HONORABLE DAVID G. ESTUDILLO

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

LEXINGTON INSURANCE COMPANY, et al.,

Plaintiffs,

v.

CINDY SMITH, in her official capacity as Chief Judge for the Suquamish Tribal Court, et al.,

Defendants,

and

THE SUQUAMISH TRIBE, a federally-recognized Indian Tribe,

Intervenor Defendant.

No. 3:21-cv-05930-DGE

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: June 17, 2022

ORAL ARGUMENT REQUESTED

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MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION

The Suquamish Tribal Court presumptively lacks jurisdiction over Plaintiffs. It is Defendants' burden to overcome that presumption, and they have not carried it. They have not demonstrated that either *Montana* exception to the rule against a tribe's exercise of subject matter jurisdiction over nonmembers applies here. The first *Montana* exception does not apply because Plaintiffs never entered or engaged in relevant activity physically on tribal land, and the second *Montana* exception does not apply because the tribe's very "subsistence" is not threatened by Plaintiffs' actions. *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 341 (2008). Nor have Defendants shown that subject matter jurisdiction exists under the theory that the Suquamish Tribe has a "right to exclude" Plaintiffs from Suquamish tribal land. Plaintiffs did nothing on Suquamish tribal land, so the right to exclude has no application here. Because Defendants have not rebutted the presumption against tribal jurisdiction over nonmembers, this Court should grant Plaintiffs' cross-motion for summary judgment, permanently enjoin the Suquamish Tribal Court from continuing its unlawful proceedings against Plaintiffs, and declare the tribal court lacks subject matter jurisdiction over the underlying tribal court action.

II. ARGUMENT

A. Federal Law Does Not Permit the Tribal Court to Exercise Subject Matter Jurisdiction Over the Underlying Tribal Action

Tribal subject matter jurisdiction over nonmembers is "presumptively invalid." *Plains Com. Bank*, 554 U.S. at 330. That means the Suquamish Tribal Court may not exercise jurisdiction over Plaintiffs (all of which are nonmembers of the Suquamish Tribe) unless one of "two distinct frameworks" applies: (1) the *Montana* exceptions or (2) a tribe's inherent right to exclude nonmembers from its land. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 898 (9th Cir. 2017). But the first *Montana* exception and the right to exclude require nonmember conduct physically on tribal land, and there was no such conduct here. The second *Montana* exception requires "catastrophic [consequences] for tribal self-government," which also does not exist here. *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1306 (9th Cir. 2013). As a result, Defendants have not rebutted the presumption against tribal jurisdiction.

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1. There Is a Presumption Against Tribal Jurisdiction Over Nonmembers

As dependent sovereign nations, tribes enjoy the "significant protection for the individual, territorial, and political rights of the Indian tribes" provided by federal law. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Incorporation into the United States "necessarily divested" tribes of some aspects of their sovereignty, *United States v. Wheeler*, 435 U.S. 313, 323 (1978), including the ability "to try nonmembers in tribal courts." *Nat'l Farmers*, 471 U.S. at 853 n.14; *Montana v. United States*, 450 U.S. 544, 564 (1981) ("The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers."). The first step in analyzing tribal jurisdiction is looking "to the member or nonmember status of the unconsenting party," *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 937 (9th Cir. 2009), as "it is the membership status of the nonconsenting party, not the status of real property, that counts as the primary jurisdictional fact." *Nevada v. Hicks*, 533 U.S. 353, 382 (2001) (Souter, J., concurring). Here, the nonconsenting parties, Plaintiffs, are nonmembers of the Suquamish Tribe.

Because "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," *Montana*, 450 U.S. at 565, efforts by a tribe to regulate nonmembers are "presumptively invalid." *Plains Com. Bank*, 554 U.S. at 330; *accord FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 932 (9th Cir. 2019) ("[T]here is a presumption against tribal jurisdiction over nonmember activity."). This presumption exists because the exercise of tribal authority over nonmembers necessarily raises due process and fairness concerns. "[N]onmembers have no part in tribal government" and "no say in the laws and regulations that govern tribal territory." *Plains Com. Bank*, 554 U.S. at 337. Here, then, there is a presumption against tribal jurisdiction that Defendants must overcome.

