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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Zurich American Insurance Company, a New York corporation,

Plaintiff,

vs.

Doreen 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.

No. 3:19-cv-08227-SPL

NAVAJO DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Oral Argument Requested

Pursuant to Rule 56.1(d) of the Local Rules of Civil Procedure, Defendants Doreen McPaul, Attorney General of Navajo Nation, in her official capacity, Judge Cynthia Thompson, in her official capacity as tribal judge of the Navajo Nation District Court, and Judge Rudy Bedonie, in his official capacity as current tribal judge of the Navajo Nation District Court (hereinafter collectively "Navajo Defendants" or "Defendants" or "Navajo Nation" or "Nation") hereby file this Reply Plaintiff Zurich American Insurance Company's ("Zurich") Response in Opposition to Defendants' Motion for Summary Judgment [Doc. 34] as set forth below:

MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

I. ZURICH'S NEW CLAIMS REGARDING COVERAGE AND THE TREATY HAVE NOT BEEN EXHAUSTED BEFORE THE NAVAJO COURTS.

In its Response, Zurich claims that "no evidence exists that any covered loss occurred," and claims that the Navajo leaders who negotiated the Treaty of 1868 ("Treaty") did not intend for the Treaty to apply in this case. In support of the second point, it includes "Proceedings of Council with the Navajo Indians" as an exhibit. Response, at 13 [Doc. 34]; *id*, at 3 n. 1 [Doc. 34]; *see generally* Doc. 34-2.

Neither argument is properly before this Court. Regarding coverage, Zurich expressly disclaimed this argument before the Navajo courts by stating that it was "not arguing its coverage defenses at this time." Navajo Defendants' Statement of Facts ("NSOF") ¶ 2 [Doc. 33]. Concerning the Treaty, the Proceedings of Council with the Navajo Indians document, and any argument regarding "the understanding of the council at the time at which it was framed" was never presented to the Navajo courts. *See generally* NSOF Exhibit B [Doc. 33-3]; NSOF Exhibit D [Doc. 33-5, at 2-3]; NSOF Exhibit G [Doc. 33-8, at 21-26]. Therefore, because one of these claims was expressly disclaimed before the Navajo court, and the other was never discussed before that court, these claims have not been exhausted. Where a party "later employs an entirely different . . . new argument[,]" the matter has not been exhausted. *Or. Nat'l Desert Ass'n v. McDaniel*, 751 F. Supp. 2d 1151, 1161 (D. Or. 2011); *see also Tesoro Ref. & Mktg. Co. v. FERC*, 384 U.S. App. D.C. 215, 217, (D.C. Cir. 2009) (stating "[b]ecause Tesoro raises new arguments for the first time before this court, it has failed to exhaust its administrative remedies").

In the case of *Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1217 (9th Cir.2007), the Ninth Circuit determined that the specific issue of the second exception to *Montana v. U.S.*, 450 U.S. 544 (1981) (hereinafter "*Montana*") had not been exhausted before the

Navajo courts. Because the specific issue of the applicability of *Montana's* second exception had not been exhausted, the Ninth Circuit withdrew its previous opinion and held that "the appeal is stayed until Ford exhausts its appeals in the tribal courts." *Id.* Accordingly, here, where specific issues have not been exhausted before the Navajo courts, the proper course of action should be for this Court to "stay[] its hand until after the Tribal Court has had a full opportunity" to discover and interpret these new claims that Zurich has presented. *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998) (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985)).

Indeed, because Zurich now summarily claims that "no evidence exists that any covered loss occurred[,]" yet disclaimed this argument below, and no discovery or factual record exists in the tribal court on this issue, this issue should be exhausted because "[t]he [Navajo tribal courts] must closely examine both the language of [the Navajo Nation's] complaint and the language of [Zurich's] Policy to determine whether coverage exists in this case" because the "insurer has a duty to defend if there is *any* allegation which *potentially, possibly or might* come within the coverage of the policy." Response, at 13 [Doc. 34]; see *Liberty Corp. Capital Ltd. v. Sec. Safe Outlet, Inc.*, 937 F. Supp. 2d 891, 898-99 (E.D. Ky. 2013) (emphasis added) (internal quotations and citations omitted). Here, because Zurich specifically disclaimed the issue of coverage below, the Navajo courts have never been able to develop a "full record . . . in the Tribal Court" regarding Zurich's coverage. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856, 105 S. Ct. 2447, 2454 (1985). Thus, this issue needs to be exhausted before being addressed by this Court.

