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,	**CASE NO. 200601-C (APPEAL)**
Plaintiffs/Respondents,	**OPINION**
vs.	**(AMENDED OCTOBER 7, 2021)[1]**
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.	

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

Appearances: Vernle C. (Skip) Durocher, Jr. For Respondents; Matthew Hoffman 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

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

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 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 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*,

[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.

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. Hjert*, 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]

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

[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

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)(l), (c)(l).[6]

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 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

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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 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).

[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).

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 & 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

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[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.'").

[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).

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 (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 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

[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.

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 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

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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).

[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.

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 by purposely, voluntarily, and 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, 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.

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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.

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 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 Tribal Court has subject matter jurisdiction, this argument fails. *See Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 533, 560 (2017) (a court of competent jurisdiction is a court that has subject matter jurisdiction). Moreover, courts have held

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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.").

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. Ironshore 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 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

[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).

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. *Int'l 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 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

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[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 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.").

right to an 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:

Eric Nielsen, Chief Judge

Bruce Didesch, Judge

Steven Aycock, Judge