JUDGE DAVID G. ESTUDILLO

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LEXINGTON INSURANCE COMPANY; HOMELAND INSURANCE COMPANY OF NEW YORK; HALLMARK SPECIALTY INSURANCE COMPANY; ASPEN SPECIALTY INSURANCE COMPANY; ASPEN INSURANCE UK LTD.; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON AND LONDON MARKET COMPANIES SUBSCRIBING TO POLICY NO. PJ193647; CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY NO. PJ1900131; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. PJ1933021; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NOS. PD-10364-05 AND PD-11091-00; AND ENDURANCE WORLDWIDE INSURANCE LIMITED (T/AS SOMPO INTERNATIONAL) SUBSCRIBING TO POLICY NO. PJ1900134-A,

Plaintiffs,

v.

CASE NO. 3:21-cv-05930 - DGE

DEFENDANT-INTERVENOR THE SUQUAMISH TRIBE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
June 17, 2022

ORAL ARGUMENT REQUESTED

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CINDY SMITH, in her official capacity as Chief Judge for the Suquamish Tribal Court; ERIC NIELSEN, in his official capacity as Chief Judge of the Suquamish Tribal Court of Appeals; BRUCE DIDESCH, in his official capacity as Judge of the Suquamish Tribal Court of Appeals; and STEVEN AYCOCK, in his official capacity as Judge of the Suquamish Tribal Court of Appeals,

Defendants,

and

THE SUQUAMISH TRIBE, a federally-recognized Indian Tribe,

Intervenor.

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I. INTRODUCTION

The Court should deny the Insurers' motion for summary judgment in its entirety, and grant the Tribe's motion confirming the Tribal Court's jurisdiction over the Tribal Court lawsuit.

The Insurers' opposition to the Tribe's motion continues the erroneous arguments and assumptions raised in the Insurers' prior briefs. The Insurers expend much effort to generate the impression that there is no direct relationship between them and the Tribe. But they cannot escape the undisputed fact that they knowingly contracted with the Tribe, to insure Tribal property on Tribal land—a consensual commercial relationship with the Tribe, directly implicating Tribal land, property, and sovereignty, and constituting conduct on Tribal land. Under well-established law, the Tribe may exercise jurisdiction over the parties' dispute arising from this relationship.

The critical premise to the Insurers' argument is their assumption that Tribal jurisdiction is limited to nonmembers physically present on Tribal land. But no decision of the Supreme Court, or any federal court, imposes that requirement; indeed, multiple courts have expressly rejected it. The Insurers fail to distinguish the cases supporting Tribal Court jurisdiction on facts similar to this case, and fail to cite a single case supporting their "physical presence" argument.

Finally, the Insurers resort to a misleading slippery slope argument, asserting the Tribe's position entails "jurisdiction over nonmembers whenever [they] happen to enter into a contractual relationship involving a tribal member or a member's property." (Dkt. No. 65 at 14.) Not so. The Court need not embrace such a broad rule to grant the Tribe's motion, and the Tribe has not suggested such a rule. The Insurers did not "happen to enter into" a run-of-the-mill contract with a tribal member. They knowingly and voluntarily contracted with the Tribe itself to insure Tribal property on Tribal land, under a program called "Tribal First." There is no basis to assume that affirming Tribal jurisdiction in this case would "swallow the rule" of *Montana*. If the Insurers wished to avoid Tribal Court, they easily could have done so by choosing not to insure the Tribe or bargaining for a mutually-agreeable forum. The facts here support Tribal Court jurisdiction.

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II. ARGUMENT

A. Standard of review

At the threshold, the Insurers mischaracterize the standards under which this Court reviews the Tribal Court's ruling, contending the Court should only "show 'some deference'" to the Tribal Court's findings of fact. (Dkt. No. 65 at 6.) This does not accurately reflect the governing standard. While the Ninth Circuit stated in *FMC v. Shoshone-Bannock Tribes* that a federal court should review *de novo* the federal *legal questions* relevant to the jurisdictional inquiry, *FMC* makes clear that (1) the tribal court's factual findings are subject only to a "deferential, clearly erroneous standard of review"; and (2) "federal courts must show some deference to a tribal court's determination of its own jurisdiction." 905 F.2d 1311, 1313 (9th Cir. 1990).