Also, based on other evidence Zurich presents, there are further facts regarding coverage that need to be developed first by the Navajo courts. For example, one fact that is potentially relevant to coverage and jurisdiction is that Zurich hired Groundwater Environmental Services, Inc. ("GES") to investigate the "facts and circumstances" of the Site regarding Pic-N-Run's claim under the Storage Tank Policy. Complaint, Ex. 4; [Doc.

1-2, at 52-53]. Though it is unclear how GES conducted its investigation, GES may have physically investigated the Site. However, Zurich has never presented this fact to the tribal court. *See generally* Doc. 33-3, Doc. 33-5, & Doc. 33-8. The facts and circumstances regarding GES's investigation, and Zurich's subsequent denial, therefore have never been adjudicated or developed before the Navajo courts. If, as Zurich now asserts, that jurisdiction should be denied *because* no covered loss occurred, then the Navajo courts must determine, in the first instance, whether a covered loss occurred. See *Corp. of the President of the Church of Jesus Christ of Latter-Day Saints v. BN*, No. 2:19-cv-00062, 2019 U.S. Dist. LEXIS 184319, at *29 (D. Utah Oct. 23, 2019) (stating "[b]ecause the Navajo District Court must make further factual findings, the Navajo Supreme Court has not had a full opportunity to review the factual basis for Plaintiffs' challenge to the tribal court's jurisdiction. Plaintiffs have not exhausted their tribal remedies").[1]

Zurich has also never briefed the issue of intent of the Treaty negotiators before the Navajo courts; so, the Navajo courts must be given a full opportunity to develop these issues before this Court adjudicates them here. Instead, Zurich inserts in its Response to Defendants' Motion for Summary Judgment entirely new arguments related to the understanding of the Navajo negotiators to the Treaty, and includes as a new exhibit the handwritten transcript of the negotiations, along with a typewritten transcript with no notation as to its origin or preparation. Response, at 3, n.1.

As Zurich improperly inserts these new issues at the federal level, this Court should

[1] Importantly, the court in *Corp. of the President* ordered further exhaustion even though the plaintiff had sought, but was denied, a writ of prohibition from the Navajo Supreme Court to review the Navajo trial court's jurisdictional decision. *Corp. of the President of the Church of Jesus Christ of Latter-Day Saints v. BN*, No. 2:19-cv-00062, 2019 U.S. Dist. LEXIS 184319, at *28-29 (D. Utah Oct. 23, 2019) (interpreting a denial of a writ as a remand when more facts were necessary). Therefore, this Court may remand for further exhaustion even though Zurich had previously sought a writ from the Navajo Supreme Court, but was denied. Regardless, Zurich never presented the coverage or Treaty interpretation issues to the Chinle District Court, which is enough to require it to return to that court to review these new arguments.

stay this matter, and remand this case to the Navajo courts for a *full* determination of these issues.

II. ZURICH CONTINUES TO IMPROPERLY CONFLATE COVERAGE WITH JURISDICTION.

Furthermore, even if properly before the Court, Zurich's argument that no covered loss occurred under its Storage Tank Policy is distinct from subject matter jurisdiction. "Subject-matter jurisdiction determines only whether a court has the power to entertain a particular claim--a condition precedent to reaching the merits of a legal dispute." Haywood v. Drown, 556 U.S. 729, 755 (2009).

Specifically, Zurich's coverage arguments are premature because "an insurer's duty to defend is broader than its duty to indemnify, so that insurers are sometimes required to defend their insureds even in situations in which the loss is not ultimately covered." *Anthem Elecs., Inc. v. Pac. Employers Ins. Co.*, 302 F.3d 1049, 1054 n. 2 (9th Cir. 2002). "The duty to defend arises at the earliest stages of litigation and generally exists regardless of whether the insured is ultimately found liable." *Nat'l Fire Ins. Co. of Hartford v. James River Ins.*, 162 F. Supp. 3d 898, 913 (D. Ariz. 2016). Therefore, the issue of Zurich's liability under the Storage Tank Policy, and whether the Navajo courts have jurisdiction, are separate issues; so the lack of a covered loss, even *if* true, does not foreclose the jurisdiction of the Navajo courts in this matter.

