No.

IN THE

Supreme Court of the United States

LEXINGTON INSURANCE COMPANY, ET AL.,

Petitioners,

v.

SUQUAMISH TRIBE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Montana* v. *United States*, 450 U.S. 544 (1981), this Court recognized a general rule against tribal jurisdiction over nonmembers, subject to two narrow exceptions for "non-Indians on their reservations." *Id.* at 565. The Court has stressed that both exceptions "permit tribal regulation of nonmember conduct *inside* the reservation that implicates the tribe's sovereign interests." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008) (emphasis altered).

The Suquamish Tribe sued its off-reservation, nonmember insurers in tribal court, seeking coverage for business losses caused by the COVID-19 pandemic on a theory that federal and state courts have rejected virtually unanimously. The insurers filed this action to prevent the exercise of tribal jurisdiction over their off-reservation conduct. While recognizing that "all relevant conduct occurred off the Reservation," the Ninth Circuit upheld tribal-court jurisdiction over the insurers, reasoning that their conduct "relate[d] to tribal lands" because the insurance policies covered tribal businesses on tribal land. App., *infra*, 14a-16a. That decision made the Ninth Circuit "the first and only circuit court to extend tribal court jurisdiction over a nonmember without requiring the nonmember's actual physical activity on tribal lands." *Id.* at 73a (Bumatay, J., dissenting from denial of rehearing en banc).

The question presented is whether a tribal court can exercise jurisdiction over nonmembers of the tribe based on off-reservation conduct.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioners are Lexington Insurance Company, Homeland Insurance Company of New York, Hallmark Specialty Insurance Company, Aspen Specialty Insurance Company, Aspen Insurance UK Ltd., and Certain Underwriters at Lloyd's, London and London Market Companies Subscribing to Policy Nos. PJ193647, PJ1900131, PJ1933021, PD-10364-05, PD-11091-00, and PJ1900134-A, which were plaintiffs in the district court and appellants in the court of appeals.

Petitioner Lexington Insurance Company is a wholly owned subsidiary of AIG Property Casualty U.S., Inc., which is a wholly owned subsidiary of AIG Property Casualty Inc., which in turn is a wholly owned subsidiary of American International Group, Inc., a publicly traded company (NYSE: AIG). No public company has an interest of 10% or more in American International Group, Inc.

Petitioner Homeland Insurance Company of New York is an indirect wholly owned subsidiary of Intact Insurance Group USA Holdings, Inc. Intact Insurance Group USA Holdings, Inc. is a wholly owned subsidiary of Intact Financial Corporation, a publicly held company (TO: IFC). No parent corporation or other entity owns 10% or more of the stock of Intact Financial Corporation.

Petitioner Hallmark Specialty Insurance Company is a wholly owned subsidiary of American Hallmark Insurance Company of Texas, which in turn is a wholly owned subsidiary of Hallmark Financial Services, Inc., a publicly traded company (NYSE: HALL). No parent corporation or other entity owns 10% or more of the stock of Hallmark Financial Services, Inc.

Petitioner Aspen Specialty Insurance Company is a wholly owned subsidiary of Aspen American Insurance Company. Aspen American Insurance Company is a wholly owned subsidiary of Aspen U.S. Holdings, Inc., a Delaware corporation. Aspen U.S. Holdings, Inc. is a wholly owned subsidiary of Aspen (UK) Holdings Limited, a U.K. corporation. Aspen (UK) Holdings Limited is a wholly owned subsidiary of Aspen Insurance Holdings Limited (AHL), a Bermuda exempted company. AHL is a wholly owned subsidiary of Highlands Holdings, Ltd., a Bermuda exempted company. All of the ordinary shares of Highlands Holdings, Ltd. are, directly or indirectly, owned by certain investment funds managed by subsidiaries of Apollo Global Management, LLC (AGM), a Delaware limited liability company. Class A units and certain preferred shares of AGM are publicly traded (NYSE: APO).

Petitioner Aspen Insurance UK Ltd. is a wholly owned subsidiary of Aspen European Holdings Limited (AEHL), a UK domiciled holding company. AEHL is a wholly owned subsidiary of Aspen Insurance Holdings Limited (AHL), a Bermuda exempted company. AHL is a wholly owned subsidiary of Highlands Holdings, Ltd., a Bermuda exempted company. All of the ordinary shares of Highlands Holdings, Ltd. are, directly or indirectly, owned by certain investment funds managed by subsidiaries of Apollo Global Management, LLC (AGM), a Delaware limited liability company. Class A units and certain preferred shares of AGM are publicly traded (NYSE: APO).

Petitioner Syndicate 1414 is the lead underwriter at Lloyd's, London subscribing to Policy Nos. PJ193647 and PJ1933021. It is organized and registered under the laws of the United Kingdom with its principal

place of business in the United Kingdom. Ascot Underwriting Group Limited is the parent corporation of Syndicate 1414, and Canada Pension Plan Investment Board is the parent corporation of Ascot Underwriting Group Limited. They are not publicly traded, and no publicly traded corporation or company possesses 10% or more interest in Syndicate 1414.

Petitioner Syndicate 510 is the second underwriter at Lloyd's, London subscribing to Policy Nos. PJ193647 and PJ1933021. It is organized and registered under the laws of the United Kingdom with its principal place of business in the United Kingdom. Syndicate 510 is managed by Tokio Marine Kiln Syndicates Ltd., of which Tokio Marine Underwriting Limited (TMUL) is an underwriting member and has a share greater than 50%. TMUL is wholly owned by Tokio Marine & Nichido Fire Insurance Co. Ltd., which is wholly owned by Tokio Marine Holdings, Inc., a Japanese publicly traded company (TSE: TKOMY).

Petitioner XL Catlin Insurance Company UK Limited (now known as AXA XL Insurance Company UK Limited) is a London market company subscribing to Policy Nos. PJ193647 and PJ1933021. It is organized and registered under the laws of the United Kingdom with its principal place of business in the United Kingdom. XL Catlin Insurance Company UK Limited is a direct subsidiary of Catlin Insurance Company (UK) Holdings Limited and an indirect subsidiary of XL Bermuda Limited, EXEL Holdings Limited, XLIT Limited, XL Group Limited and AXA S.A., which is a French publicly traded company (PSE: AXAHY). No publicly held company owns 10% or more of AXA S.A.'s stock.

Petitioner Syndicate 4444 is the lead underwriter at Lloyd's, London subscribing to Policy No. PJ1900131. It

is organized and registered under the laws of the United Kingdom with its principal place of business in the United Kingdom. It is not publicly traded, and no publicly traded corporation or company possesses 10% or more interest in Syndicate 4444.

Petitioner Syndicate 2987 is the lead underwriter at Lloyd's, London subscribing to Policy Nos. PD-10364-05 and PD-11091-00. Syndicate 2987 is organized and registered under the laws of the United Kingdom with its principal place of business in the United Kingdom. Syndicate 2987 is an unincorporated association, the managing agent of which is Brit Syndicates, Ltd. Brit Syndicates, Ltd. is a limited liability company registered in England & Wales. Brit UW Ltd. is the corporate member of Syndicate 2987. Brit Ltd. is the direct parent and whole-owner of Brit Syndicates, Ltd., and Brit UW Ltd. Fairfax Financial Holdings, Ltd. owns more than 10% of Brit Ltd. Ontario Municipal Employees Retirement System (OMERS) is the owner of more than 10% of Brit Ltd. No publicly held company owns more than 10% of Fairfax Financial Holdings, Ltd. or OMERS.

Petitioner Endurance Worldwide Insurance Limited (EWIL) is the lead London market company subscribing to Policy No. PJ1900134-A. EWIL is organized and registered under the laws of the United Kingdom with its principal place of business in the United Kingdom. EWIL is 100% owned by Endurance Worldwide Holdings Ltd. (EWHL), which is incorporated in England & Wales. EWHL is 100% owned by Endurance Specialty Insurance Ltd. (ESIL), which is incorporated in Bermuda. ESIL is 100% owned by Sompo International Holdings Ltd. (SIHL), which is incorporated in Bermuda. SIHL is 100% owned by Sompo Japan Insurance Inc. (SJII), which is incorpo-

rated in Japan. SJII is 100% owned by Sompo Holdings, Inc., which is a Japanese publicly traded company (TSE: SMPNY).

Respondent Suquamish Tribe intervened as a defendant in the district court and was an appellee in the court of appeals. Respondents 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 D. Aycock, in his official capacity as Judge of the Suquamish Tribal Court of Appeals, were named as defendants in the district court and were appellees in the court of appeals. The respondent tribal judges informed the district court that "the matter will be defended by the Tribe as intervenor." D. Ct. Doc. 40, at 4 (Mar. 21, 2022). They have not participated further in the district court or the court of appeals.

RELATED PROCEEDINGS

United States District Court (W.D. Wash.):

Lexington Insurance Company v. *Smith*
No. 21-cv-5930 (Sept. 12, 2022)

United States Court of Appeals (9th Cir.):

Lexington Insurance Company v. *Smith*
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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 94 F.4th 870. The order of the court of appeals denying rehearing and opinions respecting

that order (App., *infra*, 54a-106a) are reported at 117 F.4th 1106. The order of the district court on the parties' cross-motions for summary judgment (App., *infra*, 30a-53a) is reported at 627 F. Supp. 3d 1198.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 2024. A petition for rehearing was denied on September 16, 2024 (App., *infra*, 58a). On December 3, 2024, Justice Kagan granted petitioners' application to extend the time to file this petition to and including February 13, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

This Court has recognized tribal authority to regulate nonmembers only in limited circumstances when on-reservation conduct interferes with the tribe's ability to set conditions on entry to tribal land or to govern itself. But after adopting an expansive test for tribal-court jurisdiction over nonmembers' off-reservation conduct, the Ninth Circuit now stands as an "outlier" that has "pierce[d] the geographic limits of tribal jurisdiction." App., *infra*, 106a (Bumatay, J., dissenting from denial of rehearing en banc). That erroneous ruling, which created one circuit split and deepened another, warrants this Court's review.

Petitioners are insurers that underwrote policies for respondent Suquamish Tribe's commercial properties. The Tribe bought property insurance from a nationwide program administered off the reservation, so petitioners never set foot on the reservation. After a temporary COVID-19-related suspension of its operations on the reservation, the Tribe sought to recover business losses from petitioners. The "vast majority" of federal and state courts (including in the Tribe's

home state of Washington) have rejected similar claims that property-insurance policies cover business losses relating to the pandemic. *Another Planet Entertainment, LLC* v. *Vigilant Insurance Co.*, 548 P.3d 303, 307 (Cal. 2024); see *Hill & Stout, PLLC* v. *Mutual of Enumclaw Insurance Co.*, 515 P.3d 525, 534-535 (Wash. 2022). But the Tribe instead sued its insurers in its own tribal court.

This is not the Suquamish Tribe's first time pushing the boundaries of its authority over nonmembers. When the Ninth Circuit approved the Tribe's unprecedented attempt to prosecute a nonmember for an on-reservation crime, this Court intervened and held that tribes categorically lack criminal jurisdiction over nonmembers. *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191, 212 (1978). The Court later held that *Oliphant* "support[s] the general proposition" that tribes also lack civil jurisdiction over nonmembers, subject to only two exceptions for "non-Indians on their reservations." *Montana* v. *United States*, 450 U.S. 544, 565 (1981). Under those exceedingly narrow exceptions, the 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).

Fast forward half a century: The Suquamish Tribe again pressed a novel expansion of its jurisdiction over nonmembers. And the Ninth Circuit again accepted its theory, reasoning that tribes can regulate nonmembers' off-reservation conduct so long as it "relates to tribal lands." App., *infra*, 14a. Even though "all relevant conduct occurred off the Reservation," and even though petitioners were never "physically present there," the court concluded that the Tribe could sue petitioners in its own court because the Tribe's claims

"bear 'some direct connection to tribal lands.'" *Id.* at 15a-16a (citation omitted).

Only the Ninth Circuit has projected tribal sovereignty beyond the reservation's borders. The Seventh, Eighth, and Tenth Circuits have all held that tribal jurisdiction cannot reach nonmember conduct outside the physical boundaries of a reservation. *E.g.*, *Stifel, Nicolaus & Co.* v. *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207-208 (7th Cir. 2015). The South Dakota and Washington Supreme Courts also have refused to apply the *Montana* framework to tribal attempts to regulate off-reservation conduct.

The Ninth Circuit erred in endorsing tribal jurisdiction over nonmembers' off-reservation conduct that "relates to" tribal lands. App., *infra*, 14a. Its decision rests on an analogy between the territorial limitations on a tribal court's subject-matter jurisdiction over nonmembers and the due-process limitations on a state court's personal jurisdiction over nonresidents. But *Montana* is not *International Shoe* for tribal courts. Time and again, this Court has made clear that subject-matter jurisdiction under *Montana* requires "nonmember conduct *inside* the reservation that implicates the tribe's sovereign interests." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008) (emphasis altered). Tribes categorically lack subject-matter jurisdiction over conduct *outside* the reservation because tribal sovereignty "reaches no further than tribal land." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 653 (2001).

The Ninth Circuit also deepened a preexisting split in disregarding this Court's guidance that any tribal 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 Bank*, 554 U.S. at 337. The Seventh and Eighth Circuits have understood that language to dictate that tribal jurisdiction over nonmembers requires not only a consensual commercial relationship but also an inherent sovereign interest. In contrast, the Fifth Circuit has discounted *Plains Commerce Bank* as mere "dicta" and refused to follow it. *Dolgencorp, Inc.* v. *Mississippi Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014), aff'd by an equally divided Court, *Dollar General Corp.* v. *Mississippi Band of Choctaw Indians*, 579 U.S. 545 (2016) (per curiam). The Ninth Circuit acknowledged this conflict and sided with the Fifth Circuit. App., *infra*, 26a & n.4.

As Judge Bumatay explained, this "evisceration of *Plains Commerce* puts [the Ninth Circuit] on the wrong side of a circuit split." App., *infra*, 74a. That conflict matters because the Tribe's effort to regulate petitioners' off-reservation conduct does not stem from any sovereign interest identified in *Plains Commerce Bank*. This petition provides an opportunity to eliminate confusion that has only spread since the Court divided evenly in *Dollar General*.

The Ninth Circuit's unprecedented expansion of tribal jurisdiction to off-reservation conduct has sweeping real-world consequences. The Suquamish Tribe is just one of the 435 tribes within the Ninth Circuit. The notion that tribes can regulate off-reservation conduct that merely "relates to" tribal lands could serve as a launching pad for tribal-court lawsuits against countless nonmembers who have never set foot on a reservation. Once in tribal court, nonmembers may lack fair notice of tribal law (which is often unwritten and infused with tribal custom) and may be subject to massive financial liability even though they are not

guaranteed their constitutional rights. Such severe alterations to "the liberty interests of nonmembers" should not escape this Court's review. *Plains Commerce Bank*, 554 U.S. at 334.

This Court should grant review and reject the Ninth Circuit's extension of tribal-court jurisdiction to petitioners' off-reservation conduct.

STATEMENT

A. Factual Background

1. In 1859, the Senate ratified a treaty with the Suquamish Tribe establishing the Port Madison Reservation in what was then Washington Territory. Treaty of Point Elliott Art. II, 12 Stat. 928 (1855). The treaty forbade "any white man * * * to reside upon the same without permission" of the Tribe. *Ibid.* The Tribe also "acknowledge[d] [its] dependence on the government of the United States." Art. IX, 12 Stat. 929.

The Suquamish Tribal Council has the power to make tribal law "govern[ing] the conduct of all persons * * * to the fullest extent allowed under applicable Federal law." Suquamish Const. Art. III(i), tinyurl.com/2vyud9je. Only tribal members can run or vote for the Tribal Council. Suquamish Tribal Code §§ 1.2.7-1.2.8, tinyurl.com/ys44yd2y. And the Tribe limits its membership based on descent from those with "Suquamish Indian blood" who were enrolled members in 1942. Suquamish Const. Art. II, § 1.

The Tribal Council has established both trial and appellate courts. Suquamish Tribal Code §§ 3.1.1-3.1.3. The Council appoints judges to either three-year terms or pro tem positions. §§ 3.3.2, 3.4.3. The Council has broad authority to remove trial judges for cause, § 3.3.3, and somewhat more limited authority

to remove appellate judges, § 3.4.3(c). Since the 1970s, the Tribe has chosen to exclude nonmembers "from Suquamish tribal court juries." *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191, 194 (1978); see Suquamish Tribal Code § 4.4.3(a).

2. Spanning just twelve square miles, the Port Madison Reservation "is a checkerboard of tribal community land, allotted Indian lands, property held in fee simple by non-Indians, and various roads and public highways maintained by Kitsap County." *Oliphant*, 435 U.S. at 192-193. The Tribe and its corporate arm run several businesses on tribal land, including a casino, a seafood company, and gas stations. App., *infra*, 6a.

The Tribe looked beyond the reservation to buy insurance for its properties. Its insurance broker, which is not a tribal member, negotiated for coverage with nonparty Alliant Insurance Services, a nonmember that set up and administers the nationwide Tribal Property Insurance Program. App., *infra*, 6a-7a, 33a. That program provides insurance to tribal businesses located across the country as part of the larger Alliant Property Insurance Program that also insures municipalities, hospitals, and nonprofit organizations. *Id.* at 7a; see C.A. E.R. 1348. Alliant separately negotiates with insurers to provide coverage under general underwriting guidelines to tribes seeking policies. App., *infra*, 7a-8a. From its off-reservation office, Alliant handles the entire process, providing quotes to tribes, preparing policies consistent with insurers' underwriting guidelines, collecting premiums, and maintaining policy-related documents. *Ibid.*

Alliant, which is not an affiliate of any petitioner, prepared property-insurance policies that petitioners underwrote to cover the Tribe and its corporate arm

for "physical loss or damage" and business losses resulting from the same. App., *infra*, 8a. No petitioner is located on either tribal land or nonmember-owned land (called non-Indian fee land) within the reservation. *Id.* at 145a. In fact, petitioners never physically entered the reservation, had no direct contact with the Tribe during the underwriting process, and learned of the Tribe's identity only after Alliant issued the policies to the Tribe. *Id.* at 15a-16a; *id.* at 77a-78a (Bumatay, J., dissenting from denial of rehearing en banc). Petitioners registered the insurance contracts "under the insurance code of the state of Washington." C.A. E.R. 342, 739.

Following the pandemic's outbreak in early 2020, the Tribe temporarily suspended business operations on the reservation in an effort to slow the spread of COVID-19. App., *infra*, 8a. The Tribe and its corporate arm then made insurance claims seeking to recover business income they lost during that shutdown. *Id.* at 8a-9a. Petitioners responded with letters noting that the policies may not cover COVID-19-related losses because of the absence of physical loss or damage to property. *Id.* at 9a.

B. Procedural History

1. Before petitioners issued a final decision on the Tribe's insurance claims, the Tribe and its corporate arm sued petitioners in their own tribal court, alleging breach of the property-insurance policies and seeking a declaration of entitlement to coverage for lost business income. App., *infra*, 9a. Petitioners moved to dismiss the case for lack of subject-matter jurisdiction under federal law, pointing out that they had engaged in no conduct on the reservation. *Id.* at 156a.

The Suquamish Tribal Court held that it possessed jurisdiction over petitioners under the first exception (covering certain commercial relationships between tribes and nonmembers) to the general rule against tribal regulation of nonmembers in *Montana* v. *United States*, 450 U.S. 544 (1981). App., *infra*, 154a-161a. The court rejected petitioners' argument that tribal jurisdiction could not exist "because they do not have a physical presence on the land and did not physically enter the land." *Id.* at 156a. The court also reasoned that petitioners implicitly consented to tribal-court jurisdiction because their off-reservation conduct in considering the Tribe's insurance claim had a "direct connection to tribal lands." *Id.* at 161a.

The Suquamish Tribal Court of Appeals permitted petitioners to take an interlocutory appeal and then affirmed the tribal court's decision upholding its jurisdiction under *Montana*. App., *infra*, 116a-127a. The court agreed that tribal jurisdiction could reach petitioners even though "they were never physically present on the Tribe's land and their conduct did not occur on the land." *Id.* at 122a. The court grounded jurisdiction in the theory that the Tribe's claim is "directly related" to its businesses on tribal lands. *Id.* at 125a.

2. Once petitioners had exhausted their remedies in tribal court, they filed this action in federal court against the respondent tribal judges seeking a declaration that the tribal courts lack jurisdiction over the insurance dispute. App., *infra*, 35a-36a; see *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845, 856 (1985). The Tribe intervened as a defendant. App., *infra*, 36a.

The district court granted summary judgment to respondents. App., *infra*, 30a-53a. As relevant here,

it held that the tribal court could exercise jurisdiction over petitioners under the first *Montana* exception because "the issuance of the insurance policies arose out of activities occurring on tribal land—namely, tribal owned business activities on tribal owned land." *Id.* at 30a; see *id.* at 46a-50a.

3. The Ninth Circuit affirmed. App., *infra*, 4a-29a.

The court of appeals first held that petitioners' conduct, though occurring off the reservation, still qualified as "conduct occurr[ing] on tribal land" within the meaning of the *Montana* exceptions. App., *infra*, 13a. The court accepted that "tribal jurisdiction is 'cabined by geography'" and "cannot extend past the boundaries of the reservation." *Id.* at 11a-12a (citation omitted). The court also acknowledged that "all relevant conduct occurred off the Reservation" and that petitioners were never "physically present there." *Id.* at 15a-16a. And the court recognized that its prior decisions had never upheld "tribal jurisdiction over nonmembers" without "some form of physical presence" on the reservation. *Id.* at 17a. Nonetheless, the court held that the tribal court could exercise jurisdiction over petitioners because their off-reservation conduct "*relate*[*d*] to tribal lands." *Id.* at 14a (emphasis added). The court of appeals sought to justify this expansive conception of the requirement of "nonmember conduct occurr[ing] on tribal land" with the observation that, in "our contemporary world," "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 17a.

The court of appeals next held that the first *Montana* exception for consensual relationships applies

here. App., *infra*, 20a-24a. The court determined that petitioners had not expressly consented to tribal-court jurisdiction in the insurance policies. *Id.* at 22a n.3. But the court inferred consent on the theory that petitioners "should have reasonably anticipated" such jurisdiction because the policies "bore a direct connection to and could affect the Tribe's properties on trust land." *Id.* at 22a-23a.

The court of appeals turned to this Court's guidance that tribal authority over nonmembers must "stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." App., *infra*, 25a (quoting *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008)). Expressly breaking with the Seventh Circuit, the court held that this Court had not imposed "a supplemental requirement to the *Montana* analysis" and that any conduct that "satisfies one of the *Montana* exceptions * * * necessarily * * * implicates the tribe's authority in one of the areas described in *Plains Commerce*." *Id.* at 26a & n.4 (citing *Jackson* v. *Payday Financial, LLC*, 764 F.3d 765, 783 (7th Cir. 2014)).

4. The Ninth Circuit denied rehearing en banc. App., *infra*, 58a.

a. Judge Bumatay, joined by five other judges, dissented from the denial of rehearing en banc. App., *infra*, 69a-106a. He argued that the panel's endorsement of tribal-court jurisdiction over off-reservation conduct created a split with the Seventh, Eighth, and Tenth Circuits, *id.* at 95a-96a, departed from this Court's focus on "physical, on-reservation conduct by the nonmember," *id.* at 93a, and lacked historical support, *id.* at 80a-87a. He also criticized the panel's "evisceration of *Plains Commerce*" that had put the

Ninth Circuit "on the wrong side of a circuit split." *Id.* at 74a. And he explained that the panel's refusal to address whether an inherent sovereign interest supported tribal-court jurisdiction under *Plains Commerce Bank* made a difference because "it's doubtful that the Tribe can justify its authority over this insurance suit." *Id.* at 105a.

b. The panel judges, joined by 13 other judges, filed a statement responding to Judge Bumatay's dissent. App., *infra*, 58a-69a. They defended their "broad understanding" of the first *Montana* exception and deemed the lack of historical support for tribal-court jurisdiction over off-reservation conduct to be "not informative." *Id.* at 63a.

REASONS FOR GRANTING THE PETITION

In upholding the exercise of tribal jurisdiction over petitioners based solely on their off-reservation conduct, the Ninth Circuit created a rift with three federal courts of appeals and two state supreme courts as to the geographic scope of tribal sovereignty. This Court has recognized a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers," subject to two narrow exceptions for "non-Indians on their reservations." *Montana* v. *United States*, 450 U.S. 544, 565 (1981). The Seventh, Eighth, and Tenth Circuits, as well as the South Dakota and Washington Supreme Courts, have held that "on their reservations" means what it says: Tribes lack any power over off-reservation activities of nonmembers. Only the Ninth Circuit has extended *Montana* to off-reservation conduct on the theory that it "relates to tribal lands." App., *infra*, 14a.

Along the way, the Ninth Circuit also entrenched an existing circuit split concerning *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), which explained that any tribal regulation of a nonmember "must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id.* at 337. The Seventh and Eighth Circuits again agree that *Plains Commerce Bank* means what it says: A consensual relationship with a tribe cannot support jurisdiction absent a showing of one such sovereign interest. But the Ninth Circuit here joined the Fifth Circuit in gutting that constraint on the theory that any consensual relationship "necessarily" satisfies *Plains Commerce Bank*. App., *infra*, 26a.

The Ninth Circuit's conclusion that Suquamish courts have jurisdiction over petitioners' off-reservation practice of insurance conflicts with this Court's decisions. Because tribal sovereignty is territorial, the *Montana* framework applies only to "nonmember conduct *inside* the reservation." *Plains Commerce Bank*, 554 U.S. at 332 (emphasis altered). Nonmember conduct *outside* the reservation categorically exceeds tribal authority's geographic scope. And aside from exceeding that limit, the Ninth Circuit also erred in both inferring consent to tribal jurisdiction from petitioners' willingness to engage in off-reservation commerce with tribes and disregarding the fact that such conduct implicated no inherent sovereign interest.

The question presented is of paramount importance. The decision below endorses a vast expansion of tribal jurisdiction for the nearly 450 tribes within the Ninth Circuit. Any nonmember who does business with such a tribe or tribal member off the reservation—anywhere in the country or even across

the world—now faces the new and serious threat of a lawsuit in tribal court, where unwritten law may be drawn from tribal customs and norms, where defendants are not afforded constitutional rights, and where they are likely to face a jury consisting only of tribal members. This Court should grant review and restore the territorial limitations on tribal sovereignty that the Ninth Circuit jettisoned.

I. THE DECISION BELOW DEPARTS FROM OTHER COURTS' REJECTION OF TRIBAL JURISDICTION OVER OFF-RESERVATION CONDUCT

The Ninth Circuit created one split and deepened another in holding that tribal courts may exercise jurisdiction over nonmembers that do business with a tribe without ever physically entering tribal land. It alone holds that a tribal court can exercise jurisdiction over off-reservation conduct if it "relates" to tribal lands. App., *infra*, 14a. And it cemented another conflict over whether *Plains Commerce Bank* requires any tribal regulation to flow from an identified inherent sovereign interest. *Id.* at 26a & n.4. The Ninth Circuit could uphold the Suquamish courts' exercise of jurisdiction over petitioners' off-reservation conduct only by breaking with other lower courts on both questions.

A. Only the Ninth Circuit has held that a tribal court may exercise jurisdiction over a nonmember of the tribe even when "all relevant conduct occurred off the Reservation." App., *infra*, 15a. That approach departs from the Seventh, Eighth, and Tenth Circuits, as well as the South Dakota and Washington Supreme Courts, each of which has held that tribes cannot exercise jurisdiction over nonmembers based on conduct outside the reservation's physical confines.

1. The Seventh Circuit has held that tribal jurisdiction cannot exist over a nonmember unless the claim arises from the nonmember's on-reservation conduct. In *Jackson* v. *Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), a tribal payday lender made loans to nonmembers off the reservation and then sought to steer an action alleging usurious rates from federal court to tribal court. *Id.* at 768. The Seventh Circuit refused to enforce the agreements' provision selecting a tribal forum because "*Montana* and its progeny permit tribal regulation of nonmember *conduct inside the reservation* that implicates the tribe's sovereign interests." *Id.* at 782 (quoting *Plains Commerce Bank*, 554 U.S. at 332). Even though a tribal entity had "executed the contracts" on the reservation, tribal jurisdiction could not exist because the nonmembers themselves "ha[d] not engaged in *any* activities inside the reservation." *Id.* at 782-783 & n.42.

The Seventh Circuit returned to the question in *Stifel, Nicolaus & Co.* v. *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015). There, a tribal court asserted jurisdiction over nonmembers who had bought bonds that were secured by the revenues and assets of an on-reservation casino and accompanied by a trust indenture giving the bondholder the power to manage casino operations. *Id.* at 189-192. The Seventh Circuit rejected the tribe's argument that "the court need not limit its consideration to the on-reservation actions" and reiterated its holding in *Jackson* that the *Montana* exceptions do not apply to "[t]he actions of nonmembers outside of the reservation." *Id.* at 207. The tribal court lacked jurisdiction because the lawsuit did not "seek redress for any of [the nonmembers'] consensual activities *on tribal land*." *Id.* at 208 (emphasis added).

The Eighth Circuit has likewise held that tribal jurisdiction cannot be premised on off-reservation conduct. In *Hornell Brewing Co.* v. *Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998), the court held that a tribal court lacked jurisdiction over claims against an off-reservation brewery for the allegedly unauthorized use of a deceased tribal leader's name. *Id.* at 1089, 1091. The court recognized that tribes possess limited "'inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*.'" *Id.* at 1091 (quoting *Montana*, 450 U.S. at 565). The court emphasized that, because the "operative phrase is 'on their reservations,'" *Montana* does not allow tribal jurisdiction over the "conduct of non-Indians occurring *outside their reservations*." *Ibid.* The court then rejected the argument that a nonmember's online advertising could satisfy the requirement of on-reservation conduct just because tribal members could see such advertising from the reservation. *Id.* at 1093.

The Eighth Circuit reiterated the importance of on-reservation conduct in *Attorney's Process & Investigation Services, Inc.* v. *Sac & Fox Tribe,* 609 F.3d 927 (8th Cir. 2010). There, a tribe's chairman attempted to end an intratribal dispute over control of a casino by hiring an off-reservation security firm, which sent armed employees to raid the casino and seize confidential information. *Id.* at 932. The rival faction sued the security firm in tribal court for both conversion of the tribal funds paid by the chairman under the security contract and intentional torts committed on tribal land. *Ibid.* Although the court held that the tribal court had jurisdiction under *Montana* over torts committed during the raid on tribal land, the tribal court

lacked jurisdiction over the conversion claim because the tribe did not allege that the nonmembers' conversion of the funds "occurred within the Meskwaki Settlement." *Id.* at 940-941.

The Tenth Circuit recognized the same territorial limits on the *Montana* exceptions in *MacArthur* v. *San Juan County*, 497 F.3d 1057 (10th Cir. 2007). There, a tribal court asserted jurisdiction over tribal members' claims against their employer (a health services district), the county, and employees of those entities. *Id.* at 1060-1062. But the Tenth Circuit held that, because "inherent sovereignty ceases at the reservation's borders," "a tribe only attains regulatory authority based on the existence of a consensual employment relationship when the relationship exists between a member of the tribe and a nonmember individual or entity employing the member *within the physical confines of the reservation*." *Id.* at 1071-1072 (emphasis added). That holding foreclosed the exercise of tribal-court jurisdiction over all the nonmembers except the employer who employed tribal members "within the exterior boundaries of the Navajo reservation" (but who was separately protected from tribal-court jurisdiction as a state instrumentality). *Id.* at 1072; see *id.* at 1074.