Significantly, the Tribal Court found that the "Insurers do not dispute they knew they were insuring the Tribe." (Dkt. No. 53-4 at 3; *id.* at 14 ("[T]he insurance contracts are between the Tribe and the Insurers. Insure[r]s knew they were contracting with the Tribe."); *see also* Dkt. No. 55-5 ¶ 30.) The Insurers have not suggested this finding was clearly erroneous, and it renders irrelevant their allegations regarding the conduct of intermediaries like Alliant.

B. The Tribal Court correctly confirmed its jurisdiction under Tribal law

For several reasons, the Court should reject the Insurers' invitation to question the Tribal Court's conclusion that it has subject matter jurisdiction under Suquamish law.

First, the Tribal Court's interpretation of tribal law should be treated as conclusive. *See, e.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) ("[T]ribal courts are best qualified to interpret and apply tribal law"); *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002); *Attorneys Process & Invest. Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 943 (8th Cir. 2010).

Second, the Insurers failed to raise this argument or challenge the Tribal Court's interpretation of Tribal law in their motion for summary judgment, resulting in waiver of the argument. (*See* Dkt. No. 62 at 23-24.)

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Third, the Insurers' argument fails because, like their other arguments, it rests on the false premise that jurisdiction requires the Insurers' physical presence on the Reservation. As the Tribal Court explained, "by contracting with the Tribe to insure its reservation property and businesses, [the] Insurers… conducted continuous and substantial business within the territorial jurisdiction of the [Tribal] Court, and contracted to perform a service (insuring the Tribe's reservation property and businesses) with respect to the Tribe and its reservation property." (Dkt. 53-4 at 5.) This is conduct on and affecting Tribal land, "within the territorial jurisdiction" of the Tribe—conduct that supports jurisdiction under Tribal law as well as federal law.

C. The Tribal Court correctly confirmed its jurisdiction under federal law

i. There is no presumption against Tribal jurisdiction in this case

The Insurers invoke an inapplicable "presumption" against tribal jurisdiction over nonmembers. (Dkt. No. 65 at 8.) In fact, controlling precedent establishes a presumption of tribal jurisdiction over nonmember conduct *on tribal land*, which applies here. *See, e.g.*, *LaPlante*, 480 U.S. at 18 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty" and "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."); *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 902 (9th Cir. 2017) (affirming tribal jurisdiction presumptively arises from the "right to exclude" nonmembers and the "*Montana* framework [is] inapplicable" where the "conduct at issue occurred on tribal land"). The Insurers contend the Supreme Court discarded this presumption in *Nevada v. Hicks*, 533 U.S. 353 (2001). (Dkt. No. 65 at 9.) But the Ninth Circuit has expressly rejected the Insurers' reading of *Hicks*.

Like the Insurers, the nonmembers in *Window Rock* contended that *Hicks* eliminated the presumption of tribal jurisdiction over nonmember conduct on tribal land, and the "right-to-exclude" doctrine that undergirds it. *See Window Rock*, 861 F.3d at 902-03. The Ninth Circuit rejected that argument, noting that while *Hicks* did "suggest[]" in dicta that the "general rule of

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Montana applies to both Indian and non Indian land," the *Hicks* Court also stated that "[o]ur holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law," and left "open the question of tribal-court jurisdiction over nonmember defendants in general." *Id.* at 902 (quoting *Hicks*, 533 U.S. at 358 n.2). Given that express limitation, the Ninth Circuit has "repeatedly rejected" the interpretation the Insurers urge, holding that *Hicks* "is best understood as the narrow decision it explicitly claims to be," and did not eliminate the right-to-exclude doctrine or associated presumption of tribal jurisdiction. *Id.*

The Insurers similarly cite dicta from *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008), suggesting there is a presumption against tribal jurisdiction over nonmembers, even on tribal land. (Dkt. No. 65 at 9.) Again, the Ninth Circuit addressed these dicta in *Window Rock*, explaining that *Plains Commerce Bank* involved a "'non-Indian's sale of non-Indian fee land,' and thus does not control [a] case… in which the conduct at issue occurred on tribal land." *Window Rock*, 861 F.3d at 901 n.8.

