, and thus had no insured risk on the Navajo Nation when a loss allegedly occurred during the policy period. Any covered loss occurring under Zurich's policy would have been paid to PNR at its Arizona offices, not the Navajo Nation, which was not a named insured or beneficiary of Zurich's policy and which cannot point to any evidence of any insured risk or loss at the Chinle site during Zurich's policy period for purposes of Navajo law or jurisdiction. Even if Zurich's denial of PNR's claim indirectly affects the Navajo Nation's ability to satisfy any judgment it may or may not obtain against PNR, it is not "*necessary* to protect tribal self-government or to control internal relations," *Strate*, 520 U.S. at 459, and does

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not "imperil the subsistence" of the Navajo Nation in the sense of "avert[ing] catastrophic consequences," *Plains Commerce Bank*, 554 U.S. at 341. Tribal jurisdiction is absent in this case as a matter of federal common law because "*Montana's* second exception is only triggered by *nonmember conduct* that threatens the Indian tribe, it does not broadly permit the exercise of civil authority wherever it might be considered necessary to self-government." *Atkinson Trading Company v. Shirley*, 532 U.S. 645, 657, n. 12.

III. CONCLUSION

The Navajo Nation cannot meet its burden of establishing tribal court jurisdiction over Zurich under either Montana's second exception, or the power of exclusion. Accordingly, Zurich is entitled to judgment on the pleadings, or in the alternative, summary judgment.

RESPECTFULLY SUBMITTED this 25th day of February, 2020.

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