No. 22-35784

Decided on February 29, 2024
Hawkins, Graber, and McKeown, JJ.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEXINGTON INSURANCE COMPANY et al.,

Plaintiffs-Appellants,

v.

CINDY SMITH et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 3:21-CV-05930 | The Honorable David G. Estudillo

APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION AND RULE 35 STATEMENT

Tribes have very limited authority to extend their jurisdiction beyond their own members. So limited, in fact, that the Supreme Court has "never held that a tribal court had jurisdiction over a nonmember defendant." *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001). The panel's decision reflects none of the Supreme Court's traditional caution in this area. Invoking a conception of tribal authority the Supreme Court and other circuits have rejected, the panel went its own way in extending tribal jurisdiction to nonmembers' off-reservation conduct that in some way *relates* to tribal land. The panel then applied that rule to allow the Suquamish Tribe, which purchased property insurance for tribal businesses from insurers that never set foot on the reservation, to force its insurers into tribal court to litigate COVID-19-related coverage claims that have been rejected by virtually every federal and state court.

This troubling expansion of tribal-court jurisdiction works a fundamental change to the "'unique and limited character'" of tribal sovereignty. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008). Before this decision, tribes had to prove

"nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests" as a threshold requirement for tribal-court jurisdiction. *Id.* at 332 (emphasis in original). But if the panel's decision stands, tribes in this Circuit will be able to force nonmember defendants into tribal court whenever their conduct outside the reservation in some sense "relates to tribal lands." Opn. at 14.

The panel's decision creates a needless circuit split on the scope of tribal-court jurisdiction. If this case were in the Seventh, Eighth, or Tenth Circuit, the insurers would have prevailed because those courts hold that tribal-court jurisdiction cannot exist absent relevant nonmember conduct physically on tribal land. That new and irreconcilable conflict on a dispositive issue is reason enough for rehearing.

The panel also joined the minority side of another circuit split in refusing to follow the Supreme Court's holding in *Plains Commerce Bank* that tribal-court jurisdiction over consensual relationships between tribes and nonmembers must flow from a "tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." 554 U.S. at 337. By its

nature, the insurers' off-reservation conduct implicates no sovereign concern.

The panel's decision opens a vast frontier of tribal-court jurisdiction beyond its traditional and strictly territorial reach. Tribes and their members often purchase goods and services from off-reservation businesses for on-reservation purposes. If the decision stands, tribes will now be able to hale into tribal court anyone they do business with outside the reservation's borders. And nonmembers, for the first time, will be forced to litigate claims in tribal court about off-reservation commerce with tribes and tribal members.

The panel's unprecedented expansion of tribal-court jurisdiction warrants rehearing.

BACKGROUND

The Suquamish Tribe occupies a 12-square-mile reservation northwest of Seattle. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 192-93 (1978). The Tribe's corporate arm, Port Madison Enterprises, operates several businesses, including a casino. Opn. at 6.

The Tribe and Port Madison bought property insurance through a Washington broker and a California-based tribal insurance program.

2-ER-307; 6-ER-1318-19; 6-ER-1333. That insurance program placed the Tribe and Port Madison with a Massachusetts-based insurer, Lexington Insurance Company, and several other off-reservation insurers. 2-ER-307. No one disputes that Lexington and the other insurers never set foot on tribal land. 1-ER-16.

Like many governments, the Suquamish Tribal Council issued closure orders in March 2020 in response to the COVID-19 pandemic. Opn. at 8. Like many policyholders, the Tribe and Port Madison filed a claim with their insurers in an effort to recoup the income they lost when their businesses, including the casino, were closed. *Id.* at 8-9. Like other insurers, Lexington denied such claims, explaining that the policies do not cover pandemic-related losses. *Id.* at 9. And like many policyholders, the Tribe and Port Madison sued Lexington and their other insurers. *Id.* Unlike most policyholders, though, the Tribe and Port Madison sued in their own tribal court. *Id.*

The insurers moved to dismiss the tribal-court proceedings, arguing that the tribal court lacked jurisdiction over them under *Montana v. United States*, 450 U.S. 544 (1981). Opn. at 9. After the tribal courts disagreed, the insurers sought a declaration in federal

district court that the tribal-court judges lack jurisdiction over them. *Id.*

The Tribe and the insurers each moved for summary judgment on the question of tribal-court jurisdiction. The insurers stressed the general rule that tribal courts lack jurisdiction over defendants who are not tribal members and contended that no exception to that general rule applied, in part because the insurers had never set foot on tribal land. 2-ER-153-58. The Tribe, by contrast, argued that some connection between the nonmember and the land, even if not physical, was enough to trigger tribal jurisdiction. 2-ER-190-94. The district court sided with the Tribe, despite acknowledging "the Insurers and [their] employees never physically stepped onto tribal land." 1-ER-16. In the district court's view, tribal-court jurisdiction existed because the insurance policies related to businesses on tribal land. 1-ER-15-16.

A panel of this Court affirmed. Although the panel acknowledged the principle that "tribal jurisdiction is 'cabined by geography,'" Opn. at 11, it nonetheless decided that Lexington's off-reservation agreement to insure "tribally owned buildings and businesses located on tribal trust land" satisfies this geographical test, *id.* at 13-14. The panel was

unfazed that "all relevant conduct occurred off the Reservation" and that "neither Lexington nor its employees were ever physically present there." *Id.* at 15. In the panel's view, a metaphysical conception of on-reservation conduct is necessary to account for "our contemporary world in which nonmembers, through the phone or internet, regularly conduct business on a reservation and significantly affect a tribe and its members without ever physically stepping foot on tribal land." *Id.* at 16-17.

Having concluded that the insurers engaged in conduct on tribal land despite engaging in all conduct relevant to the claims outside the reservation, the panel turned to the question whether this case fits into one of the two "*Montana* exceptions" to the general rule against tribal jurisdiction over nonmembers. Opn. at 19. The panel concluded that this case "satisfies *Montana*'s consensual-relationship exception" because Lexington and the Tribe had a "mutual and consensual" relationship "that bore a direct connection to and could affect the Tribe's properties on trust land." *Id.* at 20-22.

The panel next addressed the Supreme Court's admonition in *Plains Commerce Bank* that tribal jurisdiction over nonmembers must

"'stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.'" Opn. at 25. Per the panel, this language was not "a supplemental requirement to the *Montana* analysis," and if a nonmember's conduct already "satisfies the consensual-relationship exception, it implicates the Tribe's authority over self-government and internal relations." *Id.* at 25-26. The panel conceded, however, that *Plains Commerce Bank* has divided other circuits. *Id.* at 26 n.4.

Finally, the panel suggested its conception of tribal-court jurisdiction was "narrow" because its "analysis does not deal with the mine run of contracts," and because the insurance policies cover tribal properties and businesses that are economically significant to the Tribe. Opn. at 26-27. The panel also said that nonmembers can avoid tribal jurisdiction by "insert[ing] forum-selection clauses into their agreements with tribes and tribal members." *Id.* at 27.

REASONS FOR GRANTING THE PETITION

I. The Panel Decision Conflicts with Decisions of the Supreme Court and Other Courts of Appeals.

The panel misapplied Supreme Court precedent and created a rift with other circuits in holding that the Suquamish Tribe can regulate its

off-reservation insurers. Rehearing should be granted because the panel has upended the longstanding principle that tribal sovereignty stops at the reservation's borders by equating the insurers' off-reservation conduct with conduct on tribal land. Rehearing is further warranted because the panel refused to apply the requirement from *Plains Commerce Bank* that tribal-court jurisdiction must be grounded in an inherent sovereign interest, not merely a consensual business relationship.