Thus, the Ninth Circuit has considered and rejected the Insurers' argument that *Hicks* and *Plains Commerce Bank* eliminated the right-to-exclude doctrine and presumption of tribal jurisdiction on tribal land. The *Window Rock* court discussed both *Hicks* and *Plains Commerce Bank*, but reiterated that "civil jurisdiction over activities of non-Indians on tribal land presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 861 F.3d at 900 (citing *LaPlante*, 480 U.S. at 18 and modifications omitted). Without even acknowledging *Window Rock*, the Insurers ask this Court to depart from controlling precedent. The Court should not do so.

The Insurers also cite *Philip Morris United States v. King Mountain Tobacco Co.*, 569 F.3d 932 (9th Cir. 2009), for the proposition that tribal jurisdiction is "cabined by geography." (Dkt. No. 65 at 2, 9.) But *Philip Morris* focused on tribal jurisdiction over federal and state trademark claims related to sales of cigarettes *off the reservation*. 569 F.3d at 945 n.2. And while the court in

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Philip Morris held the tribal court lacked jurisdiction over claims related to off-reservation sales, it stated that "tribal court exhaustion would be appropriate" as to claims related to on-reservation sales, as there would be "a colorable claim that Philip Morris's voluntary decision to sell its cigarettes within the Reservation supplies the requisite voluntary commercial relationship to meet *Montana*'s first exception." *Id.* Similarly, here, the Insurers issued insurance policies to the Tribe, insuring Tribal property on the Reservation. While these transactions involve the sale of intangible insurance coverage instead of physical goods like cigarettes, they are even more directly tied to the Tribe's land and on-reservation property. Contrary to the Insurers' arguments, *Philip Morris* actually supports Tribal jurisdiction in this case.

ii. The first Montana exception applies because the Insurers entered into a consensual relationship with the Tribe involving a direct connection to Tribal lands

As the Tribe has shown, the Tribal Court has jurisdiction over the Insurers because they entered into a consensual relationship with the Tribe and PME directly connected with Tribal lands and interests. (Dkt. No. 52 at 11-14.) The Insurers' argument to the contrary is premised on the unsupported notion that jurisdiction under *Montana* requires the nonmember's "physical presence" on tribal land. Yet the Insurers have not identified a single case embracing such a requirement, whereas the Tribe has cited multiple federal decisions expressly rejecting the "physical presence" argument. (Dkt. No. 62 at 9-10.) The Insurers' attempts to contort this case law are unavailing.

First, the Insurers claim the "central holding" of *Smith v. Kootenai College*, 434 F.3d 1127 (9th Cir. 2006), is that "a nonmember who knowingly enters tribal court[] for the purpose of filing suit against a tribal member has… entered into a 'consensual relationship,'" and that such a decision "has no bearing on this case, where the insurers were dragged unwilling into tribal court." (Dkt. No. 65 at 11.) What the *Smith* Court actually explained is that under the first *Montana* exception, "tribes may exercise jurisdiction over nonmembers of the tribe who enter into 'consensual relationships' with the tribe or its members" such that "[n]onmembers of a tribe who