III. CONTRARY TO ZURICH'S ARGUMENT, GENERAL PERSONAL JURISDICTION CONCEPTS SUPPORT THE NATION'S JURISDICTION IN THIS CASE.

Zurich claims that it cannot possibly be subject to the Nation's jurisdiction under concepts of federal personal jurisdiction. Response, at 8-10. However, Zurich's citations largely ignore the United States Supreme Court's guidance from *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (hereinafter "Burger King"), which held that personal jurisdiction "may not be avoided merely because the defendant did not *physically* enter the forum." (emphasis in original). Rather, "it is an inescapable fact of modern commercial life

that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." *Id.* Therefore, "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, *we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there*." *Id.* (emphasis added).

Here, Zurich unquestionably "purposefully directed" commercial activity towards the Navajo Nation by issuing its Storage Tank Policy that insured storage tanks physically located on tribal trust land within the Navajo Nation, a policy which even covered "third party liability" regarding "any loss caused by a release that emanates from a scheduled storage tank system at a scheduled location." NSOF ¶ 9. Thus, because Zurich "has availed [itself] of the privilege of conducting business" on the Navajo Nation, its "activities are shielded by the benefits and protections of the forum's laws [and] it is presumptively not unreasonable to require [it] to submit to the burdens of litigation in that forum as well." *Burger King*, 471 U.S. 462, 476 (1985) (internal citations and quotations omitted). And, although unnecessary, Zurich's potential use of GES to physically investigate the Site regarding coverage may "enhance" Zurich's "affiliation with [the Navajo Nation] and reinforce[s] the reasonable foreseeability of suit there[.]" *Id.* Therefore, it is clearly foreseeable for Zurich to be hailed into the Nation's courts when it insured property on the Navajo Nation, and, may have hired an investigator to physically inspect its insured property.

What's more, when viewing jurisdiction over insurance contracts that insure a specific property, it is generally held that "contracting to insure property located within a jurisdiction, even if the presence of that property is transitory, subjects a foreign . . . insurer to jurisdiction on suits over such insurance." *See Armada Supply v. Wright*, 858 F.2d 842, 849 (2d Cir. 1988) (hereinafter "*Armada*"). In fact, this concept is not unusual because New York "allows a limited cause of action on behalf of injured parties directly against

insurers" where an insurance policy covers risks in the State even though the policy was delivered out of state. *Carlson v. Am. Int'l Grp., Inc.*, 30 N.Y.3d 288, 305 (2017); *see also Aperm of Fla., Inc. v. Trans-Coastal Maint. Co.*, 505 So. 2d 459, 462 (Fla. Dist. Ct. App. 1987) (holding that Florida law considers "that if the primary risk was in Florida the policy was issued for delivery in Florida" even if the policy was mailed to South Carolina); *see also Diamondrock Hosp. Co. v. Certain Underwriters at Lloyd's of London Subscribing to Policy Nos. PRPNA1700847 & PRPNA1702387*, No. ST-18-CV-399, 2019 V.I. LEXIS 56, at *12 (Super. Ct. Mar. 5, 2019) (holding that the "insurance policy was delivered or issued for delivery in the Virgin Islands because the coverage intended to cover the risks of the properties located in the Virgin Islands"); *see also Comar, Inc. v. Am. Guarantee Liab. Ins. Co.*, 175 F. Supp. 2d 173, 175 (D.P.R. 2001) (stating "[g]enerally, an insurer who insures a property in a given jurisdiction has purposefully availed itself of doing business in that jurisdiction, and it will be reasonably foreseeable that the insurer might be hauled into court in that forum. Thus, the insurer, even though it may have no physical presence in the jurisdiction would be subject to that forum's personal jurisdiction"). Indeed, the Eastern District of New York held that *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (hereinafter "*Walden*") does not alter this analysis; if an insurer agrees to provide a service—such as insuring the life of a person in New York—it "satisfies the minimum contacts inquiry" required by *Walden*. *See Blau v. Allianz Life Ins. Co. of N. Am.*, 124 F. Supp. 3d 161, 181 (E.D.N.Y. 2015).

