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THE HON. ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALLSTATE INDEMNITY COMPANY, an Illinois Corporation, Plaintiff, v. JOSHUA CORNELSON and "JANE DOE" CORNELSON, husband and wife, and JOAQUIN ORTEGA CARRILLO, a single individual, Defendants.	Civil No.: 3:21-cv-05831-RJB PLAINTIFF'S RESPONSE TO CORNELSON DEFENDANTS' MOTION TO DISMISS FOR LACK OF TRIBAL COURT EXHAUSTION

I. INTRODUCTION

Plaintiff Allstate Indemnity Company ("Plaintiff") respectfully request that this Court deny Defendant Joshua Cornelson's ("Defendant Cornelson") Motion to Dismiss based on a claim of lack of tribal court exhaustion. (Dkt. 28). Defendant Cornelson argues that the Lower Elwha Tribal Court must have the opportunity to determine its jurisdiction over this matter. There is no basis in law or fact that another tribunal and here, the Lower Elwha Tribal Court, must have a first look at jurisdiction prior to this court. Defendant Cornelson's

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argument fails as the Lower Elwha Tribal Court plainly lacks jurisdiction over Allstate in regard to this matter and the parties have contractually agreed that this controversy must be resolved only in state or federal court. This Response is supported by the following memorandum of points and authorities.

II. STATEMENT OF FACTS

The determination of whether Plaintiff has a duty to defend and indemnify Defendant Cornelson against the claims brought against him by Defendant Joaquin Ortega Carrillo arising from an assault that occurred on September 14, 2018, is presently before this court. (Dkt. 1).

Plaintiff Allstate Indemnity Company is an Illinois-based insurance company. (Dkt. 1). Plaintiff issued a Manufactured Homeowner's Policy ("Policy") to Defendant Cornelson that was in effect from July 30, 2018 through July 30, 2019. (Dkt. 1-2 & 14). The insured property is located in the State of Washington at 75 Sampson Road, Port Angeles, in the County of Clallam. (Dkt. 1-2). Defendant Cornelson alleges that the manufactured home is located on Lower Elwha Klallam Tribal Trust land. (Dkt. 29-1). Defendant Cornelson is not an enrolled member of the Lower Elwha Klallam Tribe. (Dkt. 29-1).

The Policy provides that all lawsuits in any manner related to the policy shall be brought, heard, and decided ***only in a state or federal court*** where the residence premises[1] is located:

> "***What Law Will Apply***
> This policy is issued in accordance with the laws of the state in which the residence premises is located and covers property or risks principally located in that state. Subject to the following paragraph, the laws of the state in which the **residence premises** is located shall govern any and all claims or disputes in any way related to this policy.

[1] Residence premises" means the dwelling . . . where you reside as shown on the Policy Declarations. (Dkt. 1-2).

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> If a covered loss to property, or any other **occurrence** for which coverage applies under this policy happens outside the state in which the **residence premises** is located, claims or disputes regarding that covered loss to property, or any other covered **occurrence** may be governed by the laws of the jurisdiction in which that covered loss to property, or other covered **occurrence** happened, only if the laws of that jurisdiction would apply in the absence of a contractual choice of law provision such as this.
>
> ***Where Lawsuits May Be Brought***
> Subject to the following two paragraphs, any and all lawsuits in any way related to this policy, shall be brought, heard and decided only in a state or federal court located in the state in which the **residence premises** is located. Any and all lawsuits against persons not parties to this policy but involved in the sale, administration, performance, or alleged breach of this policy, or otherwise related to this policy, shall be brought, heard and decided only in a state or federal court located in the state in which the **residence premises** is located, provided that such persons are subject to or consent to suit in courts specified in this paragraph.
>
> If a covered loss to property, or any other **occurrence** for which coverage applies under this policy happens outside the state in which the residence premises is located, lawsuits regarding that covered loss to property, or any other covered occurrence may also be brought in the judicial district where that covered loss to property, or any other covered occurrence happened.
>
> Nothing in this provision, **Where Lawsuits May Be Brought**, shall impair any party's right to remove a state court lawsuit to a federal court." (Dkt. 1-2) (emphasis supplied).