Consistent with those decisions, two state supreme courts have emphasized that tribal sovereignty stops at the reservation's borders. The Supreme Court of South Dakota has noted that "[t]he Montana analysis generally applies to conduct *within the reservation*" and refused to uphold tribal jurisdiction over a custody dispute between a member and nonmember, in part because "the conduct at issue in th[e] case occurred entirely off the reservation." *In re J.D.M.C.*,

739 N.W.2d 796, 810-811 (S.D. 2007). And the Washington Supreme Court held that the *Montana* framework governs only "the scope of a tribe's civil regulatory jurisdiction within the reservation" and "do[es] not naturally extend to" cases involving assertions of tribal authority "outside the reservation"—there, a tribal officer's pursuit of a drunk driver beyond the reservation's borders. *State* v. *Eriksen*, 259 P.3d 1079, 1083 (Wash. 2011).

2. In upholding the exercise of tribal-court jurisdiction here, the Ninth Circuit departed from the well-settled geographic limitations on tribal sovereignty. The court held that "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." App., *infra*, 17a. Although the court accepted that "all relevant conduct occurred off the Reservation," the court reasoned that petitioners' conduct need not take place on the reservation so long as it "relates to" tribal land. *Id.* at 14a-15a.

That interpretation cannot be reconciled with the decisions of other courts of appeals. In *Stifel*, the Seventh Circuit rejected the exercise of tribal jurisdiction over nonmembers who had purchased bonds that came with the right to control the assets and direct the management of an on-reservation casino—a transaction that "related" to tribal lands at least as much as the insurance contracts here. See 807 F.3d at 189. In *Hornell*, the Eighth Circuit declined to dispense with the requirement of nonmember conduct physically occurring on the reservation even though the nonmember's advertisements related to the tribe and reached tribal members on tribal lands via the internet. See 133 F.3d

at 1093. And in *MacArthur*, the Tenth Circuit required conduct "within the physical confines of the reservation" as a prerequisite to applying the *Montana* framework. 497 F.3d at 1071-1072.

Petitioners would have prevailed in all those courts that adhere to the traditional understanding of the territorial limitations on tribal sovereignty. As Judge Bumatay noted, only the Ninth Circuit looks at the "*object*" of the nonmember's conduct rather than "actual *on-reservation actions or conduct*." App., *infra*, 73a.

B. The Ninth Circuit also deepened a circuit split over the meaning of this Court's guidance in *Plains Commerce Bank* that any tribal regulation of nonmembers "must 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.

1. In *Jackson*, the Seventh Circuit rejected tribal-court jurisdiction for the independent, alternative reason that the nonmembers' off-reservation conduct did not trigger the tribe's inherent sovereignty under *Plains Commerce Bank*. 764 F.3d at 783. The nonmembers there had consented to tribal jurisdiction in the loan agreements. *Ibid.* But applying *Plains Commerce Bank*, the Seventh Circuit held that the consensual relationship could not establish jurisdiction under *Montana* because the tribal entities "made no showing that the present dispute implicates *any* aspect of 'the tribe's inherent sovereign authority.'" *Ibid.*

The Eighth Circuit also requires a separate inquiry into whether tribal regulation serves an inherent

sovereign interest. In *Kodiak Oil & Gas (USA) Inc.* v. *Burr*, 932 F.3d 1125 (8th Cir. 2019), the court held that a tribal court lacked jurisdiction over a lawsuit by tribal members seeking to recover royalties from non-members that operated oil wells on tribal land. *Id.* at 1129-1130. The contractual relationship alone could not support jurisdiction under *Montana* because "the tribe may regulate non-member activities only where the regulation 'stem[s] from the tribe's inherent sovereign authority.'" *Id.* at 1138 (quoting *Plains Commerce Bank*, 554 U.S. at 336). The tribe had not satisfied that constraint because its regulation of royalty payments was "not necessary for tribal self-government or controlling internal relations." *Ibid.*

2. By contrast, the Fifth Circuit has rejected the need to assess whether a consensual relationship with a tribe or tribal member "'implicate[s] tribal governance [or] internal relations'" under *Plains Commerce Bank*. *Dolgencorp, Inc.* v. *Mississippi Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014). The court labeled as "dicta" this Court's discussion and held that inherent tribal sovereignty was already "built into the first *Montana* exception," which eliminates any need to assess how tribal jurisdiction enforces conditions on entry, preserves tribal self-government, or controls internal relations. *Ibid.* After five judges objected that the panel ignored *Plains Commerce Bank*'s "plain" requirement, *Dolgencorp, Inc.* v. *Mississippi Band of Choctaw Indians*, 746 F.3d 588, 590 (5th Cir. 2014) (Smith, J., dissenting from denial of rehearing en banc), this Court granted review but was unable to decide the case due to an equally divided vote, *Dollar General Corp.* v. *Mississippi Band of Choctaw Indians*, 579 U.S. 545 (2016) (per curiam).

3. The Ninth Circuit recognized this circuit split and adopted a position that "aligns with that of the Fifth Circuit" and "departs from that of the Seventh Circuit." App., *infra*, 26a n.4; accord *id.* at 60a (opinion of Hawkins, Graber, and McKeown, JJ.). Breaking with the *Jackson* decision, the court rejected the 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.'" *Id.* at 25a (quoting *Plains Commerce Bank*, 554 U.S. at 337). And agreeing with the Fifth Circuit, the court held that "[i]f 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*." *Id.* at 26a.

The Ninth Circuit thus concluded, like the Fifth Circuit but unlike the Seventh and Eighth Circuits, that *Plains Commerce Bank* does not impose an independent check on tribal-court jurisdiction.

* * *

The Ninth Circuit is the "first and only circuit court to extend tribal court jurisdiction over a nonmember without requiring the nonmember's actual physical activity on tribal lands." App., *infra*, 73a (opinion of Bumatay, J.). And once inside the *Montana* framework, the Ninth Circuit could uphold tribal-court jurisdiction here only by deepening another split on the meaning of *Plains Commerce Bank*. Those outcome-determinative conflicts justify this Court's review.

II. THE NINTH CIRCUIT'S EXPANSION OF TRIBAL JURISDICTION TO OFF-RESERVATION CONDUCT CONFLICTS WITH THIS COURT'S DECISIONS

The Ninth Circuit's outlier decision cannot be squared with this Court's decisions. Any assertion of tribal jurisdiction over a nonmember is "presumptively invalid." *Plains Commerce Bank*, 554 U.S. at 330 (citation omitted). Given the guardrails this Court has imposed on tribal assertions of power over nonmembers, the Tribe had to prove (A) nonmember conduct inside the reservation, (B) consent to tribal jurisdiction, and (C) an inherent sovereign interest. The Ninth Circuit wrongly discounted that the off-reservation location of petitioners' conduct forecloses the Tribe's ability to make any of those showings here.

A. This Court's decisions establish that conduct is potentially subject to tribal regulation only when it occurs within the reservation's physical boundaries, not when it merely "relates to tribal lands." App., *infra*, 14a.

1. Tribal sovereignty stops at the reservation's borders. The first time that the Court heard a case on tribal sovereignty, Justice Johnson observed that tribes lacked "the right of governing every person within their limits except themselves." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (concurring opinion). Chief Justice Marshall later described tribes as "distinct political communities, having territorial boundaries, within which their authority is exclusive." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). As this Court recognized long ago, the corollary is that, when a nonmember's "act was beyond the territorial limits of [a tribe's] jurisdiction," that fact "'alone would be conclusive'" of the tribe's lack of authority.

Elk v. *Wilkins*, 112 U.S. 94, 108 (1884) (citation omitted).

Tribes presumptively lack power over nonmembers, even when within their borders. In *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191 (1978), the same Tribe that here sued petitioners in its own tribal court prosecuted a nonmember for an on-reservation crime. *Id.* at 194. The Court rejected that exercise of jurisdiction because tribes, by virtue of their incorporation into the United States, categorically lack jurisdiction over crimes by nonmembers. *Id.* at 209-210. The Court noted that federal law historically allowed tribes to decide only controversies among their members and "reserve[d] to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side." *Id.* at 204 (quoting *In re Mayfield*, 141 U.S. 107, 116 (1891)). The only historical exception to a tribe's lack of authority over nonmembers concerned unlawful "non-Indian settlements *on* Indian territory." *Id.* at 197 n.8 (emphasis added); see App., *infra*, 80a-86a (opinion of Bumatay, J.) (cataloging absence of historical support for tribal regulation outside narrow circumstances when nonmember was "*physically* present on tribal lands"). As a result, a "historical perspective" on the territorial limits on tribal sovereignty "casts substantial doubt" on tribal attempts to regulate off-reservation conduct. *Oliphant*, 435 U.S. at 206.

The Court in *Montana* later applied *Oliphant*'s bar on tribal authority over nonmembers to civil jurisdiction, subject to only two exceptions for certain "non-Indians *on their reservations*." 450 U.S. at 565 (emphasis added). First, tribes have limited authority to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members,

through commercial dealing, contracts, leases, or other arrangements." *Ibid.* The Court pointed to four examples, all of which involved conduct by nonmembers within the reservation's physical boundaries. *Id.* at 565-566; see, *e.g.*, *Williams* v. *Lee*, 358 U.S. 217, 223 (1959) (nonmember operating general store "on the Reservation"); *Morris* v. *Hitchcock*, 194 U.S. 384, 393 (1904) (nonmember grazing cattle "wrongfully within [tribal] territory"). Second, a tribe "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

This Court has reinforced that the *Montana* exceptions require nonmember conduct within the reservation's territorial boundaries. In *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645 (2001), the Court held that tribal authority "reaches no further than tribal land" and that the tribe there could tax only "transactions occurring on *trust lands* [*i.e.*, lands held in trust for the tribe] and significantly involving a tribe or its members." *Id.* at 653 (citation omitted). And in *Plains Commerce Bank*, the Court reiterated that "tribes do not, as a general matter, possess authority over non-Indians," even those "who come within their borders." 554 U.S. at 327-328. Both exceptions to the general rule against tribal jurisdiction "permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests." *Id.* at 332. The Court also underscored that all four cases cited in *Montana* show that the first exception requires proof of "non-Indian activities *on the reservation* that ha[ve] a discernible effect on the tribe or its members." *Ibid.* (emphasis added).

The *Montana* framework therefore does not apply at all to this case. The Ninth Circuit acknowledged that "all relevant conduct occurred off the Reservation." App., *infra*, 15a. And this Court's decisions confirm that, although the insurance policies concerned the Tribe's businesses on tribal land, "nonmember 'conduct taking place on the land' and transactions *related* to the land * * * 'are two very different things.'" *Id.* at 95a (opinion of Bumatay, J.) (quoting *Plains Commerce Bank*, 554 U.S. at 340). That is the end of the road: "no on-reservation conduct, no jurisdiction." *Id.* at 89a.

2. The Ninth Circuit's expansive conception of the territorial scope of tribal sovereignty rests on a distorted snippet from one of this Court's opinions, a faulty analogy to due-process limitations on personal jurisdiction, and an effort to adapt tribal jurisdiction to modern conditions despite the absence of any historical support.

The Ninth Circuit relied principally on *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which stated that "a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe." *Id.* at 142. It asserted that the disjunctive "or" supported the tribe's ability to regulate off-reservation commercial relationships related to tribal businesses. App., *infra*, 16a. But this Court already rejected that overreading in *Atkinson*, which explained that *Merrion* "involved a tax that only applied to *activity occurring on the reservation*" and that any "parts of the *Merrion* opinion that suggest a broader scope for tribal [sovereign] authority" cannot overcome the general principle that tribal jurisdiction "reaches no further than tribal land." 532 U.S. at 653 (emphasis added). The Ninth Circuit's

only serious attempt to reconcile its holding with this Court's decisions on tribal jurisdiction thus rests on an inferential leap from *Merrion* that has already been "disclaimed by the Court." App., *infra*, 99a (opinion of Bumatay, J.).

The Ninth Circuit's "relates to tribal lands" test for tribal courts' subject-matter jurisdiction also derives from a strained analogy to personal jurisdiction. App., *infra*, 14a-15a (citing *Smith* v. *Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) (en banc)). The Ninth Circuit in *Smith* equated the first *Montana* exception with the "minimum contacts" test from *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), governing state courts' exercise of personal jurisdiction over nonresidents. 434 F.3d at 1138 (citation omitted). That analogy is flawed because tribal courts "*cannot* be courts of general jurisdiction" like state courts, which are generally open to claims on all subjects. *Nevada* v. *Hicks*, 533 U.S. 353, 367 (2001) (emphasis added); accord *Atkinson*, 532 U.S. at 653 n.5 (rejecting attempt to analogize tribal taxing power to "state taxing authority"). The Ninth Circuit's transformation of *Montana*'s limited exceptions for subject-matter jurisdiction over nonmembers into a miniature version of *International Shoe* defies the principle that the "sovereign authority of Indian tribes is limited in ways state and federal authority is not." *Plains Commerce Bank*, 554 U.S. at 340.

The panel further erred in disregarding the lack of historical support for tribal jurisdiction over off-reservation conduct. App., *infra*, 63a (opinion respecting denial of rehearing en banc). Half a century ago, the Ninth Circuit upheld the Suquamish Tribe's prosecution of a nonmember based on "practical considerations," *Oliphant* v. *Schlie*, 544 F.2d 1007, 1013 (9th

Cir. 1976), brushing off then-Judge Kennedy's objection that the assertion of tribal jurisdiction was "novel and unusual, and certainly inconsistent with prior practice," *id.* at 1014 (dissenting opinion). This Court reversed because tribal jurisdiction does not stretch beyond its historical limits to meet perceived modern needs. *Oliphant*, 435 U.S. at 206-207, 210.

The Ninth Circuit has again expanded the jurisdiction of the Suquamish courts into uncharted territory, supposedly to keep pace with "our contemporary world." App., *infra*, 17a. In its view, tribal-court jurisdiction should be expanded because "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." *Ibid.* That mode of analysis remains as wrong today as it was in *Oliphant*. After all, this Court decided *Montana* in 1981 and *Plains Commerce Bank* in 2008—long after "technological innovations" like the phone and internet, respectively. *Id.* at 100a (opinion of Bumatay, J.).

B. Even if the *Montana* framework could apply to off-reservation conduct in some circumstances, the Ninth Circuit still would have erred in upholding tribal jurisdiction under the first *Montana* exception. This Court has limited that exception in recognition that "nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory." *Plains Commerce Bank*, 554 U.S. at 337. "Consequently," the Court continued, "those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." *Ibid.* Petitioners here may have consented to do business with the

Tribe, but they in no way consented to tribal jurisdiction over their off-reservation practice of insurance.

As an initial matter, petitioners never gave express consent to tribal jurisdiction. A nonmember may consent to tribal-court jurisdiction by stipulation or a forum-selection clause. See *Hicks*, 533 U.S. at 383 (Souter, J., concurring). But the Ninth Circuit held that petitioners did not consent to tribal-court jurisdiction in the relevant insurance policies. App., *infra*, 22a n.3.

Petitioners also did not consent to tribal jurisdiction by their actions. Certain conduct, such as setting up shop on the reservation, *Williams*, 358 U.S. at 223, or becoming a tribal member, 7 Op. Att'y Gen. 174, 185 (1855), might constitute constructive consent to tribal jurisdiction. But merely "trading with the Indians" cannot qualify as such consent. *Id.* at 186. Under the Indian Commerce Clause, federal law rather than tribal law has long governed *on*-reservation commerce between tribes and nonmembers. U.S. Const. Art. I, § 8, cl. 3; see, *e.g.*, Indian Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790). And the remedy for a nonmember's violation of any tribal conditions on entry or presence was expulsion from the reservation enforced (typically) by federal authorities—not an action in a tribal court. *E.g.*, *Morris*, 194 U.S. at 392; Act of Mar. 30, 1802, ch. 13, § 5, 2 Stat. 142.

Whatever limited set of on-reservation actions might establish consent to tribal jurisdiction, inferring consent from an off-reservation transaction is a bridge too far. The Ninth Circuit reasoned that petitioners had impliedly consented to tribal jurisdiction because the insurance contracts "bore a direct connection to and could affect the Tribe's properties on [tribal] land." App., *infra*, 22a-23a. But the court disregarded

the importance of the fact that the Tribe reached out beyond the reservation to buy insurance from petitioners. This Court has established a default rule that "Indians going beyond reservation boundaries" are "subject to nondiscriminatory state law." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973). And petitioners accordingly registered the contracts under Washington law. See p. 8, *supra*. Nothing in that course of events establishes that petitioners consented by their actions to tribal jurisdiction.

C. The Ninth Circuit further erred in disregarding the limitation that, even when nonmembers have consented to tribal regulation, "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 Bank*, 554 U.S. at 337.

1. In the Ninth Circuit's view, this Court in *Plains Commerce Bank* "merely stat[ed]" the justifications for the *Montana* exceptions but did not require courts to decide whether the tribal regulation does, in fact, stem from one of those sovereign interests. App., *infra*, 26a. The court aligned itself with the Fifth Circuit, *ibid.* n.4, which called that requirement "dicta," *Dolgencorp*, 746 F.3d at 175.

That view of *Plains Commerce Bank* is wrong. The absence of a sovereign interest was the principal basis for the holding in *Plains Commerce Bank* that the tribal court lacked jurisdiction over a nonmember bank's sale of land within a reservation. The Court determined that the sale of non-Indian fee land did not implicate the tribe's right to exclude others from tribal land, its power to govern its members, or its control of internal relations. 554 U.S. at 335-336. For that reason, the Court held that, "[w]hatever the Bank

anticipated, whatever 'consensual relationship' may have been established through the Bank's dealing with the [tribal members], the jurisdictional consequences of that relationship cannot extend to the Bank's subsequent sale of its fee land." *Id.* at 338. The Ninth Circuit's conclusion that a consensual relationship under the first *Montana* exception "necessarily" establishes an inherent sovereign interest, App., *infra*, 26a, cannot be squared with *Plains Commerce Bank*.

2. Had the Ninth Circuit faithfully applied *Plains Commerce Bank*, the off-reservation nature of petitioners' conduct should have played a dispositive role in its assessment of inherent tribal sovereign interests.

The tribe's power to "set conditions on entry" cannot support jurisdiction here. *Plains Commerce Bank*, 554 U.S. at 337. Tribes have a "landowner's right to occupy and exclude" nonmembers from tribal land. *Strate* v. *A-1 Contractors*, 520 U.S. 438, 456 (1997); see Treaty of Point Elliot Art. II, 12 Stat. 928 (forbidding any "white man" to "reside upon [the reservation] without permission" from the Tribe). But that right could not possibly apply to nonmembers that have never set foot on the reservation. App., *infra*, 105a (opinion of Bumatay, J.).

Tribal jurisdiction over off-reservation businesses that transact with tribes and tribal members also does not "preserve tribal self-government." *Plains Commerce Bank*, 554 U.S. at 337. This Court has held that state "jurisdiction over the claims of Indian plaintiffs against non-Indian defendants * * * d[oes] not interfere with the right of tribal Indians to govern themselves." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 476 U.S. 877, 880 (1986); accord *Strate*, 520 U.S. at 459. And the Court

also has recognized that "gambling" and other business enterprises go "beyond what is needed to safeguard tribal self-governance." *Kiowa Tribe of Oklahoma* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998). The Tribe's attempt to regulate nonmembers' off-reservation provision of property insurance for its tribal casino is even further removed.

Nor is tribal jurisdiction necessary to "control internal relations." *Plains Commerce Bank*, 554 U.S. at 337. Internal relations are (for example) tribal membership, crimes by members, domestic relations among members, and inheritance of property by members. *United States* v. *Wheeler*, 435 U.S. 313, 322 & n.18 (1978). But this case is about the Tribe's *external* relations with off-reservation insurers.

* * *

At every turn, the Ninth Circuit gave no legal effect to the acknowledged fact—one that should have been dispositive—that petitioners' conduct occurred off the reservation. This Court's decisions establish that the Ninth Circuit never should have applied the *Montana* framework to the off-reservation conduct of the nonmember petitioners, as tribes categorically lack power to regulate such conduct. The court also wrongly divined consent to tribal jurisdiction from petitioners' willingness to do business with tribes that leave the reservation to buy property insurance. And the court disregarded the need for the Tribe to prove that its exercise of jurisdiction over petitioners' conduct flowed from an inherent sovereign interest. This Court should grant review and reject the Ninth Circuit's flawed approach to assessing the propriety of tribal-court jurisdiction over nonmembers.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

A. The decision below represents a massive expansion of tribal-court jurisdiction. Many tribes run commercial enterprises that transact all over the globe. Frequently, their purchases of goods and services "relat[e] to tribal lands" because that is where the *tribes* (not the nonmembers) have located their businesses. App., *infra*, 14a. The consequence of the Ninth Circuit's ruling is that, "even though the Tribe's reservation is only 12 square miles, its courts can now reach the furthest corners of the country—and perhaps the ends of the earth." *Id.* at 95a (opinion of Bumatay, J.). Petitioners here—insurers and underwriters headquartered across the United States and in the United Kingdom, *id.* at 145a—reflect the worldwide reach of the ruling. And that effect will be multiplied hundreds of times over because the Ninth Circuit contains three-quarters of the nearly 600 federally recognized tribes. Ninth Circuit Committee on Tribal and Native Relations, *Newsletter* 1 (Summer 2024), tinyurl.com/43mz4kzx.

The Ninth Circuit claimed that its decision was "narrow." App., *infra*, 27a. Not so. Its ruling unbound tribal jurisdiction from the constraints of geography and the inherent sovereign interests in *Plains Commerce Bank*, replacing them with an amorphous inquiry into whether the nonmember's conduct "bore a direct connection to and could affect" the tribe's own activities on tribal lands. *Id.* at 22a-23a. That rule could sweep in, for example, banks that make loans that are secured by tribal land or tribal property, cf. *Stifel*, 807 F.3d at 207, financial institutions that administer ERISA plans for tribal businesses, 29 U.S.C. § 1002(32), and lawyers who assist casinos with compliance under the

Indian Gaming Regulatory Act, see App., *infra*, 76a (opinion of Bumatay, J.). Only the traditional understanding that "nonmember *conduct* inside the reservation" means actions occurring within the reservation's physical boundaries could prevent the first *Montana* exception from "'swallow[ing] the rule'" that tribes generally lack power over nonmembers. *Plains Commerce Bank*, 554 U.S. at 330, 332 (citation omitted).

Allowing tribes to exercise tribal jurisdiction over nonmembers who sell goods or services to tribes or tribal members off the reservation magnifies the burdens of legal compliance. Here, for example, the Ninth Circuit held that "the Tribe's lack of insurance regulations" was irrelevant because the Tribe can make contract law for insurance policies on the fly. App., *infra*, 25a. Such unwritten tribal law can incorporate the tribe's "'customs, traditions, and practices,'" making tribal law "unusually difficult for an outsider to sort out." *Hicks*, 533 U.S. at 384-385 (Souter, J., concurring) (citation omitted); see, *e.g.*, *Plains Commerce Bank*, 554 U.S. at 338 (discussing "novel" antidiscrimination claim embraced by tribal jury). At least when a nonmember locates his business on the reservation, that nonmember is tasked with piecing together just one tribe's codes, precedent, and customs. But when a nonmember generally offers services to tribes across the country, that nonmember risks winding up in almost 600 different tribal-court systems, each applying its own tribal customs.

That variation is a recipe for unfairness. Many tribes respected their territorial boundaries by filing property-insurance lawsuits in state or federal court that met no success, just like suits filed by hundreds of other policyholders. *E.g.*, *Mashantucket Pequot Tribal Nation* v. *Factory Mutual Insurance Co.*, 313

A.3d 1219, 1237-1238 (Conn. App. 2024); *Cherokee Nation* v. *Lexington Insurance Co.*, 521 P.3d 1261, 1270 (Okla. 2022). But other tribes, including the Suquamish, seek to extract millions of dollars from insurers in their own tribal courts through claims that have been rejected in virtually all federal and state courts. App., *infra*, 146a; see, *e.g.*, *Lexington Insurance Co.* v. *Mueller*, 2024 WL 5001815, at *2 (9th Cir. Dec. 6, 2024) (upholding jurisdiction of Cabazon court over COVID-19 insurance claims on same theory advanced here). If courts "push coverage beyond its terms" and create "an insurance product that covers something no one paid for," petitioners cannot fairly price insurance. *Santo's Italian Café LLC* v. *Acuity Insurance Co.*, 15 F.4th 398, 407 (6th Cir. 2021). That dynamic benefits neither the nonmembers who do business with tribes nor the tribes themselves.

B. The Ninth Circuit's extension of tribal-court jurisdiction does serious damage to "the liberty interests of nonmembers." *Plains Commerce Bank*, 554 U.S. at 334. In tribal court, nonmembers do not possess their constitutional rights because tribes exercise "a sovereignty outside the basic structure of the Constitution." *Id.* at 337 (citation omitted). The Indian Civil Rights Act also grants tribal courts substantial "leeway" to depart from federal protections, *Hicks*, 533 U.S. at 384 (Souter, J., concurring) (citation omitted), including (as here) exclusion of nonmembers from juries, *Oliphant*, 435 U.S. at 194. Meanwhile, "[t]ribal courts are often 'subordinate to the political branches of tribal governments.'" *Duro* v. *Reina*, 495 U.S. 676, 693 (1990) (citation omitted). And those tribal political branches are unchecked by the ordinary democratic process in this context because "nonmembers 'have no part in tribal government' and have 'no say in the laws and regulations that govern tribal territory.'" *United*

States v. *Cooley*, 593 U.S. 345, 353 (2021) (quoting *Plains Commerce Bank*, 554 U.S. at 337).

Even though this Court has frequently relied on such concerns in rejecting overbroad assertions of tribal jurisdiction, the Ninth Circuit declared that "[c]onsideration of the political structure of tribal governments, including their judicial systems, has *no* place in our *Montana* analysis." App., *infra*, 24a (emphasis added). That language will empower federal and tribal courts alike within the Ninth Circuit to give the back of the hand to nonmembers' good-faith objections to submitting disputes to tribal forums that do not guarantee their constitutional rights or allow their political participation.

C. This petition is an ideal vehicle. The case cleanly raises the question presented because the Ninth Circuit acknowledged that "all relevant conduct occurred off the Reservation." App., *infra*, 15a. This Court can directly answer that question because petitioners exhausted their tribal remedies. See pp. 8-9, *supra*. But if the decision below remains undisturbed, tribal courts may deny nonmembers interlocutory appeals to exhaust their jurisdictional challenges, complicating nonmembers' ability to seek protection in federal court. *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U.S. 9, 17 (1987). This Court should grant review before the Ninth Circuit's capacious view of tribal jurisdiction calcifies in the courts of the nearly 450 tribes within its geographic scope.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

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	No. 22-35784 D.C. No. 3:21-cv-05930-DGE OPINION

LIMITED T/AS SOMPO INTERNATIONAL SUBSCRIBING TO POLICY NO. PJ1900134-A,

Plaintiffs-Appellants,

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

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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 into a contract with Alliant and issued insur-

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[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").

ance 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]

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[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 non-member'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 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

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[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.").

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 "longstanding 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] Be-

[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*).

cause 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 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.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LEXINGTON INSURANCE COMPANY, et al., Plaintiffs, v. CINDY SMITH, et al., Defendants.	CASE NO. 3:21-cv-05930-DGE ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs' insurance policies were issued for the benefit of tribal owned businesses and properties operating on tribal land. There is a present dispute as to whether those insurance policies provide coverage for losses alleged to have occurred at the insured businesses and property. Because the issuance of the insurance policies arose out of activities occurring on tribal land—namely, tribal owned business activities on tribal owned lands—a tribe's sovereign right to exclude as well as the consensual relationship between the parties confers tribal adjudicative authority.

Accordingly, and as further explained herein, the Court GRANTS Defendant-Intervenor's Motion for Summary Judgment (Dkt. No. 52), DENIES Plaintiffs' Motion for Summary Judgment (Dkt. No. 54) and DECLINES to take judicial notice (Dkt. No. 58) of certain disputed aspects of the Suquamish Tribal Code.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

Defendant-Intervenor, the Suquamish Tribe ("the Tribe"), is a federally recognized Indian tribe located in Suquamish, Washington, and situated on tribal trust lands within the Port Madison Indian Reservation ("the Reservation").[1] (Dkt. No. 55-5 at 3.) The Tribe owns and operates several businesses on the Reservation, including the Suquamish Museum and Suquamish Seafood Enterprise ("SSE"). (*Id*.)

Port Madison Enterprises ("PME") is the Tribe's wholly owned economic development arm. (*Id*.) PME is a tribally charted branch of the Suquamish Tribe and is headquartered on tribal trust lands within the boundaries of the reservation. (*Id*.)

The purpose of PME is to develop community resources "while promoting the economic and social welfare of the Tribe through commercial activities." (*Id*.) PME operates numerous businesses, including the

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[1] In reciting the facts of this case, the Court relies, in part, on the findings of the Suquamish Tribal Court and Tribal Court of Appeals. The existence and extent of a tribal court's civil subject matter jurisdiction over non-tribal members should be evaluated, in the first instance, by the tribal court itself, which serves the orderly administration of justice in the federal court "by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856-857 (1985). Courts apply "a deferential, clearly erroneous standard of review for factual questions" when evaluating decisions by tribal courts that accords with traditional judicial policy of respecting the factfinding ability of the court of first instance. *FMC v. Shoshone Bannock Tribes*, 905 F.2d 1311, 1313-1314 (9th Cir.1990).

Suquamish Clearwater Casino and Resort, Kiana Lodge, White Horse Golf Club, Masi Shop, Longhouse Texaco, and Suquamish Village Chevron. (*Id*.) PME also develops and manages commercial and residential property. (*Id*.) All tribally owned businesses are located on tribal trust lands within the Reservation's boundaries. (*Id*.)

Defendants Cindy Smith, Eric Nielsen, Bruce Didesch, and Steve Aycock are judges of the Suquamish Tribal Court and the Suquamish Tribal Court of Appeals. (Dkt. No. 40.)

Plaintiffs are insurance companies ("the Insurers") from whom the Tribe and PME purchased, on their own behalf and on behalf of various tribal entities, "All Risk" property insurance coverage. (Dkt. No. 55-5 at 4.) The Tribe and PME purchased their "All Risk" property insurance policies through the Tribal Property Insurance Program ("TPIP"), which is administered by Tribal First, a moniker used by Alliant Specialty Services, Inc. ("Alliant"). (*Id*.)

Tribal First promotes itself as a specialized program that "has focused exclusively on meeting the insurance and risk management needs of tribal governments and enterprises since 1993." (Dkt. No. 55-1 at 2.) Tribal First bills 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." (*Id*.)

B. The Impact of COVID-19 on the Tribe's and PME's Businesses

On March 9, 2020, in response to the outbreak of COVID-19 in Washington State, the Suquamish Tribal Council passed Resolution 2020-048, declaring

a public health emergency and activating comprehensive emergency management within the Tribal Government. (Dkt. No. 55-4 at 12.) On March 16, 2020, the Tribal Council passed Resolution 2020-051, restricting access to certain public facilities operated by PME and suspending operations at the Suquamish Clearwater Casino Resort. (*Id*. at 13.)

On March 27, 2020, the Tribal Council extended the suspension of operations at the Suquamish Clearwater Casino Resort and suspended operations at other tribal businesses, including the Kiana Lodge, the White Horse Golf Club, and the Longhouse Texaco outlets. (*Id*. at 13-14.) Tribally run businesses were subject to a phased reopening plan that limited their scope of operations. (*Id* at 14.)

The Tribe and PME allege that the COVID-19 pandemic damaged the buildings housing tribal businesses, caused tribal businesses to suspend or restrict operations, and further caused tribal businesses to experience loss of use, extended business income loss, and tax revenue interruption even after businesses were allowed to re-open. (*Id*.) The Tribe and PME further contend that they have incurred other expenses related to the pandemic, including costs associated with disinfecting and sanitizing their businesses premises. (*Id*.)

