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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Zurich American Insurance Company,)	No. CV-19-08227-PCT-SPL
)	
Plaintiff,)	ORDER
vs.)	
)	
Doreen N. McPaul, et al.,)	
)	
Defendants.)	

15 Before the Court is a Motion for Judgment on the Pleadings or in the Alternative,
16 Motion for Summary Judgment filed by Zurich American Insurance Company, a New York
17 corporation with its principal place of business in Illinois (“Plaintiff”). (Doc. 30)
18 Additionally, before the Court is a Motion for Summary Judgment filed by Doreen McPaul,
19 the Attorney General of the Navajo Nation, in her official capacity; Judge Cynthia
20 Thompson, in her official capacity as tribal judge of the Navajo Nation District Court; and
21 Judge Rudy Bedonie, in his official capacity as tribal judge of the Navajo Nation District
22 Court (collectively “Defendants”). (Doc. 32) For the following reasons, the Court will grant
23 Plaintiff’s motion and deny Defendants’ motion.¹

24 **I. Background**

25 This case arises from Pic-N-Run (“PNR”), a non-tribal entity, operating a gas station

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27 ¹ Because it would not assist in resolution of the instant issues, the Court finds the
28 pending motions are suitable for decision without oral argument. *See* LRCiv. 7.2(f);
Partridge v. Reich, 141 F.3d 920, 926 (9th Cir. 1998).

1 on the Navajo Reservation. (Doc. 1 at 5) In 2005, a fuel line was breached at the gas station
2 and released over 15,000 gallons of gasoline onto land located within the Navajo
3 Reservation. (Doc. 1 at 5) On November 8, 2013, the Navajo Nation filed a complaint in
4 the Chinle District Court, arguing that Plaintiff, PNR, and others were responsible for the
5 fuel breach and resulting damage to reservation land. (Doc. 33-2) As to Plaintiff, the
6 complaint alleged that Plaintiff issued an insurance policy to PNR that specifically covered
7 the damage that had occurred, and Plaintiff breached its duty to defend and indemnify its
8 insured by denying PNR’s insurance claim.² (Doc. 33-2 at 16-19)

9 In 2014, Plaintiff filed a motion to dismiss the claims, arguing that the Navajo tribal
10 court did not have jurisdiction because Plaintiff is not a tribal member. (Doc. 33-3) In 2016,
11 before the tribal court ruled on the motion, Plaintiff and the Navajo Nation—along with
12 another defendant insurance company—filed a set of joint stipulated facts regarding the
13 issue of subject matter jurisdiction. (Doc. 33-6) The following facts were stipulated to
14 during the tribal court proceedings:

- 15 1. PNR subleased tribal trust lands within the formal boundary of the
16 Navajo Nation Indian Reservation (the “Property”) in 1997 for the purpose
17 of operating a gas station and convenience store. (Doc. 33-6 at 3)
- 18 2. Plaintiff issued PNR a Storage Tank System Third-Party Liability and
19 Cleanup Policy, effective from September 9, 2003 to September 9, 2004.
20 (Doc. 33-6 at 3) The policy was issued to PNR’s main office in Flagstaff,
21 Arizona. (Doc. 33-6 at 3)
- 22 3. Beginning in July 2004, PNR contracted with a third-party to perform
23 upgrades at the Property, including installing above-ground storage tanks to
24 replace the underground storage tanks. (Doc. 33-6 at 3)
- 25 4. In March of 2005, a subcontractor employee working at the Property

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27 ² The Navajo Nation also alleged that Plaintiff was liable under the Navajo concept
28 of “nályééh,” which attributes fault to those with “the ability to provide [] compensation”
for the individuals who are actually liable. (Doc. 33-2 at 19)

1 breached a supply line connected to the above ground storage tanks, which
2 released an estimated 15,633 gallons of unleaded premium gasoline into the
3 environment within the Navajo Reservation. (Doc. 33-6 at 4) The breach
4 went undetected until August of 2005. (Doc. 33-6 at 4)

5 5. On August 27, 2009, the United States Environmental Protection
6 Agency issued an order finding that the 2005 breach had contaminated the
7 soil and affected the groundwater within the Navajo Nation Reservation.
8 (Doc. 33-6 at 4-5)

9 Based on these facts, the Chinle District Court issued an order denying Plaintiff's
10 motion to dismiss. (Doc. 33-7) In March of 2018, Plaintiff filed a Petition for a Writ of
11 Prohibition with the Navajo Nation Supreme Court. (Doc. 33-8) The Navajo Nation
12 Supreme Court denied the Writ of Prohibition. (Doc. 33-9)

13 Plaintiff filed its complaint in this Court on July 30, 2019, seeking declaratory and
14 injunctive relief. (Doc. 1) Defendants answered on August 28, 2019. (Doc. 14) On January
15 3, 2020, Plaintiff filed the Motion for Judgment on the Pleadings or in the Alternative,
16 Motion for Summary Judgment. (Doc. 30) The same day, Defendants filed their Motion
17 for Summary Judgment. (Doc. 32) Both motions are ripe and ready for review. (Docs. 30,
18 32, 34, 35, 39, 40)

