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IN THE SUPREME COURT OF THE NAVAJO NATION

OHIO CASUALTY INSURANCE COMPANY, Petitioner, v. CHINLE DISTRICT COURT, Respondent, and concerning, NAVAJO NATION, PIC-N-RUN, et al. Real Parties in Interest.	Case No.: CH-CV-166-13 Case No.: CH-CV-359-07 Case No.: CH-CV-333-09 **OHIO CASUALTY INSURANCE COMPANY'S REPLY MEMORANDUM IN SUPPORT OF OHIO CASUALTY'S PETITION FOR A WRIT BECAUSE OHIO CASUALTY HAS SATISFIED NÁLYÉÉH**

Petitioner Ohio Casualty Insurance Company, through counsel, replies to the Chinle District Court's and the Navajo Nation Department of Justice's ("NNDOJ's") responses to Ohio Casualty's Petition for a Writ Dismissing Ohio Casualty for Lack of Personal and Subject Matter Jurisdiction ("Petition"). The responses misstate facts and law, and ignore substantial evidence that proves Ohio Casualty has satisfied *nályéél*, although Ohio Casualty should have never been a party in the first instance.

The responses also do not resolve the seminal issue that the NNDOJ, through the Order it submitted, created a horizontal appeal in which one District Court Judge overruled the decision of another.

In 2018, the Chinle District Court signed the NNDOJ's Order Granting, in part, the Motion For Summary Judgment that the NNDOJ had submitted. *See* Petition, Exhibit ("Ex.") E. The 2018 Order overruled a 2011 Order acknowledging Ohio Casualty's $928,111.48 payments for "remediation and clean-up costs." *See* Petition, Ex. D. The NNDOJ solicited and triggered error, creating conflict between the decisions of the two District Court Judges. The decision of the first District Court Judge was disregarded, violating the Navajo law that words are sacred. *See Gene v. Halifax*, No. SC-CV-71-98 (Nav. Sup. Ct. 2000).

The 2018 Order also erred in finding jurisdiction. Subject matter jurisdiction was and is lacking, because Ohio Casualty did not enter into a consensual relationship with the Nation or its members, and it has never threatened the health or welfare of the Nation.

In addition, in the 2018 Order, District Court failed to address the fact that the NNDOJ provided no proof to contradict the sworn testimony submitted by Ohio Casualty.

- The NNDOJ offered no verified, admissible evidence to support its factual allegations. Given Ohio Casualty filed a motion for summary judgment, together with supporting affidavits, under Rule 56(e), the NNDOJ was compelled to provide factual support for its allegations. It failed to do so.

Lastly, the law of *nályéél* provides an independent reason for dismissing Ohio Casualty. The 2011 Order found that Ohio Casualty had paid $928,111.48 for "remediation and clean-up[.]" Now, the NNDOJ has argued that those same fees were not for remediation and clean-up. Yet, these new claims from the NNDOJ are defeated by the NNDOJ's own admissions. Their admissions are found in other submissions from the NNDOJ, including:

- The NNDOJ recently provided a Site Characterization and Remediation Actions ("SCRA") summary. *See* Petition, Ex. L. The SCRA, as authored by NNDOJ, actually enumerates and specifies the substantial remediation efforts for which Ohio Casualty paid.

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Accordingly as to the finding of *nályéél*, the 2011 Order was correct. The Nation has relied upon the monies expended by Ohio Casualty for the clean-up and remediation at the Pic-N-Run site, and, if this Court chose to find jurisdiction it should, nonetheless, dismiss Pic-N-Run as a matter of Navajo law. *Nályéél* has been fulfilled.

I. Statement Of The Case: Though Ohio Casualty Should Not Be A Party, It Is The Only Insurance Defendant, Which Has Paid For Clean-Up And Remediation.

Ohio Casualty issued an insurance policy, insuring co-Defendants Daniel and Dorothy Felix, *d.b.a.* Shiprock Construction. When the policy was created, issued and executed, the Felixes provided Ohio Casualty with a Gallup address for themselves and their business, and Ohio Casualty issued an insurance policy for this New Mexico business. *See* Petition, Ex. K.

The Felixes later contracted to assist in renovations of the Pic-n-Run gas station in Chinle. During renovations, an employee damaged an underground gas line, causing a spill of unleaded gasoline. *See* Amended Complaint. Subsequent testing revealed that most of the on-site contamination was leaded gasoline, a product that has not been manufactured for years. Hence, most of the contamination is in no way related to the Felixes or Shiprock Construction.

In 2008, Pic-n-Run filed suit to recover damages. It named many Defendants, including Ohio Casualty, the Felixes and Shiprock. Ohio Casualty has consistently maintained that an insurance company is not a proper party defendant, under Navajo law. Insurance companies should not be included as defendants, as the existence of liability insurance coverage is specifically prohibited under Navajo Rule of Evidence 11. Moreover, Shiprock Construction's policy was issued to a New Mexico address. It was not issued on the Nation, and the suggestions

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that Ohio Casualty was doing business on the Nation are in error; Ohio Casualty has not entered into a consensual relationship with the Nation or its members.

As a further reason Ohio Casualty should not have been a Party, it had already made the decision to begin paying under its policy. It has paid for clean-up and remediation. *See* Order of 2011; Petition Ex. D. Again, other insurance defendant has made payments in this case.