A. The Panel Circumvented the Traditional Requirement of On-Reservation Conduct.

Tribes have only two sources of inherent authority: "their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). This case involves an attempt by the Suquamish Tribe to regulate nonmembers—off-reservation insurers—from whom the Tribe purchased property insurance to cover the Tribe's activities on tribal land. Because the Tribe's inherent power to regulate its members is irrelevant here, the Tribe can rely only on its narrow authority over certain "nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests." *Plains Commerce Bank*, 554 U.S. at 332 (emphasis in original). That power, which is strictly territorial by

nature, "reaches no further than tribal land." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 (2001).

The panel acknowledged that "tribal jurisdiction is 'cabined by geography': a tribe's jurisdiction cannot extend past the boundaries of the reservation." Opn. at 11 (quoting *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009)). But in its next breath, the panel bypassed these geographic limits and held that a nonmember's off-reservation conduct can be deemed to be on-reservation conduct when it "relates to tribal lands." *Id.* at 14. The panel reasoned that, even though "all relevant conduct occurred off the Reservation," the Suquamish Tribal Court can exercise jurisdiction over the insurers because they issued insurance policies to cover risks associated with tribal conduct on tribal land. *Id.* at 15. This reasoning (1) conflicts with Supreme Court precedent, (2) lacks support in this Court's decisions, (3) forges a circuit conflict, (4) breaks with historical precedent, and (5) shrinks the proper domain of state law.

1. In recognizing tribal authority to regulate certain "'consensual relationships with the tribe or its members,'" the Supreme Court has referred only to conduct by nonmembers within the physical boundaries

of a reservation. *Plains Commerce Bank*, 554 U.S. at 329; *see id.* at 332-34 (describing decisions before and since *Montana*). The panel sought to justify its conclusion that tribal jurisdiction can reach off-reservation conduct under *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In particular, the panel emphasized the statement in *Merrion* that "a tribe has regulatory jurisdiction over a nonmember who 'enters tribal lands *or conducts business with the tribe*.'" Opn. at 15 (emphasis in original) (quoting 455 U.S. at 142). The panel asserted that it would take *Merrion* "at its word" and refuse to require "physical entry or presence" on the reservation. *Id.* at 15-16.

The Supreme Court has already rejected that overly broad reading of *Merrion*. In *Atkinson*, the Court explained that *Merrion* "involved a tax that only applied to *activity occurring on the reservation*." 532 U.S. at 653 (emphasis added). The tribe sought to tax "natural resources removed by nonmembers from tribal land"—conduct that physically occurred on the reservation. *Plains Commerce Bank*, 554 U.S. at 333. *Atkinson* therefore held that any "parts of the *Merrion* opinion that suggest a broader scope for tribal [sovereign] authority" are "easily reconcilable" with the *Montana* "line of authority" establishing the

principle that tribal sovereignty "reaches no further than tribal land." 532 U.S. at 653. Besides *Atkinson*, the Supreme Court has never again quoted the "or conducts business with the tribe" sentence fragment at the heart of the panel's decision, much less repurposed that line as a separate fountainhead of tribal-court jurisdiction over off-reservation conduct.

2. The panel's decision also lacks any grounding in Circuit precedent. The panel acknowledged that all of this Court's "previous cases upholding tribal jurisdiction over nonmembers involved some form of physical presence" on the reservation. Opn. at 17. Nevertheless, the panel decided that off-reservation conduct can be deemed to have "occurred on tribal land" because this Court previously has asked whether the claims "'bear[] some direct connection to tribal lands.'" *Id.* (emphasis omitted) (quoting *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1132 (9th Cir. 2006) (en banc)).

The panel took this reference to a "direct connection" out of context. The conduct at issue in *Smith* physically "occurr[ed] on the reservation, on lands and in the shop controlled by a tribal entity." 434 F.3d at 1135. And until the panel's decision, every decision of this

Court to quote the same line from *Smith* likewise described conduct that physically occurred on tribal land. *E.g.*, *Wilson v. Horton's Towing*, 906 F.3d 773, 780 (9th Cir. 2018). The panel's distortion of *Smith* thus confirms that this decision breaks new ground for assertions of tribal authority over off-reservation conduct.

3. Rehearing is further warranted because the panel's extension of tribal-court jurisdiction creates a needless circuit split. While the panel held that tribal jurisdiction could exist when a nonmember's off-reservation conduct relates to the tribe's activities on tribal land, the Seventh Circuit holds that tribal conduct on the reservation is irrelevant because *Montana* focuses on "the *nonmember's* actions, specifically the *nonmember's actions on the tribal land.*" *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 782 n.42 (7th Cir. 2014) (emphasis in original). The Eighth Circuit also requires a tribe to "show that the conduct it seeks occurred within the [reservation], for '*Montana* and its progeny permit tribal regulation of nonmember *conduct inside* the reservation.'" *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe*, 609 F.3d 927, 940 (8th Cir. 2010) (emphasis in original). And the Tenth Circuit agrees that tribal

jurisdiction can reach only nonmembers who engage in conduct "within the physical confines of the reservation." *MacArthur v. San Juan County*, 497 F.3d 1057, 1071-72 (10th Cir. 2007).

The panel decision's starkest conflict is with *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015). The tribe there operated a casino on tribal land and issued gaming revenue bonds to fund the construction of another casino, this one on a riverboat. *Id.* at 189. Although the riverboat was outside the reservation's borders, the tribal bonds were "'secured by the revenues and related assets of the Casino'" located on tribal land. *Id.* Wells Fargo, which managed the bond obligations, also had "oversight of Casino revenues." *Id.* When the tribe's investment in the riverboat did not pan out, the tribe repudiated the bonds and sued in tribal court to prevent the nonmembers from gaining access to "the tribal Casino's revenue." *Id.* at 191-92, 198. The Seventh Circuit held that the tribe lacked authority to regulate the nonmembers' off-reservation commercial activity, even though the bonds were secured by tribal property, because "actions of nonmembers outside of the reservation do not implicate the Tribe's sovereignty." *Id.* at 207.

The panel attempted to distinguish *Stifel* as a case rejecting "tribal jurisdiction over nonmembers who issued bonds for a tribe's off-reservation investment project." Opn. at 18. But that description omits the critical fact—the nonmembers in *Stifel* had a right to control revenues of the tribal casino on tribal land upon the tribe's default. 807 F.3d at 189. If the authority to seize the tribal casino's revenues was not a "direct connection" to tribal land sufficient for tribal jurisdiction in *Stifel*, the much less intrusive commercial relationship here—property insurance policies that create no right for the off-reservation insurers to dictate tribal activities on tribal land—surely would fall short in the Seventh Circuit as well.

4. In a case involving this same Tribe, the Supreme Court held that the absence of historical practice "casts substantial doubt" on new assertions of tribal jurisdiction. *Oliphant*, 435 U.S. at 206. The panel did not identify anything in the more than two centuries since the Founding that supports the exercise of tribal jurisdiction over off-reservation commercial transactions with a mere nexus to the tribe's own activities on tribal land. Nevertheless, the panel decided to change the requirement of on-reservation conduct on the theory that "tribes'

ability to regulate such consensual relationships makes sense in our contemporary world in which nonmembers, through the phone or internet, regularly conduct business on a reservation and significantly affect a tribe or its members without ever physically setting foot on tribal land." Opn. at 16-17.