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choose to affiliate with the Indians or their tribes in this way may anticipate tribal jurisdiction when their contracts affect the tribe or its members." *Smith*, 434 F.3d at 1138. In addition, for conduct to occur "on the land" such that the tribal court may exercise jurisdiction, the claim at issue simply must "bear[] some direct connection to tribal lands." *Id.* at 1135. *Smith* certainly is relevant in that it set forth circumstances in which a nonmember may anticipate tribal court jurisdiction, and the facts here fit the parameters discussed in *Smith*.[1]

The Insurers also attempt to minimize the importance of *Allstate Indemnity Co. v. Stump,* 191 F.3d 1071 (9th Cir. 1999), contending it "address[ed] only issues of tribal exhaustion, not the separate issue of tribal-court jurisdiction." (Dkt No. 65 at 13-14.) The Court should not be hoodwinked. Tribal exhaustion is not a "separate issue" from tribal-court jurisdiction; those issues are deeply intertwined, and *Allstate* is *the* single case that should guide this Court's analysis—a binding decision from the Ninth Circuit on facts very similar to those at bar. (Dkt. No. 52 at 12-13 (discussing *Allstate*).) The insurers question *Allstate*'s viability, citing the unpublished district court opinion in *Admiral Insurance Co. v. Blue Lake Rancheria Tribal Court*, No. 5:12-cv-001266-LHK, 2012 U.S. Dist. LEXIS 48595 (N.D. Cal. Apr. 4, 2012). But the *Admiral Insurance* court found there *was* a colorable basis for tribal court jurisdiction in the case before it, recognizing that the Ninth Circuit has issued rulings since *Hicks* and *Plains Commerce Bank* that reaffirm the governing principles supporting the *Allstate* decision. *Id.* at * 16-18. In other words, while the

[1] The Insurers assert "there is no need to consult lower-court decisions on the meaning of *Montana* because the Supreme Court itself was perfectly clear[.]" (Dkt. No. 65 at 12.) The case law suggests otherwise. *See, e.g.*, *Smith*, 434 F.3d at 1130 ("Sixteen years ago, we observed that 'there is no simple test for determining whether tribal court jurisdiction exists.'… The statement is no less true today.… [Q]uestions of jurisdiction over Indians and Indian country remain a 'complex patchwork of federal, state, and tribal law….'"). The Insurers preference to avoid consulting lower-court decisions appears limited to those that are contrary to their position—even controlling Ninth Circuit authority like *Window Rock.* Indeed, in the very next paragraph in their brief, the Insurers resort to a non-controlling decision from the Seventh Circuit to support their arguments. (Dkt. No. 65 at 12 (citing *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014)).) Even *Jackson*, though, did not impose a "physical presence" requirement. 764 F.3d at 782 ("tribal regulation of nonmember *conduct* [is limited to *conduct*] *inside the reservation*" (emphasis in the original)).

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Admiral Insurance court raised questions about *Allstate*, it unequivocally confirmed that *Allstate* is still good law. The Court should follow it here.

The Insurers stretch to generate the impression that *Allstate* and other cases cited by the Tribe are of limited relevance because, rather than conclusively confirming tribal jurisdiction, those cases found colorable bases for tribal court jurisdiction, thus requiring exhaustion of the jurisdictional issue in tribal court. (Dkt. No. 65 at 13-14.) This distinction is immaterial. As the Insurers acknowledge, exhaustion of remedies in tribal court is a prerequisite to a federal court deciding a tribal jurisdiction dispute, except where it is "plain" that the tribal court lacks jurisdiction. (Dkt. No. 65 at 5); *see, e.g.*, *Admiral Ins.*, 2012 U.S. Dist. LEXIS 48595, at * 9. Thus, when a nonmember seeks federal court review of tribal court jurisdiction before exhausting tribal remedies, the federal court appropriately will only determine whether there is a "colorable" basis for tribal jurisdiction, and will not conclusively resolve the issue—leaving the decision in the first instance to the tribal court. *Allstate*, 191 F.3d at 1076. There is no difference in the governing bases for tribal court jurisdiction, and there is no basis to infer hesitancy on the part of a federal court that limits its analysis to a "colorable" basis for tribal jurisdiction—the nature of these decisions simply results from the procedural posture in which they typically arise.