Rather than acknowledging this burden, Defendants argue the presumption runs the other way because Plaintiffs' "relevant conduct occurred on tribal land." Dkt. 62 at 11. Defendants rely on *Window Rock*, 861 F.3d at 901, and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), but subsequent Supreme Court cases have made clear that Defendants' reading of *Iowa*

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Mutual—and by extension, *Window Rock*—is wrong. As Justice Souter outlined in his concurrence in *Hicks*, "in explaining and distinguishing *Iowa Mutual*, we confirmed in *Strate* what we had indicated in *Montana*: that as a general matter, a tribe's civil jurisdiction does not extend to the 'activities of non-Indians *on reservation lands*,' and that the only such activities that trigger civil jurisdiction are those that fit within one of *Montana's* two exceptions." *Hicks*, 533 U.S. at 353, 380–81 (Souter, J., concurring) (emphasis added). Thus, "the general rule of *Montana* [against tribal jurisdiction] applies to both Indian and non-Indian land." *Id.* at 360; *accord id.* at 388 (J., O'Connor concurring) ("[T]he majority is quite right that *Montana* should govern our analysis of a tribe's civil jurisdiction over nonmembers both on and off tribal land.").

Defendants otherwise attempt to limit the presumption against tribal jurisdiction over nonmembers by arguing that it applies only to nonmember conduct occurring on non-Indian fee land—fee simple land owned by nonmembers within a tribe's territory. But the Supreme Court has never endorsed any such distinction; to the contrary, federal law "restricts tribal authority over nonmember activities *taking place on the reservation*," and "tribes do not, as a general matter, possess authority over non-Indians who come *within their borders*." *Plains Com. Bank*, 554 U.S. at 328 (emphasis added). Thus, the presumption applies to all land—tribal land within a reservation, non-Indian fee land within a reservation, and non-tribal land outside of a reservation—with the presumption being "particularly strong" on non-Indian fee land because the tribe has even less control over fee land, *id.*, and outright insurmountable when the nonmember conduct occurs entirely outside of tribal territory. This is because "tribal jurisdiction is, of course, *cabined by geography*." *Philip Morris*, 569 F.3d at 938 (emphasis added).

2. The *Montana* Exceptions Do Not Apply

To overcome the presumption against jurisdiction over Plaintiffs, Defendants are required to show that one of the narrow *Montana* exceptions apply, i.e., (1) that Plaintiffs entered into a "consensual relationship" with the Suquamish Tribe or its members, or (2) that Plaintiffs' conduct threatens or directly affects the Suquamish Tribe's "political integrity, economic security, health, or welfare." *Montana*, 450 U.S. at 565–66. And "[e]ven then," Defendants are required to show

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that the exercise of jurisdiction "stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Com. Bank*, 554 U.S. at 337. Defendants have failed to meet this burden.

a. The First *Montana* Exception Does Not Apply

As *Montana* and its progeny make clear, tribal subject matter jurisdiction over a nonmember is proper only if the nonmember physically enters tribal land, initiates and engages in a transaction or business venture "on the land," and deliberately intends to do business with the tribe or its members. If so, "the nonmember has consented" to "the laws and regulations of the tribe . . . by his actions." *Plains Com. Bank*, 554 U.S. at 337. Here, Plaintiffs never set foot on tribal land for any purpose, never solicited any tribal member for business opportunities, and never denied the Tribe insurance coverage under the Policy while within tribal territorial boundaries. Plaintiffs' *conduct* as insurance carriers has only ever occurred *off* the reservation.

Subject matter jurisdiction was not created simply because Plaintiffs entered into an insurance contract with the Tribe to insure tribal property. The Supreme Court has explained that the "consensual relationship" exception applies only to business dealings and contracts involving transactions *on the land*. *Plains Com. Bank*, 554 U.S. at 334, 337; *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997); *United States v. Cooley*, 141 S. Ct. 1638, 1643 (2021). In other words, "*Montana* and its progeny permit tribal regulation of nonmember conduct inside the reservation that implicates the tribe's sovereign interests." *Plains Com. Bank*, 554 U.S. at 332 (emphasis omitted). A "consensual relationship" between a nonmember and a tribe is not enough; the relationship must involve the nonmember's conduct on the tribe's land, not conduct off tribal land that merely *relates* to tribal land. *Id.* at 334. Thus, notwithstanding the parties' insurance relationship, which was brokered by other parties, tribal jurisdiction does not exist because Plaintiffs never actually entered tribal land, much less conducted business on it. *Philip Morris*, 569 F.3d at 938 ("The jurisdiction of tribal courts does not extend beyond tribal boundaries.").