The panel's impulse to expand tribal-court jurisdiction to meet "our contemporary world" is deeply ahistorical. Opn. at 16. Under the Indian Commerce Clause, the First Congress authorized the federal government to regulate both on- and off-reservation commercial activity between tribal members and nonmembers. Indian Trade and Intercourse Act, ch. 33, 1 Stat. 138 (1790). Tribes at the time "were characterized by a 'want of fixed laws [and] of competent tribunals of justice.'" *Oliphant*, 435 U.S. at 210. Formal tribal courts were a product of the Indian Reorganization Act of 1934, which long postdates telephones. *United States v. Wheeler*, 435 U.S. 313, 327 (1978). And the Supreme Court stressed the need for true "nonmember *conduct* inside the reservation" in 2008—well into the internet age. *Plains Commerce Bank*, 554 U.S. at 332 (emphasis in original). Any technological changes thus provide more reason to enforce the

traditional restrictions informing tribal sovereignty's "'unique and limited character.'" *Id.* at 327; *see, e.g.*, *Stifel*, 807 F.3d at 207 (enforcing requirement of on-reservation conduct to commercial transaction involving tribal property in 2014).

5. In expanding tribal-court jurisdiction well beyond its traditional boundaries, the panel scuttled the standard division of labor between state and tribal law. The Supreme Court has held that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). Many courts (including this Court) therefore recognize that "when a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transactions with non-Indians, its claim of sovereignty is at its weakest" and the tribe's "privately negotiated contractual affairs with non-Indians" are "subject to generally applicable laws." *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1312-13 (D.C. Cir. 2007); *see Gila River Indian*

Community v. Henningson, Durham & Richardson, 626 F.2d 708, 715 (9th Cir. 1980).

The principle that state law governs off-reservation transactions explains why the insurers registered the policies here "under the insurance code of the state of Washington," *e.g.*, 3-ER-342, and reserved their right "to remove an action" from state court to federal court, 3-ER-399. Federal and state courts have been the forum for hundreds of COVID-19 insurance cases where insurers have prevailed. *Consolidated Restaurant Operations, Inc. v. Westport Ins. Corp.*, —N.E.3d —, 2024 WL 628047, at *4-6 (N.Y. Feb. 15, 2024) (collecting cases). The panel was wrong to conclude that this dispute could instead proceed in "an unfamiliar court"—unfamiliar to the insurers, and unfamiliar to insurance law more generally. *Strate v. A–1 Contractors*, 520 U.S. 438, 459 (1997).

B. The Panel Cut the Requirement of On-Reservation Conduct Loose from Inherent Tribal Sovereignty.

Although the panel's expansion of tribal-court jurisdiction to off-reservation conduct alone justifies rehearing, the panel's implausibly narrow reading of *Plains Commerce Bank* underscores its overall

mistake in deeming the insurers' off-reservation conduct as having effectively occurred on the reservation.

In *Plains Commerce Bank*, the Supreme Court held that tribal jurisdiction requires nonmember consent to the application of tribal law *and* a tribal regulation that "stem[s] 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. The Court applied this requirement in deciding that, "whatever 'consensual relationship' may have been established" between the tribal members and the nonmember bank, the tribe lacked authority to adjudicate tribal members' claims that the bank should have sold on-reservation land to them rather than to nonmembers. *Id.* at 338.

Although *Plains Commerce Bank* establishes that a consensual relationship alone cannot establish tribal-court jurisdiction, the panel held just the opposite: that there is no "additional limitation" on tribal-court jurisdiction and that any conduct that "satisfies one of the *Montana* exceptions" necessarily establishes one of the inherent sovereign interests listed in *Plains Commerce Bank*. Opn. at 25-26. The panel "align[ed]" itself, *id.* at 26 n.4, with the Fifth Circuit's

decision in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), which improperly disregarded the requirement that tribal regulation serve an inherent sovereign interest as "dicta," *id.* at 175. That opinion remains on shaky ground after the Supreme Court granted certiorari but was unable to issue an opinion following Justice Scalia's passing. *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 579 U.S. 545, 546 (2016) (per curiam).

The panel conceded that its "understanding departs from that of the Seventh Circuit," Opn. at 26 n.4, which held that "a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court" unless the nonmember's conduct implicates "'the tribe's inherent sovereign authority,'" *Jackson*, 764 F.3d at 783. The panel did not mention that the Sixth and Eighth Circuits interpret *Plains Commerce Bank* the same way as the Seventh Circuit. *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019); *NLRB v. Little River Band of Ottowa Indians Tribal Gov't*, 788 F.3d 537, 546 (6th Cir. 2015); *see* OB-53.

The majority (and correct) reading of *Plains Commerce Bank* also forecloses the panel's metaphysical conception of on-reservation

conduct. *Supra*, at 7-17. There, the Supreme Court held that a commercial land transaction (the sale of non-Indian land within the reservation) was not "nonmember *activity* on the land" for purposes of *Montana*. 554 U.S. at 336 (emphasis in original). The Court reasoned that this sale of land did not implicate "conditions of entry" to tribal land, cause any "direct harm to [the tribe's] political integrity," or involve "noxious uses" of land "that threaten tribal welfare or security." *Id.* at 335-36. Just as "conduct taking place on the land and the sale of the land are two very different things," *id.* at 340, off-reservation processing of insurance-coverage claims related to tribal land is very different from conduct taking place on the land. The Tribe doubtless prefers for budgetary reasons that the insurers cover business losses at its casino. AB-51. But the insurers' actions outside the reservation's borders did not bypass conditions on entry, cause any direct harm to the Tribe's political integrity, or endanger tribal members.

II. The Decision Extends Tribal Sovereignty Beyond the Reservation's Borders for a Vast Array of Off-Reservation Transactions.

The panel professed that its decision would be "narrow." Opn. at 26. But the panel's elimination of the traditional territorial limits on

tribal sovereignty will have sweeping consequences for off-reservation businesses that interact with tribes and tribal members. If tribes are permitted to wield authority over off-reservation conduct that merely "relates to tribal lands," *id.* at 14, anyone could become subject to tribal regulation by doing business with tribes or tribal members purchasing services or goods for their own tribal activities on tribal land. That result would strike a blow to the principle that tribes generally lack authority over nonmembers who "have no part in tribal government" and "no say in the laws and regulations that govern tribal territory." *Plains Commerce Bank*, 554 U.S. at 337.

The panel's expansive conception of on-reservation conduct lacks any limiting principle that would shield off-reservation businesses from overly broad assertions of tribal sovereignty. Any bank that offers mortgages or other secured loans to tribal members, for example, would presumably be deemed to be "on tribal land" because it retains an interest in tribal property in the event of default. *But see Stifel*, 807 F.3d at 207. Similarly, financial institutions that administer ERISA benefit plans for tribal businesses could effectively be transported onto the reservation, even if they never set foot there. 29 U.S.C. § 1002(32)

(ERISA covers plans for tribes' "commercial activities"). So too for accountants who help balance a casino's books and lawyers who assist tribes with compliance under the Indian Gaming Regulatory Act. What matters now is not the traditional inquiry whether the nonmember does business physically on a reservation, but instead whether commercial services relate to the tribe's activities on tribal land.

The panel suggested that off-reservation businesses could limit these risks by "insert[ing] forum-selection clauses into their agreements with tribes and tribal members." Opn. at 27. The panel cited Justice Ginsburg's opinion in *Plains Commerce Bank*—which, although described by the panel as a concurrence in part, was actually *dissenting* in the relevant passage. 554 U.S. at 346 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). The *majority* in *Plains Commerce Bank* disregarded this argument because *Montana* already cabins the "jurisdictional consequences" of any "'consensual relationship'" with a tribe. *Id.* at 338.

