IN THE PORT GAMBLE S'KLALLAM COURT OF APPEALS
FOR THE PORT GAMBLE S'KLALLAM INDIAN TRIBE

PORT GAMBLE S'KLALLAM TRIBE, and NOO-KAYET DEVELOPMENT CORPORATION, **Plaintiffs/Respondents,** **vs.** **LEXINGTON INSURANCE COMPANY, HOMELAND INSURANCE COMPANY OF NEW YORK, HALLMARK SPECIALTY INSURANCE COMPANY, ASPEN SPECIALTY INSURANCE COMPANY, ASPEN INSURANCE UK. LTD.** **Défendants/Appellants.**	**CASE NO. POR-AP- 2021-0001** **OPINION** **(AMENDED OCTOBER 7, 2021)**[1]

Before: Eric Nielsen, Chief Judge; Jerry Ford, Judge; Mary Cardoza, Judge.

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

Nielsen, C.J.:

Appellants, Lexington Insurance Company, et al, physically located in places other than the Port Gamble S'Klallam Reservation, insured the Port Gamble S'Klallam Tribe, a federally recognized Tribe, and its wholly owned company, Noo-Kayet Development Corporation, for losses under "All Risk" policies. The Tribe and the Noo-Kayet Development Corporation tendered claims under the policies for losses related to the COVID pandemic. When the insurance companies failed to affirm coverage, the Tribe and the Noo-Kayet Development

[1] *See* Order dated October 7, 2021.

Corporation filed a suit in the Port Gamble S'Klallam Tribe's Community Court for breach of contract and declaratory judgment.

The insurance companies moved to dismiss on the grounds the Community Court lacked subject matter and personal jurisdiction. The Community Court entered an order denying the motion and the insurance companies timely appealed.

The issues in this appeal are whether the Port Gamble S'Klallam Tribe's Community Court has subject matter jurisdiction and personal jurisdiction over the suits brought by the Port Gamble S'Klallam Tribe and the Noo-Kayet Development Corporation. We hold the Tribe's Community Court has both subject matter and personal jurisdiction.

FACTS

The relevant facts are undisputed. Appellants are insurance companies[2] (hereinafter collectively referred to as "Insurers") who insured the Port Gamble S'Klallam Tribe and its wholly owned company, Noo-Kayet Development Corporation (hereinafter collectively referred to as "Tribe" unless otherwise indicated) under insurance policies covering losses to the Tribe and the Tribe's Reservation property. The policies were effective from July 1, 2019, to July 1, 2020, and the Tribe paid $259,730 for coverage under the polices.[3]

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." Although none of the Insurers physically entered the reservation, Alliant representatives did so on occasion. Insurers are not members of the Port Gamble S'Klallam Tribe nor have offices on the Tribe's Reservation.

The insurers did not negotiate the polices directly with the Tribe. Instead, they worked with "Tribal First" to issue the policies. The insurers are specifically listed in the Schedule of Carriers found in the polices and they knew they were insuring the Tribe and its Reservation property. Most of the Insurers have insured the Tribe for years, and all have insured the Tribe since the 2018-2019 policy year.

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[2] 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.

[3] The Port Gamble S'Klallam Tribe paid $116,430 and the Noo-Kayet Development Corporation paid $143,310.

The 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 jurisdiction within the United States."

The Tribe alleged that in the wake of the COVID pandemic it 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. 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.

The Tribe then sued Insurers for breach of contract and for a declaratory judgement in the Port Gamble S'Klallam Tribe Community Court. Insurers moved to dismiss the suit alleging the Community Court lacked subject matter and personal jurisdiction.[4]

The Community Court denied the motion. Insurers appealed and we accepted review only on the issues of subject matter and personal jurisdiction.

STANDARD OF REVIEW

Our review is governed by the Port Gamble S'Klallam Tribal Code (PGSTC). "The Court of Appeals shall limit its review to issues of law except that the Court of Appeals may review findings of fact in cases tried before a judge sitting without a jury and shall set aside such findings of fact if they are clearly erroneous." PGSTC § 7.03.04. The issue in this appeal is whether the Community Court has jurisdiction over a breach of contract claim brought by the Tribe against its insurers. This is an issue of law, and we review *de novo* issues of law, including the Community Court's jurisdiction. *Port Gamble S'Klallam Tribe v. Hjert*, 10 NICS App. 60, 62 (2011).