Defendants rely on *Allstate Indemnity Company v. Stump*, 191 F.3d 1071 (9th Cir. 1999), to argue that tribal court jurisdiction can be established solely by a nonmember's agreement to

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insure property on tribal land. Dkt. 62 at 17. But they also concede the Ninth Circuit "did not conclusively decide th[at] jurisdictional question." *Id.* *Allstate* merely held that a nonmember challenging tribal jurisdiction must first exhaust remedies in tribal court before bringing the challenge in federal court. 191 F.3d at 1076. In such cases, "the standard . . . is lower" because for exhaustion to apply, "tribal jurisdiction need only be 'colorable' or '*plausible*.'" *Rincon Mushroom Corp. v. Mazzetti*, 490 F. App'x 11, 13 (9th Cir. 2012) (emphasis in original). The Ninth Circuit has explained that this preliminary exhaustion analysis does not involve "deciding whether the tribe actually has jurisdiction under the . . . *Montana* exception[s]." *Id.* Instead, "the tribal courts get the first chance to decide" whether they have jurisdiction, and "[i]f the tribal courts sustain jurisdiction and [the nonmember] is unhappy with that determination, it may then repair to federal court." *Id.* Thus, *Allstate* does not stand for the broad proposition that an insurance contract alone is sufficient to establish tribal jurisdiction.

Defendants also cite *State Farm Insurance Cos. v. Turtle Mountain Fleet Farm LLC*, 2014 WL 1883633 (D.N.D. May 12, 2014), but that decision is an unpersuasive outlier. Dkt. 62 at 17. The court's conclusion that an agreement to insure tribal property is enough to support tribal jurisdiction was based on the same misreading of *Allstate*, *Iowa Mutual*, and *Montana* that Defendants now advance. Curiously, the court recognized that *Allstate* and *Iowa Mutual* "are all 'exhaustion cases' for which there only need be a colorable claim of jurisdiction to require exhaustion," but nevertheless treated those cases as answering a jurisdictional question they never reached. 2014 WL 1883633, at *11 & n.6.

Defendants further argue that the fact Plaintiffs never dealt directly with the Tribe is irrelevant to the jurisdictional question because the "touchstone" is whether Plaintiffs "should have reasonably anticipated that [their] interactions might 'trigger' tribal authority." Dkt. 62 at 19. But Plaintiffs' lack of contact with the Tribe is important because the Supreme Court has held the key to a consensual relationship is the nonmember's deliberate transactions intended specifically to do business with a tribe or a tribe's members and signifying the nonmembers' consent to be subject to the tribe's laws and regulations. For example, in *Hicks*, the Supreme Court held that state

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officers performing routine duties in their regulatory capacity did not consent to tribal jurisdiction simply because those duties required them to enter tribal land to execute a search warrant. 533 U.S. at 372. A nonmember consents to tribal jurisdiction only when it specifically targets business opportunities to be conducted on tribal lands, such as cigarette purchasers who "journey to the reservation to take advantage of" an alleged exemption from state taxes. *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 145, 152 (1980). Here, Plaintiffs did not specifically pursue the privilege of transacting with the Suquamish Tribe on tribal land, as their conduct was outside tribal boundaries.