In any event, forum-selection clauses do not deprive courts of jurisdiction and thus would not even fix the problem here. *Atlantic Marine Constr. Co. v. U.S. Dist. Court for the Western Dist. of Tex.*, 571

U.S. 49, 60-61 (2013). Tribal courts presumably would get to decide whether to enforce any such forum-selection clause under largely "unwritten" tribal law informed by tribal "'customs, traditions, and practices.'" *Hicks*, 533 U.S. at 384 (Souter, J., concurring). A forum-selection clause is no silver bullet to avoid tribal-court jurisdiction that should not exist in the first place.

CONCLUSION

The Court should grant panel rehearing or rehearing en banc.

Dated: March 14, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with the word limit of Circuit Rules 35-4 and 40-1(a) because it contains 4,195 words, excluding the portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This petition complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point New Century Schoolbook font.

Dated: March 14, 2024

Respectfully submitted,

/s/ *Richard J. Doren*
Richard J. Doren

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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 AND LONDON MARKET COMPANIES SUBSCRIBING TO POLICY NO. PJ1933021; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NOS. PD-10364-05 AND PD-11091-00; ENDURANCE WORLDWIDE INSURANCE LIMITED T/AS SOMPO INTERNATIONAL SUBSCRIBING TO POLICY NO. PJ1900134-A, *Plaintiffs-Appellants*,	No. 22-35784 D.C. No. 3:21-cv-05930-DGE OPINION

v.

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; STEVEN D. AYCOCK, in his official capacity as Judge of the Suquamish Tribal Court of Appeals,
Defendants-Appellees,

and

SUQUAMISH TRIBE,
Intervenor-Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Washington
David G. Estudillo, District Judge, Presiding

Argued and Submitted August 24, 2023
Seattle, Washington

Filed February 29, 2024
Before: Michael Daly Hawkins, Susan P. Graber, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown

SUMMARY*

Tribal Jurisdiction

The panel affirmed the district court's summary judgment in favor of Suquamish Tribe in an action, brought by several insurance companies and underwriters, seeking a declaratory judgment that the Suquamish Tribal Court lacked subject-matter jurisdiction over the Tribe's suit for breach of contract concerning its insurance claims for lost business and tax revenue and other expenses arising from the suspension of business operations during the onset of the COVID-19 pandemic.

The panel held that the Tribal Court had subject-matter jurisdiction over the Tribe's claim against nonmember off-reservation insurance companies that participated in an insurance program tailored to and offered exclusively to tribes. The panel concluded that the insurance companies' conduct occurred not only on the Suquamish reservation, but also on tribal lands. The panel further concluded that, under the Tribe's sovereign authority over "consensual relationships," as recognized under the first *Montana* exception to the general rule restricting tribes' inherent sovereign authority over nonmembers on reservation lands, the Tribal Court had jurisdiction over the Tribe's suit.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

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OPINION

McKEOWN, Circuit Judge:

Justice Thurgood Marshall once wrote, "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973). Yet, a complex history has made federal courts the arbiters of tribal court jurisdiction. This history has also led to the Supreme Court's general rule that restricts tribes' inherent sovereign authority over nonmembers on

reservation lands. *See Montana v. United States*, 450 U.S. 544, 565 (1981). Nonetheless, in *Montana,* a "pathmarking case concerning tribal civil authority over nonmembers," *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997), the Court crafted two important exceptions that bring conduct within tribal jurisdiction: "the activities of nonmembers who enter consensual relationships with the tribe or its members" and the conduct of nonmembers that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," 450 U.S. at 565–66.

This appeal involves an insurance claim covering tribal properties on tribal land brought by a tribe and its businesses. We consider whether the tribal court has jurisdiction over this claim against nonmember, off-reservation insurance companies that participate in an insurance program tailored to and offered exclusively to tribes.

Here, several insurance companies and underwriters (collectively, "Lexington") challenge the Suquamish Tribal Court's ("Tribal Court") jurisdiction over an insurance contract suit brought by the Suquamish Tribe ("Tribe") and its businesses. Since 2015, Lexington has insured the Tribe's properties on tribal lands within the boundaries of the Port Madison Reservation. After suspending business operations during the onset of the COVID-19 pandemic, the Tribe submitted insurance claims for lost business and tax revenue and other expenses. Lexington responded with reservation-of-rights letters. The Tribe then sued Lexington in Tribal Court for breach of contract, and Lexington moved to dismiss for lack of jurisdiction. The Tribal Court found that it had jurisdiction, and the Suquamish Tribal Court of Appeals affirmed.

Lexington commenced this action in federal court, seeking a declaratory judgment that the Tribal Court is without jurisdiction. On cross-motions for summary judgment, the district court held that the Tribal Court had subject-matter jurisdiction over this dispute. The court granted the Tribe's motion for summary judgment, denied Lexington's motion, and dismissed the case with prejudice to allow proceedings to continue in Tribal Court.

We affirm. The Tribal Court has subject-matter jurisdiction over this matter under the Tribe's sovereign authority over "consensual relationships," as recognized under *Montana*'s first exception. 450 U.S. at 565. Because our decision rests on *Montana*'s first exception, we need not examine the second *Montana* exception or the right to exclude, as discussed in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011) (per curiam).

BACKGROUND

The Suquamish Tribe is a federally recognized tribe located in the Puget Sound in Washington State. Pursuant to the Treaty of Point Elliott, the Tribe has sovereign authority over the Port Madison Reservation ("Reservation"). 12 Stat. 927 (1855). The Tribe operates a host of businesses on the Reservation, both directly and through Port Madison Enterprises ("Port Madison"), a tribally chartered economic development entity that is wholly owned by the Tribe and headquartered on tribal trust lands. The businesses, which include a museum, a seafood company, a casino, a hotel, and several gas stations, are all located on tribal trust lands within the boundaries of the Reservation.

Beginning in 2015, the Tribe and Port Madison purchased insurance policies from Lexington Insurance

Company and several other off-reservation insurance companies via an insurance broker. The policies were offered under the Tribal Property Insurance Program ("Tribal Program"), which is administered by Alliant Specialty Services, Inc., under the moniker Tribal First.[1] Tribal First provides insurance and risk management services exclusively to tribal governments and enterprises. Tribal First describes itself as "the largest provider of insurance solutions to Native America and a leader in the specialty areas of tribal business enterprises, including gaming, alternative energy, construction, and housing authorities." Because of this focus on "Native America," Tribal First "structure[s] insurance programs tailored to safeguard both [tribal] operations and [tribal] employees."

Specifically, Tribal First contracts with insurance providers and underwriting services that are willing to provide coverage to tribal entities, and then supplies insureds with the property insurance policies issued by the contracted providers. Tribal First handles the "underwriting, claims/risk management, and administrative services" for the tribal insureds. Lexington is one of these contracted providers. Lexington participated in the Tribal Program to provide insurance to tribal entities, like the Tribe and Port Madison, that signed up with Tribal First. Lexington entered

[1] In full, appellants are Lexington Insurance Company ("Lexington"); Homeland Insurance Company of New York; Hallmark Specialty Insurance Company; Aspen Specialty Insurance Company; Aspen Insurance UK Limited; Syndicate 1414; Syndicate 510; XL Catlin Insurance Company UK Limited; Syndicate 4444; Syndicate 2987; Endurance Worldwide Insurance Limited (last six collectively referred to as "Certain Underwriters as Lloyd's, London and London Market Companies Subscribing to Policy Nos. PJ193647, PJ1900131, PJ1933021, PD-10364-05, PD-11091-00, and PJ1900134-A").

into a contract with Alliant and issued insurance policies—based on underwriting guidelines specifically negotiated for the Tribal Program—that were provided through Tribal First to the tribal entities.