C. The Insurance Policies

The Tribe and PME acquired their insurance policies via insurance broker Brown & Brown of Washington, Inc. ("Brown & Brown"). (Dkt. No. 53-1.)

The relevant insurance policies purchased by the Tribe and PME were in effect from July 1, 2019 through July 1, 2020. (Dkt. No. 55-5 at 4.) During this period, the Tribe paid $231,963.00 and PME paid

$1,336,007.00 for coverage under their respective policies. (*Id*.) The named insureds on the Tribe's policies included the Suquamish Tribal Council, Totten Housing Development Limited Partnership c/o Suquamish Tribe, the Department of Community Development, and SSE. (*Id*. at 5.)

The named insured on PME's policies included PME and all its operating entities and divisions, including Suquamish Clearwater Casino Resort, Retail Division (including Masi Shop and Suquamish Village Shell), Kiana Lodge, Property Management Division (including Agate Pass Business Park and all other rental properties), White Horse Golf Course, and PME's 401(k) plan. (*Id*.)

D. The Tribe and PME's COVID-19 Related Insurance Claims

The Tribe and PME contend that the "All Risk" policies issued by the Insurers provide "broad coverage for losses caused by any cause unless the cause is explicitly excluded in the policy." (Dkt. No. 55-4 at 17.) The Tribe and PME argue that the policies issued to them by the Insurers do not exclude losses incurred due to communicable diseases or viruses. (*Id*.) The Tribe and PME submitted claims for coverage under the policies, which Lexington Insurance Company, acting as lead insurer, responded to by issuing reservation of rights letters to the Tribe and PME. (*Id*. at 19; Dkt No. 57.)

E. Proceedings in Tribal and Federal Court

After the Insurers responded to their claims, the Tribe and PME filed a complaint against the Insurers in the Suquamish Tribal Court. (Dkt. No. 55-4.) The

Tribe and PME sued the Insurers for breach of contract, and sought a declaratory judgment that the Insurers were obligated to compensate them for the full amount of their COVID related losses. (*Id*. at 19-22.)

Insurers filed a motion to dismiss the Tribe and PME's complaint, arguing that the Tribal Court did not have personal or subject matter jurisdiction. (Dkt. No. 55-5.) The Tribal Court found that it did have jurisdiction, and the Tribal Court of Appeals affirmed. (*Id*.; Dkt. No. 55-6.)

On December 22, 2021, Insurers, having exhausted their tribal remedies,[2] filed a complaint in this Court seeking a judgment that the Suquamish Tribal Court lacks jurisdiction over Insurers and the claims brought against them in the Tribal Court.[3] (Dkt. No. 1.) By stipulation of the parties, the Tribal Court case is stayed pending the outcome of the action before this Court. (Dkt. No. 48 at 41.)

Plaintiffs' complaint was initially brought against Defendants Cindy Smith, Eric Nielsen, Bruce

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[2] Although the existence of tribal court jurisdiction presents a federal question within the scope of 28 U.S.C. § 1331, considerations of comity direct that tribal remedies be exhausted before the question is addressed by the district court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987) (citing *National Farmers Union*, 471 U.S. at 856-857). The federal policy of promoting tribal self-government and self-determination requires that the tribal court have "the first opportunity to evaluate the factual and legal bases for the challenge" to its jurisdiction. *Id*. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. *Id*. at 17.

[3] In their complaint, Plaintiffs also sought injunctive relief. (Dkt. No. 1 at 35-36.) Plaintiffs filed a motion for a preliminary injunction (Dkt. No. 13), but later withdrew it. (Dkt. No. 50.)

Didesch, and Steve Aycock in their official capacity as judges of the Suquamish Tribal Court and the Suquamish Tribal Court of Appeals. (Dkt. No. 1.) On March 29, 2022, the Court granted an unopposed motion by the Suquamish Tribe to intervene as a defendant. (Dkt. No. 47.)

1. Plaintiffs' Motion for Summary Judgment

On May 2, 2022, Plaintiffs filed a motion for summary judgment. (Dkt. No. 54.) Plaintiffs argue that the Tribal Court is not the proper forum for the Tribe and PME's claims. Plaintiffs contend that tribal courts presumptively lack jurisdiction over non-members, and may only exercise jurisdiction over non-members in exceptional circumstances. (*Id*. at 11.)

Plaintiffs contend that tribal courts may exercise jurisdiction over non-members only when a non-member's conduct took place "on the land," within the territorial boundaries of a tribe, and only when the exercise of such jurisdiction is essential to protect tribal self-government and control internal relations. (*Id*.)

Plaintiffs argue that their contractual relationships with the Tribe and tribal entities such as PME, namely the provision of insurance coverage for the Tribe and PME's property, did not occur on tribal land, and are therefore insufficient to establish Tribal Court jurisdiction. (*Id*. at 12.)

2. Defendant-Intervenor's Motion for Summary Judgment

The Suquamish Tribe filed a motion for summary judgment on May 2, 2022. (Dkt. No. 52.) The Tribe asks the Court to adopt the reasoning of the Tribal Court of Appeals, which found that the Tribal Court had subject matter jurisdiction over this claim based

on the Tribe's inherent right to exclude non-members from tribal land and the decision of the non-member Insurers to engage in a consensual commercial relationship with the Tribe and PME by issuing them insurance policies. (*Id*.)

II. LEGAL STANDARD

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

Here, the parties agree there are no genuine issues of material fact and that the cross-motions raise only legal issues for the Court to consider.

III. DISCUSSION

There is no simple test for determining whether tribal court jurisdiction exists. *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873

F.2d 1221, 1228 (9th Cir. 1989). Questions involving tribal jurisdiction remain a complex patchwork of federal, state, and tribal law, which are "better explained by history than by logic." *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir. 2006) (internal citations omitted.)

Despite this, there are "two distinct frameworks for determining whether a tribe has jurisdiction over a case involving a non-tribal member defendant: (1) the right to exclude, which generally applies to nonmember conduct on tribal land; and (2) the exceptions articulated in *Montana v. United States*[.]" *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 898 (9th Cir. 2017).

In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court noted that while tribes retain certain inherent sovereign powers, such as the ability to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members, the inherent sovereign powers of a tribe do not, as a general proposition, "extend to the activities of nonmembers of the tribe." 450 U.S. at 565.

"To be sure, Indian tribes do retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id*. First, 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. *Id*. Second, a tribe may also 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.

The applicability of the Supreme Court's rationale in *Montana* is contingent, to a significant extent, on whether the dispute arose on tribal land. As the Supreme Court noted in *Strate v. A–1 Contractors*, 520 U.S. 438, 445 (1997), "tribes retain considerable control over nonmember conduct on tribal land." 520 U.S. at 454. While the Supreme Court in *Montana* endorsed "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," the Court also stated that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations." 450 U.S. at 565.

Thus, "[g]enerally speaking, the *Montana* rule governs only disputes arising on non-Indian fee land, not disputes on tribal land." *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1074 (9th Cir.1999). *Montana*, however, did not limit the regulation of non-member conduct on tribal land. To read *Montana* otherwise would "impermissibly broaden *Montana*'s scope beyond what any precedent requires and restrain tribal sovereign authority despite Congress's clearly stated federal interest in promoting tribal self-government." *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 810-813 (9th Cir. 2011).

Accordingly, distinct from *Montana* exists the second framework for determining tribal jurisdiction rooted in a tribe's right to exclude. As a general principle, "a tribe's right to exclude non-tribal members from its land imparts regulatory and adjudicative jurisdiction over conduct on that land." *Window Rock*, 861 F.3d at 899. Citing *Strate*, the Ninth Circuit stated the "Supreme Court tied the scope of [a tribe's]

adjudicative jurisdiction to [its] regulatory jurisdiction." *Id*. "This suggested that, because tribes generally maintain the power to exclude and thus to regulate nonmembers on tribal land, tribes generally also retain adjudicative jurisdiction over nonmember conduct on tribal land." *Id*. In fact, the Supreme Court has identified that "[c]ivil 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." *Id*. at 900 (quoting *Iowa Mut. Ins*., 480 U.S. at 18). This is because "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins.*, 480 U.S. at 18.

Moreover, the Ninth Circuit has specifically noted that absent concerns of state law enforcement conduct[4] raised in a civil case, "tribal courts have jurisdiction unless a treaty or federal statute provides otherwise—regardless of whether the *Montana* exceptions would be satisfied." *Window Rock*, 861 F.3d at 902.

Therefore, before considering the applicability of the *Montana* exceptions, the Court must determine whether the dispute involves conduct or activities on tribal land such that the Tribe's right to exclude confers tribal adjudicative jurisdiction over the dispute.

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[4] Civil claims involving state officers enforcing state law was the limited subject of *Nevada v. Hicks*, 533 U.S. 353 (2001). Therein, the Supreme Court stated, "[o]ur holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general." *Id*. at 358 n.2. Having repeatedly recognized *Hicks*' limited holding, the Ninth Circuit made "clear that the right-to-exclude framework survives the narrow carve out effected by *Hicks*." *Window Rock.*, 861 F.3d at 903.

A. The Right to Exclude

The parties dispute whether the contractual relationship arising out of the activity of providing insurance to the Tribe and PME triggers tribal jurisdiction pursuant to the Tribe's right to exclude. Despite acknowledging awareness of providing insurance to the Tribe and PME (Dkt. No. 55-5 at 9)—which means awareness of the business and properties subject of the insurance policies being operated and located on tribal land—the Insurers assert the right to exclude is inapplicable because the Insurers and their employees never physically set foot on tribal land.[5] (Dkt. No. 54 at 30) ("When a nonmember has *not* physically entered and engaged in activity on tribal land, the 'right to exclude' does not apply."). Thus, from the Insurers' perspective "conduct" or "activity" on tribal land requires a party's physical presence on tribal land.

As support, Plaintiffs cite *Employers Mutual Casualty Company v. McPaul*, 804 F. App'x 756 (9th Cir. 2020), which affirmed *Employers Mutual Casualty Company v. Branch*, 381 F. Supp. 3d 1144 (D. Ariz.

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[5] The Court questions the scope of this relationship and whether the acts of Tribal First are imputed to the Insurers on whose behalf Tribal First sold insurance and presumably helped set insurance premiums. Since 2008, representatives of Tribal First have apparently visited the Suquamish Reservation on several occasions, for purposes including safety inspections and ergonomic assessments; this includes recent visits to the Reservation in July and November 2019. (Dkt. 53-1.) The extent to which the conduct of an intermediary like Tribal First can be attributed to the Insurers, when Tribal first is apparently acting on behalf of the Insurers, is a question not addressed by the pleadings.

2019).[6] Therein, an insurer without any relationship to the tribe in question issued policies to two non-tribal contractors who performed work at a gas station located on tribal land. The tribe sued the contractors and the insurer to recover damages related to a gas leak that may have been caused by the non-tribal contractors. *Branch*, 381 F. Supp. 3d at 1146–1147. In concluding the right to exclude did not support tribal jurisdiction, the district court stated,

> [the insurer] is not being sued for conduct that occurred while it, or one of its agents, was physically present on the tribal land where the gas station was located. Thus, it's difficult to fathom how the right-to-exclude framework could be construed to confer tribal jurisdiction over a lawsuit against [the insurer]. The theory underlying that framework is that, because a tribe has the sovereign right to exclude nonmembers from entering its land, the tribe must have the corollary right to adjudicate disputes arising from non-member conduct occurring on its land. Yet here, [the insurer] never set foot on the [tribe's] land. Because the tribe couldn't have 'excluded' EMC from engaging in the conduct at issue (i.e. selling insurance policies to non-member corporations at off-reservation locations), it follows

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[6] Plaintiffs also cite *Water Wheel Camp Rec. Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011); *Knighton v. Cedarville Rancheria of Norther Paiute Indians* 922, F.3d 892 (9th 2019); and *Grand Canyon Skywalk Dev. 'SA' Nyu Wa Inc.*, 715 F.3d 1196 (9th Cir. 2013). Although each of these cases involved some type of physical action on tribal land, they do not explicitly state the right to exclude is triggered only through physical presence on tribal land.

> that the 'right to exclude' framework doesn't supply a valid pathway to tribal jurisdiction.

Id. at 1149. The Ninth Circuit affirmed the district court's analysis by concluding, "[b]ecause it is not contested that [the insurer's] relevant conduct—negotiating and issuing general liability insurance contracts to [non-tribe] entities—occurred entirely outside of tribal land, tribal court jurisdiction cannot be premised on the [tribe's] right to exclude." *McPaul*, 804 F. App'x at 757.

Here, unlike *Branch* and *McPaul* where the insurer had no dealings with the tribe and was sued only because its insureds performed work on tribal land, the Insurers in this case maintain a direct contractual relationship with the Tribe and PME to insure tribal businesses and property located on tribal land. The Insurers specifically authorized Tribal First to negotiate and issue insurance policies to the Tribe and PME. Moreover, *Branch* acknowledged decisions that "suggested it may be possible to sue an insurance company in tribal court despite the absence of any physical presence on tribal land." 381 F. Supp. 3d at1149 (citing *Allstate,* 191 F.3d at 1075) ("Allstate's conduct in this case . . . is related to the reservation. Allstate sold an automobile insurance policy and mailed monthly premium statements to an Indian resident of the reservation. After the accident on the reservation, Allstate's agents communicated with the Indians and their counsel."). Accordingly, *Branch* and *McPaul* are inapposite.

The Insurers also argue the absence of insurance regulations in the Suquamish Tribal Code shows "this

case has no bearing on tribal sovereignty[.]"[7] (Dkt. No. 54 at 27.) They further assert the Tribe cannot regulate insurance on tribal land because the Tribe "has not been granted regulatory authority by Congress over any aspect of the insurance industry" which means "the Tribal Court cannot exercise adjudicative jurisdiction over Plaintiffs' insurance activity." (*Id*. at 28) (citing *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 782 (7th Cir. 2014)) ("[I]f a tribe does not have the authority to regulate an activity, the tribal court similarly lacks jurisdiction to hear a claim based on that activity"). The Insurers, however, fail to identify any statute or decision that explicitly bars the Tribe from regulating the insuring of tribal businesses and property located on tribal land. The Insurers, therefore, offer no basis to conclude the Tribe lacks the ability to regulate the activity of contractually insuring tribal businesses and property located on tribal land.

In this Court's opinion, providing insurance to businesses and property owned by the Tribe (or its tribal members), operated by the Tribe (or its tribal members), and located on tribal land involves conduct or activity on tribal land that concerns tribal sovereignty and otherwise provides tribal adjudicative jurisdiction based on the right to exclude. First, the selling and issuance of insurance policies originate from activity on tribal land. This is because the coverage provided, and premiums charged, are based on the op-

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[7] Although this argument is contained in Insurers' discussion of the *Montana* exceptions (Dkt. No. 54 at 27-28), it is addressed here because a "tribe's right to exclude . . . imparts regulatory and adjudicative jurisdiction over conduct on [tribal] land." *Window Rock*, 861 F.3d at 899.

eration and the management of businesses and property located on tribal land. It matters not that the Insurers physically issued the policies away from tribal land considering that the coverage they sold is based on activities occurring on tribal land. Second, the tribal business activity occurring on tribal land generates significant economic activity for the Insurers in the form of over $1.5 million in premiums and conversely financially impacts the Tribe and its tribal members. Third, the losses claimed under the insurance policies are based on business activities occurring at businesses and property owned by the Tribe and PME on tribal land. Fourth, precluding tribal adjudicative jurisdiction would prevent the Tribe from exercising its right to regulate contractual relations between itself, its members, and non-tribal members as well as regulate business activities on tribal land.[8] Such preclusion, therefore, impacts tribal sovereignty.

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[8] The Court found instructive the reasoning of the Suquamish Tribal Court of Appeals in considering the applicability of the right to exclude:

> Here the insurance contracts are between the Tribe and the Insurers. Insures (sic) knew they were contracting with the Tribe. The contracts were expressly directed and tied to the Tribe's trust lands and businesses located on the Suquamish Tribe's reservation. The Tribe's claimed losses occurred on Tribal land within its Reservation. The Tribe's breach of contract suit asserts insurer's failed to cover those losses. The Suquamish Tribe has the authority to regulate insurance contracts with the Tribe covering the Tribe's Reservation lands, and therefore the authority to adjudicate disputes arising under those contacts. Thus, the Tribal Court has subject matter jurisdiction under the right to exclude doctrine.

(Dkt. No. 55-6 at 14.)

Based on these circumstances, the fact that the Insurers and its employees never physically stepped onto tribal land does not preclude a finding that the issuance of insurance policies subject of this litigation involved conduct or activity on tribal land.[9] *See Allstate*, 191 F.3d at 1075 (rejecting argument that off-reservation settlement activities automatically precluded tribal jurisdiction because, "[t]he authorities . . . suggest that the . . . bad faith claim should probably be considered to have arisen on the reservation. At the least, [it is impossible] to say that the claim plainly arose off the reservation."). As such, the right to exclude supports tribal adjudicative jurisdiction in this case.

B. First *Montana* Exception

In addition to concluding the right to exclude confers tribal court jurisdiction, the Court also concludes the first *Montana* exception applies. Under the first *Montana* 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

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[9] Similar to the comment in Footnote 5, the Court questions whether the degree of separation between the Insurers and the Insured created by the utilization of a broker and an insurance program known as Tribal First can divest the Tribal Court of jurisdiction. The Insurers knew they were contracting directly with the Tribe and PME. (Dkt. No. 55-5 at 13-14.) Further, as discussed in more detail below, *infra* Section III.B. the insurance policies in question do not exclude the possibility of tribal jurisdiction over claims between the Tribe, PME, and the Insurers.

565.[10] Non-tribal members who choose to affiliate with a tribe or its members in this way "may anticipate tribal jurisdiction when their contracts affect the tribe or its members." *Smith*, 434 F.3d at 1138. *Montana's* consensual relationship exception requires that the tax or regulation imposed by a tribe "have a nexus to the consensual relationship itself." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001). Consent may be established "expressly or by [the nonmember's] actions." *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce Bank*, 554 U.S. at 337). Courts must consider the circumstances of the relationship between the tribe and the nonmember and whether under those circumstances a non-member defendant should have reasonably anticipated that his interactions might "trigger" tribal authority. *Id*.

The Ninth Circuit has previously held that nonmembers may reasonably anticipate being subject to a tribe's jurisdiction when language in an agreement between the tribe and the non-member implies the possibility of tribal jurisdiction over disputes between the parties. *Grand Canyon*, 715 F.3d at 1206 (finding that when a nonmember signed an agreement to act in compliance with all applicable tribal laws, the nec-

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[10] The language of the *Montana* decision suggests that the first *Montana* exception, when applicable, may permit Indian tribes to exercise some forms of civil jurisdiction over non-members on their reservations, "even on non-Indian fee lands." 450 U.S. at 565. If the first *Montana* exception permits a tribal court to exercise jurisdiction over non-members on non-tribal land located within the Reservation, a tribal court's claim for jurisdiction is presumably stronger when, as here, the relevant dispute concerns tribal properties on tribal land.

essary corollary of this would be that if the non-member operated in violation of the tribe's laws, it could be subjected to its jurisdiction.)

The policies at issues in this case contain a "Service of Suit" clause. That clause provides that "in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Named Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States."[11] (Dkt. No. 56-1 at 85.) The Service of Suit clause does not appear to exclude the possibility of Tribal Court jurisdiction, and the Insurers do not appear to have included such an exclusion. (Dkt. No. 53-1 at 3.) Tribal courts have repeatedly been recognized as competent law applying bodies and appropriate forums for the "exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 (1978). By insuring tribal businesses located on tribal land, and in doing business with the Suquamish Tribe, an entity with its own legal system and courts of competent jurisdiction, the Insurers should reasonably have anticipated the possibility that any disputes arising under the polices between the Tribe, PME and Insurers would fall within the jurisdiction of the tribal courts.

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[11] Plaintiffs argue that the phrase "court of competent jurisdiction" merely permits suit in any court *already* endowed with subject matter jurisdiction over the suit. (Dkt. No. 65.); *Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 553, 561 (2017). Because the Court finds herein that tribal jurisdiction is supported under the right to exclude, *supra* Section III.A., the Service of Suit clause weighs in favor of finding tribal jurisdiction under the first *Montana* exception.

In *State Farm Insurance Co. v. Turtle Mountain Fleet Farm LLC*, the United States District Court for the District of North Dakota evaluated whether a tribe had jurisdiction under the first *Montana* exception in a case where an insurance company, State Farm, issued a property insurance policy to tribal members for a home on tribal land. No. 1:12-cv-00094, 2014 WL 1883633 at *1 (D.N.D. May 12, 2014). The court found this was a sufficient consensual relationship with respect to an activity or matter occurring on the reservation to invoke the first *Montana* exception, and created a sufficient nexus between the claims of the tribal members and the consensual relationship arising out of the property insurance contract to provide for tribal court jurisdiction. *Id*. at *11.

Here, the Court similarly finds that the underlying insurance policies evidence a consensual relationship between the Tribe and the Insurers. The Insurers were aware they were contracting with, and receiving payments from, the Tribe and PME. The Court further finds that there is a sufficient nexus between the Tribe and PME's claims and the consensual relationship to establish tribal jurisdiction under the first *Montana* exception.[12]

Moreover, finding tribal jurisdiction in this case under the first *Montana* exception would not "swallow" or "severely shrink" *Montana's* "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Plains Commerce Bank*, 554 U.S. at 330;

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[12] As to the Insurers' arguments that the Tribe has no authority to regulate insurance matters or that the first *Montana* exception does not apply because the Insurers had no physical contact on tribal land, those arguments are rejected for the reasons stated previously. *See supra* Section III.A.

see also Montana, 450 U.S. at 565. This is because there is a contractual relationship between the parties that arises out of activities occurring on tribal property owned by tribal members. *See supra* Section III.A. Thus, the facts of this case are in line with the first *Montana* exception and otherwise do not expand the exception.

C. Second *Montana* Exception

Under the second *Montana* 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. 450 U.S. at 566. In addition, the non-member conduct in question must do more than injure the tribe, it must "imperil the subsistence" of the tribal community and the exercise of tribal jurisdiction under this exception "must be necessary to avert catastrophic consequences." *Plains Commerce Bank*, 554 U.S. at 341.

The Tribe states that the Court need not reach the second *Montana* exception, but argues, briefly, that the health risks posed by the COVID-19 pandemic and crippling financial losses suffered by the Tribe's revenue generators "directly affects the economic security and health and welfare of the Tribe, satisfying the second *Montana* exception." (Dkt. No. 52 at 26, n.8.)

At present time, the United States is still recovering from the COVID-19 pandemic, and individuals and businesses are still assessing the human and economic toll. A tribe might, under these circumstances, plausibly contend that an insurer's refusal to cover significant economic losses stemming from the pan-

demic imperils the tribe's financial viability. Considering the nature of the businesses claiming losses, arguably, there is a colorable claim for jurisdiction under the second *Montana* exception. *See Water Wheel*, 642 F.3d at 817 ("The tribe clearly had authority to regulate the corporation's activities under *Montana*'s first exception and—considering that the business also involved the use of tribal land and that the business venture itself constituted a significant economic interest for the tribe—under the second exception as well.") Notwithstanding, on the evidence currently before it, the Court cannot clearly conclude the Tribe's economic loss, while undoubtedly significant, imperils the subsistence of the tribal community.

D. Personal Jurisdiction

The Insurers assert the tribal courts lack personal jurisdiction. As identified in *Allstate*, "this argument is foreclosed entirely by *Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911 (9th Cir. 1990), in which [the Ninth Circuit] held that a Montana state court, for purposes of an accident injury claim arising in Montana, had personal jurisdiction over Portage, a Canadian insurer that sold a policy covering travel in Montana." 191 F.3d at 1075. There, the Ninth Circuit concluded:

> Allstate not only sold a policy covering travel in the Rocky Bay Reservation, it sold the policy to a resident of the reservation. This sale of a policy is more clearly a 'purposeful availment' of the forum's laws than was Portage's inclusion of Montana within its coverage territory. . . . As in *Portage*, this dispute arose out of the insurance coverage. . . . [I]t is difficult to see why Allstate's amenability to suit in tribal court is any less 'reasonable' than a

> state's exercise of jurisdiction over a foreign insurance company."

Id. (citations omitted).

Although the present matter does not involve an accident injury insurance claim, it does involve insurance sold to tribal members for covered losses occurring at businesses and properties located on tribal land and owned by tribal members. As in *Allstate*, "it is difficult to see why [the Insurers'] amenability to suit in tribal court is any less 'reasonable' than a state's exercise of jurisdiction over a foreign insurance company." *Id*.

Moreover, as previously noted, the insurance policies include a Service of Suit clause, which support the Tribal Court's exercise of personal jurisdiction over the Insurers.

IV. ORDER

Having considered the pleadings filed in support of and in opposition to the motions, the exhibits and declarations attached thereto, and the remainder of the record, the Court finds and ORDERS:

(1) Defendant-Intervenor's motion for summary judgment (Dkt. No. 52) is GRANTED.

(2) Plaintiff's motions for summary judgment (Dkt. No. 54) is DENIED.

(3) The Court DECLINES to take judicial notice (Dkt. No. 58) of certain disputed aspects of the Suquamish Tribal Code.

(4) This case is DISMISSED WITH PREJUDICE and shall proceed under the jurisdiction of the Suquamish Tribal Court.

Dated this 12th day of September, 2022.

/s/ David G. Estudillo
David G. Estudillo
United States District Judge

APPENDIX C

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	No. 22-35784 D.C. No. 3:21-cv-05930-DGE ORDER

LIMITED T/AS SOMPO INTERNATIONAL SUBSCRIBING TO POLICY NO. PJ1900134-A,

Plaintiffs-Appellants,

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

Filed September 16, 2024

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

Order;

Statement by Judges Hawkins, Graber, and McKeown; Dissent by Judge Bumatay

SUMMARY*

Tribal Jurisdiction

The panel filed an order denying a petition for panel rehearing and rehearing en banc following the panel's opinion affirming 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.

In its opinion, 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.

In a statement respecting the denial of rehearing en banc, the panel, joined by Chief Judge Murguia and Judges Tashima, Wardlaw, W. Fletcher, Gould, Paez, Berzon, Christen, Hurwitz, Koh, Sanchez, Mendoza, and Desai, wrote that the facts of the case pointed to one conclusion—tribal jurisdiction was appropriate under Supreme Court precedent. The panel wrote that Lexington Insurance Co. explicitly held itself out as a potential partner to tribes, tailored its insurance policies specifically for tribes and tribal businesses, knowingly contracted with the Suquamish Tribe and its chartered economic development entity over a series of years to provide coverage for properties and businesses on Tribal trust lands and then denied claims arising from losses on the Reservation. The panel wrote that, in its opinion, confining itself to these facts, it faithfully applied Supreme Court and circuit precedent in holding that Lexington's actions qualified as conduct on tribal lands and made Lexington subject to tribal jurisdiction.

Dissenting from the denial of rehearing en banc, Judge Bumatay, joined by Judges Callahan, Ikuta, R. Nelson, VanDyke, and Collins as to Part III.B only, wrote that, in holding that the tribal court had jurisdiction over the nonmember insurance company, the panel defied both the Constitution and Supreme Court precedent. Judge Bumatay wrote that the panel gutted any geographic limits of tribal court jurisdiction and also significantly expanded the substantive scope of tribal regulatory authority over nonmembers. In Part III.A, Judge Bumatay wrote that *Montana*'s consensual-relationship exception did not apply.

In Part III.B, Judge Bumatay wrote that under *Plains Com. Bank v. Long Fam. Land & Cattle Co.*,

554 U.S. 316 (2008), the case did not meet the additional requirement that tribal assertion of regulatory authority over nonmembers must be connected to the right of Indians to make their own laws and be governed by them.

ORDER

The panel unanimously voted to deny the petition for panel rehearing. Judges Hawkins, Graber, and McKeown recommended denial of the petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, Dkt. #44, is DENIED.

HAWKINS, GRABER and McKEOWN, Circuit Judges, joined by MURGUIA, Chief Judge, and TASHIMA, WARDLAW, FLETCHER, GOULD, PAEZ, BERZON, CHRISTEN, HURWITZ, KOH, SANCHEZ, MENDOZA, and DESAI, Circuit Judges, respecting the denial of rehearing en banc:

The facts of this case point to one conclusion—tribal jurisdiction is appropriate under Supreme Court precedent. The tailored tribal insurance policy from insurance companies offering specialized tribal coverage for tribal property, and the transactions surrounding these polices have "tribal" written all over them: Tribal First is an entity set up to offer insurance for tribes. *Lexington Ins. Co. v. Smith*, 94 F.4th 870, 877 (9th Cir. 2024). Lexington Insurance Company and several other insurance companies (collec-

tively, "Lexington") contracted with Tribal First to offer insurance policies to tribal governments and enterprises. *Id.* Lexington then issued insurance policies—based on underwriting guidelines specifically negotiated for the Tribal Property Insurance Program—that were to be provided through Tribal First to tribes. *Id.*

Lexington explicitly held itself out as a potential business partner to tribes, tailored its insurance policies specifically for tribes and tribal businesses, knowingly contracted with the Suquamish Tribe ("Tribe") and its chartered economic development entity, Port Madison Enterprises ("Port Madison"), over a series of years to provide coverage for properties and businesses on Tribal trust lands, including almost $242 million worth of real property, and then denied claims arising from losses on the Reservation. *Id.* at 876–77. And the panel—confining itself to these facts—faithfully applied Supreme Court and circuit precedent in holding that Lexington's actions qualified as conduct on tribal lands and made Lexington subject to tribal jurisdiction.

Judge Bumatay's recasting of this case endeavors to reshape the record. He also sidesteps the Supreme Court's and our circuit's tribal jurisdiction precedent. His claim that the panel "gutted any geographic limits of tribal court jurisdiction" is unfounded. Dissent from the Denial of Rehearing En Banc at 20. The panel concluded that Lexington's relationship with the Tribe and Port Madison and the breach of contract action bear a "direct connection to tribal lands," fulfilling this circuit's test. *Lexington*, 94 F.4th at 880–81 (quoting *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 902 (9th Cir. 2019)).

That connection coupled with Lexington's "conduct[ing] business with the tribe[]" fulfills the Supreme Court's directives in *Montana v. United States*, 45 U.S. 544, 565-66 (1980) and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982).

Contrary to Judge Bumatay's assertions, no tribal jurisdiction case from the Supreme Court or this court has ever held that nonmember *conduct* on tribal land equates to *physical presence* on that land. Instead of turning to precedent, Judge Bumatay resorts to history and endeavors to impugn the legitimacy of tribal courts. But the history he reviews is neither controlling nor persuasive under our tribal jurisdiction precedent. Ultimately, it is difficult to understand why providing insurance policies that exclusively cover tribal property on trust land should not count as conduct occurring on tribal land.

Judge Bumatay's second point—that the panel's failure to engage in a separate inquiry under *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), "puts us on the wrong side of a circuit split"—is not faithful to a plain reading of *Plains Commerce* or our controlling precedent in *Knighton*. Dissent at 21. The Fifth and Ninth Circuits have rejected the separate inquiry notion as a misreading of *Plains Commerce*. *See Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 174–75 (5th Cir. 2014), *aff'd by an equally divided court*, 579 U.S. 545 (2016) (per curiam); *Knighton*, 922 F.3d at 903–04. Only the Seventh Circuit explicitly requires this separate inquiry. *See Jackson v. Payday Fin.*, 764 F.3d 765, 783 (7th Cir. 2014). Our court is in the majority on this split, and we should remain so.

Because the panel's narrow holding applied our tribal jurisdiction jurisprudence, the court appropriately decided not to rehear this case en banc.