At bottom, Defendants' argument conflates the analysis for *subject matter* jurisdiction with the one for *personal* jurisdiction. Defendants claim the "'consensual relationship' analysis under *Montana* 'resembles the [Supreme] Court's Due Process Clause analysis for purposes of personal jurisdiction,' including purposeful availment and minimum contacts." Dkt. 62 at 15. But the Supreme Court has explained that *Montana* and its analysis of tribal jurisdiction "pertain[] to subject-matter, rather than merely personal, jurisdiction." *Hicks*, 533 U.S. at 367 n.8; *see also Progressive Specialty Ins. Co. v. Burnette*, 489 F. Supp. 2d 955, 957 (D.S.D. 2007) (tribal court committed error "in confusing questions of personal jurisdiction with questions of subject matter jurisdiction"). If Defendants' proposition were accepted, it would render the *Montana* analysis unnecessary, as federal courts would have to decide only whether tribal courts had personal jurisdiction over the parties. Instead, this Court should focus its analysis on the fact that it is undisputed Plaintiffs never physically entered Suquamish tribal land. As the Seventh Circuit has explained, the "question of a tribal court's *subject matter jurisdiction* over a nonmember . . . is tethered to the *nonmember's* actions, specifically the *nonmember's actions on the tribal land*." *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782 n.42 (7th Cir. 2014). Here, Plaintiffs did not engage in business, enter into any transaction, or negotiate the Policy on Suquamish tribal land. Thus, the first *Montana* exception does not serve as a basis for tribal court jurisdiction.

b. The Second *Montana* Exception Does Not Apply

Under the second *Montana* exception, a tribe may regulate a nonmember's conduct within

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its boundaries if the activity "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. The challenged conduct "must be so severe as to 'fairly be called catastrophic for tribal self-government.'" *Evans*, 736 F.3d at 1306. Mere loss of income does not meet the particularly "elevated threshold" for this exception. *Plains Com. Bank*, 554 U.S. at 341. Instead, "[t]he conduct must do more than injure the tribe"—"it must 'imperil the subsistence' of the tribal community." *Id.* The exception is a break-the-glass failsafe that confers jurisdiction only when it is "necessary to avert catastrophic consequences." *Id.*

Defendants say the second *Montana* exception is "not necessary to affirm Tribal Court jurisdiction here," but "is satisfied because [of] the health risks posed by the COVID-19 pandemic and crippling financial losses suffered" by the Tribe. Dkt. 62 at 23. Defendants are wrong; their alleged financial losses, including the circumstances under which they arise, do not meet the particularly "elevated threshold" for *Montana*'s second exception. *Plains Com. Bank*, 554 U.S. at 341. As the Seventh Circuit explained, the second *Montana* exception cannot apply "whenever the economic effects of its commercial agreements affect a tribe's ability to provide services to its members," as this "would swallow the rule" against tribal jurisdiction over nonmembers. *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015). Thus, the second *Montana* exception does not provide a basis for tribal jurisdiction.

c. The Tribe's Inherent Sovereign Authority Also Is Not a Basis for the Exercise of Tribal Jurisdiction

When determining whether tribal jurisdiction exists under the *Montana* exceptions, the Supreme Court additionally requires that the exercise of jurisdiction "stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Com. Bank*, 554 U.S. at 336–37; *Nat'l Labor Relations Bd. v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 545 (6th Cir. 2015) ("*Montana* made plain that tribal power over non-members extends only as far as 'necessary to protect tribal self-government or to control internal relations.'"). Here, the tribal court lacks jurisdiction because the Tribe's inherent sovereign authority is not at issue. To find that the *Montana* exceptions apply without

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implicating the Tribe's inherent sovereign authority (or, as discussed, without Plaintiffs' physical presence within tribal territorial boundaries) would do exactly what the Supreme Court has cautioned against—it would construe the "limited" *Montana* exceptions "in a manner that would swallow the rule or severely shrink it." *Plains Com. Bank*, 554 U.S. at 330.

Defendants claim the Ninth Circuit and Supreme Court have never acknowledged this requirement. Dkt. 62 at 20. The Ninth Circuit has not specifically addressed the requirement, and certainly has not rejected it.[1] The Supreme Court has addressed the requirement, expressly holding that a tribe must show its regulation of nonmembers "stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Com. Bank*, 554 U.S. at 337; *accord Strate*, 520 U.S. at 459 (a tribe's inherent authority does not reach "beyond what is necessary to protect tribal self-government or to control internal relations" (citing *Montana*, 450 U.S. at 564)). "The logic of *Montana* is that certain activities on non-Indian fee land . . . may intrude on the internal relations of the tribe or threaten tribal self-rule," and thus may be regulated only "[*t*]*o the extent* they do." *Plains Com. Bank*, 554 U.S. at 334–35 (emphasis added); *accord Hicks*, 533 U.S. at 359 ("Where nonmembers are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'"). Hence, the Tribe has no authority to regulate nonmembers like Plaintiffs outside of these specified areas of sovereign concern.