The relevant insurance policies named Lexington as the insurer and the Tribe, Port Madison, and various subsidiaries—all located on tribal trust lands within the Reservation—as the insureds. In addition to being listed on the evidence-of-coverage letters and the policies' declaration pages as the insurer, Lexington knew it was insuring the Tribe and Port Madison. The "All Risk" policies issued by Lexington provided broad coverage for losses to the Tribe's and Port Madison's businesses and properties. The policies covered "all risks of physical loss or damage" to "property of every description both real and personal" located on the trust lands, as well as interruptions to business and tax revenues generated within the Reservation. Overall, the policies covered almost $242 million worth of real property, $50 million worth of personal property, and $98 million of business interruption value—all centered on Tribal trust lands—for the Tribe and Port Madison.

In March 2020, in response to the outbreak of COVID-19, the Suquamish Tribal Council passed several resolutions that declared a public health emergency, restricted access to certain public facilities operated by Port Madison, and suspended operations at all tribal businesses on the Reservation. Eventually the Tribal Council initiated a phased reopening plan for these businesses. As a result of these closures and the pandemic, the Tribe and Port Madison allege various injuries, including damage to the buildings on trust lands, loss of business income and tax revenue, and costs associated with disinfecting and sanitizing the business

premises. In an effort to recoup these losses, the Tribe and Port Madison submitted claims for coverage under the Lexington insurance policies. Lexington responded to these claims by issuing reservation-of-rights letters, contending that the policies may not cover COVID-19-related losses. The merits of the coverage claims are not before us.

The Tribe and Port Madison then sued Lexington in the Tribal Court, claiming breach of contract and seeking a declaratory judgment that the insurers were obligated to compensate them for the full amount of their pandemic-related losses. Lexington, in its motion to dismiss the complaint, argued that the Tribal Court did not have personal or subject-matter jurisdiction. In denying the motion, the Tribal Court found that it had jurisdiction based on the Tribe's inherent right to exclude and the consensual-relationship exception set forth in *Montana*, 450 U.S. at 565–66. The Suquamish Tribal Court of Appeals affirmed the Tribal Court's denial of Lexington's motion to dismiss on the same grounds. The parties agreed to stay further proceedings in the Tribal Court so Lexington could pursue this action in federal court.

In December 2021, Lexington initiated this suit in the Western District of Washington, seeking a declaratory judgment that the Tribal Court lacks jurisdiction over Lexington. The complaint named the judges of the Tribal Court and Tribal Court of Appeals as defendants, and in March 2022, the Suquamish Tribe intervened as a defendant.[2]

[2] The individual defendants-appellees are Cindy Smith, Chief Judge, Suquamish Tribal Court; Eric Nielsen, Chief Judge, Suquamish Tribal Court of Appeals; and Bruce Didesch and Steve Aycock, Judges, Suquamish Tribal Court of Appeals.

On cross-motions for summary judgment on the jurisdictional issues, the district court granted the Tribe's motion for summary judgment and denied Lexington's motions. In rejecting Lexington's argument that its conduct did not take place on tribal land, the court held that the provision of insurance to businesses owned by the Tribe and to properties located on Tribal land qualified as conduct that is subject to tribal adjudicative jurisdiction under the right to exclude. The court also held that the first *Montana* exception applied and that the Tribal Court had personal jurisdiction over the insurers. The court then dismissed the case with prejudice. On appeal, Lexington argues that the Tribal Court lacks subject-matter jurisdiction over the insurers.

ANALYSIS

I. Federal Jurisdiction and Standard of Review

We have jurisdiction under 28 U.S.C. § 1291. It is well settled that the issue of "whether a tribal court has adjudicative authority over nonmembers is a federal question." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008); *see also Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852–53 (1985). We review de novo this question of law, and we review for clear error the Tribal Court's factual findings. *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 930 (9th Cir. 2019).

Our review, however, is not free-ranging. We must keep in mind that "because tribal courts are competent law-applying bodies, the tribal court's determination of its own jurisdiction is entitled to 'some deference.'" *Water Wheel*, 642 F.3d at 808 (quoting *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990)). We also are mindful

of the longstanding "federal policy of deference to tribal courts." *Id.* (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987)). While undertaking our duty to determine the scope of tribal jurisdiction over nonmembers, our review proceeds with proper respect for both the Tribal Court's authority over reservation affairs and federal promotion of tribal self-government. *See Iowa Mutual*, 480 U.S. at 16–17.

II. Sources of Tribal Authority

Our analysis of a tribe's civil jurisdiction over nonmembers is rooted in several longstanding principles. The most important of these principles is that "Indian tribes have long been recognized as sovereign entities, 'possessing attributes of sovereignty over both their members and their territory.'" *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). As the Supreme Court has reinforced, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, 435 U.S. at 323. But even in the face of these broad propositions, "tribes do not, as a general matter, possess authority over [nonmembers] who come within their borders." *Plains Commerce*, 554 U.S. at 328. In determining whether tribal court jurisdiction over nonmembers exists, we look to the "outer boundaries" of tribal sovereignty. *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 899 (9th Cir. 2019).

Several principles shape those outer boundaries. First, tribal jurisdiction is "cabined by geography": a tribe's jurisdiction cannot extend past the boundaries of the reservation. *Philip Morris USA, Inc. v. King Mountain*

Tobacco Co., 569 F.3d 932, 938 (9th Cir. 2009). This is, indeed, a prerequisite to tribal jurisdiction. If the nonmember's conduct occurred not only within the boundaries of the reservation, but on tribal land, then a presumption of tribal jurisdiction applies. *See Strate*, 520 U.S. at 454 ("We can readily agree, in accord with *Montana*, that tribes retain considerable control over nonmember conduct on tribal land." (cleaned up)); *Plains Commerce*, 554 U.S. at 328 ("Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it.") (citations omitted). Thus, the conduct must have occurred within the boundaries of the reservation, and if the conduct occurred on tribal land, then the scales tip sharply toward tribal jurisdiction.

Once we have determined that the nonmember's conduct has occurred within the boundaries of the reservation, we must further examine the tribe's exercise of power, keeping in mind that a tribe's adjudicative jurisdiction cannot exceed its legislative jurisdiction. *Strate*, 520 U.S. at 453. Accordingly, to determine whether a tribe has adjudicative, or subject-matter, jurisdiction over nonmembers, we first inquire whether a tribe has regulatory authority over the activities of those nonmembers. *See id.* at 453 ("Where tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.'" (quoting *Iowa Mutual*, 480 U.S. at 18) (cleaned up)).

We have recognized two independent sources of a tribe's regulatory power over nonmembers: inherent sovereign authority and the power to exclude. The first source is a tribe's inherent sovereign authority to protect self-government and control internal relations, an authority encapsulated in the two *Montana* exceptions. *See Montana*,

450 U.S. at 565–66; *Knighton*, 922 F.3d at 895, 903–05. The second source of regulatory power is a tribe's inherent power to exclude nonmembers from tribal land, deriving from the tribe's status as a sovereign and a landowner. *See Water Wheel*, 642 F.3d at 814; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982). Accordingly, we will uphold a tribal court's exercise of civil jurisdiction over nonmembers if a tribe's regulatory authority—and by extension, its adjudicative authority—is supported by either of the *Montana* exceptions or the power to exclude.