DECISION

A. Tribal Law

Under Article I of the Constitution of the Port Gamble S'Klallam Tribe:

> The jurisdiction of the Port Gamble S'Klallam Tribe shall extend over the following, to the fullest extent, except where prohibited by codes, statutes, ordinances or resolutions of the Port Gamble S'Klallam Tribe ("Tribal Law") or *applicable federal law:*

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

> A. All persons, property and activities within: (1) the confines of the Port Gamble S'Klallam Reservation as established by Proclamation dated June 16, 1938, and (2) such other lands as may hereafter be added thereto, and (3) other lands held or acquired by the Port Gamble S'Klallam Tribe or for the benefit of the Port Gamble S'Klallam Tribe;...
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> D. To all persons, subjects and property that are, or may hereafter be, included within the jurisdiction of the Tribe.

PGST Constitution, Art. I.

Title 1 of the Port Gamble S'Klallam Tribe Community Court General Rules provides, "[t]he Port Gamble S'Klallam Community Court is vested with the fullest personal, subject matter and territorial jurisdiction permissible under *applicable law*." PGSTC 1.02.01 (emphasis added). When PGSTC 1.02.01 is read in conjunction with Article I of the Port Gamble S'Klallam Tribe Constitution, we find that the Port Gamble S'Klallam Tribe's intent is to assert personal, subject matter or territorial jurisdiction unless prohibited by its own codes or applicable law.

We find no Port Gamble S'Klallam Tribal law that specifically prohibits the Community Court from asserting subject matter and personal jurisdiction over a nontribal member insurance company that insures the Tribe's Reservation property and businesses in a suit brought by the Tribe against the insurance company for a breach of contract claim and declaratory judgement. We find under the Port Gamble S'Klallam Tribe's Constitution and laws; the Community Court has both subject matter and personal jurisdiction over the suit in this case.

B. Federal Law

The next question is whether the suit is prohibited by applicable federal law. We do not find any federal statutes that prohibit the Community Court's jurisdiction over this suit.[5] Therefore, we are compelled to search the murky waters of federal jurisprudence addressing tribal court civil jurisdiction to find the answer.[6]

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[5] 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).

[6] *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.'").

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

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*, 520 U.S. at 454 ("tribes retain considerable control over nonmember conduct on tribal land,"); *Plains Commerce* 554 U.S. at 334 (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

[7] 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).

"general proposition" that absent a treaty or statute, Indian tribes generally lack authority to regulate the activities of nonmembers. 450 U.S. at 565.[8]

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 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 reservation 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

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[8] 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.

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 the 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 property. While we do not find that 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.[9]

Although no federal court has addressed the issue, *Allstate Indemnity Company. v. Stump*, 191 F.3d 1071 (1998), is instructive. That case concerned a car accident on a tribal road on the

[9] *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): *Suquamish Tribe v. Lexington Insurance Company*. No.200601-C. (Suquamish Tribal Ct. Mar. 16. 2021).

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. A*llstate*, 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 reservation, and the insurer was an off-reservation insurer 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.[10]

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 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 Port Gamble S'Klallam 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 by knowingly, purposely, and voluntarily contracting with the Tribe to issue policies covering loss and damage to the Port

[10] 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.

Gamble S'Klallam Tribe's Reservation property and businesses, Insurers should have anticipated that a dispute with the Tribe arising from the policies could result in the Port Gamble S'Klallam's Community Court subject matter jurisdiction over that dispute alleging breach of contract.

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

Insurers, however, argue that the Community Court lacks subject matter jurisdiction because they were never physically present on the Port Gamble S'Klallam Tribe's land and their conduct did not occur on the land. Brief of Appellants at 10-13. 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 that required 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. *Id.* at 779. It also found the assertion of tribal court

jurisdiction was not colorable under the trial 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. 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, and the plaintiffs had no connection with tribal land because the loan agreements did not relate to tribal lands and were transacted over the internet.

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.*

Relevant to the Court's analysis was that there was no nexus between the asserted discrimination claim and consensual commercial relationship. *Id.* 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 Nevada v. 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* case 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 trust land on the Port Gamble S'Klallam Reservation. 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 given that Insurers knew they were insuring the Tribe's reservation lands and businesses, Insurers should have reasonably anticipated the Tribe would assert jurisdiction over their commercial dealings with the Tribe concerning those 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 that because the insurance industry is regulated by states, and because the Port Gamble S'Klallam Tribe does not have any codified law or regulation relating to the insurance industry or insurance contracts, the Community Court does not have adjudicative jurisdiction because that would exceed Port Gamble S'Klallam's legislative authority. Brief of Appellants at 10. Therefore, the Community Court lacks subject matter jurisdiction.