Significantly, no exhaustion is required where the tribal court does *not* "have colorable jurisdiction" over the nonmember, and federal courts sometimes find a plain lack of jurisdiction before exhaustion has occurred. *Philip Morris*, 569 F.3d at 935. This reality renders particularly conspicuous the Insurers' inability to cite a *single* federal decision questioning tribal jurisdiction on facts similar to this case. For example, while the Insurers dispute the persuasive authority of cases such as *AT&T Corp. v. Oglala Sioux Tribe Utility Commission*, Civ. 14-4150, 2015 U.S. Dist. LEXIS 129071 (D.S.D. Sept. 25, 2015), and *Sprint Communications Co., L.P. v. Wynne*, 121 F. Supp.3d 893 (D.S.D. 2015), because they "address only the threshold question of exhaustion of tribal court remedies" (Dkt. No. 65 at 14), these cases expressly rejected the Insurers' "physical

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presence" argument. If the Insurers were right that a nonmember's physical presence on tribal land is an absolute prerequisite to tribal jurisdiction under governing Supreme Court precedent, those cases would have come out the other way—they would have found no colorable basis for tribal jurisdiction and held that exhaustion was not required. Instead, they rightly recognized that there is no physical presence requirement, and found consensual nonmember conduct affecting tribal land was sufficient to establish a colorable basis for tribal jurisdiction.

Finally, the Insurers completely ignore *State Farm Insurance Co. v. Turtle Mountain Fleet Farm LLC*, No. 1:12-cv-00094, 2014 WL 1883633 (D.N.D. May 12, 2014), as it relates to the *Montana* exceptions. As the Tribe has shown, *State Farm* is factually very similar to this case. (Dkt. No. 52 at 20.) The Insurers' failure to mount any argument against the decision is telling.

The Supreme Court itself explained that a tribe may regulate "the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981). Here, the Insurers entered into a "consensual relationship" through an insurance contract with the Tribe itself, to insure on-Reservation Tribal properties, under an insurance program called "Tribal First." The Insurers knew exactly what relationship they were entering into, and if they wanted to avoid the potential for Tribal Court jurisdiction they could have chosen not to issue these specific policies, or negotiated for agreement to a non-tribal forum. This is a specific and limited situation that does not create an overbroad exception that swallows the general *Montana* rules.

iii. The Insurers misconstrue the basis for tribal jurisdiction under the Tribe's inherent sovereign authority

The Insurers continue to seek to impose an artificial roadblock to Tribal court jurisdiction—namely that a tribe's inherent sovereign authority must be implicated in order to assert tribal jurisdiction. (Dkt. No. 65 at 15-17.) But the main authority the Insurers cite, *Plains Commerce Bank*, applied to *non-Indian fee land* as opposed to a dispute concerning tribally-owned

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property on tribal trust land within a Reservation. 554 U.S. at 332. As the Insurers are forced to acknowledge, the Ninth Circuit has not embraced this prerequisite to tribal jurisdiction, and the Fifth Circuit has rejected it outright.[2] *See Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014). Despite the Insurers' attempts to distinguish *Dolgencorp*, the court's language was clear. Responding to the argument that *Plains Commerce Bank* narrowed the "consensual relationship exception" such that tribes could regulate nonmember conduct in such a relationship only if the relationship implicated "tribal governance and internal relations," the court stated: "[w]e do not interpret *Plains Commerce* to require an additional showing that one specific relationship, in itself, 'intrude[s] on the internal relations of the tribe or threaten[s] self-rule.…" 746 F.3d at 174. The court also noted that "any discussion in *Plains Commerce Bank* of tribal authority to regulate nonmember conduct under *Montana* is dicta," as *Plains Commerce Bank* concerned only the sale of non-Indian fee land, which the Supreme Court distinguished from "conduct taking place on the land." *Id.* at 175.