19 **II. Legal Standard**

20 “Questions about tribal jurisdiction over non-Indians is an issue of federal law.” *Big*
21 *Horn Cty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 949 (9th Cir. 2000). Accordingly, this
22 Court has jurisdiction under 28 U.S.C. § 1331 to determine whether the Navajo Nation
23 tribal courts properly asserted jurisdiction over Plaintiff. “The standard of review for an
24 Indian tribal court decision deciding jurisdictional issues is de novo on questions of federal
25 law.” *Id.* (citation omitted). A district court’s review of tribal jurisdiction is akin to an
26 appellate review of the tribal court record. *Water Wheel Camp Recreational Area, Inc. v.*
27 *LaRance*, 642 F.3d 802, 817 n.9 (9th Cir. 2011). Therefore, a district court cannot rely on
28 evidence that was not before the tribal court. *Id.*

1 **III. Discussion**

2 Plaintiff argues that the jurisdictional facts here are not disputed, and it is therefore
3 entitled to summary judgment as a matter of law. (Doc. 39 at 4) Specifically, Plaintiff
4 asserts that it did not cause the gas leak alleged in the tribal court complaint and was not
5 present within the Navajo Reservation, literally or constructively, when the fuel line breach
6 occurred. (Doc. 39 at 4) Plaintiff maintains that neither the “right to exclude” doctrine nor
7 the jurisdictional exceptions outlined in *Montana v. United States*, 450 U.S. 544 (1981),
8 confer tribal jurisdiction against it. (Doc. 30 at 6-16)

9 In response, Defendants assert that the insurance policy issued to PNR specifically
10 included lands on the Navajo Reservation to cover the exact type of damage that occurred
11 in this case, and therefore, the tribal court has jurisdiction to determine whether Plaintiff
12 wrongfully denied PNR a duty to defend and indemnify the gas leak claim. (Doc. 32 at 12)
13 Furthermore, Defendants argue that Plaintiff is relying on arguments that were not argued
14 before the tribal court, so this Court may not consider them when ruling on the motions.
15 (Doc. 35 at 3-4) Defendants maintain that this Court may not take into consideration the
16 arguments regarding Plaintiff’s policy period covering PNR or the arguments regarding the
17 right to exclude under the Treaty of 1868. (Doc. 40 at 2) Defendants further argue that if
18 the Court finds merit in either argument, then the Court is obligated to send the case back
19 to the tribal court to hear the arguments first. (Doc. 40 at 2)

20 Generally, a federal court may intervene only after a tribal appellate court has ruled
21 on the jurisdictional issue. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19-20 (1987).
22 However, this tribal court exhaustion requirement is not a jurisdictional bar for a district
23 court to hear issues regarding tribal jurisdiction. *Grand Canyon Skywalk Dev., LLC v. ‘SA’*
24 *NYU WA Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013). Instead, principles of comity obligate
25 a district court to abstain from adjudicating claims over jurisdiction before the tribal court
26 has a chance to hear the matter. *Id.* A district court may relieve a non-tribal member from
27 the duty to exhaust, however, where it determines that tribal court jurisdiction is “plainly
28 lacking.” *See id; Evans v. Shoshone-Bannock Land Use Pol’y Comm’n*, 736 F.3d 1298,

1 1302 (9th Cir. 2013).

2 After considering the principles of comity, and as discussed further in this Order,
3 the Court finds that remand to the tribal court is unnecessary in this case. The record
4 confirms that the parties stipulated to certain facts regarding Plaintiff's policy period,
5 which were before both the Chinle District Court and Navajo Nation Supreme Court. (Doc.
6 33-6) In addition, Plaintiff has consistently maintained that its status as the insured of a
7 non-tribal member is insufficient to establish "presence" under a tribe's right to exclude.
8 (Doc. 33-5) The record confirms that the Navajo Nation first asserted an argument in favor
9 of jurisdiction under the Treaty of 1868 and the "right to exclude" doctrine in its response
10 to Plaintiff's motion to dismiss. (Doc. 33-4 at 2) Therefore, as a part of the de novo review
11 of jurisdiction, this Court considers Plaintiff's arguments and finds that jurisdiction in this
12 case is "plainly lacking."

13 **B. Right to Exclude**

14 In the Ninth Circuit, a tribal court may obtain jurisdiction over a non-tribal member
15 under the "right to exclude" doctrine. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d
16 894, 899 (9th Cir. 2017). The general principle is that a tribe's right to exclude a non-tribal
17 member from physically entering tribal land also establishes the tribe's right to adjudicate
18 claims that arise once a non-tribal member is allowed onto the land. *See id.* In the context
19 of insurance, courts have found tribal jurisdiction where an insurance company contracted
20 directly with a tribe or tribal member to sell a policy and thereafter engaged in conduct
21 directed toward the reservation. *Compare State Farm Ins. Cos. v. Turtle Mountain Fleet*
22 *Farm LLC*, No. 1:12-cv-00094, 2014 WL 1883633, at *9-10 (D.N.D. May 12, 2014)
23 (finding that tribal jurisdiction was sufficiently established where State Farm sold a
24 homeowner's insurance policy to a tribal member to insure a house located on reservation
25 land), *with Emps. Mut. Cas. Co. v. Branch*, 381 F.Supp.3d 1144, 1149-50 (D. Ariz. 2019)
26 (finding no jurisdiction where general liability policies were issued to a non-tribal member
27 corporation and there were no facts suggesting that the insurance company directed activity
28 toward the tribal land).