I. No Physical Presence Requirement for Nonmember Conduct on Tribal Land

To determine whether a tribe has jurisdiction over a nonmember, we first determine whether the nonmember's conduct at issue occurred within the boundaries of the reservation. *See Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009). The extensive recitation in the opinion establishes this prong of the analysis. That foundation—relying on *Merrion*—and coupled with *Montana* confirm that a nonmember conducting business with a tribe that is directly connected to tribal lands can be subject to tribal jurisdiction. No part of this test requires the physical presence of a nonmember on a reservation.

The dissent, however, seeks to graft a physical presence requirement onto our tribal jurisdiction precedents, but points to no language in any Supreme Court or circuit court opinion that explicitly equates *conduct* on tribal land with *physical presence* on that land. Dissent at 41–42. He assumes that just because every case that has come before the Supreme Court or the Ninth Circuit thus far has involved some sort of physical presence, that it should be imposed as a necessary predicate for conduct inside a reservation. And his foray into history does not alter the jurisdictional analysis we must undertake. This effort to collapse jurisdiction into a physical requirement ignores the importance of applying the law given to us to the facts before us.

A. Precedent, Not History, is Controlling

The dissent starts with historical background because supposedly "historical perspective [can] cast[] substantial doubt upon the existence of [tribal] jurisdiction." Dissent at 26 (citation omitted). Compiling articles and books, laws, treaties, and U.S. Attorney General opinions to argue that "nothing in the history of Indian relations supports tribal jurisdiction over nonmembers acting outside of Indian lands," *id.*, is a misleading syllogism.

Despite the dissent's love of early American history, history is not the solution to the jurisdictional puzzle. In the early nineteenth century and prior, business with tribes—in the form of trade—as a practical matter required physical interactions, thus giving rise to the robust legal framework regulating, and federal-tribal disputes over, the permitting of outside traders within tribal territories. *See, e.g.*, Act of July 22, 1790, ch. 33, 1 Stat. 137, 137–38; Act of March 30, 1802, ch. 13, 2 Stat. 139, 142–43; Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836*, at 154–55 (2010). Non-Indian traders would have to come onto tribal territories to sell goods. But the circumstances of tribes have drastically changed. Trading no longer requires a physical presence and so, unsurprisingly, the Supreme Court has never imposed such a requirement. Today, tribes run a variety of businesses, ranging from casinos to seafood companies. *See, e.g.*, *Lexington*, 94 F.4th at 876. And now nonmembers regularly conduct business with tribes over the phone, the Internet, and email. *See, e.g.*, *id.* at 881–82; *Jackson*, 764 F.3d at 768–69.

Tribes' capacity to adjudicate disputes involving nonmembers and businesses has also changed dramatically. Although tribes may not have had "formal adjudicatory bodies to handle civil disputes" long ago, Dissent at 27, many tribes now have organized trial and appellate court systems, law-trained judges, and extensive codes. For example, the Suquamish Tribe, a defendant here, has a trial court and a court of appeals, and it requires its judges to have graduated from an accredited law school and be licensed to practice law. Suquamish Tribal Code §§ 3.1, 3.3. The Tribe also has reasonable measures to protect judicial independence, including fixed terms of office for judges and a requirement for notice and a hearing before removal. *Id.* § 3.3. Whatever historical constraints may have existed to limit tribal adjudication no longer exist, nor do they suggest that tribal courts "treat members unfairly." *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 944 (9th Cir. 2019). The Supreme Court, our court, and our sister circuits have rejected attacks like the dissent's on tribal judiciaries time and time again. *See id.* at 943–44; *see also Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011) (per curiam) (recognizing the longstanding "federal policy of deference to tribal courts," which "are competent law-applying bodies" (citations omitted)).

Tribal history is definitely interesting, but it is not informative here. The dissent's dalliance into history also does not conform with controlling Supreme Court and circuit precedent on what qualifies as nonmember conduct inside the reservation. The pathmarking tribal jurisdiction case, *Montana v. United States*—decided almost 130 years after the history recounted in the dissent—provides for a broad understanding of consensual relationships between nonmembers and

tribes, not just for business transactions involving physical interactions. 450 U.S. at 565 ("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."). Two years later, in *Merrion v. Jicarilla Apache Tribe*, the Supreme Court built on this understanding by explaining that the "territorial component to tribal power" is triggered when a "nonmember enters tribal lands **or** *conducts business with the tribe*." 455 U.S. at 142 (1982) (emphasis added).

Our own court's precedent further belies the dissent's emphasis on physical presence. As an en banc panel of our court explained, we determine whether nonmember conduct has occurred on tribal land by considering "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). Taking our cues from this test in *Smith* and *Knighton*, we concluded that Lexington's conduct took place on tribal land because "[t]ribal land literally and figuratively underlies the contract at issue here." *Lexington*, 94 F.4th at 881. The dissent chooses to ignore that tribal jurisdiction may be proper under the "direct connection" test if a cause of action is sufficiently tied to tribal lands.

B. Other Circuits' Cases

The dissent's invocation of tribal jurisdiction cases from other circuits fares no better. In *Stifel*, the Seventh Circuit rejected tribal jurisdiction where the tribe had issued bonds to off-reservation companies for an *off-reservation investment* project, albeit secured by the revenues and assets of a casino on tribal

lands. *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 189, 207–08 (7th Cir. 2015). Significantly, the bonds' purpose had no connection to the reservation. *Id.* at 189. Nor did the tribal court action "seek to regulate any of [the nonmember company's] activities on the reservation," namely meetings regarding the sale of the bonds. *Id.* at 207–08. The *Stifel* analysis is not persuasive here.

The Tenth Circuit's decision in *MacArthur* is also inapposite. In *MacArthur*, the court held that even though a consensual relationship existed between a clinic situated on non-Indian fee land within the Navajo Nation Reservation and tribal member employees, the tribe did not have jurisdiction under *Montana* because the entity that administered the clinic was "a political subdivision of the State of Utah." *MacArthur v. San Juan County*, 497 F.3d 1057, 1072 (10th Cir. 2007). Enough said as the focus on an employment relationship is far afield from this case.

Finally, the dissent's reliance on other circuit's tribal jurisdiction cases involving the Internet is misplaced. In *Jackson v. Payday Financial, LLC*, the Seventh Circuit rejected tribal jurisdiction over nonmembers' suit against a tribal member's loan companies because the nonmembers' activities, which were entirely conducted over the Internet, did "not implicate the sovereignty of the tribe over its land." 764 F.3d at 782. In contrast, this case directly implicates sovereignty over the land. Likewise, in *Hornell Brewing*, the Eighth Circuit similarly rejected tribal court jurisdiction over nonmember breweries for their use of the name "Crazy Horse" for their malt liquor. *Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d

1087, 1093–94 (8th Cir. 1998). The breweries manufactured, sold, and distributed the malt liquor only outside the reservation and had no connection to the reservation other than advertising on the Internet. *Id.* at 1093. The common thread in both cases is that neither involved tribal land.

At base, Judge Bumatay elevates form over substance. We doubt that Judge Bumatay would have objected to the panel's holding had a Lexington insurance representative met a tribal official one foot within the bounds of the Reservation or if a Lexington representative had inspected the Tribal properties in person or denied coverage in a single meeting on the Reservation. We should not reduce our test for nonmember conduct—a test that "centers on the land held by the tribe" and looks to protecting the "tribe's sovereign interests"—to whether a nonmember has physically tiptoed onto a parcel of land within the boundaries of a reservation. *Plains Commerce*, 554 U.S. at 327, 332. Ultimately, the dissent glosses over the fact that no court has addressed a situation like *Lexington*. In sum, no physical presence requirement exists, and rehearing en banc to create one out of whole cloth was properly rejected.

II. *Plains Commerce* Imposed No Additional Jurisdictional Requirement

The dissent argues that the Supreme Court now imposes a new limitation as a result of *Plains Commerce*, in which the Court stated:

> Consequently, [tribal] laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must 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. Rather than imposing an additional requirement, the Court was merely clarifying that a nonmember's consent to tribal law is not enough for tribal jurisdiction and cannot circumvent the limitations on tribal authority. Tribal law could only be enforced against a nonmember if that person consented *and* 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.'" *Lexington*, 94 F.4th at 886 (quoting *Plains Commerce*, 554 U.S. at 337). No new requirement was imposed.

In *Knighton*, we interpreted the "must stem" language as an affirmation of the "varied sources of tribal regulatory power over nonmember conduct on the reservation," including a tribe's power to exclude and its inherent sovereign authority. 922 F.3d at 903 (citing *Plains Commerce*, 554 U.S. at 337). *Knighton* did not recognize this phrase as a supplemental requirement to the *Montana* analysis but as an explanation that the "*Montana* exceptions are 'rooted' in the tribes' inherent power to regulate nonmember behavior that implicates these *sovereign interests*." 922 F.3d at 904 (emphasis added) (citation omitted). The panel therefore followed the controlling law of the circuit—which properly construed *Plains Commerce*—in rejecting this separate inquiry requirement.

Only one circuit—the Seventh Circuit—has explicitly held in a tribal jurisdiction case that *Plains Commerce* requires a separate inquiry into a tribe's authority for a regulation. *See Jackson*, 764 F.3d at

783. Notably, the other cases cited by the dissent—from the Sixth and Eighth Circuits—do not relate to tribal jurisdiction. *See NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537, 544, 546 (6th Cir. 2015) (addressing whether the National Labor Relations Board could apply the National Labor Relations Act to the operations of a tribal casino); *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1134–38 (8th Cir. 2019) (discussing federal preemption of oil and gas royalty suits brought by tribal members). And the Fifth Circuit has sided with the Ninth in definitively rejecting this separate inquiry requirement. *Dolgencorp,* 746 F.3d at 175.

Tribal jurisdiction stems from the principle 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)). And that tribal sovereignty over territory is implicated when nonmember behavior regarding that territory "sufficiently affect[s] the tribe as to justify tribal oversight." *Plains Commerce*, 554 U.S. at 335. The Lexington scenario easily fits within this construct as "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.'" *Lexington*, 94 F.4th at 887 (quoting *Water Wheel*, 642 F.3d at 817).

The panel in *Lexington* did nothing but apply our precedent straight up and surely did not open the floodgates for unnecessary tribal court litigation. The

court's decision to deny rehearing en banc was grounded in precedent and common sense.

BUMATAY, Circuit Judge, joined by CALLAHAN, IKUTA, R. NELSON, VANDYKE, Circuit Judges, and COLLINS, Circuit Judge, as to Part III.B only, dissenting from the denial of rehearing en banc:

This case should be a run-of-the-mill insurance dispute. Those familiar with insurance cases will know the basic facts of the case: plaintiffs buy insurance policy from insurance company; plaintiffs have an event causing loss; plaintiffs believe the loss should be covered by the policy; insurance company disagrees that the policy applies; and, as a result, plaintiffs sue insurance company. Federal courts see these types of cases repeatedly under our diversity jurisdiction. In those cases, we simply apply state law to determine who wins. Indeed, the Ninth Circuit has seen this precise dispute many times—do property insurance policies cover damages caused by COVID-19?

But this case features a minor twist. Plaintiffs are an Indian tribe and its businesses. And rather than applying state law and invoking diversity jurisdiction, the tribe wants to hale the insurance company into its own tribal court to apply its own law. It asserts jurisdiction even though the insurance company is not a member of the tribe and isn't located on the reservation. In fact, none of its employees have ever entered the reservation. The insurance company never communicated with the tribe or a tribal member before this dispute—instead, two nonmember, off-reservation intermediaries secured the policies for the tribe. As a panel of our court concluded, "all relevant conduct occurred off the [r]eservation" and no insurance company employee was "ever physically present" on the reservation. *Lexington Ins. v. Smith*, 94 F.4th 870,

881 (9th Cir. 2024). Even with these facts, the panel granted tribal court jurisdiction over the nonmember insurance company. This decision defies both the Constitution and Supreme Court precedent.

* * *

Indian tribes enjoy a unique status under our Constitution. "At one time," before the founding of this Nation, Indian tribes may have had "virtually unlimited power" over their members and nonmembers in their territories. *Nat'l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). But today, because of their quasi-sovereign status under the United States, tribal relationships with nonmembers have significantly changed. Now, Indian tribes retain only the sovereign powers not divested by Congress and not inconsistent with their dependence on the federal government. So federal law—not Indian sovereignty—defines the "outer boundaries of an Indian tribe's power over non-Indians." *Id.* And under the Constitution, federal courts must protect the "liberty interests of nonmembers." *Plains Com. Bank v. Long Fam. Land & Cattle, Co.*, 554 U.S. 316, 330 (2008). Thus, the Supreme Court has been clear on the default rule when it comes to non-Indians: "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981).

So while tribes retain residual sovereign powers, tribal courts have no plenary civil jurisdiction over nonmembers. Of course, as with every rule, there are exceptions, but they are "limited ones." *Plains Com.*, 554 U.S. at 330 (simplified). First, tribal courts may assert civil jurisdiction over a nonmember if the nonmember enters a "consensual relationship[] with the

tribe or its members," *Montana*, 450 U.S. at 565 (simplified), and the dispute involves "non-Indian activities on the reservation." *Plains Com.*, 554 U.S. at 332. Second, tribal courts may have civil jurisdiction over nonmember conduct on a reservation that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. Under either of these two *Montana* exceptions, the dispute must center on "nonmember *conduct* inside the reservation." *Plains Com.*, 554 U.S. at 332; *see also id.* at 333 ("Our cases since *Montana* have followed the same pattern, permitting regulation of certain forms of nonmember conduct on tribal land."). So, a tribe's jurisdictional limits can be no greater than its geographic limits. No on-reservation activity, no tribal court jurisdiction. And we may not interpret these exceptions to either "swallow the rule" or "severely shrink it." *Id.* at 330 (simplified).

Even with on-reservation conduct, tribal court civil authority is not assured. That's because the Supreme Court has put up another hurdle—tribal court jurisdiction may only exist for some substantive *types* of claims brought against non-Indians. *Id.* at 337. Even if "the nonmember has consented" to tribal laws and regulations, tribal courts' adjudicative power still "must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id.* (citing *Montana*, 450 U.S. at 564). And tribes may only regulate and adjudicate nonmember activities "flow[ing] directly from these limited sovereign interests." *Id.* at 335. Thus, in *Plains Commerce*, although the suit involved the sale of non-Indian fee land on a tribal reservation, the Court said that "whatever 'consensual relationship' may have been established through the

[nonmember's] dealing with the [tribal members]," tribal courts had no authority to regulate "fee land sales" by nonmembers. *Id.* at 336, 338–40. That's because the regulation could not be justified by the tribes' interest in excluding persons from tribal land or in protecting internal relations and self-government. *Id*. at 338–40. So geography isn't enough—suits over nonmembers must implicate both tribal geography and tribal sovereignty. Only after meeting both *Montana*'s on-reservation requirement and *Plains Commerce*'s inherent-sovereign-authority requirement can nonmembers be haled into tribal court. In other words, even if a nonmember satisfies the geographic nexus to tribal land, certain substantive areas of regulation of nonmembers are still off limits for tribal courts.

If these prerequisites seem hard to meet, that's because they are. In the more than forty years after *Montana*, the Supreme Court has "never held that a tribal court had jurisdiction over a nonmember defendant." *See Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001). These are fundamental limits on tribal court jurisdiction. And they cannot be ignored.

* * *

Despite the Court's clear mandate, a Ninth Circuit panel blessed tribal court jurisdiction over an insurance claim involving a nonmember even when "all relevant conduct occurred off the reservation" and the nonmember was "[n]ever physically present" on the reservation. *Lexington Ins.*, 94 F.4th at 881. Instead, the panel concluded that "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." *Id.* This is a startling expansion of tribal court jurisdiction in two ways.

First, the panel decision gutted any geographic limits of tribal court jurisdiction. The panel focused instead on the facts that "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." *Id.* at 886. But no conduct or activity actually occurred on the reservation. The panel shrugged off that deficiency. It simply ripped the requirement of actual physical presence and activity from the meaning of "nonmember conduct inside the reservation." *Plains Com.*, 554 U.S. at 332. It then looked to the *object* of the contract, rather than any actual *on-reservation actions or conduct*, and said that was good enough for tribal court jurisdiction. As far as I can tell, we are the first and only circuit court to extend tribal court jurisdiction over a nonmember without requiring the nonmember's actual physical activity on tribal lands. So the application is novel, unwarranted, and contrary to precedent.

Second, beyond jettisoning the geographic limits, the panel also significantly expanded the substantive scope of tribal regulatory authority over nonmembers. The panel permitted an insurance claim to proceed in tribal court even though insurance regulation, like regulation of fee land sales, has little connection to a tribe's inherent sovereign authority. Rather than determining whether insurance regulation "stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations," *Plains Com.*, 554 U.S. at

337, the panel dispensed with this limitation by collapsing the *Plains Commerce* requirement into the *Montana* exceptions analysis. The panel concluded, "[i]f 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*." *Lexington Ins.*, 94 F.4th at 886 (emphasis added). Thus, if there is a sufficient consensual relationship between the nonmember and tribe, in the panel's view, that's the end of the inquiry. The tribal courts *automatically* have jurisdiction—no matter the subject matter. So tribes now have authority over insurance regulation despite "states' near-exclusive regulation of insurance and the Tribe's lack of insurance regulations." *Id.* at 885.

This evisceration of *Plains Commerce* puts us on the wrong side of a circuit split. Three circuits support an independent inquiry into whether the subject matter of tribal regulation involves the tribe's inherent sovereign authority. *See Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019); *NLRB. v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 546 (6th Cir. 2015) (in dicta); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 783 (7th Cir. 2014). Only one, the Fifth, disagrees. *See Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014), *aff'd by an equally divided court*, 579 U.S. 545, 546 (2016) (per curiam). We should have reheard this case to put ourselves on the correct side of that split.

The effects of the panel decision are significant. Granting tribal court jurisdiction over nonmembers is no little matter. Tribal courts are unlike state and federal courts. First, there's no protection against political interference or the guarantee of the separation

of powers. Instead, tribal courts "are often subordinate to the political branches of tribal governments." *Duro v. Reina*, 495 U.S. 676, 693 (1990) (simplified). Second, tribal courts don't rely on well-defined statutory or common law. Rather, tribal law is "frequently unwritten, [and] based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices.'" *Hicks*, 533 U.S. at 384 (Souter, J., concurring) (quoting Melton, *Indigenous Justice Systems and Tribal Society*, 79 Judicature 126, 131 (1995)). Tribal law then is "unusually difficult for an outsider to sort out." *Id.* at 385. And finally, because the tribes lie "outside the basic structure of the Constitution," the Bill of Rights, including the rights of due process and equal protection, doesn't apply in tribal courts. *See Plains Com.*, 554 U.S. at 337 (simplified). So, without any constitutional backstop, tribal suits are almost exclusively tried before tribe-member judges and all-tribe-member juries. *See, e.g.*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 n.4 (1978). All this is foreign to those accustomed to the protections of state and federal courts and may well deprive nonmembers of their constitutional rights.

But now *every* off-reservation nonmember person or company is at risk of being haled into tribal court if they enter a business relationship with a tribe or a tribal member related to tribal land. Imagine the implications of the panel's view: A certified public accountant in Pittsburgh who made calculations involving "losses and expenses incurred by . . . businesses and properties on [tribal] lands," *Lexington Ins.*, 94 F.4th at 881, is at risk of a tribal negligence claim. A foreign software designer who contracts with a tribe to update a widely available slot machine may qualify

for a tribal products liability suit because the machines are used on tribal lands and constitute a "significant economic interest for the tribe," *id.* at 887 (simplified). And a New York-based lawyer advising on compliance, "involv[ing] tribally owned buildings and businesses located on tribal trust land," *id.* at 880, could face a tribal malpractice claim when things go south. Never mind that no one ever made it within 1,000 miles of the tribe's land. *See id.* at 882 ("Lexington's business relationship with the Tribe satisfie[d] the requirements for conduct occurring on tribal land, thereby occurring within the boundaries of the reservation. . . .").

So we should have corrected two errors here. First, we should have corrected the extension of tribal court jurisdiction to nonmembers who enter a contract with a tribe involving tribal land—even if they never set foot on tribal land and even though "all relevant conduct occurred off the [r]eservation." *See id.* at 881. Second, we should have corrected the removal of *all substantive limits* on what nonmember activity tribes may regulate. Letting these errors stand places the Ninth Circuit—yet again—against the weight of precedent and longstanding constitutional principles.

I respectfully dissent from the denial of rehearing en banc.

I.
Factual Background

The Suquamish Tribe is a federally recognized tribe with sovereign authority over the Port Madison Reservation in the State of Washington. *Lexington Ins.*, 94 F.4th at 876. The reservation encompasses about 12 square miles. *Oliphant*, 435 U.S. at 192–93. On the reservation, the Suquamish Tribe operates

several businesses, including a museum, casino, hotel, and gas stations. *Lexington Ins.*, 94 F.4th at 876. It runs its commercial operations partly through a "tribally chartered economic development entity," known as Port Madison Enterprises. *Id.*

In 2015, the Suquamish Tribe and Port Madison Enterprises (collectively, the "Tribe") purchased insurance policies from Lexington Insurance Company and several other off-reservation insurance companies (collectively, "Lexington") through a nonmember off-reservation insurance broker. *Id.* That broker found the insurance policies through Alliant Specialty Services, Inc., a nonmember off-reservation firm, which operates "Tribal First"—a program that tailors insurance needs for tribes and tribal businesses around the country. *Id.* at 876–77. Tribal First does not provide the insurance itself, but it contracts with insurance companies that provide coverage to tribal governments and businesses. *Id.* Tribal First handles the underwriting, provides quotes, collects premiums, and manages claims and administrative services. *Id.* Under the Tribal First program, the underlying insurance companies do not negotiate directly with the tribal entities. Instead, so long as the tribal applicant meets the Tribal First requirements, the contracted insurance companies will issue a policy. That policy is then forwarded by Tribal First to the insured entity.

This case followed the usual Tribal First process. The nonmember insurance broker secured a contract between the Tribe and Alliant. *Id.* In turn, Lexington contracted with Alliant to issue the insurance policies here. *Id.* Alliant then provided those policies to the Tribe. Lexington never had any contact with the Tribe. As the Tribe admitted, "it did not have direct contact with [Lexington] during the negotiation of the

policies." Lexington merely contracted with Alliant, which set forth Lexington's obligations under the Tribal First program. Lexington did not process the Tribe's applications for insurance; collect premiums from the Tribe; prepare or provide quotes, cover notes, policy documentation, or evidence of insurance to the Tribe; or develop or maintain an underwriting file for the Tribe. Alliant performed these tasks. So Lexington never dealt directly with the Tribe. Lexington did not even know the Tribe's identity until the policies were issued.

The insurance policies between Lexington and the Tribe "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 [r]eservation." *Id.* at 877. And the policies were registered "under the insurance code of the state of Washington."

In March 2020, the Suquamish tribal government and Washington State issued orders restricting business operations and travel because of the COVID-19 pandemic. *Id.* The Tribe then submitted claims for coverage under the insurance policies. *Id.* After receiving reservation-of-rights letters suggesting the policies may not cover COVID-19-related losses, the Tribe sued Lexington for breach of contract in the Tribe's court. *Id.* Lexington moved to dismiss, arguing the tribal court lacked tribal jurisdiction and personal jurisdiction. *Id.* at 878. The Suquamish lower court denied the motion and the tribal court of appeals affirmed. *Id.*

After exhausting appeals in the tribal courts, *see Nat'l Farmers Union Ins.*, 471 U.S. at 857 (requiring exhaustion in tribal court), Lexington sued in federal court for a declaratory judgment that the tribal court

lacked jurisdiction, *Lexington Ins.*, 94 F.4th at 878. The district court sided with the Tribe and confirmed the tribal court's jurisdiction over Lexington. Lexington then appealed to our court, and the panel "easily conclude[d] 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." *Id.* at 882. It held that the insurance policies between Lexington and the Tribe sufficed to establish a "mutual and consensual" relationship because the "transaction had tribe and tribal lands written all over it." *Id.* at 884. So Lexington was "on notice" that it could be haled into a tribe's courts for actions related to the insurance policies. *Id.*

Lexington then petitioned for rehearing en banc.

II.
Historical and Legal Background

Before getting into the multiple ways that the panel decision gets this case wrong, it's worth providing some historical background on tribal court authority over nonmembers. After all, "historical perspective [can] cast[] substantial doubt upon the existence of [tribal] jurisdiction." *See Oliphant*, 435 U.S. at 206. Here, nothing in the history of Indian relations supports tribal jurisdiction over nonmembers acting outside of Indian lands. After surveying this history, I turn to Supreme Court precedent governing this question. As is no surprise, Supreme Court precedent doesn't support extending tribal-court jurisdiction to nonmembers' off-reservation conduct either.

A.
History of Tribal Authority over Nonmembers

Early American laws, treaties, and executive branch views all hint at a "commonly shared presumption," *id.* at 206, that tribal courts do not have adjudicative authority over nonmembers acting outside of tribal lands. Much of the evidence indicates Indian tribes had little to no authority over non-Indians. When Indian tribes exercised any civil authority over non-Indians, historical evidence suggests it was only when the non-Indian was *physically* present on tribal lands and had joined the tribe or otherwise forfeited the protections of the United States. While this history may not be dispositive here, it "carries considerable weight." *Id.* And it strikes sharply against the panel's view of significant tribal authority over nonmembers operating outside of tribal lands.

During the colonial period, Indians did not have formal adjudicatory bodies to handle civil disputes. "To the Indians, law and justice were personal and were clan matters not generally involving a third party and certainly not involving an impersonal public institution. The Indians considered such English legal apparatus as courts, juries, and jails meaningless." Yasuhide Kawashima, *The Indian Tradition in Early American Law*, 17 Am. Indian L. Rev. 99, 99 n.1 (1992). Thus, some colonies "tried to extend their own law to the Indians." *Id.* at 99. For example, the Massachusetts colonists "demanded the extension of the colonial jurisdiction over the Indian territories, except for legal matters arising among the tribal Indians themselves." Yasuhide Kawashima, *Jurisdiction of the Colonial Courts over the Indians in Massachusetts,*

1689–1763, New Eng. Q. 532, 549 (1969). Massachusetts and Connecticut began asserting expansive jurisdiction over Indian territory, likely fueled by military victories over tribes. Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* 19 (2010).

Even so, colonies did not completely exclude Indians from adjudicating disputes. For example, some laws permitted Indian tribes to act directly against the property of those who entered Indian territory. Take a law from the Connecticut colony. It established how property damage to Indian corn fields by colonists would be compensated. An Act for the Well-Ordering of the Indians (1715), *reprinted in Acts and Laws, of His Majesties Colony of Connecticut in New England* 58 (Timothy Green ed., 1715). The law authorized Indians to "impound and secure Cattel, Horses or Swine trespassing upon [their lands]." *Id.* Thus, they could act unilaterally on property that entered the tribe's territory. Other colonial laws required some forms of consultation with Indian tribes. Consider a 1715 North Carolina law establishing that trade disputes between a colonist and an Indian would be "heard, tried, and determined" by colonial leaders "together with the Ruler or Head Man of the Town to which the *Indian* belongs." An Act, for Restraining the Indians from Molesting or Injuring the Inhabitants of This Government, and for Securing to the Indians the Right and Property of Their Own Lands (1715).

Thus, during the colonial period, tribes had a role in adjudicating property and commercial disputes between settlers and Indians, despite lacking formal courts themselves. Still, even at this early stage, the seeds of the current geographic framework for tribal

jurisdiction were already planted. Indian tribes were recognized to have authority to seize colonist property physically on their land but the colonies retained authority when regulating trade between the two.

By the Founding, and in the decades that followed, historical evidence supports some tribal civil power over non-Indians—but only for non-Indians residing on tribal land who had joined the tribe or had otherwise withdrawn from the protection of the United States. Early treaties, for instance, recognized Indian jurisdictional authority over trespassers who chose to remain unlawfully and settle in tribal territory. They would "forfeit the protection of the United States, and the Indians may punish him or not as they please." Treaty With the Cherokee, Art. V, Nov. 28, 1785, 7 Stat. 19; *see also* Treaty With the Chickasaw, Art. IV, Jan. 10, 1786, 7 Stat. 25 (non-Indian settlers forfeit United States protection, allowing the tribe to "punish him or not as they please"); Treaty With the Choctaw, Art. IV, Jan. 3, 1786, 7 Stat. 22 (same); Treaty With the Creeks, Art. VI, Aug. 7, 1790, 7 Stat. 37 (same).

Outside of non-Indians residing on Indian lands who abandoned the protections of the United States, most treaties explicitly recognized the United States' "sole and exclusive right of regulating the trade with the Indians." Treaty With the Cherokee, Art. IX, 7 Stat. 20 ("For the benefit and comfort of the Indians . . . the United States in Congress . . . shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper"); Treaty With the Chickasaw, Art. VIII, 7 Stat. 25 (same); Treaty With the Choctaw, Art. VIII, 7 Stat. 23 (same); Treaty With

the Cherokee, Art. VI, July 2, 1791, 7 Stat. 40 (Cherokee agree "that the United States shall have the sole and exclusive right of regulating their trade"). Under other treaties, tribes agreed they would ensure that Indians and settlers alike would abide by federal commercial laws. *See* Treaty With the Wyandot, Etc., Art. VII, Jan. 9, 1789, 7 Stat. 30 (requiring non-Indian traders to acquire licenses from the territorial governor or an Indian agent, and requiring Indians to hand over traders without permits to be punished under United States law); Treaty With the Wyandot, Etc., Art. VIII, Aug. 3, 1795, 7 Stat. 52 (similar); Treaty With the Sauk and Foxes, Art. 8, Nov. 3, 1804, 7 Stat. 86 ("the said tribes do promise and agree that they will not suffer any trader to reside amongst them without [a federal] license"); Treaty With the Creeks, Art. 3d, Aug. 9, 1814, 7 Stat. 121 (requiring the Creek to "not admit among them, any agent or trader" not licensed by "the President or authorized agent of the United States"); *Articles of Agreement and Capitulation Between the United States and the Sauk and Fox*, *in* 2 *The Black Hawk War, 1831–1832* 85, 86 (William K. Alderfer ed., 1973) (similar). Even when tribes had some say, they generally could provide licenses to traders who "reside in the [tribal] Nation and are answerable to the laws of the [tribal] Nation." *See, e.g.*, Treaty With the Choctaw, Art. X, Sept. 27, 1830, 7 Stat. 335. In other words, tribal authority was limited to those who had voluntarily submitted to tribal authority through residence.

Some treaties even limited Indian tribes' inherent sovereign authority to exclude. When the Suquamish signed the Treaty of Point Elliott, the United States permitted "full jurisdiction" by the Choctaw and Chickasaw over their own members but forbid jurisdiction over "all persons, with their property, who are

not by birth, adoption, or otherwise citizens or members" of the tribes. Treaty With the Choctaw and Chickasaw, Art. 7, June 22, 1855, 11 Stat. 613. As to trespassers, the United States permitted removal, but not by the tribe. Instead, only "by the United States agent, assisted if necessary by the military." *Id.* These same terms appeared in the treaty with the Creeks and Seminoles. Treaty with the Creeks, Etc., Art. 15, Aug. 7, 1856, 11 Stat. 704. Those treaties also provided that, in the event of a wrongful act by a U.S. citizen, it was the federal government that would provide recompense and "full indemnity . . . to the party or parties injured." Treaty With the Choctaw and Chickasaw, Art. 14, 11 Stat. 615; Treaty With the Creeks, Etc., Art. 18, 11 Stat. 705.