Although Ninth Circuit case law undisputedly does not require an impact on tribal sovereignty as a prerequisite to jurisdiction in this case, the Insurers' conduct here does implicate the Tribe's sovereign authority. The Tribe's ability to review disputes concerning the sale of insurance of Tribal property on Tribal land undoubtedly impacts the Tribe's ability to self-govern. And as stated in the First Amended Complaint in the underlying lawsuit, this dispute involves a threat to the Tribe's ability to provide government services to its members because of the Insurers' refusal to affirm the Tribe's and PME's insurance claims. (Dkt No. 53-5 ¶¶ 1, 3, 5-7; *see also* Dkt. No. 53-3 ¶ 3.) Denial of the Tribe's claims under the Policies will jeopardize the Tribe's ability to maintain the services it provides to its members, a vital function of the Tribal government.

[2] The Insurers take issue with the Tribe's citation to the Supreme Court's denial of a petition for a writ of certiorari from the Ninth Circuit's *FMC* decision, in which the Supreme Court passed on an opportunity to address whether a tribe's inherent sovereign authority must be implicated in order to establish tribal jurisdiction over a nonmember. (*See* Dkt. No. 65 at 16 n.3.) Though a denial of certiorari is not a ruling on the merits, it signals that the "issue remains unresolved by the Supreme Court." *House v. Hatch*, 527 F.3d 1010, 1022 (10th Cir. 2008).

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The Insurers cite cases from other circuits addressing the effect of nonmember conduct on tribal sovereignty, but these cases are both non-controlling and readily distinguishable. *Kodiak Oil & Gas (USA) Inc. v. Burr* involved oil wells held in trust by the federal government under a form lease issued by the Bureau of Indian Affairs, where the entire relationship between the parties was "mediated by the federal government." 932 F.3d 1125, 1138 (8th Cir. 2019). The "complete federal control" of the disputed assets on allotted lands was dispositive for the purposes of the court's holding—there was no connection to tribal governance. *Id.* Similarly, *Jackson v. Payday Financial, LLC*, involved alleged violations of Illinois civil and criminal statutes related to online lending, claims that bear no resemblance to the dispute at issue here. 764 F.3d at 768-70. Finally, *NLRB v. Little River Band of Ottawa Indians Tribal Government* concerned application of the National Labor Relations Act to non-member employees of a tribal casino after the tribe had enacted an ordinance regulating labor-organizing activities—again, readily distinguishable from a breach of contract claim between a tribe and an insurer. 788 F.3d 537, 539-42 (6th Cir. 2015).

The Insurers attempt to compare state regulation of insurance to the federal regulatory scheme in *Kodiak*, but state regulation of insurance is irrelevant here, as is the lack of specific Tribal ordinances governing insurance. As the Tribe has explained, although the Suquamish Tribal Code does not contain a title concerning regulation of insurance, the Tribe would be able to regulate insurance contracts through general contract law per its Tribal Code, and the case law is clear that where a tribe has civil jurisdiction—as the Tribe does here—it may exercise that jurisdiction through adjudicatory authority rather than legislation. (Dkt. No. 62 at 21-22 & n.8.)

Lastly, the Court should reject the notion that the Insurers could not have "reasonably anticipated that [their] interactions with the Tribe might trigger tribal authority." (Dkt. No. 65 at 17.) The Insurers entered into consensual relationships with the Tribe and PME for the sole purpose of insuring tribal property and businesses on the Reservation, and did so for years. (Dkt. No. 53-4 at 2-3.) The Insurers even conceded they knew they were contracting with the Tribe. (*Id.* at 3; Dkt.