III. ARGUMENT & AUTHORITY

A. The Lower Elwha Tribe Plainly Lacks Jurisdiction Over Allstate

The tribal court plainly lacks jurisdiction over Plaintiff because Plaintiff has neither engaged in any conduct on tribal land, nor entered into any contractual relationship with the tribe or a tribal member. Joshua Cornelson is the Insured under the Certified Policy Allstate issued and is not a tribal member, as Plaintiff acknowledges. Native American tribes "do

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not, as a general matter, possess authority over non-Native Americans 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.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328, 128 S. Ct. 2709 (2008) (quoting *Montana v. United States*, 450 U.S. 544, 565, 101 S. Ct. 1245 (1981)). The Ninth Circuit "has long recognized two distinct frameworks for determining whether a tribe has jurisdiction over a case involving a non-tribal member defendant: (1) the right to exclude, which generally applies to nonmember conduct on tribal land; and (2) the limited exceptions articulated in *Montana v. United States* as follows:

> "(1) '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'; and (2) '[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its 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.' *Montana*, 450 U.S. at 565."

1. The Right to Exclude Doctrine is Not Applicable Because Allstate Did Not Contract with a Tribal Member, Enter Tribal Land or Direct Activity Within the Borders of the Reservation.

The "right to exclude" doctrine stands for the general principal that a tribe's right to exclude a non-tribal member from physically entering tribal land also establishes the tribe's right to adjudicate claims that arise once a non-tribal member is allowed onto the land. *Window Rock Unified Sch. Dist. V. Reeves*, 861 F. 3d 894, 899 (9th Cir. 2017). In the context of insurance, courts have found tribal jurisdiction where an insurance company contracted directly with a tribal member to sell a policy and thereafter engaged in conduct directed toward the reservation. *Zurich Am. Ins. Co. v. McPaul*, 2002 U.S. Dist. LEXIS 141405, *9. However, the "right to exclude" framework does not allow tribal courts to exercise jurisdiction over parties that have never set foot on reservation land, interacted with

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tribal members, or expressly directed any activity within the reservation's borders. See *Emplrs. Mut. Cas. Co. v. Branch*, 381 F. Supp. 3d 1144, 2019 U.S. Dist. LEXIS 58088 (2019).

Here, Allstate simply issued a policy of insurance to a non-tribal member whose modular home is allegedly located on the outer boundaries of tribal trust land. Allstate did not contract with any member of the Lower Elwha Tribe, nor did it have any interactions with any member of the Lower Elwha Tribe. There is no argument being made that Allstate ever set foot on reservation land. Furthermore, Allstate has not denied Defendant Cornelson's claim; rather, Allstate seeks a determination of whether it has an obligation to defend and indemnify Defendant Cornelson against the claims brought against him in Clallam County Superior Court. There has been no affirmative activity on the part of Allstate directed toward the reservation or any member of the reservation, and the "right to exclude doctrine" is inapplicable.

2. The Montana Exceptions Do Not Apply Because Allstate Did Not Consent to Tribal Jurisdiction and the Relief Sought in its Declaratory Action Does Not Threaten the Lower Elwha Tribe's Political Integrity, Economic Security or Welfare.

The first exception to the *Montana* rule is inapplicable in this matter: Plaintiff never consented to tribal jurisdiction and the forum selection clause in the Policy explicitly provides that the state or federal court in which the insured premises is located has jurisdiction. The first exception to the *Montana* rule covers "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Strate v. A-1 Contrs.*, 520 U.S. 438, 457, 117 S. Ct. 1404 (1997). Furthermore, a non-Indian who enters into a contract with the tribe or a member of the tribe that specifically provides for submission to tribal court jurisdiction should be bound by that agreement. *Ford Motor Co. v. Todocheene*, 258 F. Supp.2d 1038, 1051 (2002).