Early federal laws regulating commerce often established federal Indian agents who adjudicated disputes between Indians and non-Indian traders. Those acts regulated the rules of trade between tribal territories and the United States. *See, e.g.*, Act of July 22, 1790, ch. 33, 1 Stat. 137, 137–38; Act of March 30, 1802, ch. 13, 2 Stat. 139, 141. They also established federal Indian agents to "reside among the Indians, as [the President] shall think proper." Act of March 1, 1793, ch. 19, 1 Stat. 329, 331. While these laws did not speak explicitly to "settler torts and breaches of contract" within tribal territory, some federal Indian agents stepped into the void. *See* Ford, *supra*, at 60. These agents oversaw the resolution of criminal and civil matters between Indians and nonmembers. For example, Return J. Meigs, a federal agent to the Cherokees, "set up commissions in Cherokee Country to adjudicate civil disputes between settlers and Indians." *Id.* at 39. Meigs "staffed these commissions with settlers and ran them remarkably like common law

courts." *Id.* Thus, it was federal agents who "investigate[d] claims arising between settlers and indigenous people about the theft of property or broken promises." *Id.* at 65. Instead of tribal authorities deciding civil disputes, federal agents did so by applying non-Indian law and equity. *See id.* at 66–67. In Meigs's view, "the Cherokees were a dependent people, and as such had no innate right to maintain their tribal integrity or independent governance." *Id.* at 39.

That said, federal Indian agents were not unanimous in the view of their authority. Benjamin Hawkins, who was federal Indian agent for the Creek, believed he was acting under designated tribal authority while resolving disputes "untill [*sic*] I am otherwise directed by our government or that Congress can legislate on the subject." 2 *Letters, Journals and Writings of Benjamin Hawkins*, *1802–1816* 508–09 (C.L. Grant ed., 1980). And he oversaw tribal adjudications of settlers—although apparently those settlers had voluntarily submitted themselves to tribal authority in line with relevant treaties and lost the protection of the United States. *See* Ford, *supra*, at 60–61. These settlers then occupied "a whole and growing category of [people] who might fall outside federal law" and who thus fell within the authority of tribes. *See id.* at 60.

Early U.S. Attorney General opinions also limited tribal authority over nonmembers. In 1834, Attorney General Benjamin Butler sweepingly concluded that Choctaw courts had *no jurisdiction* whatsoever over American citizens. 2 U.S. Op. Att'y Gen. 693 (1834). In Butler's view, while the United States had guaranteed internal governance of Indian tribal members, U.S. citizens were independently subject to the authority of the United States and immune from tribal

authority. *Id.* at 694. They "were not amenable to the laws or courts of the Choctaw nation; and that, for offences against the person or property of each other, or of the Choctaws, they could only be tried and punished under the laws of the United States." *Id.* at 695. Butler appeared unmoved by any appeal to inherent tribal authority over nonmembers—even those on tribal lands who became tribe members. *See id.* at 693–94 (recognizing "the limitation of the Choctaw jurisdiction to the government of the Choctaw Indians"). But Butler's view conflicted with the "long-held convention . . . that long-term residents of Indian Country were subject to indigenous jurisdiction." Ford, *supra*, at 61.

In 1855, Attorney General Caleb Cushing cabined Butler's opinion to criminal matters and recognized Indian civil jurisdiction over non-Indian American citizens who voluntarily joined the tribe and resided on tribal lands. 7 Op. Att'y Gen. 174, 185 (1855). Cushing opined that Congress had the authority to give the federal government jurisdiction in Indian country, which it had done for criminal cases, but Congress had "ommitt[ed] to take jurisdiction in civil matters." *Id.* at 180. Because the United States "did not reserve by treaty the civil jurisdiction" nor "assume[] it by act of Congress," *id.* at 184, the Choctaw retained civil jurisdiction over its members, including U.S. citizens who "of their own free will and accord [chose] to become members of the [Choctaw] nation," *id.* at 185. As Cushing wrote, "jurisdiction is left to the Choctaws themselves of civil controversies arising *strictly within* the Choctaw nation." *Id.* (emphasis added).

* * *

At a minimum, this perspective shows that the panel's view of tribal court jurisdiction untethered

from physical presence and activity on tribal lands is a historical anomaly. If that's not enough to impeach the panel's position, Supreme Court precedent should take care of the rest.

B.
Supreme Court Precedent

Indian tribes "were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty." *United States v. Kagama*, 118 U.S. 375, 381 (1886). "Through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." *Montana*, 450 U.S. at 563. Today, "the inherent sovereignty of Indian tribes [i]s limited to 'their members and their territory.'" *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 (2001) (quoting *Montana*, 450 U.S. at 564). Given "the powers of self-government," tribes retain broad authority to govern internal relations. *Montana*, 450 U.S. at 564. But this power "involve[s] *only the relations among members of a tribe*." *Id.*

Regulation of nonmembers is a different story. "[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains Com.*, 554 U.S. at 328. That's because "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Atkinson Trading*, 532 U.S. at 651 (simplified). After all, "the tribes have, by virtue of their incorporation into the American republic, lost the right of governing persons within their limits except themselves." *Plains Com.*, 554 U.S. at 328 (simplified).

In *Montana*, the "pathmarking case concerning tribal civil authority over nonmembers," the Court delineated "two exceptions" to this default rule. *Strate v. A-1 Contractors*, 520 U.S. 438, 445–46 (1997). The first exception permits some tribal authority over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565 (simplified). Still, the "regulation imposed by the Indian tribe [must] have a nexus to the consensual relationship itself." *Atkinson Trading*, 532 U.S. at 656. The second *Montana* exception allows regulation of "the conduct of non-Indians . . . within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

Even with these exceptions, the Court has further limited the subject matter of tribal jurisdiction. Both exceptions recognize that tribes may regulate only nonmember conduct "that implicates the tribe's sovereign interests." *Plains Com.*, 554 U.S. at 332. Thus, when a *Montana* exception is met, "[e]ven then," the tribal court may only have civil jurisdiction when the regulation at issue "stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id*. at 336. In *Plains Commerce*, the Court held that a tribal court lacked jurisdiction to adjudicate a tribal discrimination claim related to a non-Indian bank's sale of fee land because "regulating the sale of non-Indian fee land" is unrelated to the sovereign interests of protecting tribal self-government or controlling internal relations. *Id*. at 335–36. This was the

rule "whatever consensual relationship" the non-Indian bank established with tribal members. *Id.* at 338 (simplified).

Even under *Montana*'s consensual-relationship exception, a relationship alone is insufficient. Instead, *Montana* permits only the "regulation of nonmember conduct inside the reservation." *Id.* at 332 (emphasis omitted). So *Montana*'s first exception permits "regulation of non-Indian activities *on the reservation* that had a discernible effect on the tribe or its members." *Id.* (emphasis added). Indeed, *Montana* and its progeny "have always concerned nonmember conduct on the land." *Id.* at 334. As the Court said, they have all "followed [a] pattern, permitting regulation of certain forms of nonmember conduct on tribal land." *Id.* at 333. And this makes sense—after all, sovereignty "centers on the land held by the tribe and on the tribal members within the reservation." *Id.* at 327. So the consensual-relationship exception requires a relationship *plus* nonmember conduct on the reservation. Simply put, the precedent says, no on-reservation conduct, no jurisdiction.

Start with decisions before *Montana*. In *Washington v. Confederated Tribes of Colville Indian Reservation*, various Indian tribes imposed taxes for on-reservation sales of cigarettes to nonmembers. 447 U.S. 134, 141–45 (1980). The Court upheld the tribes' power to do so, explaining that they have the inherent "authority to tax the activities or property of non-Indians taking place or situated on Indian lands." *Id.* at 153. That authority includes the power "to tax non-Indians *entering the reservation* to engage in economic activity." *Id.* (emphasis added). This on-reservation requirement was articulated long before the 1980s. *See, e.g.*, *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904)

(upholding tribal authority to tax nonmembers' cattle and horses grazing on Indian territory because refusal to pay the tax would allow the animals "to be wrongfully within the territory"); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (permitting tribal authority over nonpayment action because the nonmember "was on the [r]eservation and the transaction with an Indian took place there").

Next comes *Montana*. In that case, the Court tackled whether a tribe could regulate hunting and fishing by nonmembers on non-Indian reservation land. *Montana*, 450 U.S. at 547. The Court concluded that the default rule, no jurisdiction, applied. *Id.* at 566. For the consensual-relationship exception, the Court determined, while the nonmembers entered the reservation to fish and hunt, thus acting on the land, they "d[id] not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction." *Id.* The Court thus stressed both parts of the first exception—(1) a relationship and (2) an action on the land. Neither is sufficient alone.

A year later, the Court approved a tribe's power to levy a tax on natural resources removed by nonmembers from on-reservation tribal land. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133, 136 (1982). Without citing *Montana*'s first exception by name, the Court observed that tribes have "authority to tax non-Indians who do business on the reservation." *Id.* at 136–37. In explaining the origin of this taxing power, the Court observed that the power comes from "the nonmember['s] enjoy[ment of] the privilege of trade or other activity on the reservation." *Id*. at 141–42. So there is of course a "territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts

business with the tribe." *Id.* at 142. In *Merrion*, the nonmembers did both—they entered a relationship with the tribe and physically removed natural resources from the reservation. *See id.* at 133–38. Thus, the tax "derive[d] from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction[,] . . . [such as by] requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Id.* at 137.

Now, fast forward to cases applying *Montana*'s "consensual relationship" exception by name. In *Strate*, a car driven by an employee of a nonmember landscaping company collided with another nonmember vehicle within the bounds of a reservation, but on "alienated, non-Indian land." 520 U.S. at 442–43, 454. While the landscaping company "was engaged in subcontract work on the . . . [r]eservation, and therefore had a consensual relationship," the on-reservation car accident between nonmembers, on non-Indian land, was "distinctly non-tribal in nature." *Id.* at 457 (simplified). That is, even with a consensual relationship, the nonmember's on-reservation conduct was unrelated to that relationship. *Id.* Without the hook of related on-reservation nonmember conduct, the tribal relationship was not "of the qualifying kind" for jurisdiction. *Id.*

Atkinson Trading followed a similar course. There, tribes sought to tax nonmember activity on non-Indian fee land—a hotel occupancy tax on any room within the reservation. *Atkinson Trading*, 532 U.S. at 647–48. Nonmember guests paid the tax to the hotels who remitted it to the tribe. *Id.* So nonmember activity occurred on the reservation. And it related to the tribe's regulation. But the tribe failed to establish the required consensual relationship.

Tribes could not establish a constructive relationship with nonmember guests and businesses through "actual or potential receipt of tribal police, fire, and medical services." *Id.* at 655. And even though the hotel acquired a permit to become an "Indian trader"—an actual consensual relationship—the permit was unrelated to the relevant nonmember on-reservation conduct: provision of rooms to nonmember guests. *Id.* at 656–57. Finally, the Court rejected the tribes' argument that *Merrion* allowed for tribal authority beyond the limits of *Montana*. *Id.* at 653. "*Merrion* involved a tax that only applied to activity *occurring on the reservation*, and its holding is therefore easily reconcilable with the *Montana–Strate* line of authority, which we deem to be controlling." *Id.* (emphasis added).

Hicks, decided the same term as *Atkinson Trading*, involved a slight twist on the standard tribal authority framework. There, the Court was asked whether a "tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." *Hicks*, 533 U.S. at 355. The Court explained that "[t]ribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them." *Id.* at 361. Applying that rule, the Court concluded the tribe lacked the inherent power to regulate the state officials. "[R]egulat[ing] state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to the right to make laws and be ruled by them." *Id.* at 364 (simplified).

The most recent case on the consensual-relationship exception, *Plains Commerce*, perhaps puts the

finest point on the importance of on-reservation nonmember conduct. There, a tribe sought to regulate the "sale of a 2,230-acre fee parcel [located on the reservation] that the [nonmember b]ank had acquired from the estate of a non-Indian." *Plains Com.*, 554 U.S. at 331. The bank had "general business dealings" with tribal members that could have established a consensual relationship for regulation of some activities. *Id.* at 338. But the bank's sale of the non-Indian fee land was not "nonmember conduct on the land" at all. *Id.* at 334. "The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule." *Id.* at 334–35. But "conduct taking place on the land and the sale of the land are two very different things." *Id.* at 340. The former involves "regulating nonmember *activity* on the land." *Id.* at 336. But "in no case" had the Court "found that *Montana* authorized a tribe to regulate the sale of [non-Indian fee] land." *Id.* at 334. "Rather, [the Court's] *Montana* cases have always concerned nonmember conduct on the land." *Id.* And while the land sale *affected* the land, that fact was immaterial without on-reservation nonmember conduct. *Id.* at 336.

Thus, the through-line for all these cases is physical, on-reservation conduct by the nonmember. Without it, no tribal jurisdiction exists.

III.
No Tribal Jurisdiction over Lexington

With this framework in mind, I turn to this case.

First, the panel violated *Montana* and its progeny by gutting the on-reservation conduct requirement.

Because Lexington never acted on the Tribe's land, a straightforward application of *Montana* means no tribal jurisdiction. Second, besides the geographical problems, there's also subject-matter problems. Simply, the regulation of insurance, which is traditionally a state matter, doesn't implicate the Tribe's sovereign interests. Without regulatory authority over insurance, the Tribe's courts have no adjudicative authority over the claims against Lexington.

A.
Montana's Consensual-Relationship Exception Does Not Apply

Looking at the *Montana* consensual-relationship exception under these circumstances, the Tribe lacks jurisdiction over Lexington. As all the Court's cases make clear, the exception requires both a relevant relationship *and* relevant "nonmember conduct inside the reservation." *Id.* at 332 (emphasis omitted). Even assuming the insurance policies show a consensual relationship between Lexington and the Tribe, the Tribe can't establish that Lexington had the requisite on-reservation conduct.

1.

Lexington conducted no activity whatsoever on the Tribe's land. As far as the record is concerned, Lexington never even entered the Tribe's reservation. Just look at the jumps needed to get from the Tribe to Lexington. First, the Tribe sought insurance from a nonmember insurance broker, who was located off the reservation. *Lexington Ins.*, 94 F.4th at 876. Second, that insurance broker contacted an insurance middleman, "Tribal First," another nonmember company located off the reservation. *Id.* at 877. And finally, that middleman contracted with Lexington, a nonmember

located off the reservation. *Id.* The middleman handled all the paperwork. So Lexington is at least three steps removed from any conduct occurring on the reservation. Lexington thus acted 100% off reservation. As the panel had to concede, "all relevant conduct occurred off the [r]eservation" and Lexington was never "physically present" on the reservation. *Id.* at 881.

This concession should end this case. Without any actual physical activity by Lexington on the reservation, no conduct permits jurisdiction. As the Court has emphasized many times, the Tribe's authority "reaches no further than tribal land." *See Atkinson Trading*, 532 U.S. at 653. By detaching on-reservation conduct from actual physical activity on Indian land, we stretch tribal sovereignty beyond the limits set by the Supreme Court. So even though the Tribe's reservation is only 12 square miles, its courts can now reach the furthest corners of the country—and perhaps the ends of the earth.

And it is not enough that the object of the insurance policies was tribal land. The Court has been clear—transactions with a direct connection to tribal land, without on-reservation conduct, don't suffice for jurisdiction. So nonmember "conduct taking place on the land" and transactions *related* to the land (like insurance policies on tribal businesses and property) "are two very different things." *Plains Com.*, 554 U.S. at 340. Without more, Lexington's insuring property and businesses on the land isn't enough to confer tribal court jurisdiction.

Montana and its progeny thus hold that tribal jurisdiction over nonmembers requires the nonmember's actual physical presence and activity on the reservation. Other circuits have recognized this necessity. *See Stifel, Nicolaus & Co. v. Lac du Flambeau*

Band of Lake Superior Chippewa Indians, 807 F.3d 184, 207 (7th Cir. 2015) ("The actions of nonmembers outside of the reservation do not implicate the Tribe's sovereignty."); *Jackson*, 764 F.3d at 782 & n.42 (ruling against tribal jurisdiction when "[nonmembers] have not engaged in *any* activities inside the reservation[, they] did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents," and just "applied for loans . . . by accessing a website"); *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1071–72 (10th Cir. 2007) ("[A] tribe only attains regulatory authority based on the existence of a consensual employment relationship when the relationship exists between a member of the tribe and a nonmember individual or entity employing the member *within the physical confines of the reservation*.") (emphasis added); *Hornell Brewing v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1093 (8th Cir. 1998) ("The Internet is analogous to the use of the airwaves for national broadcasts over which the Tribe can claim no proprietary interest, and it cannot be said to constitute non-Indian use of Indian land.").

2.

Contrary to the weight of authority, the panel still found jurisdiction here. And it did so, first, by misreading Supreme Court precedent and, second, by relying on faulty policy reasons. I review each error in turn.

First, the panel twists the Supreme Court's clear words mandating "nonmember conduct inside the reservation" into a claim that courts have "never stated that physical presence is necessary to conclude that nonmember conduct occurred on tribal land." *Lexington Ins.*, 94 F.4th at 882. So it expressly disclaimed

any "require[ment that] the nonmember . . . be physically present on those lands." *Id.* To justify these linguistic gymnastics, the panel almost entirely relies on six words from *Merrion*. Recall that case involved a tax on natural resources removed from tribal land by nonmembers. *Merrion*, 455 U.S. at 135–36. While explaining the origin of tribal taxing authority, the Court observed: "a tribe has no authority over a nonmember until the nonmember enters tribal lands *or conducts business with the tribe*." *Id.* at 142 (emphasis added). The panel took these words to confer vast authority over nonmembers for off-reservation actions. According to the panel, "[n]owhere . . . has the Court limited the definition of nonmember conduct on tribal land to physical entry or presence." *Lexington Ins.*, 94 F.4th at 881. Taking the six words from *Merrion* as license to disregard clear precedent, the panel concluded that 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." *Id.*

But the panel failed to appreciate the context of the *Merrion* statement before overreading it. To begin, in that section of the opinion, the majority was responding to the dissent's argument "that a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands, and that this power provides a basis for tribal authority to tax." *Merrion*, 455 U.S. at 141. The majority sought to refute the dissent's claim that the taxing power must derive from the power to exclude. It thus wrote:

> Instead, these cases demonstrate that a tribe has the power to tax nonmembers only to the extent the *nonmember enjoys the privilege of trade or other activity on the reservation* to

> which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because *the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction*. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe. However, we do not believe that this territorial component to Indian taxing power, which is discussed in these early cases, means that the tribal authority to tax derives solely from the tribe's power to exclude nonmembers from tribal lands.

Id. at 141–42 (emphasis added). Put into context, the "conducts business with the tribe" fragment is directly connected to nonmember activity *inside* the territorial bounds of the reservation. Every other part of that paragraph refers to "activity on the reservation," "nonmember ent[ry into] the tribal jurisdiction," and the "territorial component to tribal power." *Id*. As the "Court has long stressed . . . the language of an opinion is not always to be parsed as though we were dealing with the language of a statute." *Brown v. Davenport*, 596 U.S. 118, 141 (2022) (simplified). Yet that is exactly what the panel did.

If that's not convincing enough, the Supreme Court itself tempered an expansive reading of *Merrion*'s language. In *Atkinson Trading*, the tribe argued for a broad authority over nonmembers and cited *Merrion* as expanding the reach of the tribe's authority beyond the limits in the *Montana* line of cases. 532

U.S. at 652–53. Rejecting this view, the Court wrote, "*Merrion*, however, was careful to note that an Indian tribe's inherent power to tax only extended to '*transactions occurring on trust lands* and significantly involving a tribe or its members.'" *Id.* at 653 (quoting *Merrion*, 455 U.S. at 137) (emphasis added). The Court wrote that "[t]here are undoubtedly parts of the *Merrion* opinion that suggest a broader scope for tribal taxing authority than the quoted language." *Id.* But it rejected that broad reading, emphasizing "*Merrion* involved a tax that only applied to activity *occurring on the reservation*, and its holding is therefore easily reconcilable with the *Montana–Strate* line of authority, which we deem to be controlling." *Id.* (emphasis added). And the Court closed by reiterating the core proposition of the *Montana* cases: "[a]n Indian tribe's sovereign power . . . reaches no further than tribal land." *Id.*

Finally, since it corrected its loose language, the Court has never again quoted the "conducts business with the tribe" phrase. Other circuits have gotten the hint; we are the only one to have ever quoted that language in any context. Even then, since *Atkinson*, we have done so only once and in passing. *See Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1139–40 (9th Cir. 2006) (en banc). And *Smith* involved conduct which physically "occurr[ed] on the reservation" and had nothing to do with a business relationship. *See id.* at 1135. All told, *Merrion*'s six words cannot support the panel's theory—upending the entire framework of tribal jurisdiction with a phrase tempered by its surrounding language, disclaimed by the Court, and never relied upon by any other circuit. At the very least, it is not a "foundational rule" as the panel framed it. *Lexington Ins.*, 94 F.4th at 881.

And the panel's policy arguments do not move the needle either. The panel first appeals to technological innovations, claiming that jettisoning physical presence "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." *Id.* But mail, telephone calls, and the internet existed long before the panel's decision in February 2024. And yet the Court did not see it fit to alter its framework for those modes of communication. Indeed, contrary decisions from other circuits sometimes involved the internet. *See, e.g.*, *Jackson*, 764 F.3d at 782 (rejecting tribal jurisdiction where nonmembers "applied for loans in Illinois by accessing a website [hosted by the tribal entity]"); *Hornell Brewing*, 133 F.3d at 1093 (rejecting tribal jurisdiction where nonmember offered advertising on the internet available to tribal members).

So too for the panel's concern that tribes will be left unprotected without tribal jurisdiction. When courts deny tribal jurisdiction, they do what *Montana* and its progeny require—apply generally applicable state law. *See, e.g.*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973) ("Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1312–13 (D.C. Cir. 2007) ("[W]hen 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 . . . [when] engaging in privately negotiated contractual affairs with non-Indians, []the tribal government does so subject to generally applicable laws."). Our court

has observed the same. *Gila River Indian Cmty. v. Henningson, Durham & Richardson*, 626 F.2d 708, 715 (9th Cir. 1980) ("We see no reason why commercial agreements between tribes and private citizens cannot be adequately protected by well-developed state contract laws."). So the Tribe will be adequately protected by Washington law or the other state law chosen by the parties.

Finally, perhaps recognizing the sweep of its decision, the panel sought to minimize it by claiming that "sophisticated commercial actors, such as insurers" could avoid the opinion's scope by "insert[ing] forum-selection clauses into their agreements with tribes and tribal members." *Lexington Ins.*, 94 F.4th at 887. But that doesn't recognize that tribal courts will have the first crack at deciding whether to give these clauses effect—potentially leaving nonmembers in much the same position as before. And ultimately "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given the special nature of Indian tribunals." *Hicks*, 533 U.S. at 383 (Souter, J., concurring) (simplified).

In turn, the panel ignored the harm that this decision will bring to Indian tribes within our circuit. Given the huge uncertainty and great expense associated with being haled into tribal courts and subject to uncertain tribal law, many nonmembers may abandon business with tribes and tribe members. After all, why should they subject their businesses and employees to this newly minted vulnerability just by answering a phone call, sending an email, or using an internet insurance portal? If nonmembers cut back on tribal commerce, fewer goods and services will be available for purchase by tribe members. And those

products that remain will suffer from reduced competition. In the case of insurance, premiums must now price in unpredictable tribal law. The inescapable consequence of the panel's opinion is higher prices for tribes, which are already among the most deprived socioeconomic groups.

* * *

The key question here was an easy one: whether the "nonmember conduct inside the reservation" requirement means what it says. *Plains Com.*, 554 U.S. at 332 (emphasis removed). The panel discarded that requirement—so any commercial action anywhere in the world can be constructively made into on-reservation conduct so long as the off-reservation "business conduct[ed] with the [t]ribe . . . is directly connected to tribal lands." *Lexington Ins.*, 94 F.4th at 881. This constructive presence rule is out of sync with the long history of tribal jurisdiction and current doctrine. We should have corrected the error en banc.

B.
Plains Commerce's Inherent Sovereign Authority Requirement Not Met

The panel also erred on a second important issue. It refused to determine whether the *type* of tribal regulation here falls within the limited sovereign powers that tribes may maintain over nonmembers. The "tribe's inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 459 (simplified). Thus, "tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them." *Hicks*, 533 U.S. at 361; *see id.* at 364 (ap-

plying that rule to forbid tribal regulation because doing so "is not essential to tribal self-government or internal relations—to the right to make laws and be ruled by them" (simplified)).

In *Plains Commerce*, the Court clarified the effect of this limitation. Even when *Montana*'s consensual relationship exception is otherwise satisfied, federal courts must still assure themselves that tribal jurisdiction "stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Com.*, 554 U.S. at 337 (citing *Montana*, 450 U.S. at 564). Only when the subject matter at issue "intrude[s] on the internal relations of the tribe or threaten[s] tribal self-rule" do we accede to tribal jurisdiction. *Id.* at 334–35. So we must *also* look to whether the type of tribal regulation derives from a permissible font of sovereign authority.

Thus, even when a *Montana* exception applies, three circuits have read *Plains Commerce* to require separate judicial inquiry into whether the relevant regulation is necessary to the tribe's inherent sovereign authority before approving an assertion of regulatory or adjudicative authority.

- The Seventh Circuit denied tribal jurisdiction because, aside from lacking nonmember on-reservation conduct, "[the tribal entities] made no showing that the present dispute implicate[d] *any* aspect of 'the tribe's inherent sovereign authority.'" *Jackson*, 764 F.3d at 783.
- The Eighth Circuit explained that "[e]ven where there is a consensual relationship with

the tribe or its members, the tribe may regulate non-member activities only where the regulation 'stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.'" *Kodiak Oil & Gas (USA)*, 932 F.3d at 1129 (quoting *Plains Com.*, 554 U.S. at 336).

- In dicta, the Sixth Circuit has observed: "At the periphery [of tribal authority], the power to regulate the activities of non-members is constrained, extending only so far as 'necessary to protect tribal self-government or to control internal relations.'" *Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d at 546 (quoting *Montana*, 450 U.S. at 564). And when courts review the authority of a tribe, "[t]ribal regulations of non-member activities must 'flow directly from these limited sovereign interests.'" *Id.* (quoting *Plains Com.*, 554 U.S. at 335).

Only the Fifth Circuit has held otherwise. *See Dolgencorp*, 746 F.3d at 175 ("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.'") (simplified). Even so, five judges dissented from denial of rehearing en banc. *See Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 588, 590 (5th Cir. 2014) (Smith, J., dissenting from denial of rehearing en banc).

Our court's panel rejected the majority view, concluding, "[i]f 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*." *Lexington Ins.*, 94 F.4th at 886. That's simply wrong. Just look at this case. Whether Lexington entered a consensual relationship with the Tribe tells us nothing about whether the Tribe's authority stems from its sovereign interests. A relevant consensual relationship under *Montana* may show the nonmember's consent to tribal regulation and perhaps notice of tribal authority, but it doesn't tell us whether jurisdiction flows from the tribe's inherent sovereign authority. So "whatever 'consensual relationship' may have been established through" Lexington's "dealing with" the Tribe, the Tribe must still prove its authority derives from its need to "set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Com.*, 554 U.S. at 337–38.

And, on that front, it's doubtful that the Tribe can justify its authority over this insurance suit. The regulation of insurance contracts has nothing to do with the Tribe's right to exclude (as Lexington has not entered, and doesn't seek to enter, the reservation). And neither does the Tribe's interest in tribal self-governance and control of internal relations support a tribal regulatory scheme for insurance. Even though the Tribe has the "right to make [its] own laws and be governed by them," that doesn't mean it may "exclude all state regulatory authority on the reservation." *Hicks*, 533 U.S. at 361. When tribal authority implicates "state interests outside the reservation, . . . [s]tates may regulate the activities even of tribe members on tribal land." *Id.* at 362. And here, insurance law has long been the province of state regulation. "States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. v. Barry*, 438 U.S. 531, 539 (1978). In contrast, there's no history of tribal regulation in this area of law. Indeed, no Tribe

insurance code exists. It's no wonder why the policies here were registered "under the insurance code of the state of Washington." All this suggests no role for tribal regulation under *Plains Commerce*.

IV.

The Ninth Circuit, once again, is an outlier on the law. This time we put ourselves at odds with every other circuit on the question of tribal jurisdiction over nonmembers. Now we pierce the geographic limits of tribal jurisdiction and refuse to consider the substantive limits on what tribes may regulate. Our decision provides near limitless tribal jurisdiction over nonmembers worldwide so long as they hold themselves out for business with tribes. This case cried out for rehearing en banc. It is a shame that we have chosen otherwise.

APPENDIX D

IN THE SUQUAMISH TRIBAL COURT OF APPEALS PORT MADISON INDIAN RESERVATION SUQUAMISH, WASHINGTON

SUQUAMISH INDIAN TRIBE, a federally recognized Indian Tribe, and PORT MADISON ENTERPRISES, a wholly entity of the Suquamish Tribe, Plaintiffs/Respondents, vs. **LEXINGTON INSURANCE COMPANY, HOMELAND INSURANCE COMPANY OF NEW YORK, HALLMARK SPECIALTY INSURANCE COMPANY, ASPEN SPECIALTY INSURANCE COMPANY, APSEN INSURANCE UK LTD., AND LONDON CARRIERS.** Defendants/Appellants.	**CASE NO. 200601-C (APPEAL)** **OPINION** **(AMENDED OCTOBER 7, 2021)**[1]

Before: Eric Nielsen, Chief Judge; Bruce Didesch, Judge; Steven Aycock, Judge.

[1] *See* this Court's Order dated October 7, 2021.

Appearances: Vernle C. (Skip) Durocher, Jr. For Respondents; Matthew Hoffinan and Eric Neal for Appellants.

Nielsen, C.J.:

This case involves a lawsuit filed by the respondent, the Suquamish Tribe, a federally recognized Indian Tribe and its wholly owned economic development entity, Port Madison Enterprises ("PME")[2] against the appellants, several insurance companies[3] ("Insurers") for breach of contract and declaratory judgement. Insurers issued insurance policies insuring the Tribe and PME for losses under "All Risk" policies. The Tribe and PME tendered claims under the policies for losses related to the COVID pandemic. When the insurance companies failed to affirm coverage, the Tribe and PME filed this suit in the Tribe's Court.

The Insurer's moved to dismiss on the grounds the Tribe's Court lacked subject matter and personal jurisdiction. Insurers Hallmark and Aspen also moved to dismiss asserting potential juror lack of impartiality and bias. The court denied the motions and the Insurers timely appealed.

The issues in this appeal are whether the Tribe's Court has subject matter jurisdiction and personal jurisdiction over the suits brought by the Suquamish

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[2] The Suquamish Tribe and PME are collectively referred to as "Tribe" unless otherwise indicated.

[3] The companies are Lexington Insurance Company, Homeland Insurance Company of New York, Hallmark Specialty Insurance Company, Aspen Specialty Insurance Company, Aspen Insurance UK, Ltd., and London Carriers.

Tribe and PME and whether the court erred in denying the motion to dismiss due to potential juror bias.

We hold the Tribe's Court has both subject matter and personal jurisdiction. We also hold the tribal court judge did not abuse her discretion in denying the motion to dismiss for potential juror bias.

FACTS

The Tribal Court entered detailed findings of facts. Order at 3-8. The relevant facts, as found by the Court are undisputed and supported by the record.

Appellants are insurance companies who insured the Suquamish Tribe and its wholly owned company, PME under "All Risk" insurance policies covering losses to the Tribe and the Tribe's reservation trust property. The policies were effective from July 1, 2019, to July 1, 2020. The Suquamish Tribe paid $231,963 and PME paid $1,336,007 for coverage under the polices. Order at 4 (findings of fact 6 and 7). None of the Insurers are members of the Suquamish Tribe, located on the Tribe's reservation or have physically entered the reservation. *Id.* at 7 (findings of fact 19, 26 and 27).