III. Conduct on Tribal Lands

The question whether conduct occurred on tribal land—where the exercise of tribal jurisdiction is the strongest—and therefore took place within the bounds of the reservation underlies our jurisdictional analysis. We conclude that Lexington's conduct occurred not only on the reservation, but on tribal lands.

A tribe's regulatory authority over a nonmember is triggered when "the nonmember enters tribal lands or conducts business with the tribe." *Merrion*, 455 U.S. at 142. Lexington clearly made itself subject to the Tribe's authority by "conduct[ing] business with the tribe." *See id.* Lexington held itself out as a potential business partner to tribes by entering into a contract with Tribal First. Lexington then cemented that business relationship with the Tribe and Port Madison—a tribally owned entity—when it issued the insurance policies, which had been developed by Lexington specifically for tribes and which listed Lexington as the insurer. This business relationship was ongoing: not only did Lexington continue to renew the insurance policies annually from 2015 onward as the Tribe and Port Madison paid premiums, but the Tribe and Port Madison also

submitted their insurance claims to the company authorized by Lexington to process the claims on its behalf.

The facts of this case closely align with those in *Merrion v. Jicarilla Apache Tribe*, the defining case for tribal authority over tribal lands. In *Merrion*, the Court upheld the Jicarilla Apache Tribe's imposition of a severance tax on nonmember companies that had contracted with the Apache Tribe to extract oil and gas from tribal land. 455 U.S. at 135–36, 144. Although the companies' employees entered tribal lands to extract the resources, the Court did not solely rely on this fact; it specifically pointed to the Apache Tribe's sovereign power over commercial agreements as derivative of a tribe's power to exclude on tribal lands. *Id.* at 145–48 (distinguishing between "the sovereign nature of the tribal authority to tax" and a private "landowner's contractual right"). Thus, the Court held that the nonmember companies were subject to tribal jurisdiction when the commercial relationship between the companies and the tribe centered on tribally owned resources on tribal land. *Id.* at 135–36, 144. Here, the commercial relationship at issue—an insurance contract—is also between a nonmember company—Lexington—and a tribe—the Suquamish Tribe—and involves tribally owned buildings and businesses located on tribal trust land. Lexington's provision of insurance was therefore the type of business conduct on tribal land that the Court contemplated in *Merrion*.

Importantly, we have held that tribal regulatory authority is proper when a nonmember's conduct relates to tribal lands. We have explained that "[o]ur inquiry is not limited to deciding when and where the claim arose," but also considers "whether the cause of action brought by the[ ] parties *bears some direct connection to tribal lands*." *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1135 (9th Cir. 2006)

(en banc) (emphasis added); *Knighton*, 922 F.3d at 901–02; *see also Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013) (holding that tribal jurisdiction is plausible when "the dispute *centers on [tribal] trust land*" (emphasis added)).

The unique facts of the Tribe's suit against Lexington satisfy, and even exceed, the requirement that the claims bear "some direct connection to tribal lands." *Knighton*, 922 F.3d at 902. To begin, Lexington's business conduct with the Tribe and Port Madison is directly connected to tribal lands—the insurance policies cover the Tribe's and Port Madison's businesses and properties on the Tribe's trust lands. Additionally, this breach-of-contract dispute centers on whether these policies cover the losses and expenses incurred by those businesses and properties on the trust lands. Tribal land literally and figuratively underlies the contract at issue here. What could be more quintessentially tribal-land-based than an insurance policy covering buildings and businesses on tribal land? We would be ignoring *Merrion* and our own precedent to conclude that a suit over a commercial agreement that solely involves tribal property on trust land does not fulfill the territorial component for finding that nonmember conduct occurred on tribal land.

Any suggestion that Lexington cannot be subject to tribal jurisdiction because all relevant conduct occurred off the Reservation—and neither Lexington nor its employees were ever physically present there—misreads our caselaw. The foundational rule in *Merrion* states that a tribe has regulatory jurisdiction over a nonmember who "enters tribal lands *or conducts business with the tribe*." 455 U.S. at 142 (emphasis added). Nowhere in *Merrion* or in subsequent cases has the Court limited the definition of nonmember conduct on tribal

land to physical entry or presence. Rather, the Court has explicitly recognized that a nonmember *either* entering tribal lands *or* conducting business with a tribe can make that person subject to a tribe's regulatory authority. We take the Court at its word.

It is easy to understand why the Court makes this distinction between physical entry and business conduct. Nonmembers may enter tribal lands or travel on tribal roads without conducting business with the tribe or tribal members. And when these nonmembers commit torts or trespass on tribal lands, the tribe may exercise its civil jurisdiction over them. *See McDonald v. Means*, 309 F.3d 530, 537–40 (9th Cir. 2002) (holding that a tribal court had jurisdiction over a suit between a tribal member and a nonmember arising from an accident on a tribal road); *see also Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 849–50 (9th Cir. 2009) (holding that tribal court jurisdiction over a nonmember who trespassed on tribal lands was plausible). On the other hand, a tribe may regulate nonmembers' contractual relationships with the tribe or tribal members apart from any physical entry that takes place under those contracts. Thus, for example, tribes can impose taxes on the value of nonmembers' leasehold interests on tribal lands. *See Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 599–600 (9th Cir. 1984) (upholding tribe's possessory interest tax imposed on nonmember corporation's mining leases on tribal lands), *aff'd*, 471 U.S. 195 (1985).

The tribes' ability to regulate such consensual relationships makes sense in our contemporary world in which nonmembers, through the phone or internet, regularly conduct business on a reservation and significantly affect a tribe and its members without ever physically stepping foot

on tribal land. In sum, a nonmember's business with a tribe may very well trigger tribal jurisdiction—even when the business transaction does not require the nonmember to be physically present on those lands.

Although our previous cases upholding tribal jurisdiction over nonmembers involved some form of physical presence, we have never stated that physical presence is necessary to conclude that nonmember conduct occurred on tribal land. Rather, we have repeatedly stated that "[o]ur inquiry is not limited to deciding when and where the claim arose" but "whether the cause of action brought by the[ ] parties *bears some direct connection to tribal lands*." *Smith*, 434 F.3d at 1135 (emphasis added).

In *Smith*, we concluded that a tribal court had jurisdiction over a nonmember's claims arising from an accident that occurred on a federal highway when the vehicle was maintained and the accident investigated by a tribal college situated on tribal lands. *Id.* In *Knighton*, yet another case implicating the role of tribal land, we similarly held that a tribe's suit against a nonmember tribal employee who worked off the reservation related to tribal lands. *Knighton*, 922 F.3d 901–02. There, we pointed to the employee's involvement in moving the tribe's headquarters from tribal land on the reservation to off-reservation fee land. *Id.* The teaching from these cases is that, even if Lexington employees never entered the Reservation, Lexington's insurance coverage of the Tribe's and Port Madison's businesses on trust lands relates directly to tribal lands and conforms with our precedent.