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No. 48 ¶¶ 37, 45.) It is specious to now claim that somehow an "absence of the Tribe's regulation of insurance" meant the Insurers could not anticipate triggering Tribal authority when they specifically entered into relationships that they knew involved contracting with the Tribe.

iv. The Tribal Court's jurisdiction is supported by the inherent right to exclude

As explained in the Tribe's earlier briefs, the Tribe's inherent right to exclude nonmembers provides a basis for Tribal Court jurisdiction independent of the *Montana* framework. (Dkt. No. 52 at 20-21.) The Insurers continue to rely on *Employers Mutual Casualty Co. v. McPaul*, 804 F. App'x 756, 757 (9th Cir. 2020), contending it means the right to exclude "does not extend to nonmembers who have not entered or acted on tribal land." (Dkt. No. 65 at 18.) In reality, *McPaul* does not discuss entry on the land, and it does not support the Insurers' argument. *McPaul* found tribal jurisdiction lacking over a dispute over insurance contracts between a nonmember insurer and nonmember insureds. In reaching its decision, the Ninth Circuit emphasized that "[t]he insurance contracts, which do not mention liability arising from activities on the reservation, bear 'no direct connection to tribal lands.'" *McPaul*, 804 Fed App'x at 757 (quoting *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 902 (9th Cir. 2019)). This strongly implies that the test is not "physical entry" but rather "direct connection" to tribal lands, and that if the insurance contracts had involved liability arising from activities on a reservation, the outcome would have been different. That is exactly the case here. The Tribe's inherent right to exclude supports jurisdiction in this case. (*See also* Dkt. No. 52 at 20-21.)

v. The Insurers waived any argument regarding personal jurisdiction, which plainly exists in any event

Finally, the Insurers now contend that the Tribal Court lacks personal jurisdiction over them. (*See* Dkt. No. 65 at 20-21.) But the Insurers' Complaint and motion for summary judgment did not raise this argument, which they accordingly waived. (*See* Dkt. Nos. 1, 54); *see, e.g., Robertson v. Kitsap Cnty.*, No. 3:15-cv-05422-RBL-DWC, 2015 U.S. Dist. LEXIS 164570, at

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* 20 (W.D. Wash. Oct. 27, 2015) (arguments not raised in opening brief are waived).

In any event, the Insurers' arguments are wrong on the merits. The Insurers aver that the insurance policies do "not contain any provision through which [the Insurers] consent to the jurisdiction of the Tribe or its Tribal Court." (Dkt. No. 65 at 3.) Yet as explained in the Tribe's opening brief, the policies contain "service-of-suit" clauses in which the Insurers consented to the jurisdiction of *any* "Court of competent jurisdiction within the United States." (Dkt. No. 52 at 22.) The Insurers argue the Tribal Court is not a "court of competent jurisdiction" because it lacks subject-matter jurisdiction. (Dkt. No. 65 at 20.) But for all the reasons set forth in the Tribe's briefs, the Tribal Court does have subject-matter jurisdiction, and it follows that the Tribal Court has personal jurisdiction pursuant to the service-of-suit clause.

The Insurers also argue that they "did not purposefully direct their activities toward the Tribe or tribal land, enter tribal land, conduct any business on tribal land, or invoke the protections of Suquamish tribal law." (Dkt. No. 65 at 21.) In actuality, Insurers knew they were insuring the Tribe. (Dkt. No. 53-4 at 3.) Lexington worked with "Tribal First," a division of Alliant, to sell the policies at issue. (Dkt. No. 56 ¶¶ 4, 6, 7.) Tribal First is specifically directed to Native American tribes and designed to insure tribal property. (*See* Dkt. No. 53-1 ¶¶ 3, 5; Dkt. No. 53-2 (pdf p. 6-7).) The Insurers admit that Lexington issued the policies here (Dkt. No. 56 ¶¶ 8-9), and the Insurers do not dispute that they knew they were contracting with the Tribe in issuing insurance for Tribal properties on Tribal land (*see supra* at 3). There is no question that Tribal Court jurisdiction over the Insurers comports with due process and the requirements for personal jurisdiction under federal law. (Dkt. No. 52 at 22-23.)

III. CONCLUSION

For the foregoing reasons, the Court should confirm that the Tribal Court has jurisdiction.

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