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In *Strate v. A-1 Contrs*., an injured driver filed a civil action against a company and its employee in a Native American tribal court for injuries the driver received in a traffic accident on a state highway that traversed tribal land. In determining whether the plaintiff's tribal-court action against nonmembers qualified under the consensual relationship exception, the Court began its analysis by providing a list of cases involving the type of activities the *Montana* Court had in mind as fitting within the first exception:

> "*Williams v. Lee*, 358 U.S. 217, 223, 79 S. Ct. 269 (declaring tribal jurisdiction exclusive over lawsuits arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock*, 194 U.S. 384, 24 S. Ct. 712, 48 L. Ed. 1030, (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as 'inherent' the Tribe's 'authority … to prescribe the terms upon which noncitizens may transact business within its borders'); *Confederated Tribes of the Colville Reservation v. Washington*, 447 U.S. 134, 152-154, 100 S. Ct. 2069, 2080-2082, 65 L. Ed. 2d 10 (1980) (tribal authority to tax on-reservation cigarette sales to nonmembers 'is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status')." (*Strate*, 520 U.S. at 457).

The Supreme court stated that when Plaintiff's highway accident was measured against the above-cited cases, there was no "'consensual relationship' of the qualifying kind." *Id*. The Court concluded that the tortious conduct alleged in the plaintiff's complaint was "distinctly non-tribal in nature" because it arose between two non-Indians involved in a run-of-the mill [highway] accident. *Id*. at 457.

Here, Plaintiff has not entered into any type of contractual relationship with the Lower Elwha Tribe or any of its tribal members, much less the type of relationship contemplated by the first *Montana* exception. The relief sought by Allstate in its declaratory

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action is clearly non-tribal in nature: Allstate seeks a determination that it does not owe a duty to defend and indemnify a non-tribal member against claims brought by another non-tribal member.

Furthermore, Defendant Cornelson has agreed that any lawsuit related to the Policy must be brought in state or federal court. The Policy specifically provides that "any and all lawsuits in any way related to this policy, shall be brought, heard and decided ***only in a state or federal court*** in which the **residence premises** is located." (Emphasis added & supplied). The residence premises in this matter is located in the State of Washington. Thus, the plain language of the forum selection clause provides that any lawsuit related to the policy must be brought in a state or federal court. No rational argument can be made that Plaintiff consented to tribal jurisdiction when the Allstate policy specifically provides otherwise.

The second Montana 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." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341, 128 S. Ct. 2709 (2008), citing *Montana*, 450 U.S., at 566, 101 S. Ct. 1245, 67 L. Ed. 2d 493. 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." *Id*. citing Cohen § 4.02[3][c], at 232, n 220.

The determination of whether Allstate has a duty to defend and indemnify Defendant Cornelson – a non-tribal member – has no conceivable 'direct effect on the political integrity, the economic security, or the health and welfare of the Lower Elwha Tribe. *Yellowstone County v. Pease*, 96 F. 3d 1169, 1177 (tribal member's speculative concern over a future foreclosure of his property located within the boundaries the reservation failed to establish direct effect on *the tribe as a whole*) (emphasis supplied), see also *Emplrs Mut. Cas. Co. v.*

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McPaul, 804 Fed. Appx. 756, 757 (an insurer's refusal to defend and indemnify its insured did not imperil the subsistence of the tribal community and such harm was only speculative in nature). There has been no harm in this matter. The determination of the existence of coverage in the underlying matter has no potential to cause catastrophic consequences to the tribe.

B. Exhaustion of Tribal Court Remedies Is Not Necessary.

Adherence to the tribal exhaustion rule in this matter would serve no other purpose than delay in this matter, and, therefore, is unnecessary. The Supreme Court has outlined four exceptions to the exhaustion rule: (1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) when the tribal court action is "patently violative of express jurisdictional prohibitions"; (3) when "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay." *Elliott v. White Mt. Apache Tribal Court*, 566 F.3d 842, 847 (9th Cir. 2009), citing *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (internal quotation marks omitted).

Based on the foregoing analysis, it is clear that the tribal court plainly lacks jurisdiction over Plaintiff and the tribal court exhaustion rule would only serve to delay the resolution of the issues in this matter.

IV. CONCLUSION

Based on the foregoing, Defendant Cornelson's Motion to Dismiss for Lack of Tribal Court Exhaustion must be dismissed.

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DATED this 14th day of March, 2022.

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CERTIFICATE OF SERVICE

I hereby certify I caused the foregoing to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and on the parties listed below:

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