Defendants argue that the Fifth Circuit in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), "expressly addressed the 'inherent sovereign authority' argument" and "concluded the Supreme Court has not imposed any such requirement." Dkt. 52 at 14. But Defendants misinterpret the Fifth Circuit's reasoning. *Dolgencorp* involved the alleged

[1] In support of their argument, Defendants cite a denied petition for a writ of certiorari filed in *FMC Corp. v. Shoshone-Bannock Tribes*, 141 S. Ct. 1046 (2021). But a denial of certiorari "[o]bviously . . . does not imply approval of anything that may have been said by the lower court in support of its decision." *Agoston v. Com. of Pa.*, 340 U.S. 844, 844 (1950). "The [Supreme] Court has stated again and again what the denial of a petition for writ of certiorari means and more particularly what it does not mean. Such a denial, it has been repeatedly stated, 'imports no expression of opinion upon the merits of the case.'" *Id.*

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sexual assault of a minor tribal member by his nonmember employer while on the reservation. 746 F.3d at 169. The Fifth Circuit decided that "one specific relationship, in itself"—i.e. "a single employment relationship between a tribe member and a [nonmember] business"—could not possibly threaten internal relations or self-rule. *Id.* at 175. Thus, the requirement must be applied "at a higher level of generality." *Id.* Although that "single employment relationship" did not carry the requisite impact on tribal self-rule, the Fifth Circuit held "the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land" did. *Id.* The Fifth Circuit held the tribal court had jurisdiction because, "[s]imply put, the tribe [was] protecting its own children on its own land," *id.* at 173, which undoubtedly implicates the inherent sovereign authority of the tribe.

Here, by contrast, there is no such interest. Defendants concede the Tribe does not regulate insurance. Dkt. 62 at 22 n.8 ("The Tribe does not dispute that the Tribal Code does not contain a regulation specifically directed toward the insurance industry."). Defendants argue this fact is irrelevant to the rule that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate*, 520 U.S. at 453. Tribal jurisdiction, Defendants claim, does not require "the presence of tribal positive law, such as regulations"—it should be enough that the Tribe "could issue regulations over this insurance conduct." Dkt. 62 at 21–22. But as the Eighth Circuit has explained, it is not enough that a nonmember's conduct "*could be* permissibly regulated by tribal law, as determined by *Montana* and its two exceptions"—it must be that the conduct "*has been* regulated by tribal law." *See Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1135 & n.4 (8th Cir. 2019). Because the Tribe has never regulated insurance, and because its inherent sovereign authority is not implicated, the *Montana* exceptions do not provide a basis for tribal court jurisdiction.

3. The Right-to-Exclude Doctrine Does Not Apply

The Ninth Circuit has recognized a third exception to the rule that tribes lack jurisdiction over nonmembers: the "right to exclude" doctrine, which arises out of a tribe's "inherent powers to exclude and manage its own lands." *Water Wheel Camp Rec. Area, Inc. v. LaRance*, 642 F.3d

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802, 814 (9th Cir. 2011). The Ninth Circuit has made clear that tribal court jurisdiction may not be premised on the right to exclude nonmembers *not on tribal land*. *See Emp'rs Mut. Cas. Co. v. McPaul*, 804 F. App'x 756, 757 (9th Cir. 2020). And because a tribe's right to exclude is limited to tribal land, so too is its "lesser" power to regulate—and therefore adjudicate—nonmember conduct. *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 899 (9th Cir. 2019) ("From a tribe's inherent sovereign powers flow lesser powers, including the power to regulate [nonmembers] *on tribal land*." (emphasis added)).