Insurance broker Brown & Brown Insurance assisted the Tribe in purchasing the policies through a program called the Tribal Property Insurance Program ("TPIP"), which markets insurance to tribes. Alliant Specialty Insurance Services, Inc. administers the TPIP under the moniker 'Tribal First." Order at 4 (findings of fact 4 and 5). The insurers of these policies are Lexington and "Additional A rated and Non Admitted Carriers." *Id.* (findings of fact 8, 10). The policies include a schedule of carriers which includes Lexington, Homeland, Hallmark, and London Carriers. *Id.* at 5 (finding of fact 13). The majority of the

Insurers listed on the Schedule of Carriers have been insuring the Tribe through the TPIP since 2015, and all of them have insured the Tribe since the 2018-2019 policy year. *Id.* at 6 (finding of fact 16).

The policies include a "Service of Suit" clause. That clause provides that "It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the named Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States." Order at 6, (finding of fact 17).

In the wake of the COVID pandemic, the Tribe was forced to suspend or restrict its operations that it claims resulted in the loss of millions of dollars in business and tax revenue and other expenses. Order at 7 (finding of fact 27). Because of those losses, the Tribe tendered the COVID-related claims under the policies. Insurer Lexington, acting as the lead insurer, tendered a reservation of rights letter to the Tribe indicating the policies may not cover the claimed losses. *Id.* at 7-8 (finding of fact 2). Insurers do not dispute they knew they were insuring the Tribe. *Id.* at 8 (finding of fact 30).

The Tribe then sued Insurers for breach of contract and for a declaratory judgement in the Suquamish Tribal Court. Insurers moved to dismiss the suit alleging the Court lacked subject matter and personal jurisdiction.[4] Additionally, Insurers Hallmark and Aspen moved to dismiss alleging potential

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[4] Insurers also moved to dismiss based on forum non comeniens, absence of ripeness, and judicial impartiality, which the Court also denied. Its ruling on those issues is not before us.

juror bias. The court denied the motions and Insurers timely appealed.

STANDARD OF REVIEW

The Suquamish Tribal Code is silent on the standard of appellate court review of a Tribal Court's decision and orders. This Court has held that questions of law are reviewed de novo, questions of fact are reviewed for clear error, and matters of discretion are reviewed for abuse of discretion. *In re J.M.,* No. 160304-C (Suquamish Cout of Appeals, 2018): *In re L.C.,* No. 170117-C (Suquamish Court of Appeals, 2017).

Where there is an absence of a relevant code provision or precedent the Suquamish Tribal Code directs us to look to tribal, federal and state law for guidance. Suquamish Tribal Code (STC) § 4.1.4. Most foreign courts hold that the issues of a court's subject matter and personal jurisdiction are questions of law. *ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Commission,* 173 Wn.2d 608, 268 P.3d 929 (2012) (subject matter jurisdiction question of law); *Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas,* S.A., 20 F.3d 987, 990 (9th Cir.1994) (same). *Failla v. FixtureOne Corp.,* 181 Wn.2d 642, 649, 336 P.3d 1112 (2014), *cert. denied,* 135 S. Ct. 1904. 191 L. Ed. 2d 765 (2015) (personal jurisdiction question of law); *Bourassa v. Desrochers,* 938 F.2d 1056. 1057 (9th Cir.1991) (same); *Port Gamble S'Klallam Tribe v. lijert, 10* NICS App. 60, 62 (2011) (subject matter and personal jurisdiction are questions of law). We find the subject matter and personal jurisdiction issues are questions of law, consequently we review those issues de novo.

The juror impartiality issue is not a question of law. We will review that issue under the abuse of the discretion standard.

DECISION

Jurisdiction Under Suquamish Law

If under Suquamish law the Tribal Court lacked either subject matter or personal jurisdiction it will end our inquiry. Therefore, we will first look at whether the Tribal Court has subject matter and personal jurisdiction to adjudicate the Tribe's suit under Suquamish law.

This case involves a business transaction between the Tribe and Insurers. Insurers contracted with the Tribe to insure Tribal properties and businesses located on trust land on the Port Madison Reservation. The Tribe's suit alleges the contracts were breached.

The Suquamish Constitution gives the Tribal Council the power to pass ordinances that govern the conduct of all persons and regulate all property within the Tribe's jurisdiction to the fullest extent allowed under applicable federal law. Suquamish Const. Art. III. The Suquamish Tribal Court is a court of general jurisdiction that has subject matter jurisdiction over *all* cases and controversies within the territorial jurisdiction of the Tribe. STC § 3.2.1.[5]

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[5] Subject Matter Jurisdiction. The Suquamish Tribal Court shall be a court of general jurisdiction. Its subject matter jurisdiction shall extend to all cases and controversies within the territorial jurisdiction of the Suquamish Tribe, including but not limited to: (a) All crimes committed by Indians; (b) All actions under the civil regulatory laws of the Tribe; (c) All civil actions involving any Indian person, tribe, organization, or property . . . STC § 3.2.1

We find the Suquamish Tribal Council intended STC § 3.2.1 to invest the Tribal Court with broad subject matter jurisdiction as a court of general jurisdiction. We hold the Tribal Court has subject matter jurisdiction under Suquamish law because this is a case and controversy within the territorial jurisdiction of the Suquamish Tribe involving organizations and Tribal property. STC § 3.2.1.

The Court has personal jurisdiction over any person for any actions arising from the commission by that person, personally or through an agent within the territorial jurisdiction of the Tribe, that involves the transaction of any business, contracting for the performance of any service with respect to any person or property or for conduct constituting continuous and substantial business within the territorial jurisdiction of the Courts. STC §§ 3.2.2(a), (b)(1), (c)(1).[6]

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[6] Jurisdiction over Persons. (a) The Suquamish Tribal Courts have personal jurisdiction over all persons who are domiciled or resident within, or served with process within, or conduct continuous and substantial business within the territorial jurisdiction of the Courts and also over all persons who consent to the jurisdiction of the Tribal Courts. (b) The Tribal Courts shall also have personal jurisdiction over any person for any actions arising from the commission by that person, personally or through an agent, of any of the following acts within the territorial jurisdiction of the Court: (1) The transaction of any business; (2) The commission of a tortious act; (3) Ownership, use, or possession of any real or personal property situated within said territory; (4) Conceiving a child; (5) Living in a marital relationship, so long as either the petitioning party or the respondent is domiciled within the territorial jurisdiction of the Court at the time the action is commenced; (6) Any violation of a tax law or licensing or other civil regulatory law, of the Tribe; or (7) Any crime. (c) The Suquamish Tribal Courts shall also have personal jurisdiction over any person for any actions arising from the commission by

We also find that by contracting with the Tribe to insure its reservation property and businesses, Insurers transacted business within the territorial jurisdiction of the Tribe, conducted continuous and substantial business within the territorial jurisdiction of the Court. and contracted to perform a service (insuring the Tribe's reservation property and businesses) with respect to the Tribe and its reservation property. STC §§ 3.2.2(a), (b)(1) and (c)(1). Additionally, we find Insurers performed acts that established minimal contacts within the Tribe's territory (which is explained later in this opinion). STC §§ 3.2.2(c)(3). We hold the tribal court has personal jurisdiction over the Insurers under Suquamish law.

Jurisdiction Under Federal Law

The Tribal Court held it had subject matter jurisdiction under the *Montana*[7] consensual relationship framework and the Suquamish Tribe's authority to exclude nonmembers. Order at 15 and 21. The Insurers argue here as they did below that the tribal lacks subject matter and personal jurisdiction under federal law. We do not find any federal statutes that prohibit

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that person, in any place, of any of the following acts: (1) Contracting for the delivery of any goods into the territorial jurisdiction of the Court, or for the performance of any services or with respect to any person or property therein; (2) Any act that causes injury to a person or property located within the territorial jurisdiction of the Court at the time the injury occurs; or (3) Any other act or series of acts that establish minimal contacts with the territorial jurisdiction of the Court, or that are otherwise sufficient to confer personal jurisdiction consistent with due process. STC §§ 3.2.2

[7] *Montana v. United States,* 450 U.S. 544 (1981).

the Tribal Court's jurisdiction over this suit.[8] Therefore, we tread through the confusing and inconsistent federal case law on the "ill-defined" scope of tribal court civil jurisdiction to address the issue whether under that law the Suquamish Tribal Court has subject matter and personal jurisdiction over this case.[9]

1. Subject Matter Jurisdiction

Indian tribes have the inherent sovereign power of self-governance. *United States v. Wheeler,* 435 U.S. 313, 322-323 (1978). "Tribal authority over the activities of Non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins. Co. v. LaPlant,* 480 U.S. 9, 18 (1987). The Supreme Court has ruled, "Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18. On the other hand, it has also ruled, "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land" are presumptively invalid. *Plains Commerce Bank v. Long Family Land &*

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[8] In fact, Congress has consistently encouraged the development of tribal courts as part of its efforts to foster tribal self-governance. *Iowa Mut. Ins. Co. v. LaPlant,* 480 U.S. 9, 14-15 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 856 (1985).

[9] See e.g., *Nevada v. Hicks,* 533 U.S. 353, 376 (2001) (Souter, J., concurring) (the scope of tribal courts' jurisdiction over nonmembers is admittedly "ill-defined."); *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.,* 569 F.3d 932, 937 (9th Cir. 2009) ("Tribal jurisdiction cases are not easily encapsulated, nor do they lend themselves to simplified analysis."); *County of Lewis v. Allen,* 163 F.3d 509, 513 (9th Cir. 1998) (en banc) (quoting William C. Canby, Jr., American Indian Law 111 (1998)) ("Jurisdictional disputes have been called '[t]he most complex problems in the field of Indian Law.'").

Cattle Co., 554 U.S. 316. 330 (2008) citing *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 659, (2001).

Given these seemingly inconsistent rulings, we do not apply either presumption in reaching our decision. Instead, we conduct an independent analysis of the relevant case law. We start with the United States Supreme Court's seminal decision in *Montana.*[10] *See Attorney's Process & Investigation Services. Inc. v. Sac & Fox Tribe,* 609 F.3d 927, 937 (8th Cir 2010) ("Each claim must be analyzed individually in terms of the *Montana* principles to determine whether the tribal court has subject matter jurisdiction over it.").

A. *Montana* Jurisdiction

In *Montana,* the Court addressed the issue of the Crow Tribe's authority to regulate the activities of Non-Indians on fee lands within the Tribe's reservation. *Montana,* 450 U.S. 544 (1981). The *Montana* Court agreed the Crow Tribe retained inherent sovereign power to limit or forbid hunting or fishing by nonmembers on land owned by or held in trust for the Tribe. *Montana,* 450 U.S. at 557. That legal proposition can hardly be questioned. The Supreme Court has consistently recognized that a tribe has sovereign authority over its land. *See United States v. Mazurie,* 419 U.S. 544, 557 (1975) (tribes retain authority to govern "both their members and their territory"); *Strate v. A-1 Contractors,* 520 U.S. at 454 ("tribes retain considerable control over nonmember conduct on tribal land,"); *Plains Commerce,* 554 U.S. at 334

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[10] The Supreme Court has called its decision in *Montana* "the path making case concerning tribal civil authority over nonmembers." *Strate v. A-1 Contractors,* 520 U.S. 438, 445 (1997).

(tribes have a sovereign interest in managing their lands).

The *Montana* Court, however, held that the Crow Tribe did not have the sovereign power to regulate nonmember hunting and fishing on fee land within its reservation. It announced a "general proposition" that absent a treaty or statute, Indian tribes generally lack authority to regulate the activities of nonmembers. *Montana,* 450 U.S. at 565.[11]

The *Montana* Court identified two exceptions where "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." *Id.* (emphasis added).

> "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. A tribe may also retain inherent power to exercise civil

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[11] The Court supported finding that general proposition from its decision in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978). *Oliphant,* however, only addressed the issue of whether the Suquamish Tribe has the sovereign power to try and punish nonmembers for a violation of tribal criminal laws. It found by submitting to the overriding sovereignty of the United States it gave up that power. *Id.* at 208. It would not be unreasonable to question how a general proposition that tribes lack the civil authority to regulate the reservation activities of nonmembers can be gleaned from the principle that tribes lost the sovereign power to punish a nonmember for violation of a criminal offense, particularly given the *Oliphant* Court's stated concern was a tribe's power to criminally punish nonmembers (435 U.S. at 208), which is not implicated by the power to regulate or adjudicate non-criminal activities.

> 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 565–566 (citations omitted).

Although *Montana* concerned a tribe's regulatory authority over nonmember activity on fee lands, the Supreme Court later created another rule addressing a tribe's adjudicatory authority. That rule is that when a tribe has authority to regulate the activity of nonmembers, tribal courts have adjudicatory authority over disputes arising out of that activity. *Strate* 520 U.S. at 453.

As to the first *Montana* exception—that a tribe's civil jurisdiction extends to activities of nonmembers who enter a consensual relationship with the tribe—"consent may be established 'expressly or by [the nonmember's] actions.'" *Water Wheel Camp Recreational Area, Inc. v. LaRance,* 642 F.3d 802, 818 (9th Cir. 2011) quoting *Plains Commerce,* 554 U.S.at 337. A nonmember entering a consensual relationship with a tribe, may anticipate tribal jurisdiction when their contracts affect the tribe or its members." *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1138 (9th Cir. 2006). In *Smith,* the Ninth Circuit analogized the *Montana* "consensual relationship" to the minimum contacts requirement for personal jurisdiction under the Due Process Clause of the United States Constitution. Under the minimum contacts test, a nonresident defendant who purposively establishes contacts with a forum state can reasonably expect to be subject to suits in that state's courts. *Id.* (citations omitted). Following its decision in *Smith.* the Ninth Circuit

again enunciated that tribal jurisdiction depends on what the "non-Indians "reasonably" should "anticipate" from their dealings with a tribe or tribal member." *Water Wheel,* 642 F.3d at 817, citing *Plains Commerce Bank,* 554 U.S. at 338.

It also appears that another factor informing the *Montana* consensual relationship analysis is the nature of the activity in relation to the consensual relationship. Federal case law requires there be a nexus between consensual relationship and the regulation a tribe seeks to impose. or the claim brought in the tribe's court. "[W]e hold that a tribal court has jurisdiction over a nonmember only where the claim has a nexus to the consensual relationship between the nonmember and the disputed commercial contacts with the tribe." *Philip Morris USA, Inc. v. King Mountain Tobacco Co.,* 569 F.3d 932, 942 (9th Cir. 2009). *See Atkinson Trading Co.* 532 U.S. at 656 ("*Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself); *see also Attorney's Process and Investigation Servs., Inc.,* 609 F.3d at 941 (for jurisdictional purposes the operative question is whether the claim has a sufficient nexus to the consensual relationship); *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC,* No. 1:12-cv-00094, 2014 WL 1883633, at *11 (D.N.D. May 12, 2014) (the focus of the first *Montana* exception is whether there is a sufficient nexus between the claims being asserted and the consensual relationship).

The issue here is whether a tribal court has jurisdiction to adjudicate an insurance coverage dispute where the nonmember insurers who do not have a physical presence on a tribe's reservation contracted with the tribe to insure the tribe's reservation trust

property. While we do not find any federal courts have squarely addressed the issue, other tribal courts have recently held they have jurisdiction to adjudicate similar contractual disputes involving similar policies issued by one or more of the same Insurers in this case.[12]

Although no federal court has addressed the issue, *Allstate Indemnity Company v. Stump,* 191 F.3d 1071 (9th Cir. 1999), is instructive. That case concerned a car accident on a tribal road on the Rocky Boy Reservation that resulted in the death of two passengers. The driver and passengers were tribal members who lived on the reservation. The driver had purchased Allstate car insurance from an independent insurance agency located off the reservation and paid his premiums at the agency's office. The policy itself bore the driver's reservation address. The estate of the deceased passengers sued Allstate in tribal court for damages under Montana's unfair claims settlement practices statute. Allstate challenged the tribal court's jurisdiction in the federal district court. *Allstate,* 191 F.3d at 1073.

The Ninth Circuit. finding it was likely the tribal court had jurisdiction to adjudicate the dispute, remanded under the tribal court exhaustion doctrine. *Allstate,* 191 F .3d at 1075. In support of its decision, the court relied on the facts that the tribal members lived on the reservation, the accident occurred on the

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[12] *See Jamul Indian Village Development Corporation v. Lexington insurance Company.* No. CV J-2020-0003-GC. (intertribal Ct. of S. Cal. for the Jamul Indian Village, Feb.2.2021); *Cabazon Band of Mission Indians v. Lexington Insurance Company,* No. CBMI 2020-0103 (Cabazon Reservation Court, Mar. 11. 2021); *Port Gamble S'Klallam Tribe v. Lexington Insurance Company*, No.POR-CI-2020-001 (Port Gamble Community Court, April 20, 2021).

reservation, and the insurer was an off-reservation insurance company that sold a policy to a tribal member living on the reservation. The court stated that "the authorities thus suggest that the estates' bad faith claim should probably be considered to have arisen on the reservation." *Allstate,* 191 F.3d at 1075.[13]

Stale Farm, *supra*, is also instructive. The insurer, State Farm, entered into an agreement with tribal members to provide property damage and loss coverage to a home located on the Turtle Mountain Indian Reservation. There, the district court concluded, "this was a sufficient consensual relationship with respect to an activity or matter occurring on the reservation to invoke the first *Montana* exception." *State Farm,* 2014 WL 1883633 at *11.

Here, Insurers targeted the Tribe to sell their product and voluntarily and knowingly contracted with the Tribe for insurance coverage of the Tribe's businesses and its reservation trust property. Insurers collected the premiums for that coverage from the Tribe. The Tribe's claim is breach of the insurance contracts issued to the Tribe by Insurers. The contracts between the Tribe and Insurers and the Tribe's claim concerns activity directly related to the Tribe's reservation property. Because these facts establish the Tribe's claim is directly related to the consensual business dealings between the Tribe and Insurers there is a nexus between the claim and that consensual relationship. And purposely, voluntarily. and

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[13] The *Allstate* court remanded for exhaustion of the tribal court jurisdictional dispute because the bad faith claim did not appear to arise from the parties' contractual relationship but from conduct governed by Montana State law. 191 F.3d at 1076.

knowingly contracting with the Tribe to issue insurance policies covering loss and damage to the Tribe's reservation trust property and businesses, Insurers should have anticipated that a dispute with the Tribe arising from the policies could result in tribal court subject matter, jurisdiction over a dispute alleging a breach of the contracts.

Insurers, however, argue that the Community Court lacks subject matter jurisdiction under the *Montana* framework because they were never physically present on the Tribe's land and their conduct did not occur on the land. Brief of Appellant at 11-12. In support of that argument, Insurers primarily rely on the Seventh Circuit's decisions in *Jackson v. Payday Financial LLC,* 764 F.3d 765 (7th Cir. 2014), and the Supreme Court's decision in *Plains Commerce*.

Neither case holds that the *Montana* consensual relationship framework requires the nonmember's physical presence on tribal land nor stand for that broad proposition. *Montana* itself identifies two separate criteria in determining tribal court jurisdiction, (1) a consensual relationship and (2) conduct on reservation fee lands that have certain enumerated effects. *Montana,* 450 U.S. at 565-566. *Montana's* consensual relationship framework does not mention presence on tribal land. Additionally, both *Jackson* and *Plains Commerce* are distinguishable from this case.

The issue in *Jackson* involved the interpretation of a forum selection clause in a loan agreement. In *Jackson.* a tribal member offered small high interest loans. The potential customers applied for and agreed to the loan terms through an internet website. *Jackson,* 764 F.3d at 768. The loan agreement contained a forum selection clause requiring any litigation to be conducted in the courts of the Cheyenne River Sioux

Tribe. *Id.* at 775. Some persons who received loans sued in the Illinois state court, alleging violations of Illinois civil and criminal statutes related to the loans. *Id.* at 765. The tribal member removed the case to the federal district court, which ruled that the loan agreements required that all disputes be resolved through arbitration conducted by the Cheyenne River Sioux Tribe on the Cheyenne River Sioux Tribe Reservation. *Id.*

The *Jackson* court found the forum selection clause pertaining to arbitration procedurally and substantively unconscionable. *Jackson,* at 779. It also found the assertion of tribal court jurisdiction was not colorable under the tribal court exhaustion doctrine because the loan agreements were not with the tribe or had any relation to tribal lands and the plaintiffs did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents. *Id.* at 782, 785-786, 782.

The *Jackson* court did not hold physical presence on tribal land is a necessary requirement for tribal court subject matter jurisdiction under the *Montana* framework. The case is also readily distinguishable from this case. Unlike in this case, the suit brought by the plaintiffs in *Jackson* alleged violations of state law and not a breach of contract, the plaintiffs did not enter contracts with the tribe, the loan agreements did not relate to tribal lands, and because the transaction occurred over the internet, the plaintiffs had no connection with tribal land.

In *Plains Commerce* the issue was the tribal court's jurisdiction over a discrimination claim brought by tribal members over the nonmember bank's sale of fee lands on the reservation. The Court

explained that the bank may reasonably have anticipated that its various commercial dealings with the tribal member could trigger tribal authority to regulate those transactions but no reason it should have "anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank's *sale of land it owned in fee simple*." *Plains Commerce*, 554 U.S. at 337 (emphasis added). Indeed, the defendant nonmember bank did not appeal from the tribal court's jurisdiction over the breach of contract claim or contractual bad faith claim, the subjects of its various commercial dealings with the tribal member. *Id.* at 324-325.

Relevant to the Court's analysis was that there was no nexus between the asserted discrimination claim and consensual commercial relationship. *Plains Commerce*, 554 U.S. at 337. Also, relevant was the status of the land. *Id.* at 336 ("The tribe cannot justify regulation of such land's sale by reference to its power to superintend tribal land, then, because non-Indian fee parcels have ceased to be tribal land.); *Id.* at 340 ("conduct taking place on the land and the sale of the land are two very different things."). *See Hicks,* 533 U.S. at 371-372 (where the Court recognized tribal ownership is a significant factor in the *Montana* analysis that may be dispositive and the *Montana* consensual relationship framework "was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into.").

The *Plains Commerce* Court did not hold that for a tribal court to have subject matter jurisdiction it required a nonmember's physical presence on tribal land. *Plains Commerce* is also factually distinguishable. This case does not involve the sale of fee land or

a claim that is divorced from the parties' commercial dealings. Here, the Insurers contracted with the Tribe to insure Tribal reservation trust land. The Tribe's claim, breach of that contract, is directly related to that activity regarding those lands. *See, Montana,* 450 U.S. at 565 ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."). And Insurers should have reasonably anticipated the Tribe would assert jurisdiction over their commercial dealings with the Tribe concerning the Tribe's reservation lands.

The Insurers attempt to find the requirement of the nonmember's physical presence on tribal land under the *Montana* consensual relationship framework fails. That requirement is not found in any relevant federal case law.

The Insurers also assert that because the insurance industry is regulated by states, and the Suquamish Tribe does not have any codified law or regulation relating to the insurance industry or insurance contracts, the Tribal Court does not have adjudicative jurisdiction because that would exceed Suquamish Tribe's legislative authority. Brief of Appellant at 10. Therefore, the Tribal Court lacks subject matter jurisdiction.

This case, however, is a breach of contract claim. The Tribe has not claimed Insurers have violated the Suquamish Tribe's laws or regulations. Insurers do not point to any federal case where a tribe's jurisdiction over a breach of contract claim is tethered to any codified regulatory scheme.

Furthermore, in *Attorney's Process & Investigation Services. Inc.*, 609 F.3d at 939, the court ruled if a tribe has the power to regulate conduct tailored regulations are not required and the conduct can be regulated my other means. *See Knighton v. Cedarville Rancheria of Paiute Indians,* 922 F.3d 892, 904 (9th Cir. 2019) ("The conduct that the Tribe seeks to regulate through tort law arises directly out of the consensual employment relationship between the Tribe and Knighton."). Here, the conduct the Suquamish Tribe seeks to regulate through contract law arises directly out of the sale of insurance policies to the Tribe. It borders on absurd to suggest the Suquamish Tribe does not have regulatory authority over insurers entering a consensual relationship with the Tribe itself to insure the Tribe's reservation property. We find the Suquamish Tribe has that regulatory power and the consequent authority to adjudicate this breach of contract claim.

In sum, we do not find the Insurers arguments persuasive or legally supported. The Insurers entered consensual contracts with the Tribe to insure its property and businesses located on its trust land within the exterior boundaries of its reservation, which they have done for several years. The Insurers should have reasonably anticipated that its commercial dealings with the Tribe would trigger tribal authority. The events giving rise to this breach of contract claim, and Insurers' conduct is directly connected to the Tribe's reservation lands. Furthermore. the Suquamish Tribe has regulatory authority over Insurers conduct.

We find *Montana*'s consensual relationship framework as fleshed out by subsequent federal case law compels the conclusion the Tribal Court has subject matter jurisdiction over this dispute.

B. Power to Exclude Jurisdiction

The Tribal Court also ruled it has jurisdiction proper under the Suquamish Tribe's right to exclude nonmembers. A tribe's inherent sovereign power to exclude nonmembers has been held to confer subject matter jurisdiction, independent of subject matter jurisdiction under the *Montana* framework. *Water Wheel Camp Rec. Area, Inc. v. LaRance,* 642 F.3d 802, 811 (9th Cir. 2011).

In *Water Wheel,* the Ninth Circuit recognized that this "inherent sovereign power" to exclude likewise gives rise to other powers, including "the power to regulate non-Indians on tribal land," and in turn exercise adjudicative authority over the same. *Water Wheel,* 642 F.3d at 808-09. The right to exclude non-tribal members from its land imparts regulatory and adjudicative jurisdiction over the "conduct on that land." *Emplyrs. Mut. Cas. Co. v. Branch,* 381 F.Supp 3d 1144, 1148-49 (D. Az. 2019), aff'd. *Employers Mutual Casualty Company v. Paul,* 804 Fed. Appx. 756 (9th Cir. 2020), citing, *Knighton, 922* F.3d at 900. Under a tribe's sovereign right to exclude is the lesser power to regulate non-Indians on tribal land. *Window Rock Unified Sch. Dist. v. Reeves,* 861 F.3d 894, 898 (9th Cir. 2017).

Insurers do not contend the Suquamish Tribe lacked the power to exclude them from engaging in business with the Tribe (or its members) concerning the Suquamish Tribe's lands, which it clearly did. Instead, they assert that because they never physically

entered on the Tribe's land, did not interact with tribal members, or expressly directed any activity on the Tribe's land, the Tribal Court lacked jurisdiction under the Tribe's inherent sovereign power to exclude, citing *Emplyrs. Mut. Cas. Co.,* 381 F.Supp 3d at 1148-49.[14] Brief of Appellant at 16. Those factors are not dispositive in determining tribal court subject matter jurisdiction to adjudicate claims against a nonmember under the power to exclude doctrine.

The jurisdictional inquiry under the right to exclude doctrine, however, is whether the claim bears some direct connection to tribal lands. *Knighton* 922 F.3d 892 at 900. Under the right to exclude doctrine, "in the insurance context, courts have found tribal jurisdiction where an insurance company contracted directly with a tribe or tribal member to sell a policy and thereafter engaged in conduct directed toward the reservation." *Zurich Am. Ans. Co. v. McPaul,* No. CV-19-08227-PCT-SPL, 2020 WL 4569559 at *4 (D. Ariz. Aug. 7, 2020), citing *State Farm,* 2014 WL 1883633,

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[14] *Emplyrs. Mut. Cas. Co.* is distinguishable. In that case, a nonmember insurer issued general liability insurance contracts to non-tribal companies that in turn hired other companies to perform work on a gas station on tribally owned land within the Navaho Reservation. An employee of one those companies breached a fuel line. causing thousands of gallons of gasoline to leak into the ground. The Navajo Nation sued several parties, including the insurer. 381 F. Supp. 3d at 1145. The court concluded the Navajo Nation lacked subject matter jurisdiction because the Navajo Nation could not have excluded the insurance company from selling polices to non-member corporations at off-reservation locations. 381 F. Supp 3d at 1149. Here, the insurers contracted directly with the Tribe to provide insurance coverage for losses to the Tribe's on-reservation property and businesses. The Tribe could have excluded Insurers from selling those policies.

at *9-10 (finding that tribal jurisdiction was sufficiently established where State Farm sold a homeowner's insurance policy to a tribal member to insure a house located on reservation land).

Here the insurance contracts are between the Tribe and the Insurers. Insures knew they were contracting with the Tribe. The contracts were expressly directed and tied to the Tribe's trust lands and businesses located on the Suquamish Tribe's reservation. The Tribe's claimed losses occurred on Tribal land within its Reservation. The Tribe's breach of contract suit asserts insurer's failed to cover those losses. The Suquamish Tribe has the authority to regulate insurance contracts with the Tribe covering the Tribe's Reservation lands, and therefore the authority to adjudicate disputes arising under those contacts. Thus, the Tribal Court has subject matter jurisdiction under the right to exclude doctrine.

2. Personal Jurisdiction

The Indian Civil Rights Act (ICRA) guarantees the right of due process under the law. 25 U.S.C. I302(a)(8). "No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." *Id.* This provision of the ICRA is similar to the Fourteenth Amendment to the United States Constitution, which states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1.

The Fourteenth Amendment due process clause does not apply to Indian Tribes. *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe,* 370 F.2d 529, 533 (8th Cir.1967). Nonetheless, the Tribe does not ask us to interpret the due process provisions of the ICRA differently than the due process provisions of the Fourteenth Amendment in determining personal jurisdiction. Thus, we look to federal case law interpreting the due process guarantees of the Fourteenth Amendment as applied to the issue of personal jurisdiction.[15]

"As [t]he personal jurisdiction requirement recognizes and protects an individual liberty interest, . . . it can, like other such rights, be waived." *Dow Chemical Co. v. Calderon,* 422 F.3d 827, 831 (9th Cir. 2005) (citations and internal quotation marks omitted). Where a party consents to personal jurisdiction as part of a freely negotiated agreement, the enforcement of that agreement does not offend due process. *Burger King Corp. v. Rudzewicz,* 471 U.S. 461, 472 n.14 (1985).

The Insurers argue the policies' "Service of Suit" clause does not constitute a waiver of personal jurisdiction because by its terms they agree to submit to "a court of competent jurisdiction" and the tribal court is not a court of competent jurisdiction as it lacks subject matter jurisdiction. Because we have concluded the

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[15] See F. Cohen, Handbook of Federal Indian Law 604 (2005 ed.) ("Because ICRA is intended both to protect individual rights and to preserve tribal sovereignty, tribal courts are the final arbiters of the meaning of ICRA. Nevertheless, tribal courts often consult Supreme Court precedents defining the parameters of personal jurisdiction under the fourteenth amendment's due process clause.").

Tribal Court has subject matter jurisdiction, this argument fails. *See Lightfoot v. Cendant Mortg. Corp.*. 1 37 S. Ct. 533, 560 (2017) (a court of competent jurisdiction is a court that has subject matter jurisdiction). Moreover, courts have held that similar contact clauses are waivers of personal jurisdiction, allowing the plaintiff to sue in a jurisdiction of their own choosing. *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.,* 948 A.2d 1285, 1287 (N.J. 2008); *Ace Ins. Co. v. Zurich Am. Ins. Co.*. 59 S.W.3d 424, 429 (Tex. App. 2001) *See also Investments of North Carolina Inc. v. lronshore Specialty Ins. Co.,* No. 2:19-cv-2609-DCN WL 705172 at *9-11 (D.S.C. Feb. 12, 2020).

We find that because the Tribal Court has subject matter jurisdiction, under the "Service of Suit" clause Insurers waived any challenge to personal jurisdiction.

Even if there were no waiver of personal jurisdiction, we find the Tribal Court has personal jurisdiction under Suquamish law. STC §§ 3.2.2(b)(1) and (c)(1).[16] Additionally, the Suquamish Tribal Court has jurisdiction over any other act or series of acts that establish minimal contacts with the territorial jurisdiction of the Court, or that are otherwise sufficient to confer personal jurisdiction consistent with due process." STC § 3.2.2(c)(3).