Cases from other circuits strengthen our conclusion. In *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe*, the Eighth Circuit remanded a claim to determine

whether "the conversion claim has a sufficient nexus to the consensual relationship between [the parties]" and could be subject to tribal jurisdiction. 609 F.3d 927, 941 (8th Cir. 2010). There, the tribe had failed to delineate the relationship between the claim and the nonmember entity's services on tribal land. *Id.* In contrast, the Suquamish Tribe has provided a clear nexus between its breach-of-contract claim and Lexington's coverage of tribal properties on tribal land. *See also, e.g.*, *DISH Network Serv. LLC v. Laducer*, 725 F.3d 877, 884 (8th Cir. 2013) (holding that tribal jurisdiction over an abuse-of-process tort against a nonmember company, even if it occurred off tribal lands, would "not clearly be lacking" because "the tort claim arises out of and is intimately related to [the contract] and that contract relates to activities on tribal land").

Contrasting the core of this appeal—a contract centered on insuring tribal properties on tribal land—to other circuits' cases underscores the distinction between the nexus to conduct on tribal land and conduct that could not even plausibly be viewed as connected to tribal land. *See Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 189, 207–08 (7th Cir. 2015) (holding no tribal jurisdiction over nonmembers who issued bonds for a tribe's off-reservation investment project); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 768 (7th Cir. 2014) (holding no tribal jurisdiction over suit brought by off-reservation nonmembers against on-reservation tribal lenders when the loan transactions were completed online); *MacArthur v. San Juan County*, 497 F.3d 1057, 1060–61 (10th Cir. 2007) (holding no tribal jurisdiction over tribal member employees' suit against nonmember clinic operated on non-Indian fee land).

We easily conclude that Lexington's business relationship with the Tribe satisfies the requirements for conduct occurring on tribal land, thereby occurring within the boundaries of the reservation and triggering the presumption of jurisdiction. We turn next to the Tribe's inherent sovereign authority as a basis for jurisdiction.

IV. Tribal Jurisdiction Under the First *Montana* Exception

In *Montana*, the Supreme Court affirmed that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S. at 565. More than twenty years later, the Court explained that "the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce*, 554 U.S. at 337. We have described this inherent sovereign power as encapsulated in the two "*Montana* exceptions," which "are 'rooted' in the tribes' inherent power to regulate nonmember behavior that implicates these sovereign interests" in protecting self-government and controlling internal relations. *Knighton*, 922 F.3d at 904 (quoting *Attorney's Process*, 609 F.3d at 936); *see also Montana*, 450 U.S. at 565–66 (describing the exceptions to "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe").

Under the first *Montana* exception, a "tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members." *Montana*, 450 U.S. at 565. And under the second exception, a tribe may "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." *Id.* at 566.

Although we early on characterized the *Montana* framework as applicable only to tribal jurisdictional issues on non-tribal, or non-Indian fee, land, we clarified our view in *Knighton.* In *Knighton*, we spelled out that *Water Wheel* and "our subsequent cases involving tribal jurisdictional issues on tribal land do not exclude *Montana* as a source of regulatory authority over nonmember conduct on tribal land." 922 F.3d at 903; *see Water Wheel*, 642 F.3d at 810. Rather, the *Montana* exceptions allow us to determine the scope of a tribe's "general jurisdictional authority" over nonmember conduct, whether it be on tribal or non-tribal land. *Water Wheel*, 642 F.3d at 810.

A. Regulatory and Adjudicative Jurisdiction

Under *Montana*'s first exception, 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." 450 U.S. at 565. For the purposes of determining whether a consensual relationship exists, "consent may be established 'expressly or by [the nonmember's] actions.'" *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce*, 554 U.S. at 337).

Lexington's insurance contract with the Tribe squarely satisfies *Montana*'s consensual-relationship exception. The insurance policy establishes a contract between Lexington as the insurer and the Tribe, Port Madison, and subsidiary entities as beneficiaries. In exchange for coverage, Lexington received premiums from the Tribe and Port

Madison, and Lexington renewed the policies many times over the course of several years. Thus, Lexington entered into a "relationship[ ] with the tribe . . . through commercial dealing [and] contracts." *See Montana*, 450 U.S. at 565. There is no dispute that the relationship was mutual and consensual.

We must also "consider the circumstances and whether under those circumstances the non-Indian defendant should have reasonably anticipated that his interactions might 'trigger' tribal authority." *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce*, 554 U.S. at 338). It should have been no surprise to Lexington that its contract with the Tribe would trigger tribal authority. The transaction had tribe and tribal lands written all over it. Because of its participation in the Tribal Program—an insurance program marketed specifically to tribes—Lexington was objectively on notice that it was taking advantage of a program targeted at providing insurance to tribes. Additionally, Lexington knew that it was contracting with the Tribe to provide insurance coverage for businesses and properties on tribal trust land.[3] *See id.* at 817 (holding that a consensual relationship was

[3] We agree with Lexington that, in its *Montana* analysis, the district court improperly relied on the insurance policies' service-of-suit clause, which provided that the parties would submit to a court of competent jurisdiction. That clause does not identify a specific court. Rather, this clause would allow the suit to proceed in tribal court if the tribal court has subject-matter jurisdiction. It is circular reasoning to conclude that the clause itself gives a tribal court jurisdiction when the thrust of this federal court case is whether the Tribal Court has jurisdiction in the first place and therefore qualifies as a "court of competent jurisdiction." *See Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 82, 92 (2017) ("[T]he phrase 'court of competent jurisdiction' [refers] to a court with an existing source of subject-matter jurisdiction.").

established when the nonmember "corporation had full knowledge the leased land was tribal property").

As a sophisticated commercial actor conducting business with tribes, Lexington could not have ignored tribes' status as sovereigns that retain jurisdiction over nonmembers in certain circumstances. Nor could Lexington have disregarded the fact that tribal courts have long adjudicated suits involving nonmembers. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."). As we counseled in *Smith*, nonmembers are on notice that should they "choose to affiliate with" tribes through a consensual relationship, they "may anticipate tribal jurisdiction when their contracts affect the tribe." 434 F.3d at 1138. In entering into a contract with the sovereign Tribe that bore a direct connection to and could affect the Tribe's properties on trust land, Lexington should have reasonably anticipated that it could be subject to tribal jurisdiction.

Finally, we address the nexus requirement. "*Montana*'s consensual-relationship exception requires that 'the regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.'" *Knighton*, 922 F.3d at 904 (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001)). The nexus between Lexington's consensual relationship with the Tribe and the conduct that the Tribe seeks to regulate is no mystery. The consensual relationship is embodied in an insurance contract involving tribal lands, and the Tribe seeks to regulate the scope of insurance coverage that Lexington was bound to provide under that contract. *See Water Wheel*, 642 F.3d at 818–19 (stating that

either *Montana* exception would provide jurisdiction over a breach-of-contract claim when "the commercial dealings between the tribe and [the nonmember] involved the use of tribal land, one of the tribe's most valuable assets"). We conclude that the Tribe has regulatory jurisdiction over Lexington under *Montana*'s first exception.

The Supreme Court has counseled that should a consensual relationship exist and "tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.'" *Strate*, 520 U.S. at 453 (quoting *Iowa Mutual*, 480 U.S. at 18) (cleaned up). When regulatory jurisdiction exists, important sovereign interests are at stake, and "long-standing Indian law principles recognizing tribal sovereignty" are implicated, a tribe possesses adjudicative jurisdiction. *Water Wheel*, 642 F.3d at 816.