1 No cases cited by either party or reviewed by this Court directly address the
2 circumstances in this case. Here, unlike *State Farm Insurance* and *Employers Mutual*
3 *Casualty*, Plaintiff issued a policy to PNR, a non-tribal entity, that specifically insured
4 activity on tribal land—as opposed to a general liability policy that was silent about
5 dealings on tribal land. Although this fact raises unique jurisdictional questions, the
6 complaint and stipulated facts before the tribal court do not allege that the damage at issue
7 in this case arose from any dealings during the policy period. It remains that the Navajo
8 Nation’s right to exclude, if any, occurred when Plaintiff specifically insured land on the
9 Navajo Reservation from September 9, 2003 to September 9, 2004. Instead, the record
10 indicates that the parties stipulated to facts that show the gas leak occurred in 2005—well
11 after Plaintiff ceased to engage in any activity on the tribal land. Therefore, the Court finds
12 that any conduct arising after the policy date cannot establish jurisdiction under the right
13 to exclude doctrine.

14 C. Second *Montana* Exception³

15 Under the second *Montana* exception, a tribe may have jurisdiction over a non-tribal
16 member when the non-tribal member’s conduct threatens the tribe’s political integrity,
17 economic security, or health and welfare. *Montana*, 450 U.S. at 566. It logically follows
18 that a non-tribal member’s specific conduct and a resulting injury (i.e. the threat to the
19 tribe’s economic security or health and welfare) must be alleged as causally related before
20 the tribe has any authority to adjudicate an action arising from the conduct.

21 For the same reasons described above, the Court finds that the Navajo tribal court
22 does not have jurisdiction over the claims made against Plaintiff under the second *Montana*
23 exception. None of the 2005 acts alleged in the tribal court complaint occurred during the
24 time Plaintiff insured PNR. Furthermore, although the record alludes to gas leakage that
25 occurred on the Property prior to 2005, the record does not indicate any specific claims
26 regarding conduct by Plaintiff or PNR that caused a gas leak during the time period Plaintiff

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28 ³ The parties have stipulated that the first *Montana* exception is inapplicable in this case. (Docs. 30 at 5; 32 at 11)

1 insured PNR. *See Brendale v. Confederate Tribes*, 492 U.S. 408, 431 (1989) (The impact
2 of the nonmember’s conduct must be “*demonstrably* serious and must imperil the political
3 integrity, the economic security, or the health and welfare of the tribe.”) (emphasis added);
4 *see also Evans*, 736 F.3d at 1306 (holding that a tribe must do more than show a long
5 history of groundwater contamination and generalized concerns about waste disposal;
6 instead, a tribe must proffer evidence showing that a non-tribal member’s specific conduct
7 would “meaningfully exacerbate the problem”). Moreover, the record before this Court
8 does not establish that Plaintiff’s insurance funds are necessary to protect the Navajo
9 Nation’s land and water supply. *See Emps. Mut. Cas. Co.*, 381 F.Supp.3d at 1152
10 (“Defendants have not identified any Ninth Circuit cases where the hope of maximizing
11 insurance funds, or something even similar, was deemed sufficient to meet the second
12 *Montana* exception.”). The fact that two non-tribal entities entered into a business
13 agreement relating to Navajo land, which began and ended before any alleged damage
14 occurred on the Property, is insufficient to invoke *Montana*’s second exception. Indeed,
15 the Ninth Circuit has repeatedly held that the second *Montana* exception is invoked only
16 in rare circumstances. *See, e.g., Big Horn Cty.*, 219 F.3d at 951. Therefore, the Court finds
17 that jurisdiction in this case is plainly lacking. Accordingly,

18 **IT IS ORDERED** that:

- 19 1. Plaintiff’s Motion for Judgment on the Pleadings or in the Alternative, Motion
20 for Summary Judgment (Doc. 30) is **granted**;
- 21 2. Defendants’ Motion for Summary Judgment (Doc. 32) is **denied**;
- 22 3. Plaintiff’s request for declaratory relief is **granted** as follows: The Court declares
23 that the Navajo Nation tribal courts lack jurisdiction over Zurich American
24 Insurance Company in Case No. CH-CV-166-13, and any related actions;

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4. Plaintiff's request for injunctive relief is **denied**; and
5. The Clerk of Court shall enter judgment accordingly and terminate this action.
Dated this 7th day of August, 2020.


Honorable Steven P. Logan
United States District Judge