Under the due process guarantees of the Fourteenth Amendment, the test for personal jurisdiction

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[16] Under those provisions the tribal court has personal jurisdiction over any person for any actions arising from the commission by that person or through an agent of the transacting any business or contracting for the performance of any service with respect to any person or property. STC §§ 3.2.2(b)(1) and (c)(1).

requires that a defendant has certain minimum contacts with the forum, such that "the maintenance of the suit . . . not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. State of Washington, 326* U.S. 310, 316 (1945). Personal "jurisdiction exits if 1) the non-resident defendant does some act by which it purposefully avails itself of the privilege of conducting activities in the forum, 2) the claim arises out of the defendant's forum-related activities, and 3) the exercise of jurisdiction is reasonable." *Farmers Ins. Exchange v. Portage La Prairie Mut. Ins.,* 907 F.2d 911, 913 (9th Cir. 1990).

"The purposeful availment prong is satisfied when a defendant takes deliberate action within a forum state or creates continuing obligations to forum residents. It is not required that a defendant be physically present within, or have physical contacts with the forum, provided that his efforts are "purposefully directed toward [the] forum . . ." *Hirsch v. Blue Cross, Blue Shield,* 800 F.2d 1474, 1478 (9th Cir., 1986), citing *Burger King Corporation,* 471 U.S. at 476.

Here, Insurers contracted with the Tribe to provide insurance coverage to the Tribe covering its property within the Port Madison Reservation. In doing so insurers purposefully availed themselves of the privilege of conducting activities on the Suquamish Tribe's Reservation and created a continuing obligation to the Tribe. *See Allstate,* 191 F.3d at 1075 (sale of an insurance policy covering travel in the reservation to a resident of the reservation constitutes purposeful availment of the forum's laws.)

The breach of contract claim arises out of Insurers activity selling insurance to the Tribe. albeit through a broker, covering tribally owned properties and businesses located on the Port Madison Reservation.

Thus, the claim arises out of the Insurers' forum-related activities.

Once minimum contacts have been established, the defendant "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King,* 471 U.S. at 477. The Insurers do not argue personal jurisdiction is unreasonable. Nonetheless, we find personal jurisdiction is reasonable.

The Insurers participated in the "Tribal First" program and the policies are entitled the Tribal Property Insurance Program. Even though insurers do not maintain offices on the Port Madison Reservation, they purposely injected themselves into the Tribe's affairs. They knew their business activities and commercial dealings were with the Tribe and their policies covered Suquamish Tribal trust property and businesses located on the Port Madison Reservation. The Suquamish Tribe has a substantial interest in litigation over contracts covering its lands. Litigation in the Tribal Court will likely be more efficient than in another forum. The losses allegedly occurred on the Reservation. It can be inferred that the evidence regarding the dispute will be on the Reservation as well as witnesses, who will likely be the Tribe's employees. The record supports concluding personal jurisdiction is reasonable.

Furthermore, if Insurers were concerned about litigating any dispute with the Tribe in the Tribal Court regarding coverage under the policies, they could have easily included a choice of law or choice of forum provision *in* the contract—they did not. Insurers could have reasonably anticipated and foreseen

that a dispute concerning coverage under those polices could subject them to a civil suit in the Tribal Court.

We find Insurers had sufficient minimum contacts with the Suquamish Tribe and Port Madison Reservation lands and thus personal jurisdiction in the Tribal Court satisfies considerations of fairness and justice. *Intl Shoe Co.,* 326 U.S. at 316. The Tribal Court has personal jurisdiction over the Insurers even if they had not waived it.

Impartial Jury

We review issues of juror bias and impartiality under the abuse of discretion standard. Abuse of discretion occurs if the decision is "manifestly unreasonable or based upon untenable grounds or reasons." *Suquamish Tribe v. Lah-Huh-Bat-Soot,* 4 NICS App. 32, 43 (1995) (citation omitted).

Insurers Hallmark and Aspen argue that they cannot receive a fair trial in the Tribal Court due to a conflict of interest of potential jurors. Hallmark/Aspen Brief at 5-10. They assert that the basis for this conflict of interest is that any proceeds from a judgement for the plaintiffs would be used to fund the tribal government and could possibly result in per capita payments to tribal members, pursuant to the Indian Gaming Regulatory Act (IGRA) 25 U.S.C. § 202(2), and the Suquamish Tribal Code. STC § 11.5.14. *Id.* at 6.[17] Hallmark and Aspen cite *Reich v. Cominco*

[17] As the Tribal Court noted, "It is not clear that recovery of losses from an insurance policy would constitute revenue under 25 U.S.C. § 202(2), and STC § 11.5.14. Assuming that any insurance proceeds are subject to these statutes, this would not apply to all the proceeds because other businesses besides the casino

Alaska, Inc. 56 P.3d 18 (Alaska 2002) in support of their argument. Hallmark/Aspen Reply Brief at 4-5.

In *Reich,* the court was interpreting Alaska Civil Rule 47(c). It held that a trial court must dismiss from the jury pool stockholders of companies that have direct financial interests in the outcome of the litigation under the rule. *Reich,* 56 P.3d at 20. The interpretation of an Alaska procedural rule to prohibit a class of potential jurors is not relevant to jury trials in the Suquamish Tribal Court.

The Suquamish Code requires a fair and impartial jury. STC § 4.4.4. The parties are permitted to question jurors and the judge is required to excuse any juror who would not be completely fair and impartial. *Id.*[18] That potential jurors are members of the Suquamish Tribe does not automatically mean they will not be fair and impartial. *See Smith v. Phillips,* 455 U.S. 209, 216 (1982) quoting *Dennis v. United States,* 339 U.S. 162, 171-172 (1950) ("A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible . . . . Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an

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were also insured. Even if some of the monetary recovery on the insurance policy does fall under the requirements of the 25 U.S.C. § 202(2), and STC § 11.5.14, it is purely speculative that individual jurors, the tribal court, or tribal personnel will benefit financially from any judgement against the defendants." Order at 23, n.10.

[18] *See State v. Munzanreder,* 199 Wn. App. 162, 176, 398 P.3d 1160 (2017) (the primary purpose of voir dire is to give a litigant an opportunity to explore the potential jurors' attitudes in order to determine whether the jury should be challenged); *see also Dyer v. Calderon,* 151 F.3d 970, 973 (9th Cir. 1998) ("One important mechanism for ensuring impartiality is voir dire, which enables the parties to probe potential jurors for prejudice.").

impartial jury."). If the argument made by Hallmark and Aspen is carried to its logical conclusion, any citizen of a state would necessarily be prohibited to sit on a jury where the state was the plaintiff, and a successful suit would result in the payment of monetary damages benefiting the state's citizens.

Furthermore, it is mere speculation whether the Tribal Court will be able to sit a fair and impartial jury should this case be tried. Based on the current record, there is insufficient evidence to find all potential jurors are necessarily bias toward Insurers because of their affiliation with the Suquamish Tribe.

We hold that the contention that this case should be dismissed because all potential jurors cannot be fair or impartial because they will be Suquamish Tribal members is speculative and devoid of a record to support that claim. The Tribal Court did not abuse its discretion in denying the motion to dismiss based on potential juror bias and impartiality.

CONCLUSION

We hold that the Tribal Court has both subject matter and personal jurisdiction over the Tribe's claim against the Insurers. We further hold the Tribal Court did not abuse its discretion in denying the motion to dismiss based on the speculative claim of juror bias and impartiality. The Tribal Court's order denying Insurers' motion to dismiss is hereby affirmed.

It is so ordered, this 7th day of October 2021.

For the Court of Appeals:

/s/ Eric Nielsen
Eric Nielsen, Chief judge

/s/ Bruce Didesch
Bruce Didesch, Jude

/s/ Steven Aycock
Steven Aycock, Judge

APPENDIX E

IN THE SUQUAMISH TRIBAL COURT
PT. MADISON INDIAN RESERVATION
SUQUAMISH, WASHINGTON

THE SUQUAMISH TRIBE, a federally-recognized Indian Tribe, and PORT MADISON ENTERPRISES, a wholly-owned arm of the Suquamish Tribe, **PLAINTIFFS,** **vs.** **LEXINGTON INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S—Syndicates DEFENDANTS' MOTIONS TO ASC1414, XLC 2003, TAL 1183, MSP 318, ATL1861, DISMISS KLN 510, AND AGR 3268, subscribing to Policy with NUMBER PJ193647; CERTAIN UNDERWRITERS AT LLOYD'S—Syndicate CNP 4444 subscribing to Policy with number PJ1900131; CERTAIN UNDERWRITERS AT LLOYD'S—Aspen Specialty Insurance Company subscribing to Policy with Number PX006CP19;**	**CASE NO. 200601-C** **ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS**

CERTAIN UNDERWRITERS AT LLOYD'S—Syndicates KLN 0510, ATL 1861, ASC I 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015, I and XLC 2003 subscribing to Policy with number PJ1933021; CERTAIN UNDERWRITERS AT LLOYD'S—Syndicate BRT 2987 (excluding B&M) Subscribing to Policy with number PD-10363-05; HOMELAND INSURANCE COMPANY OF NY (ONE BEACON); HALLMARK SPECIALITY INSURANCE COMPANY; and ENDURANCE WORLKWIDE INSURANCE LTS T/AS SOMPO INTERNATIONAL	]
DEFENDANTS.	]

This matter came before the Court on January 28, 2021, for a hearing on the defendants' motions to dismiss. Present at the hearing were Skip Durocher and Katie Pfeifer, representing the Suquamish Tribe and Port Madison Enterprises; Tim Woolsey, representing the Suquamish Tribe; Devon Tiam, representing Port Madison Enterprises; Matthew Hoffman and Ryan Appleby representing Lexington Insurance Co.; Michael Ricketts, representing Homeland Insurance Co. of N.Y.; Eric Neal and Charles Hostmark, representing Hallmark Specialty Insurance Co, Aspen Insurance Co., and Aspen Insurance UK, Ltd.; and Robert Novasky, representing London Carriers.

PROCEDURAL BACKGROUND

On June 4, 2019, the Suquamish Tribe ("Tribe") and Port Madison Enterprises ("PME") filed a complaint against the insurers listed above ("insurers" unless individual companies are specified) for Declaratory Judgement and for Breach of Contract. The essence of the allegations set forth in the complaint are that, due to the COVID-19 pandemic, the Tribe and PME have suffered monetary losses that are covered by the insurance contract between the plaintiffs and the defendants.

Subsequently, the insurers appeared by limited appearance to contest the jurisdiction of the Tribal Court to hear this matter. Lexington Insurance Company ("Lexington") filed a motion to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction and forum non conveniens. Homeland Insurance Company of New York ("Homeland") also filed a motion to dismiss on the same basis and joined Lexington's motion. Hallmark Specialty Insurance Company, Aspen Specialty Insurance Company, Aspen Insurance UK. Limited ("Hallmark") and London Carriers also joined in Lexington's Motion to Dismiss.

Hallmark filed a motion to dismiss on three additional grounds. First, they assert that the Tribal Court has no authority to issue a declaratory judgement on excess insurers.

Second, they argue for dismissal for failure to state a claim. Third, they move to dismiss due to the inability to receive a fair trial.

FACTS

1. The Suquamish Tribe is a federally recognized Native American tribal government. (Trube Decl. ¶ 2) (Complaint ¶ 7). The Tribe's headquarters

are located on tribal trust lands within the Port Madison Indian Reservation ("Reservation"). (Trube Decl. ¶ 2) (Complaint ¶ 7). The Tribe owns and operates the Suquamish Museum, which includes a gift shop and Suquamish Seafood Enterprise ("SSE") a fully chartered business entity of the Suquamish Tribe. (Complaint ¶ 7). The Tribe receives income from seafood markets developed by SSE for tribal fisherman, and among other things, markets the geoduck clams that populate the Tribe's surrounding waters. (Trube Decl. ¶2) (Complaint ¶7).

2. Port Madison Enterprises is the wholly-owned economic development arm of the Tribe. PME is a tribally-charted branch of the Suquamish Tribe under Suquamish Tribal Code Chapter 11.4 and is headquartered on tribal trust lands within the boundaries of the reservation. (Klatt Decl. ¶ 2) (Complaint ¶ 8).

3. PME operations are aimed at developing community resources while promoting the economic and social welfare of the Tribe through commercial activities. PME operates a number of businesses, including the Suquamish Clearwater Casino and Resort, Kiana Lodge, White Horse Golf Club, Masi Shop, Longhouse Texaco, and Suquamish Village Chevron. PME also develops and manages commercial and residential property. All tribally owned businesses are located on tribal trust lands within the Reservation's boundaries. (Klatt Decl. ¶ 3) (Complaint ¶ 8).

4. For the past seven years, (and since 2006 for PME) Brown & Brown has assisted both entities in obtaining property insurance through a tribal insurance program, the Tribal Property Insurance

Program ("TRIP"). Brown and Brown submits applications and requests for insurance quotes through Alliant Specialty Insurance Services, Inc. ("Alliant"). Alliant administers the TPIP under the name "Tribal First". (Amaral Decl. ¶ 3).

5. Tribal First/Alliant is not the insurer under these policies. The insurers of these policies are Lexington and "Additional A rated and Non Admitted Carrriers". (Trube Decl. ¶ 6) (Klatt Decl. ¶ 6)

6. The insurance policies that the Tribe and PME purchased were in effect from July 1, 2019 to July 1, 2020. (Trube Decl. Exhibit 2 at pdf p. 2) (Klatt Decl. Exhibit A at pdf p. 2).

7. For the policy period 2019-2020 alone, the Tribe paid $231,963 and PME paid $1,336,007 for insurance coverage under their respective policies. (Trub Decl. Exhibit 3 at pdf p. 8) (Klatt Decl. Exhibit A at pdf p.8).

8. Alliant provided the Tribe and PME with a letter outlining Evidence of Coverage. (Trube Decl. Exhibit 2 at pdf p. 2.) (Klatt Decl. Exhibit A at pdf p. 2.) (Hoffman Decl. Exhibit land 10). The Evidence of Coverage letters lists the insurance companies as Lexington "and Additional A rated and Non Admitted Carriers".

9. The Declaration Page on both the Tribe's and PME's policies lists the insurer as Lexington. (Trube Decl. Exhibit 2 at pdf p. 15) (Klatt Decl. Exhibit A at pdf p. 12) (Hoffman Decl. Exhibits 6 and 9).

10. The named insured on both the Tribe's and PME's Declaration pages are All Entities listed as Named Insureds on file with Alliant. (Trube Decl. Exhibit 2 at pdf p. 12) (Klatt Decl. Exhibit A at pdf

p. 13). However, both policies include a list of the 2019-2020 Named Insured as of 07/01/2029. (Trub Decl. Exhibit 2 at pdf p. 11) (Klatt Decl. Exhibit A at pdf p. 12).

11. For the Tribe, the list of named insureds includes the Suquamish Tribal Council, Totten Housing Development Limited Partnership c/o Suquamish Tribe, Department of Community Development, and the Suquamish Seafood Enterprise. (Trub Decl. Exhibit 2 at pdf p. 11).

12. For PME, the list of named insureds includes Port Madison Enterprises and all of its operating entities and divisions, including without limitation: Suquamish Clearwater Casino Resort, Retail Division (which includes Masi Shop, Suquamish Village Shell), Kiana Lodge, Property Management Division (which includes the Agate Pass Business Park and all other rental properties), White Horse Golf Course, and Port Madison Enterprises 401(k) Plan. (Klatt Decl. Exhibit A at pdf p. 12).

13. Both policies include a schedule of carriers which includes Lexington, Homeland, Hallmark, and London Carriers. (Trube Decl. Exhibit 2 at pdf p. 44) (Klatt Decl. Exhibit A at pdf p. 108). On the Schedule of Carriers all of the carriers are listed under the All Risk section up to $50,000,000. Only Hallmark and Lloyd's are included in the All Risk section in excess of $50,000,000.

14. Hallmark states that they are excess carriers. (Clifford Decl. ¶3) (Anniello Decl. ¶3). Hallmark submitted their policies which include documentation that may suggest that Lexington is the primary insurer up to $2,500,000 in losses. (Anniello Decl. Exhibit 6 p. 318). However, given the lack

of explanation from the insurers and the listing in the Schedule of Carriers for 2019-2020, it is unclear whether or not Hallmark also participates in the primary layer of coverage.

15. Hallmark submitted tribal declaration schedule addendums showing that among their insureds were the Suquamish Tribal Council, the Suquamish Clearwater Casino and Resort, and Port Madison Construction Enterprises (Clifford Decl. ¶¶ 5-6, Exhibit 1, 2, and 3)[1] (Anniello Decl. Exhibit 1, 2, and 3).

16. The majority of the insurers listed on the Schedule of Carriers, for both the Tribe's and PME's policies, have been insuring the Plaintiffs through the TPIP since 2015, and all of them insured the Plaintiffs since the 2018-2019 policy year. (Trube Decl. Exhibit 2 at pdf. pp 12, 17, 22, 28) (Klatt Decl. Exhibit A at pdf pp. 13, 18, 23, 29).

17. Both the Tribe's and PME's policies include a "Service of Suit" clause providing that "It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the named Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdic-

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[1] Clifford's declaration is captioned regarding a case filed in the Port Gamble S'Klallam Community Court, not Suquamish Tribal Court. In the declaration Clifford refers to the Port Gamble S'Klallam Tribe and the Noo-Kayet Development Corporation. While this pleading has been filed in the wrong court, the tribal declarations schedule addendums included in the attached exhibits also list the Suquamish Tribal Council, the Suquamish Casino and Resort, and the Port Madison Construction Enterprises as their insureds.

tion within the United States." (Trueb Decl. Exhibit 2 at pdf p. 84) (Klatt Decl. Exhibit A at pdf p. 148).

18. Both the Tribe's and PME's policies have included the same "Service of Suit clause for the previous four years. (Tribe—Trube Decl. ¶ 7) (PME—Klatt Decl. ¶ 7).

19. It is undisputed that none of the insurers have offices on the Reservation.

20. Lexington is incorporated in Delaware with its principal place of business in Boston, Mass. (Complaint ¶ 9).

21. Homeland is incorporated in New York with its principal place of business in Massachusetts. (Complaint ¶ 16).

22. Hallmark is incorporated in Texas with its principal place of business in Texas. (Complaint ¶ 17).

23. Aspen Specialty Insurance is incorporated in North Dakota with its principal place of business in Connecticut. (Complaint ¶ 13).

24. Certain Underwriters at Lloyd's is headquartered and has its principal placed of business in the United Kingdom. (Complaint ¶ 12).

25. It is undisputed that none of the insurers negotiated directly with the Tribe or PME regarding the terms or purchase of insurance under the TPIP.

26. It is also undisputed that none of the insurers physically entered the Port Madison Indian Reservation.

27. The basis for this lawsuit is that, due to the COVID-19 pandemic, the Tribe and PME were forced to suspend or restrict operations for Tribal

businesses. The Plaintiffs allege that this resulted in both the Tribe and PME losing millions of dollars in business and tax revenues and also incurring additional unexpected expenses. (Complaint ¶¶ 2-5, 21-35).

28. The Tribe and PME submitted claims to the insurers. (Tribe—Trube Decl. ¶ 8) (PME—Klatt Decl. ¶ 8).

29. Lexington, acting as lead insurer, tendered a reservation of rights letter to the Tribe and PME indicating that the insurance policies may not cover the claimed losses. (Trube Decl. ¶ 8) (Klatt Decl. ¶ 8).

30. Lexington admitted, in oral argument on the Motion to Dismiss, that it knew it was insuring the Suquamish Tribe and PME. The other insurers did not dispute this admission.

31. Judge Smith is not a member of the Suquamish Tribe. (Trube Decl. ¶ 10).

32. The Tribal Court is funded by a mix of federal and tribal monies. (Trube Decl. ¶ 10).

DECISION

1. The Suquamish Tribal Court has Subject Matter Jurisdiction Based on the Tribe's Inherent Sovereignty Pursuant to the Suquamish Tribal Constitution and the Suquamish Tribal Code.

Indian tribes have the inherent sovereign power of self-governance. *United States v. Wheeler,* 435 U.S. 313, 322-323 (1978). Suquamish is governed by its Constitution and the Suquamish Tribal Code. The Suquamish Constitution gives the Tribal Council the power to pass ordinances that govern the conduct of

all persons and regulate all property within the Tribe's jurisdiction to the fullest extent allowed under applicable Federal law. Art. III(i). This includes the power to manage and contract for Tribal property. Art. III(b). Furthermore, the Tribal Council is empowered to "take such actions" as are necessary to carry into effect any of these powers. Art. III(i)

Pursuant to the Constitution, the Suquamish Tribal Council has vested the judicial power with the Suquamish Tribal Court. STC § 3.1.1. The Suquamish Tribal Court is a court of general jurisdiction. It has subject matter jurisdiction over all cases and controversies within the territorial jurisdiction of the Tribe, including all civil actions involving any organization or property. STC § 3.2.1. The Court has "personal jurisdiction over any person for any actions arising from the commission by that person, personally or through an agent, of the transaction of any business," as well as, over any person for actions arising from the commission by that person in any place, for "contracting for the performance of any service with respect to any person or property therein." STC §§ 3.2.2(b)(1), (c)(1).[2]

The defendants argue that because they did not physically come to the reservation to negotiate or enter into the contract, there is no "case or controversy" within the territorial jurisdiction of the Tribe. Therefore, the Tribal Court has no jurisdiction. However, this misapprehends what is required in order for this Court to have jurisdiction.

The Constitution and the Tribal Code govern "conduct" that occurs within the territorial jurisdiction of

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[2] This section, while addressing personal jurisdiction, demonstrates the scope of jurisdiction over tribal property.

the Tribe, including actions arising from the "contracting for the performance of any service with respect to property therein". Art. III(i), STC § 3.2.2(c)(1). The Constitution also gives the Tribe the power to regulate, enter into contracts, and take other actions as needed to manage the land. Art. III(b). The Constitution mandates that all jurisdictional provisions over conduct of all persons and regulation of tribal property be applied "to the fullest extent" consistent with federal law. Art. III(i). There is nothing in the Constitution or Tribal Code that requires a physical presence on the land in order to assert jurisdiction.

Here, the insurers entered into a contract with the Tribe and PME to insure tribal property and businesses. The "conduct "of entering into an insurance contract provides a basis for jurisdiction, as well as the property itself (insured premises). Entering into this contract constitutes "conduct" that arises from "contracting for the performance of any service with respect to property therein". Art. III, STC § 3.2. This "case or controversy" arises out of these insurance policies to insure tribal property. Pursuant to the Constitution and the Suquamish Tribal code, this case is a civil action over which the Court has subject matter jurisdiction.

2. <u>The Suquamish Tribal Court has Subject Matter Jurisdiction Under Federal Law.</u>

a. <u>The Tribal Court has Subject Matter Jurisdiction Pursuant to the Tribe's Inherent Sovereign Right to Exclude.</u>

"Tribal authority over the activities of Non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins.* Co. *v. LaPlant,* 480 U.S.

9 (1987). Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18. One of the bases for subject matter jurisdiction, independent of a determination under *Montana,* is the Indian Tribe's inherent sovereign power to exclude non-members. *Water Wheel Camp Rec. Area, Inc. v. Larance,* 642 F.3d 802, 811 (9th Cir. 2011).

Implicit with the Indian Tribe's right to exclude, is the lesser power to regulate non-Indians on tribal land. *Window Rock Unified Sch. Dist. v. Reeves,* 861 F.3d 894, 898 (9th Cir. 2017); *Water Wheel,* 642 F.3d at 808-809. Where a tribe possesses power to regulate nonmember conduct, the tribe also has adjudicatory authority over activities of the nonmember arising on tribal land. *Strate v. A-I Contractors,* 520 U.S. 438, 453 (1997). The right to exclude non-tribal members from its land imparts regulatory and adjudicative jurisdiction over the "conduct on that land." *Emplyrs. Mut. Cas. Co. v. Branch,* 381 F.Supp 3d 1144, 1148-49 (D. Az. 2019), citing, *Knighton v. Cedarville Rancheria of N. Paiute Indians,* 922 F.3d 892 (9th Cir. 2019).

While many of the cases address conduct of non-members who are physically present on the land,[3]

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[3] In support of the argument that the right to exclude doctrine requires that the defendants be physically present on the land, defendants cite *Water Wheel Camp Rec. Area, Inc. v Larance*, 642 F.3d 802, 811 (9th Cir. 2011); *Knighton v. Cedarville Rancheria of N. Paiute Indians,* 922 F.3d 892 (9th Cir. 2019); and *Emplyrs. Mut. Cas. Co. v. Branch,* 381 F.Supp 3d 1144, 1148 (D. Az. 2019). In both *Water Wheel* and *Knighton,* the non-member was physically present on the land. Neither case involved contract disputes with an off-reservation insurer.

physical presence on the reservation is not dispositive of whether or not the tribe can regulate nonmember conduct. The mere fact that the insurers are not located on the reservation is insufficient to find that the claim arises off the reservation. *See. e.g., Admiral Ins. Co. v. Blue Lake Rancheria Tribal Court,* No. 5:12-cv-01266-LHK, 2012 U.S. Dist. LEXIS 48595 *15 (N.D. Cal. Apr. 4, 2012). The jurisdictional inquiry is not limited to deciding precisely when and where the claim arose, but whether it bears some direct connection to tribal lands. *Knighton v. Cedarville Rancheria of N. Paiute Indians,* 922 F.3d 892, 900 (2019). Under the right to exclude doctrine, "in the insurance context, courts have found tribal jurisdiction where an insurance company contracted directly with a tribe or tribal member to sell a policy and thereafter engaged in conduct directed toward the reservation." *Zurich Am. Ans. Co. v. McPaul,* No. CV-19-08227-PCT-SPL, 2020 U.S. Dist. LEXIS 141404, *6 (D. Az. Aug. 7, 2020), citing *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC,* No. 1:112-cv-00094, 2014 U.S. Dist. LEXIS 65748 *, (D.N.D. May 12, 2014) (finding tribal jurisdiction sufficiently established where State Farm

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In *Employers Mutual,* the Navajo Nation brought suit against EMC, an off-reservation insurance company, for damages arising from a gas leak and other repairs performed by two nonmember companies who were insured by EMC. EMC had no contractual relationship with the Navajo Nation.

The court held that because EMC never entered the land, the tribe "couldn't have excluded EMC from selling polices to non-member corporations at off-reservation locations." Therefore, the right to exclude framework did not allow for jurisdiction. *Emplyrs. Mut.,* 381 F.Supp 3d at 1149. The obvious difference here is that the defendants entered into insurance contracts directly with the Tribe and PME to provide insurance for losses to tribal trust property.

sold a homeowner's insurance policy to a tribal member to insure a house located on reservation land).

The defendants argue that they never entered the "land" of the reservation and did not negotiate directly with the Tribe when entering this insurance contract. They "merely entered into a routine business relationship with another nonmember, Alliant, to participate in a nationwide insurance program." Lexington Reply Brief p. 4. Because they have not been physically present on the land, or acted on tribal land, they assert that they cannot be subject to the regulatory and adjudicatory jurisdiction of the Tribe.

The insurers mischaracterize their relationship with the Tribe and PME. While Alliant may have been the insurance broker, the insurance contract was entered between the insurers and the Tribe and PME. The Declaration Page on both the Tribe's and PME's policies identifies Lexington as the insurer. (Trube Decl., Exhibit 2 at pdf p. 15) (Klatt Decl. Exhibit A at pdf p. 13). Both the Tribe's and PME's insurance policies include a schedule of other insurers and excess carriers which include Homeland, Hallmark, and London Carriers. (Trube Decl. Exhibit 2 at pdf p. 46) (Klatt Decl. Exhibit A at pdf p. 108). Alliant provided the Tribe and PME with documentation outlining Evidence of Coverage which lists the insurance providers as Lexington "and Additional A rated and Non Admitted Carriers". (Trube Decl. Exhibit 2 at pdf p. 2.) (Klatt Decl. Exhibit A at pdf p. 2.). This evidence proves that the defendants entered into insurance contracts with the Tribe and PME.

The insurers try to deflect this determination by stating that the policies list the insured entities as "on file with Alliant". Thus, indicating again, "merely a business relationship with a nonmember". While the

policies do say that, the insurers neglect to state that both policies include a list of the 2019-2020 Named Insured as of 07/01/2029. (Trub Decl. Exhibit 2 at pdf p. 11) (Klatt Decl. Exhibit A at pdf p. 12). These documents list the specific entities that are being insured by the insurers. Finally, when asked at oral argument, Lexington admitted knowing that it was entering into an insurance contract with the Tribe and PME. The other insurers did not dispute this statement.

It is clear from the insurance policies and documentation that the insurance contracts are between the Tribe, PME, and the insurers. Furthermore, the insurance contract between the parties is directed to tribal lands. The contract provides insurance for property and businesses owned by the Tribe and PME, all of which are located on trust land within the exterior boundaries of the reservation. The claimed losses occurred within the exterior boundaries of the reservation on trust land. Where insurance companies' contract with a tribe to insure tribal property and businesses, they have engaged in conduct directed toward the Reservation. Consequently, the Tribe has the power to regulate and thus adjudicate any disputes arising from these contracts. Therefore, the Court has subject matter jurisdiction pursuant to the right to exclude doctrine.

Relying on *Water Wheel* and *Nevada v. Hicks,* Homeland contends that the Court has no subject matter jurisdiction, because the State's interest in regulating the insurance industry outweighs the Tribe's right to exclude. In *Nevada v. Hicks,* the United States Supreme Court held that the tribal court has no jurisdiction over state law enforcement officers who were executing a state warrant on tribal

land. *Nevada v. Hicks*, 533 U.S. 353, 350-60 (2001). The Court determined where the state has a competing interest in executing a warrant for an off-reservation crime, the tribe's power of exclusion was not enough to assert regulatory jurisdiction over the officers. *Nevada v. Hicks,* 533 U.S. at 350-60 (2001).

Water Wheel limited the holding of *Hicks* to its facts, stating that its application to "a jurisdictional question arising on tribal land should apply only when the specific concerns at issue in that case exist." *Water Wheel,* 642 F.3d at 813. *See also, Window Rock Unified Sch. Dist. v. Reeves,* 861 F.3d 894, 898 (9th Cir. 2017). (*Hicks* is a narrow exception to the general rule, that absent contrary provisions in treaties or federal statutes, tribes retain adjudicative authority over nonmember conduct on tribal land—land over which the tribe has the right to exclude.) The insurers have not demonstrated a state interest that would preclude the assertion of jurisdiction under the right to exclude framework.

This case is simply a contract dispute regarding whether or not the terms of the insurance contract cover the losses that the Tribe and PME sustained due to the COVID-19 pandemic, and whether or not there was a breach of that contract. This case is not about insurance regulations. Nor is there is an implication of a state's criminal law enforcement interests (the interest identified in *Hicks*). Homeland's assertion that Washington State's insurance statutes and regulations constitute a state interest that limits the inherent right of tribes to exclude nonmembers conducting business on tribal lands is without merit

Here, the insurers entered into an insurance contract with the Tribe and PME to insure tribal property

and businesses located on tribal trust land.[4] Clearly, the Tribe could exclude the insurers from conducting business with the Tribe and PME. The insurers contracts with the Tribe and PME constitutes nonmember "conduct on the land", and thus, is subject to the Tribe's right to exclude and, the lesser power to regulate. Consequently, the Tribal Court has the power to adjudicate any disputes that occur from the activities of the nonmember that arise on tribal land. The Court has subject matter jurisdiction in this case pursuant to the Tribe's inherent sovereign right to exclude nonmembers.

b. The Suquamish Tribal Court has Subject Matter Jurisdiction under the consensual relationship prong of *Montana.*

The first *Montana* exception provides that tribes have jurisdiction to "regulate through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members," including consensual relationships "through commercial dealing, contracts, leases or other arrangements." *Montana v. United States,* 450 U.S. 544, 565-66 (1981). The parties raise two issues. First, whether or not the insurers entered into a consensual relationship with the Tribe and PME, and thus consented to tribal jurisdiction. Second, whether

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[4] Homeland argues that the plaintiffs sought out the insurers, and that the insurers did not affirmatively seek out the plaintiffs, therefore, there is no basis for subject matter jurisdiction. Regardless of who initiated the business relationship, the facts clearly establish that the insurers entered into a contract with the Tribe and PME. If the insurers did not want to be subject to the jurisdiction of the Tribal Court, they could have declined to enter into the contract or included a choice of forum clause. The insurers did neither.

or not that relationship was directly related to tribal land.