Here, similar to *Armada*, Zurich insured specific storage tanks at the Site on the Navajo reservation and contracted with a company, GES, to investigate the Site, potentially through a physical inspection. Complaint, Ex. 4; [Doc. 1-2, at 52-53]; *see Armada*, 858 F.2d 842, 848 (2d Cir. 1988) (stating that the insurer "issued an insurance certificate on property located in New York . . . and designated two representatives in New York to investigate . . . the claim"). Thus, like *Armada*, where a Brazilian company insured goods traveling to New York, and investigated the claim in New York, Zurich similarly has

"transacted business" within the Navajo Nation and should be subject to the Navajo Nation's jurisdiction. *See id.*, at 848-849; *cf. Tohono O'Odham Nation v. Schwartz*, 837 F. Supp. 1024, 1032 (D. Ariz. 1993) (stating "although the contract was negotiated and executed by the parties off the Reservation, the performance of the contract occurred exclusively within the confines of the Reservation").

IV. ZURICH MISINTERPRETS THE TREATY OF 1868.

Zurich argues that the Nation lacks jurisdiction under the Treaty of 1868. Its main argument is that the Treaty's language limits the Nation's authority to those physically present within the Navajo Reservation. Response, at 2-3. Though not precise in identifying what language in the Treaty creates that limitation, it appears Zurich focuses on the phrase in Article II that non-Indians may not "pass over, settle upon, or reside in, the territory described in the Article[.]" Treaty of June 1,1868, 15 Stat. 667, 668; Response, at 2.[2] As Zurich claims it was not physically present at the Pic-N-Run site, but merely insured the storage tank on the site, it contends that language means it is *per se* outside the Nation's authority. *Id.*[3]

Zurich misconstrues the principles of treaty interpretation. That the literal English language of Article II arguably refers to physical presence, without more, does not negate a broader view that all those who affect tribal land, whether through physical presence,

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[2] Zurich also cites two other articles of the treaty in support of its argument that the Nation's authority only applies to physical presence. Response, at 2. Those articles concern other matters, and are not concerned with excluding non-Indians. Further, as noted above, *infra*, at 8-9, the Treaty's language is to be interpreted not simply by its literal English words, but by the broader understanding of its meaning by the Nation.

[3] As noted above, however, Zurich provides evidence at the federal level that its agent, GES, may have physically entered the Reservation to investigate Pic-N-Run's claim for coverage. *Supra*, at 3-4. Zurich may have arguably been present at some point on the Reservation through GES, and therefore may be within the Nation's authority under the Treaty. However, as also discussed above, this issue was not reviewed by the tribal court, as Zurich did not present it, and so the issue must be fully adjudicated by the tribal court through exhaustion. *Id.*

or through legal presence, are within the authority of the Nation. Indeed, as the U.S. Supreme Court recently reiterated in *Cougar Den*, tribal negotiators' understanding of the English language was limited, and the words of the treaty were translated to them during the negotiations. *Washington State Dept. of Licensing v. Cougar Den, Inc.*, 139 S.Ct. 1000, 1012 (2019). Therefore, the interpretation of such language is not limited to a strict reading of the English words. *See id.* at 1011-12 (noting interpretation of "in common with" language different than literal meaning based on tribal understanding at the time of negotiation). Whether Zurich has "crossed over" or "settled upon" the Nation's treaty lands is the question; a literal, decontextualized reading of those words is not enough to provide an answer.

In focusing on the literal language, Zurich ignores the case law the Nation cites in its motion for summary judgment, including *Williams v. Lee*, 358 U.S. 217 (1959), and *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973), which broadly interpret the language of Article II beyond its literal text to provide for the Nation's exclusive sovereignty over the reservation, and *Window Rock Unified School Dist. v. Reeves*, 861 F.3d 894(9th Cir. 2017), which recognizes the right to exclude non-Indians present on tribal lands, and therefore regulate their conduct. The interpretation of Article II in those cases is sufficiently broad to encompass jurisdiction over Zurich here, where it insured a physical object located on tribal trust land within the Nation, the gasoline storage tank, and where the Nation seeks to adjudicate what responsibility, if any, Zurich had to provide coverage for damage arising out of the presence of the tank on its land.[4]