Because Plaintiffs have never entered the Tribe's land, the "right to exclude" doctrine does not apply. Defendants argue the cases cited by Plaintiffs never use the words "physical presence," so it cannot be a requirement. Dkt. 62 at 13. But the through line in each of these cases is the "non-Indian activity in question occur[ing] on tribal land" that "interfered directly with the tribe's inherent powers to exclude and manage its own lands." *Water Wheel*, 642 F.3d at 814. In *Water Wheel*, a nonmember refused to pay rent and vacate the tribal land he occupied when his lease with the tribe expired. 642 F.3d at 814. Not only was the nonmember trespassing by continuing to reside within the tribe's territory, he illegally profited off the land and the tribe by collecting rent from subtenants and running a business *physically on the land*. *Id.* In *Knighton*, "the nonmember defendant *while on tribal land* allegedly used her position as Tribal Administrator to violate the terms of her employment in a wide variety of ways that were significantly detrimental to the management and financial security of the Tribe." 922 F.3d at 901. And in *Grand Canyon Skywalk Development v. 'SA' Nyu Wa Inc.*, tribal jurisdiction was "not plainly lacking" because the "essential basis for the agreement" at issue between nonmember and tribal corporations was "access to" tribal land, "interfer[ing] with the [tribe's] ability to exclude" the nonmember corporation. 715 F.3d 1196, 1204–05 (9th Cir. 2013).

Here, Plaintiffs have never had any physical presence on tribal land. Nor is there any evidence that Plaintiffs have "interfered directly" with the Tribe's inherent powers to exclude or manage its own lands. *Water Wheel*, 642 F.3d at 814. Because Plaintiffs have "never set foot on reservation land, interacted with tribal members, or expressly directed any activity within the

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reservation's borders," they cannot be "excluded" from tribal land, and the "right to exclude" doctrine cannot "supply a valid pathway to tribal jurisdiction." *Emp'rs Mut. Cas. Co. v. Branch*, 381 F. Supp. 3d 1144, 1149–50 (D. Ariz. 2019), *aff'd sub nom. McPaul*, 804 F. App'x 756.

B. Plaintiffs Need Not Challenge the Tribal Court's Rulings in the Underlying Action

Defendants argue that because Plaintiffs did not challenge the tribal court's findings of (1) subject matter jurisdiction under Suquamish tribal law, or (2) personal jurisdiction under federal law, this Court "should treat these rulings as conclusively established." Dkt. 62 at 23–24. That makes no sense. The question of subject matter jurisdiction presented by Plaintiffs' motion is legal, and this Court reviews legal questions de novo and has "no obligation to follow" the tribal court's decision. *FMC*, 905 F.2d at 1314. This is because "federal courts are the final arbiters of federal law, and the question of tribal jurisdiction is a federal question." *Id.*

Further, Defendants argue that the tribal court's rulings should be accepted as "conclusively established" because Plaintiffs supposedly did not challenge them in their opening brief. Dkt. 62 at 24. That makes no sense either. Plaintiffs did not specifically address every basis for the tribal court's subject-matter-jurisdiction ruling under *tribal* law because the whole point of this lawsuit is to determine whether *federal law* limits the tribal court's exercise of jurisdiction. *Nat'l Farmers*, 471 U.S. at 852–53. The tribal court's decision on subject matter jurisdiction under *tribal law* is irrelevant if federal law prohibits such an exercise.

Defendants are also wrong that Plaintiffs should have contested the tribal court's decision on *personal* jurisdiction. That decision is irrelevant. Plaintiffs' prayer for injunctive and declaratory relief in this action has always been limited to the question of tribal court subject matter jurisdiction. *See generally* Dkt. 1. Defendants' request that this Court accept the tribal court's ruling of personal jurisdiction as "conclusively established" is improper because a party may not oppose summary judgment by raising grounds not at issue in the pleadings. *See Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 991 (9th Cir. 2006).

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III. CONCLUSION

For these reasons, this Court should grant Plaintiffs' motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned certifies, under penalty of perjury under the laws of the United States of America and the State of Washington, that on the 17th day of June, 2022, the document attached hereto was delivered to the below counsel in the manner indicated:

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Signed this 17th day of June, 2022, in Kansas City, MO.

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