Consent may be established "expressly or by the [nonmember's] actions. *Water Wheel,* 642 F.3d at 818 (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 337 (2008)). The test is not subjective. Rather, it is "whether under the circumstances the non-Indian defendant should have reasonably anticipated that its interactions might "trigger" tribal authority." *Id.*, at 817. The test for tribal jurisdiction depends on the what the "non-Indians "reasonably" should "anticipate" from their dealings with a tribe or tribal member." *Water Wheel*, 642 F.3d at 817.

The defendants argue that they did not enter into a consensual relationship with the Tribe or consent to tribal jurisdiction. The insurers attempt to portray that they had no relationship with the Tribe and PME, but "merely had a business relationship" with a third party, Alliant. Moreover, since the Tribe and PME sought them out, the insurers assert that they did not deliberately intend to specifically do business with the Tribe and PME.

However, the facts demonstrate that the insurers did have a business relationship with the Tribe and PME. The defendants have provided insurance to the Tribe for the last seven years and to PME for the past sixteen years. As stated previously, (see Section 2.a.) the insurers are parties to the insurance contract with the Tribe and PME, and they contracted to provide insurance to tribally owned property and businesses located on trust land on the Port Madison Indian Reservation. Lexington is listed as the insurer on the policies. The other insurers are included in Schedule A attached to the policies. Hallmark and Aspen submitted tribal declaration addendums showing that their

insureds were the Tribe and PME. While the Declaration of Insurance page lists the "named insured on file with Alliant" the policies also include a list of the tribal entities that were insured by the defendants. At oral argument Lexington admitted knowing that they were providing insurance to the Tribe and PME. None of the other insurers disputed this statement.

In determining whether or not a nonmember entered into a business relationship with a tribe, it is irrelevant who initiated the relationship. The insurers could have declined to enter into a contract with the Tribe and PME, but they chose to do business with the Tribe. There is no clause in the insurance contract excluding tribal jurisdiction for the resolution of any disputes arising out of the contract. Based upon the facts in this case, the Court finds that the insurers entered into a consensual relationship with the Tribe and PME, expressly and through their actions, by entering into an insurance contract with both the plaintiffs. Under these circumstances, the insurers should have "reasonably anticipated" that their interactions with the Tribe might trigger tribal authority.

Defendants argue that there can be no subject matter jurisdiction because they do not have a physical presence on the land and did not physically enter the land. However, as stated in Section 2.a. above, in the insurance context, an insurer's physical presence on the land is not dispositive of whether or not the nonmember entered into a consensual relationship with the Tribe. *See e.g.*, *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC,* No. 1:112-cv-00094, 2014 U.S. Dist. LEXIS 65748, (D.N.D. May 12, 2014) at 29. (Focus of the first *Montana* exception is not limited to where the conduct necessary to establish a particular element of a claim for breach of contract or tort took

place, but rather, more broadly, is whether there is a sufficient nexus between the claims being asserted and the consensual relationship.); *Admiral Ins. Co. v. Blue Lake Rancheria Tribal Court*, No. 5:12-cv-01266-LHK, 2012 U.S. Dist. LEXIS 48595 (N.D. Cal. Apr. 4, 2012) at *15. ([M]ere fact that Admiral is located off the reservation is not sufficient to find that the claim arose off the reservation.)

Allstate v. Stump is analogous to this case. *Allstate Insurance Co. v. Stump,* 191 F.3d 1071 (1998). In *Allstate,* a car accident on a tribal road on the Rocky Boy Reservation resulted in the death of two passengers. The driver and passengers were tribal members who lived on the reservation. The driver had purchased Allstate car insurance from an independent insurance agency located off the reservation and paid his premiums in cash at the agency's office. The policy itself bore the driver's reservation address and Allstate mailed the policy and premium statements to that address. The estate of the deceased passengers sued Allstate in tribal court for damages pursuant to Montana's unfair claims settlement practices statute. Allstate brought an action in federal court to challenge the tribal court's jurisdiction. *Allstate,* 191 F.3d at 1073.

The Ninth Circuit remanded for exhaustion of tribal court remedies. *Allstate,* 191 F.3d at 1075. In support of its decision to require exhaustion, the court relied on the facts that the tribal members lived on the reservation, the accident occurred on the reservation, and the insurer was an off-reservation insurer that sold a policy to a tribal member living on the reservation. Relying on *La Plant*, the court stated that "the authorities thus suggest that the estates' bad faith

claim should probably be considered to have arisen on the reservation. *Allstate,* 191 F.3d at 1075.

The facts of this case are similar to *Allstate.* Here the Tribe and PME purchased insurance from an off-reservation insurer. The insurance policies insured tribal property and tribal businesses owned on trust land on the reservation. The complaint alleges that, due to the COVID-19 pandemic, the Tribe lost business income, tax revenue, and incurred other unexpected costs related to the insured properties. The fact that the insurers did not physically enter the reservation is not determinative of whether or not a consensual relationship exists between the insurers, and the Tribe and PME. *Allstate* 191 F.3d at, 1075 (1998).

Under the *Montana* "consensual relationship exception, one consideration is whether or not the cause of action bears some direct relationship to the land. *Smith v. Salish Kootenai Coll.,* 434 F.3d 1127, 1135 (9th Cir. 2006). The cause of action in this case bears a direct relationship to tribal property. The insured property is on trust land on the reservation. The claim arises from lost income from those properties due to the pandemic. The claim has a direct connection to tribal lands. Indeed, it is hard to envision any connection that could be more intimately tied to tribal lands.

In support of their position that there is no consensual relationship between the Tribe, PME, and the insurers, defendants attempt to collapse the first and second *Montana* exceptions. Relying on *Plains Commerce*, they argue that the Tribe can regulate insurance companies only if such regulation "stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal government, or control internal relations." Lexington brief at p. 13, *citing,*

Plains Commerce Bank, 554 U.S. at 337.[5] However, *Plains Commerce,* does not require an additional showing that a specific relationship intrude on the internal relations of the tribe or threaten self-rule. *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians,* 746 F.3d 167, 175 (5th Cir. 2014). As the court in *Dolgencorp* noted, no court finding a consensual relationship since *Plains Commerce* has rejected tribal jurisdiction because the relationship did not "implicate tribal governance and internal relations." *Id.*[6] Determining subject matter jurisdiction under the consensual relationship exception in *Montana* does not require an additional showing that the relationship implicates tribal governance or internal relations.

Finally, the defendants assert two additional bases to support their argument that the Tribal Court has no subject matter jurisdiction in this case. First, they argue that because the Tribe does not have an

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[5] In support of this argument, defendants rely on *Jackson v. Payday Financial LLC,* 764 F.3d 765 (7th Cir. 2014), which is not analogous to this case. In *Jackson* a tribal member offered loans over the Internet. The issue in that case involved the interpretation of a forum selection clause in a loan agreement. The activity in *Jackson* did not involve tribal land. Moreover, it is not even clear whether the tribal member operated the loan company or the website on the reservation. Here, the insurers contracted directly with the Tribe and PME to insure trust land on the reservation.

[6] Furthermore, *in Dolencorp* the court noted, "any discussion in *Plains Commerce* of tribal authority to regulate nonmember conduct under *Montana* is dicta; its result is based on the holding that *Montana* does not allow a tribe to regulate the sale of land owned by a non-member." *Dolencorp, 746 F.3d at 175*, citing, *Plains Commerce*, 554 U.S. at 340. See also, *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC,* No. 1:112-cv-00094, 2014 at *21-22 U.S. Dist. LEXIS 65748, (D.N.D. May 12, 2014).

any law or regulation relating to the insurance industry or insurance contracts, any assertion of adjudicative jurisdiction would exceed the Tribe's legislative jurisdiction. Second, they argue because Washington State vests the Insurance Commissioner with authority to set insurance policy and to regulate insurance, the Tribe has no regulatory or legislative authority over the insurance industry. Therefore, the Tribal Court has no adjudicative authority to hear this case.

First, the Tribe's regulation of nonmember activity (insurance contracts with nonmembers) does not require an extensive regulatory system like the State of Washington. "If the Tribe retains the power under Montana to regulate conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through tort [contract] claims." *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe,* 609 F.3d 927,939 (8th Cir 2010). See also, *Knighton v. Cedarville Rancheria of N Paiute Indians,* 922 F.3d 892, 904 (9th Cir. 2019). Second, this is not a case involving insurance regulations or determining insurance policy within the State of Washington. This is simply a contract case between non-members and the Tribe and PME. Pursuant to Montana, the Tribe has regulatory authority over the insurers because they entered into a consensual relationship with the Tribe. Therefore, the Court has adjudicative jurisdiction over this case.

In summary, the insurers entered into consensual contracts with the Tribe and PME to provide insurance for tribal property and businesses located on trust land within the exterior boundaries of the Port Madison Indian Reservation. The insurers have entered similar contracts with the Tribe and PME for a

number of years. The insurers should have reasonable anticipated that its interactions with the Tribe might trigger tribal authority. The events giving rise to this suit have a direct connection to tribal lands. Since the insurers entered into a consensual relationship with the Tribe, the Tribe has regulatory authority over their conduct, and consequently, the Court has adjudicative authority over this case. For these reasons, the Court denies the insurers' motions to dismiss for lack of subject matter jurisdiction.

3. <u>The Squamish Tribal Court has Personal Jurisdiction Over the Defendants</u>.

a. <u>The Insurers have Waived Personal Jurisdiction Pursuant to the Service of Suit</u> <u>Clause in the Insurance Policies.</u>

Both insurance policies contain the same Service of Suit clause. In pertinent part the Service of Suit clause states as follows:

> It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Named Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States.
>
> Trube Decl. Exhibit 4.

While the service of suit clause does not distinguish between personal and subject matter jurisdiction, subject matter jurisdiction cannot be waived. Therefore, reading the plain language of the clause, it can only refer to personal jurisdiction. *See Ward v. Certain Underwriters of Lloyd's of London,* No. 18-cv-07551-JCS, 2019 U.S. Dist. LEXIS 79664 at *7-8, 2019 WL 2076991 (N.D. Cal, May 10, 2019). To read the

language otherwise would render the service of suit clause meaningless. *C3 Invs. Of N.C., v. Ironshore Specialty Ins. Co.,* No. 2:19-cv-2609-DCN 2020 U.S. Dist. LEXIS 24498 at *9-11 WL 705172 (D.S.C. Feb. 12, 2020).

Personal jurisdiction can be waived. *See Burger King Corp. v. Rudzewicz,* 471 U.S. 461, 472 n.14 (1985). Courts have held that similar service of suit clauses are waivers of personal jurisdiction, allowing the plaintiff to sue in a jurisdiction of their own choosing. *C3 Invs. Of N.C., v. Ironshore Specialty Ins. Co.,* No. 2:19-cv-2609-DCN 2020 U.S. Dist. LEXIS 24498 at *9-11 WL 705172 (D.S.C. Feb. 12, 2020). Where a party consents to personal jurisdiction as part of a "freely negotiated" agreement, the enforcement of that agreement "does not offend due process." *Id.* at *11 (citing *Burger King Corp. v. Rudzewicz,* 471 U.S. 461, 472 n.14 (1985).

Here, the plain language of the service of suit clause states that the underwriters will submit to a court of competent jurisdiction. This language is in a freely negotiated agreement between the parties. The Service of Suit clause constitutes a waiver of personal jurisdiction.

The insurers argue that this clause does not constitute a waiver of personal jurisdiction because it states that the insurers agree to submit to "a court of competent jurisdiction." A court of competent jurisdiction is a court that has subject matter jurisdiction. *See Lightfoot v. Cendant Mortg. Corp.,* 137 S. Ct. 533, 560 (2017). *Ward v. Certain Underwriters of Lloyd's of London,* No. 18-cv-07551-JCS, 2019 U.S. Dist. LEXIS 79664 at *7-8, 2019 WL 2076991 (N.D. Cal, May 10, 2019). Defendants' assert that the

Suquamish Tribal Court has no subject matter jurisdiction in this case. Therefore, the Tribal Court is not "a court of competent jurisdiction."

As set forth above, (Sections 2(a) and 2(b)) this Court has subject matter jurisdiction pursuant to the inherent sovereign power of the tribe to exclude nonmembers and pursuant to the "consensual relationship" exception articulated in *Montana.* A tribal court that has subject matter jurisdiction is a "court of competent" jurisdiction. *See Tiessen v. Chrysler Capital,* No. 16-cv-422, 2016 U.S. Dist. Lexis 158990 at *9-13 (D. Minn. Oct. 20, 2016).

Thus, the Court concludes that the insurers have waived personal jurisdiction through the service of suit clauses that are included in the insurance policies at issue.

Homeland argues that the service of suit clause does not apply because tribal courts are not courts "within the United States". Homeland relies on interpretations of "within the United States" under the Full Faith and Credit Act (28 U.S.C. § 17838) to support to this position. However, this is a contract case and contract principles apply.

Courts will interpret the "plain language" of a contract. *See e.g., Brewington v. State Farm Mut. Auto. Ins. Co.*, 45 F. Supp. 3d 1215, 1218 (D. Nev. 2014). Any ambiguities should be construed against the insurer. *Ingenco Holdings. LLC v. ACE Am. Ins. Co.,* 921 F.3d 803, 813 (9th Cir. 2019). A plain language reading of the service of suit clause contemplates any court "within the United States."

Clearly, the Suquamish Tribal Court is within the United States. Indian tribes are "domestic dependent nations" of the United States. *See Michigan v. Bay*

Mills Indian Cmty, 572 U.S. 782, 788 (2014.). The Suquamish Tribe is located within the United States, and is a "domestic dependent nation" of the United States. As the insurer of Indian tribes, Homeland could certainly have bargained for language in the service of suit clause excluding tribal courts. No such language exists in this clause. Finally, assuming *arguendo,* that somehow this clause is ambiguous, any ambiguity is construed against the insurer.

The clause is not ambiguous. The plain language reading of the clause includes the Suquamish Tribal Court, since this court is within the United States. There is no basis to impute any exclusion of tribal courts in the service of suit clause. Homeland's argument is without merit.

b. The Tribal Court has Personal Jurisdiction Even Absent the Waiver in the Service of Suit Clause.

The Suquamish Tribal Court has "personal jurisdiction over any person for any actions arising from the commission by that person, personally or through an agent, of the transaction of any business," as well as, "over actions arising from the commission by that person in any place, of "contracting for the performance of any service with respect to any person or property therein." STC §§ 3.22(b)(1), (c)(1). Additionally, the Suquamish Tribal Court has jurisdiction over "any other act or series of acts that establish minimal contacts with the territorial jurisdiction of the Court, or that are otherwise sufficient to confer personal jurisdiction consistent with due process. STC § 3.2.(c)(3).

Pursuant to the Suquamish Tribal Code, the Court has personal jurisdiction. This case arises from

the a business transaction between the parties, where the insurers entering into an contract with the Tribe and PME, to provide insurance for tribal properties and businesses located on trust land on the reservation. However, any assertion of personal jurisdiction must comply with due process. The Indian Civil Rights Act, guarantees the right of due process under the law. 25 U.S.C. 1302(a)(8).

The test for due process in tribal courts is no different than for state or federal courts. *See Allstate,* 191 F.3d at 1075.[7] Personal "jurisdiction exits if 1) the non-resident defendant does some act by which it purposefully avails itself of the privilege of conducting activities in the forum, 2) the claim arises out of the defendant's forum-related activities, and 3) the exercise of jurisdiction is reasonable." *Farmers Ins. Exchange v. Portage La Prairie Mut. Ins.,* 907 F.2d 911, 913 (9th Cir. 1990). "The purposeful availment prong is satisfied when a defendant takes deliberate action within a forum state or creates continuing obligations to forum residents. It is not required that a defendant be physically present within, or have physical contacts with the forum, provided that his efforts are "purposefully directed toward [the] forum . . ." *Hirsch v. Blue Cross, Blue Shield,* 800 F.2d 1474, 1478 (9th Cir., 1986) (citing, *Burger King,* 105 S. Ct. at 2184).

The test for personal jurisdiction is met in this case. First, the insurers entered into insurance contracts with the Tribe and PME. This constitutes con-

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[7] Homeland relies on a criminal case from the Port Gamble S'Klallam Tribe and asserts that consent to tribal court jurisdiction must be a knowingly, intelligently and voluntary waiver. *Port Gamble S'Klallam Tribe v. Hjert, 10* NICS App. 60, 69-70 (2011). No such requirement exists for civil cases.

duct where the insurers purposefully availed themselves of the privilege of conducting activities on the Suquamish Reservation and also creates a continuing obligation to the Tribe and PME. *E.g., Allstate,* 191 F.3d at 1075. (The sale of an insurance policy to a tribal member is clearly purposeful availment of the forum's laws.) Second, this claim arises out of losses sustained by tribally owned properties and businesses located on the reservation and thus relates to the defendant's forum-related activities. Finally, since the claim arose on the reservation, and arises directly from the insurance contract between the parties, the exercise of jurisdiction is reasonable.

Defendants again assert that they merely participated in a nation-wide insurance program that was managed by Alliant and marketed to Tribes across the nation. Because of their participation in a nation-wide program, the insurers did not avail themselves of the privilege of conducting activities in this specific forum. Thus, they argue that the Suquamish Tribal Court has no personal jurisdiction over the defendants. Lexington Brief at p. 13.

The defendants' depiction of themselves as "hapless bystander[s]" who were unable to control the selection of insureds, is misleading. *Hirsch v. Blue Cross Blue Shield,* 800 F.2d 1474, 1479 (9th Cir. 1986). The insurers participated in a program "Tribal First". The policies are entitled the Tribal Property Insurance Program. The insurers could reasonably foresee that they would be insuring Tribes. "An insurer who enters an obligation knowing it will have an effect in the forum state, purposefully avails itself of the privilege of acting in the forum state." *Haisten Grass Valley Medial Reimbursement Fund, Ltd.,* 784 F.2d 1392, 1398 (9th Cir. 1986). The insurers knew

they were insuring tribes and they could foresee that their actions would have an effect in tribal jurisdictions.

The fact that when the insurers entered the program they did not know which specific tribes would be participating in Tribal First does not defeat personal jurisdiction. Once the insurers entered into a contract with a specific tribe, not only could they foresee that their actions would have an effect in the jurisdiction, but that effect was actually contemplated and bargained for when they entered into a contract with the Tribe and PME. The insurers could have included a choice of law or choice of forum provision in the contract, but they did not. Therefore, it stands to reason that the insurers could have easily anticipated that they might be "haled" into a tribal forum, and specifically the Suquamish Tribal Court, to address any disputes that arose from the contract.

Regardless of the fact that Alliant was the broker for these policies, Lexington and the other insurers have clearly availed themselves of the privilege of conducting activities in the forum, by providing insurance to the Tribe and PME. This claim arises directly out of these insurance contracts. It is reasonable to exercise jurisdiction over claims arising out contracts insuring tribal property and businesses. The defendants' argument regarding lack of personal jurisdiction is without merit. This court has personal jurisdiction over the defendants.

4. <u>Dismissal Under the Doctrine *Forum Non Conveniens is* Not Warranted.</u>

Forum Non Conveniens is a federal doctrine that other courts may choose to adopt. *See American*

Dredging Co. v. Miller, 510 U.S. 443 (1994). Its application is discretionary. *Luek v. Sunstrand Corp.,* 236 F.3d 1137, 1142 (9th Cir. 2001). This Court does not need to reach the issue of whether or not the doctrine *of forum non conveniens* applies in tribal court. Rather, even assuming *arguendo* that this doctrine applies to tribal courts, dismissal is not warranted.

The application *of forum non conveniens* is discretionary with the court. *Lueck* 236 F.3d at 1142. The two factors to consider, should this doctrine apply in tribal court, are whether or not an adequate alternative forum exists, and whether the balance of public and private interest factors favors dismissal. *Id.* There is no dispute that there is an alternate forum in a Superior Court in the State of Washington. However, the balance of public and private interests does not favor dismissal.

Private factors to consider include the residence of parties and witnesses, availability of compulsory process for attendance of witnesses, costs of bringing witnesses and parties to the place of trial, access to physical evidence and other sources of proof, enforceability of judgments, and "other problems that interfere with an expeditious trial." *See e.g. Vivendi SA v. T-Mobile USA Inc.,* 586 F.3d 689, 695 (9th Cir. 2009). Here, the private factors weigh against dismissal. The plaintiffs are the Tribe and PME. Witnesses are likely to be employees of each entity. The losses occurred on the reservation, and presumably much of the evidence will be on the reservation. Additionally, since none of the defendants are Washington corporations, it is no more inconvenient for the defendants to litigate this case in Suquamish Tribal Court than in a Superior Court in the State of Washington.

In support of dismissal, defendants argue that Alliant will be a critical party to this litigation. Thus, there may be procedural issues regarding obtaining discovery. Defendants also assert that because Suquamish has no law governing insurance contract disputes, the court will be required to make a determination regarding choice of law.

In many respects, this case is similar to *Allstate,* where the case arose from an automobile accident occurring on the Rocky Boy Reservation, and the tribal member had purchased insurance from Allstate, an off-reservation insurer. *Allstate,* 191 F.3d at 1071. In deciding that the tribal court had personal jurisdiction, while not specifically addressing *forum non conveniens,* the court stated that the tribal form was more convenient for all the parties except Allstate, and that objections to the legitimacy of process in the trial court was not a basis for depriving tribal courts of jurisdiction. *Allstate,* 191 F.3d at 1076.

Similarly, here, in the context *of forum non conveniens,* the tribal forum is more convenient for all the parties except the insurers. Any objections to procedural issues or choice of law issues do not warrant a dismissal of this case on *forum non conveniens.* Defendants' motions to dismiss on this basis are denied.

5. <u>The Claims Against Hallmark and Aspen are Ripe for Adjudication.</u>

Hallmark and Aspen assert that the claims against them are not ripe for adjudication and should be dismissed. They state, as excess insurers, any claim against them cannot be determined until the primary layer of insurance is exhausted. While there may be some confusion whether or not they are excess

insurers,[8] it is undisputed that the primary layer of insurance has not been exhausted.

The parties argue whether or not the federal standard for determining declaratory judgment actions should be applied in Tribal Court. The Court does not need to make this determination, because even under the federal standard for justiciability this claim is ripe for adjudication.

"In determining whether a declaratory judgment action involving an excess insurer is ripe for adjudication, "courts should focus on 'the practical likelihood' that the excess insurance policy will be implicated." *Potter v. Davis,* No. 2:15-cv-266, 2015 U.S. Dist. LEXIS 119425 *9 (E.D. Va. Sept. 8, 2015) *(citations omitted).* Merely because there is uncertainty that primary insurance limits will be exceeded "does not mer se defeat jurisdiction. *Id. (citations omitted).* A suit against excess insurers is permitted so long as there is a "substantial, reasonable, and/or practical likelihood that the dispute will trigger excess policies. *Seattle Times Co. v. Nat'l Sur. Corp.,* No. C13-1463RSL, 2016 U.S. Dist. LEXIS 69981, *9 (W.D. Wash. May 27, 2016).

Here, the complaint, filed on June 4, 2020, alleges losses of "millions of dollars" in lost business income

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[8] Both policies include a schedule of carriers which includes Lexington, Homeland, Hallmark, and London Carriers. (Trube Decl. Exhibit 2 at pdf p. 44) (Klatt Decl. Exhibit A at pdf p. 108). All of the carriers are listed under the All Risk section up to $50,000,000. Only Hallmark and Lloyd's are included in the All Risk section in excess of $50,000,000. Hallmark and Aspen indicate that they are excess carriers. (Clifford Decl. ¶ 3) (Anniello Decl. ¶ 3). It is difficult to determine from the Schedule of Carriers for 2019-2020 if Hallmark also participate in primary coverage. (Finding of Fact 13-14).

and tax revenue, and that losses continue to accrue to this day. Complaint ¶ 5. Millions of dollars implies, at a minimum, at least two million dollars. Hallmark and Aspen assert that the primary policy limit is $2,500,000. Hallmark Mem. 5-6. Given that the Tribe has incurred these losses for almost one year, there is a "reasonable and/or practical likelihood" that the losses will be above the primary policy limits of $2,500,000 and that this dispute will trigger the excess policies. As in *Seattle Times,* if the excess insurers were dismissed at this point, they would be placed at the risk of having binding precedent established in their absence, or would force the re-litigation of liability for losses over the primary policy. *Seattle Times Co. v. Nat'l Sur. Corp.,* No. C13-1463RSL, 2016 U.S. Dist. LEXIS 69981, at *11. Hallmark and Aspen's motion to dismiss the declaratory judgement action for lack of ripeness is denied.

The Tribe has also alleged a breach of contract claim against Hallmark and Aspen for failing to affirm coverage for the plaintiffs' losses. Complaint ¶ 60. However, Hallmark and Aspen argue that they have neither affirmed or denied coverage. They argue that their coverage is contingent on the exhaustion of the primary layer of insurance coverage.

If they are truly excess carriers, and do not participate in the primary level of insurance, as in *Seattle Times,* any breach of contract claim against Hallmark and Aspen is not ripe. However, based upon the record before the Court it is not completely apparent that Hallmark and Aspen are only excess carriers, and are not included in the primary layer of insurance. The Schedule of Carriers included in the plaintiffs' insurance policies for July 1, 2019 to July 20, 2020, lists Hallmark and Aspen under the All Risk section. Only

Hallmark is included in the excess coverage section. Based upon the evidence presented, given that Hallmark and Aspen may provide primary coverage, the motion to dismiss the breach of contract claim is denied.

6. Hallmark and Aspen's Motion to Dismiss Due to Bias and Lack of Impartiality of the Judge and Potential Jurors is Denied.

Hallmark and Aspen argue that they cannot receive a fair trial in the tribal court due to a conflict of interest of potential jurors and the judge. They assert that the basis for this conflict of interest is that any proceeds from a judgement for the plaintiffs would be used to fund the tribal government (including the court and court personnel)[9] and could possibly result in per capita payments to tribal members, pursuant to the Indian Gaming Regulatory Act (IGRA) 25 U.S.C. § 202(2), and the Suquamish Tribal Code, STC § 11.5.14.

The Tribal Code provides for a fair and impartial jury. STC § 3.8.14, §4.4.4. The parties are permitted to question jurors and the judge will excuse any juror who would not be completely fair and impartial. *Id.* Jurors are presumed to follow the law as instructed by the court. STC Title 6, Criminal Procedure Appendix § 8.1(h); STC § 4.4.11.

Moreover, the interest of a citizen in cases involving the government is not grounds for disqualification to serve as a juror. As an example, Washington State has codified this principal in its statutes. RCW

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[9] Tribal Court funding is not solely from the Tribal government but is a mix of tribal and federal funds.

4.44.180(4) provides that there are no grounds for disqualifying a juror because that juror is a member or citizen of the county or municipal corporation. While the Suquamish Tribal Code does not have a similar statutory provision, the stated principal is sound. Merely being a member or citizen of a government is not a basis for disqualifying a juror. Hallmark and Aspen's claim of bias is pure speculation.[10]

Hallmark and Aspen have not provided any evidence that the judge has a conflict of interest. Judge Smith is not a member of the Tribe. The Tribal Code prohibits a judge from acting in a case where she has an interest. STC § 3.3.11. The Tribal Code prohibits a reduction in a judge's salary. STC § 3.3.4. If there were some bias on Judge Smith's part, rather than dismissing the case, the remedy is to appoint a pro tern judge. STC § 3.3.11

The mere fact that the tribal government may prevail in an insurance contract case does not create bias on the part of the tribal court judge. Assuming the funds were used to fund court personnel, government funding is a "'remote, contingent, and speculative interest [and] is not a financial interest within the meaning of the recusal statute . . . nor does it create a

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[10] It is not clear that recovery of losses from an insurance policy would constitute "revenue under 25 U.S.C. § 202(2), and STC § 11.5.14. Assuming that any insurance proceeds are subject to these statutes, this would not apply to all the proceeds because other businesses besides the casino were also insured. Even if some of the monetary recovery on the insurance policy does fall under the requirements of the 25 U.S.C. § 202(2), and STC § 11.5.14, it is purely speculative that individual jurors, the tribal court, or tribal personnel will benefit financially from any judgement against the defendants.

situation in which a judge's impartiality might reasonably be questioned.'" *Draper v. Reynolds,* 369 F.3d 1270, 1280 (11th Cir. 2004) (quotations omitted). The fact that federal judges are compensated from federal tax revenues does not create bias requiring federal judges to recuse themselves in tax cases. *United States v. Bell*, No. CV-F-95-5346 OWWSMS, 1997 U.S. Dist. LEXIS 13629, 1997 WL 639262, at *1 n.1. (E.D Cal. Aug. 28, 1997). Finally, a citizen's financial interest in her government as a taxpayer or recipient of government services, "which a judge has in common with many others in a public matter is not sufficient to disqualify [her]. *In Re City of Houston*, 745 F.2d 925, 930 (5th Cir., 1984), *see also, Draper v. Reynolds*, 369 F.3d at 1281 n.17.

Judge Smith is not a member of the tribe. She is subject to conflict of interest statutes in the Tribal Code. Government funding of court personnel does not create a situation where a judge's impartiality might be questioned. Like federal judges, simply because Judge Smith is compensated by the Suquamish Tribal government, this does not create bias requiring her to recuse herself

Hallmark and Aspen have not demonstrated any bias on the part of potential jurors or the judge that would result in an unfair trial.[11] They have not demonstrated that it would be impossible for them to receive a fair trial. Rather, their argument is based

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[11] The cases cited by Hallmark and Aspen do not support their argument that the jurors and judge would be biased because the lawsuit involves recovery of insurance proceeds for losses from the COVID-19 pandemic. They merely stand for the undisputed proposition that litigants are entitled to a fair trial by impartial jurors and judges.

on pure speculation. Hallmark and Aspen's motion to dismiss on this basis is denied.

CONCLUSION

The Suquamish Tribal Court has subject matter jurisdiction and personal jurisdiction in this case and the Court is the appropriate forum. The claims against the excess insurers are ripe. The Suquamish Tribal Court is an impartial forum and the defendants will receive a fair trial. For all the reasons set forth above, the defendants' motions to dismiss are denied.

This case will be set for a status hearing on April 22, 2021 @ 9 A.M.

DATED THIS 16th DAY OF MARCH, 2021

/s/ Cindy Smith
CHIEF JUDGE CINDY SMITH
SUQUAMISH TRIBAL COURT

No.

IN THE
Supreme Court of the United States

LEXINGTON INSURANCE COMPANY, ET AL.,

Petitioners,

v.

SUQUAMISH TRIBE, ET AL.,

Respondents.

CERTIFICATE OF COMPLIANCE

I hereby certify that I am a member in good standing of the bar of this Court and that the Petition for a Writ of Certiorari contains 8,996 words and complies with the word limitation established by Rule 33.1(g)(i) of the Rules of this Court.

Dated: February 13, 2025

/s/ Miguel A. Estrada
Miguel A. Estrada

No.

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v.

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CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that on this 13th day of February, 2025, I caused three copies of the Petition for a Writ of Certiorari to be served by third-party commercial carrier on the counsel identified below, and caused an electronic version to be transmitted to the counsel below, pursuant to Rule 29.5 of the Rules of this Court. All parties required to be served have been served.

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