[4] As such, this case is readily distinguishable from the "Bad Men" cases Zurich references in its Response. Response, at 2-3. Those cases involve a different section of the Treaty, Article I, and tort claims filed against the United States for damages caused by non-Indian "bad men." When the tort clearly occurred outside the boundaries of the reservation, the Court of Federal Claims has ruled the "Bad Men" clause in Article I does not authorize a cause of action against the United States. *Pablo v. United States*, 98 Fed. Cl. 376, 377 (Fed. Cl. 2011). As discussed here and in the Nation's prior pleadings, that is not this case, as the gas spill occurred on trust land within the Navajo Reservation, Zurich's policy covered

Further, contrary to Zurich's assertion, the scope of such language is not restricted by the technology of the time. Response, at 3. As shown in *Cougar Den*, advancements in commerce and technology adapt to the original understanding of the tribal nation, and do not undermine it. *See* 139 S.Ct. at 1013 (discussing fuel tax assessed on state highways in context of treaty right to travel). Indeed, there were no fuel trucks or state excise taxes when the Yakama Nation entered into its 1855 treaty. Yet, the U.S. Supreme Court concluded the State of Washington's modern fuel tax violated the Yakama's right to travel on public highways. *See Id*. Similarly, culverts built under state-highways that blocked salmon runs did not have to exist in 1854 and 1855 for the State of Washington to be required to repair them to fulfill the United States' treaties with several tribes. *See U.S. v. Washington*, 853 F.3d 946, 965-66 (9th Cir. 2017).

Finally, Zurich fails to respond at all to the argument that the Nation may exclude its policy through exclusion of its insured, Pic-N-Run. Navajo Nation Memorandum in Support for Motion for Summary Judgment, at 9-10. Even if Zurich itself cannot be physically excluded, because it never had a physical presence in the first place, the Nation can exclude its legal presence through the physical exclusion of its insured. As the Nation therefore may bar the application of the policy in its territory completely, its courts can adjudicate Zurich's obligations under the policy when the policy is allowed to apply on its lands.

III. ZURICH INCORRECTLY CLAIMS JURISDICTION IS LACKING UNDER *MONTANA'S* SECOND EXCEPTION.

In the case of *Montana v. United States EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998), the Ninth Circuit stated that "threats to water rights may invoke inherent tribal authority over non-Indians" under the second exception to *Montana*. The Ninth Circuit relied on this language in both *Rincon Mushroom Corp. of Am. v. Mazzetti*, 490 F. App'x 11, 13 (9th Cir.

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a physical object on that trust land, and Zurich's agent may have entered the Nation's land to investigate a claim under the policy.

2012) (hereinafter "*Mazzetti*") and *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 935 (9th Cir. 2019) (hereinafter "*FMC*"). Thus, in the Ninth Circuit, "[t]hreats to tribal natural resources . . . constitute threats to tribal self-governance, health and welfare." *FMC*, 942 F.3d at 935. Here, the threat to the Nation's land and groundwater is not even speculative like it was in *Mazzetti*—it is uncontested. NSOF ¶ 22 [Doc. 33]; *see Mazzetti*, 490 F. App'x at 13. Like in *FMC*, there has been a U.S. Environmental Protection Agency ("EPA") determination that there is contamination. NSOF ¶¶ 21-22 [Doc. 33]; *FMC*, 942 F.3d 916, 919 (9th Cir. 2019). Therefore, given the harm to the Nation's land and groundwater, that has been undisputed by Zurich, said contamination alone satisfies the second *Montana* exception.

Rather than focusing on the undisputed contamination that has occurred to the Navajo Nation's land and groundwater in this case, Zurich instead conflates the jurisdiction with coverage. Zurich claims that its "policy cannot possibly apply to the . . . spill." Response, at 10 [Doc. 34]. However, as it was explained above, Zurich's ultimate liability, and the question of jurisdiction, are not the same. Accordingly, the Nation has the ability to adjudicate this dispute even if Zurich is ultimately not liable.

I. Conclusion

Therefore, for all the reasons set forth above, and in Defendants' prior pleadings, this Court should grant the Defendants' Motion for Summary Judgment [Doc. 32].

RESPECTFULLY SUBMITTED this 25th day of February, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2020, I electronically submitted the attached 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 registrant:

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