This case, however, is a breach of contract claim. The Tribe has not claimed Insurers have violated the Port Gamble S'Klallam 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 by 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 Port Gamble S'Klallam 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 a tribe does not have regulatory authority over insurers entering a consensual

relationship with the tribe itself to insure the tribe's reservation trust property. We find the Port Gamble S'Klallam Tribe has that regulatory power and the consequent authority to adjudicate this breach of contract claim in its Community Court.

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 Port Gamble S'Klallam trust land within the exterior boundaries of the Port Gamble S'Klallam 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 Port Gamble S'Klallam Tribe has regulatory authority over Insurers conduct.

Although, the Community Court found it has jurisdiction under *Montana's* consensual relationship framework, jurisdiction is also arguably proper under the 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,*642 F.3d at 811.

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 tum exercise adjudicative authority over the same. 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 892. 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 Port Gamble S'Klallam Tribe lacked the power to exclude them from engaging in business with the Tribe (or its members) concerning the Port Gamble S'Klallam Tribe's lands, which it clearly did. Instead, they assert that because they never physically entered on the land, did not interact with tribal members, or expressly directed any activity on the Port Gamble S'Klallam Tribe's land, the Community Court lacked jurisdiction under the Tribe's inherent sovereign power to exclude, citing *Emplyrs. Mut. Cas. Co.*, 381

F.Supp 3d at 1148-49. [11] Brief of Appellants 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 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, 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 the Tribe. The contracts were expressly directed and tied to the Port Gamble S'Klallam Tribe's trust lands and businesses located on the Port Gamble S'Klallam Reservation. The Tribe's claimed losses occurred on those lands. The Tribe's breach of contract suit asserts insurer's failed to cover those losses. And the Port Gamble S'Klallam Tribe has the authority to regulate insurance contracts with the Tribe covering the Port Gamble S'Klallam's Reservation lands. Thus, the Community Court has subject matter jurisdiction under the right to exclude doctrine as well as under the *Montana* consensual relationship framework.

2. Personal Jurisdiction

The Indian Civil Rights Act (ICRA) guarantees the right of due process under the law. 25 U.S.C. 1302(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

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[11] *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 withing 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 entered into insurance contracts directly with the Tribe to provide insurance coverage for losses to the Tribe's reservation property and businesses. The Tribe could have excluded the insurance companies from selling those policies.

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 again look to federal case law interpreting the due process guarantees of the Fourteenth Amendment as applied to the issue of personal jurisdiction. [12]

"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 Community Court is not a court of competent jurisdiction as it lacks subject matter jurisdiction. Because we have concluded the Community Court has subject matter jurisdiction, this argument fails. 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 Investments of North Carolina Inc., v. Ironshore Specialty Ins. Co.*, No. 2:19-cv-2609-DCN WL 705172 at *9-11 (D.S.C. Feb. 12, 2020).

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[12] *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.").

We find that because the Community 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 Community Court has jurisdiction under federal case law. Under the due process guarantees of the Fourteenth Amendment, the test for personal jurisdiction requires 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 Gamble S'Klallam Reservation. In doing so Insurers purposefully availed themselves of the privilege of conducting activities on the Port Gamble S'Klallam 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, albeit through a broker, covering tribally owned properties and businesses located on the Port Gamble S'Klallam 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.

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 Gamble

S'Klallam Reservation, they purposively injected themselves into the Tribe's affairs. They knew their business activities and commercial dealings were with the Tribe and their policies covered its property and businesses located on the Port Gamble S'Klallam Reservation. The Port Gamble S'Klallam Tribe has a substantial interest in litigation over contracts covering its lands. Litigation in the Community Court will likely be more efficient than in another forum. The losses allegedly occurred on the Port Gamble S'Klallam Reservation. It can be inferred that the evidence regarding 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 Community Court regarding coverage under the policies, they could have readily and 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 Community Court.

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

CONCLUSION

We find that the Community Court has both subject matter and personal jurisdiction over the Tribe's claim against the Insurers. The Community Court's order denying Insurers' motion to dismiss is affirmed.

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

For the Court of Appeals:

Eric Nielsen, Chief Judge

Jerry Ford, Judge

Mary Cardoza, Judge