Because the Tribe has regulatory jurisdiction over Lexington, and considering the nature of the Tribe's cause of action, the Tribal Court presumptively has adjudicative jurisdiction over this dispute. Tribal Court jurisdiction over the breach-of-contract suit would not exceed the Tribe's ability to regulate the contract. *See Strate*, 520 U.S. at 453 (stating that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction"); *see also Knighton*, 922 F.3d at 906 (holding that a tribal court had authority to adjudicate claims arising from an employee's breach of Tribal employee standards of conduct, which the Tribe had the power to regulate). Because the Tribe's sovereign interest in managing its businesses on tribal lands is at stake, tribal sovereignty principles are implicated. *See Plains Commerce*, 554 U.S. at 334 (identifying "managing tribal lands" as one of tribes' "sovereign interests"); *Merrion*, 455 U.S. at 137 (recognizing a "tribe's general authority, as

sovereign, to control economic activity within its jurisdiction"). Therefore, the Tribal Court has jurisdiction under the first *Montana* exception in view of the Tribe's regulatory authority coupled with its adjudicative jurisdiction over Lexington.

B. Sovereignty Considerations under *Montana*

Our holding of tribal jurisdiction conforms with precedent counseling respect for tribal sovereignty—including the competency of tribal governments—while affirming the limited scope of tribal jurisdiction over nonmembers under *Montana*. Lexington's suggestion to the contrary misreads our case law.

Consideration of the political structure of tribal governments, including their judicial systems, has no place in our *Montana* analysis. There is no merit to Lexington's suggestion that the Tribal Court should not adjudicate this suit because of the "hometown" advantage and control exercised by the Suquamish Tribal Council over the Tribal Court judges, the exclusion of nonmembers from Tribal juries, and the threat to Lexington's due-process rights posed by Tribal Court judges and juries selected by the Tribe to rule on its own claims. The Supreme Court, our circuit, and our sister circuits have rejected such attacks on tribal judiciaries time and time again in light of federal law guaranteeing due-process rights in tribal courts, as well as empirical studies and judicial experience showing that "tribal courts do not treat nonmembers unfairly." *FMC*, 942 F.3d at 943–44 (collecting cases from the Supreme Court and other circuits).

Nor does the current state of the insurance regulatory regime—namely states' near-exclusive regulation of insurance and the Tribe's lack of insurance regulations—

serve as a counterweight to an anticipation of tribal jurisdiction. We have never held that a tribe must possess positive law addressing certain conduct to exercise jurisdiction over that conduct. Rather, we have embraced the opposite: so long as federal law determines that a tribe has authority to regulate and adjudicate certain conduct, it makes no difference whether a tribe does so based on positive law or another source of law, like tort law, or in this case, contract law. *See Knighton*, 922 F.3d at 906–07.

We also do not countenance Lexington's argument that *Plains Commerce* imposed an additional limitation on the *Montana* exceptions, namely that the tribal regulation must not only satisfy *Montana* but also "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. This argument misreads *Plains Commerce*. As we explained in *Knighton*, the Court was only affirming the "varied sources of tribal regulatory power over nonmember conduct on the reservation" with that statement in *Plains Commerce*. 922 F.3d at 903 (citing *Plains Commerce*, 554 U.S. at 337). The Court was not imposing a supplemental requirement to the *Montana* analysis. Rather, it was merely stating that even if a nonmember consented to tribal law, the tribe could impose that law on the nonmember only if the tribe had the authority to do so under the power to exclude—the "authority to set conditions on entry"—or the *Montana* exceptions—the authority to "preserve tribal self-government[ ] or internal relations." *Plains Commerce*, 554 U.S. at 337 (citing *Montana*, 405 U.S. at 564); *see also Knighton*, 922 F.3d at 904 ("The *Montana* exceptions are 'rooted' in the tribes' inherent power to regulate nonmember behavior that implicates these sovereign interests." (quoting *Attorney's*

Process, 609 F.3d at 936)). If the conduct at issue satisfies one of the *Montana* exceptions, it necessarily follows that the conduct implicates the tribe's authority in one of the areas described in *Plains Commerce*.[4] Because Lexington's conduct satisfies the consensual-relationship exception, it implicates the Tribe's authority over self-government and internal relations.

Finally, our holding does not construe *Montana*'s first exception "in a manner that would swallow the rule or severely shrink it." *Plains Commerce*, 554 U.S. at 330 (internal quotation marks and citations omitted). The circumstances in this case resulting in tribal jurisdiction are narrow: the nonmember consensually joined an insurance pool explicitly marketed to tribal entities; the nonmember then entered into an insurance contract with a tribe; the contract exclusively covered property located on tribal lands; and the tribe's cause of action against the nonmember arose directly out of the contract. In *Allstate Indemnity Company v. Stump*, we deemed tribal jurisdiction over an off-reservation insurance company as "colorable," even when the insurance was purchased by a tribal member

[4] Our understanding of *Plains Commerce* aligns with that of the Fifth Circuit. *See Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 174–75 (5th Cir. 2014) ("We 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.'" (quoting *Plains Commerce*, 554 U.S. at 337)), *aff'd by an equally divided court*, 579 U.S. 545 (2016); *see also id.* at 175 (stating that the limitations expressed in *Plains Commerce* are "already built into the first *Montana* exception"). However, this understanding departs from that of the Seventh Circuit. *See Jackson*, 764 F.3d at 783 (holding that, beyond nonmember consent, the tribal members also had to make a showing that the dispute implicated an aspect of the tribe's sovereign authority as stated in *Plains Commerce*).

outside the reservation. 191 F.3d 1071, 1074–76 (9th Cir. 1999). The situation here rises from colorable to actual. We conclude that under the circumstances, the Tribe decidedly has jurisdiction over an off-reservation insurance company.

Importantly, we do not suggest that an off-reservation nonmember company may be subject to tribal jurisdiction anytime it does business with a tribe or tribal member or provides goods or services on tribal lands. Our analysis does not deal with the mine run of contracts. Such a generalization would swallow the rule. Rather, the *Montana* framework requires a factual inquiry into each component—the existence of a consensual relationship, the nonmember's anticipation of tribal jurisdiction, and the nexus between the relationship and the conduct being regulated. The circumstances here telescope the close nexus between tribal land and the consensual transaction. We emphasize that tribal jurisdiction is proper because the relevant insurance policy covers the properties and operations of a tribal government and businesses that extensively "involved the use of tribal land" and the businesses "constituted a significant economic interest for the tribe." *Water Wheel*, 642 F.3d at 817. Any concern regarding the scope of *Montana* is quelled by the reminder that sophisticated commercial actors, such as insurers, can easily insert forum-selection clauses into their agreements with tribes and tribal members, thereby precluding the exercise of tribal court jurisdiction in such circumstances. *See, e.g.*, *Plains Commerce*, 554 U.S. at 346 (Ginsburg, J., concurring in part) (stating that a nonmember company can include "forum selection, choice-of-law, or arbitration clauses in its agreements" with tribal members to avoid tribal court and the application of tribal law).

Ultimately, the *Montana* exceptions ensure that a tribe's exercise of authority over nonmembers is limited to a tribe's "sovereign interests" in "managing tribal land, protecting tribal self-government, and controlling internal relations." *Id.* at 334 (cleaned up). Because this case squarely fits into the first *Montana* exception, the jurisdiction recognized here flows from the Suquamish Tribe's retained sovereignty. *See Montana*, 405 U.S. at 565 ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations . . . .").

CONCLUSION

We agree with the Tribal Court, the Suquamish Tribal Court of Appeals, and the district court that the Tribal Court has subject-matter jurisdiction over this suit pursuant to the Tribe's inherent sovereign power under the first *Montana* exception. Our inquiry is at an end, and the case can proceed under the jurisdiction and laws of the Suquamish Tribe.

AFFIRMED.