Subsequently, Ohio Casualty filed a Motion for Summary Judgment, because it was not a proper party, and jurisdiction was lacking, as Ohio Casualty did not purposefully avail itself of the Nation's jurisdiction having issued a policy to an off-Nation business. Ohio Casualty also proved that it caused no damage on the Nation, as *nályéél* was met by its payments of the money bag.

In 2011, the Chinle District Court, the Honorable Leroy Bedonie presiding, issued an order denying, in part, the Ohio Casualty Motion but acknowledging Ohio Casualty's payments totaling $928,111.48 for "remediation and clean-up costs." Petition, Ex. D. The 2011 Order invited Ohio Casualty to obtain dismissal, when it had fully satisfied *nályéél* by paying the $1,000,000.00 policy limit.

In 2014, Ohio Casualty renewed its Motion. The Navajo Nation Department of Justice responded. Thereafter, the Motions awaited resolution. Ultimately, the issues were argued, again, and the Honorable Rudy Bedonie signed a proposed Order, drafted by the NNDOJ, in 2018.

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Unfortunately, the NNDOJ's Order solicited a horizontal appeal by disregarding the 2011 Order, and finding that Ohio Casualty had not proven its payments were for "remediation and clean-up costs."[1] Petition, Ex. E.

In 2019, the NNDOJ drafted a Site Characterization and Remediation Actions ("SCRA") summary for this case. Petition, Exs. L and M. The SCRA confirms Ohio Casualty has been paying remediation and clean-up costs. The NNDOJ's own filings establish these payments have fulfilled *nályééh*. *Id.*

Lastly, and with due respect, the actions of the NNDOJ reflect poor, public policy. Submitting documents that cause one District Judge to overrule another is not in furtherance of the Nation's judicial system, and, when a foreign corporation, like Ohio Casualty, chooses to pay for work to be performed on the Nation, that decision should not be discouraged by creating inconsistent, judicial rulings that ignore the finality of decisions and the law that words are sacred.

As the Court has consistently held, *nályééh* has the overarching goal of restoring *hozho* and making parties whole. *Hozho* is restored, when appropriate insurance proceeds are paid. In this case, *nályééh* was fulfilled through Ohio Casualty's payments, but *hozho* has been denied.

II. Ohio Casualty Has Satisfied The District Court's Order, And, Of Equal Importance, *Nályééh*.

Navajo tort law is a reflection of *nályééh*, which has the overarching goal of restoring *hozho* and making parties whole. It is foundational that litigants who comply with *nályééh* should

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[1] The NNDOJ has never offered a single shred of evidence to support its contentions that the payments were for anything but remediation and clean-up. Ohio Casualty offered affidavit testimony approving the opposite.

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be dismissed.[2] *Allstate v. Blackgoat*, 8 Nav. R. 660 (Nav. Sup. Ct. 2005); *Benally v. First National Ins. Co.*, 7 Nav. R. 329, 337-338 (Nav. Sup. Ct. 1998).

In *Benalli v. First National Insurance*, this Court likened insurance proceeds to a money bag. 2 Nav. App. Rep. 595 (Nav. Sup. Ct. 1998). The amount of damages owing to the injured party was based on the nature of the tort, including the alleged damages, and the ability of the clan to pay the alleged tortfeasor. *Id.* In sum, a tortfeasor "is expected to set things right . . . That is done on the basis of the ability to help, and in [the case of insurance], that ability is measured by the amount of money put into the bag... ." *Id.* Thus, the amount of the money bag is defined by the policy, and insured persons, like the Felixes, are liable only for what is specified in the policy, and no more. Navajo principles would never require someone to give up more than he or she has. *Hozho* is restored, when appropriate insurance proceeds are paid.

Given the 2011 Order and as proven by the evidence provided since, Ohio Casualty has satisfied *nályééh*. *See* Affidavit of Jill Crosbie, Petition, Ex. A; Itemized Bill, Petition, Ex. B; Invoices Submitted for Testing and Remediation Services, Petition, Ex. C and Petition, Ex. D.

III. Consistently With The 2011 Order, The NNDOJ's Site Characterization And Remediation Action Report Also Prove Ohio Casualty Has Satisfied *Nályééh*.

At the direction of the NNEPA and USEPA, Red Hawk, an engineering and remediation company, oversaw testing, remediation and clean-up activities at the Pic-N-Run site. Red Hawk and its subcontractors were paid by Ohio Casualty. *See* Petition, Ex. A. Unlike the other

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[2] Contrary to what the District Court response claims, Ohio Casualty provided analysis and citations that provide cases are dismissed when *nályééh* is satisfied. *Compare* District Court Response at 16, Petition at 14, and Ohio Casualty's MSJ at 7, Ex. 1.

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Defendants in this case, Ohio Casualty did not dispute coverage, and from the beginning, has paid for testing, remediation and clean-up. Indeed, the work paid for by Ohio Casualty was approved and supervised by the Navajo Nation EPA and USEPA.

The NNDOJ makes lengthy arguments about whether the Ohio Casualty payments are defense or indemnification dollars, but it ignores the prior decisions of the Court. Judge Leroy Bedonie authored a careful analysis and found that, in 2011, Ohio Casualty had spent $928,111.48 for "remediation and clean-up." Thus, the arguments the NNDOJ now raises are settled, and although the following analysis is not necessary for this Court's reasoning, the presumptions cited in the following cases are noteworthy.

In addressing the distinction between indemnity versus defense costs, courts have held that where a party enters into an agreement "with an environmental agency, resolving the party's liability, the clean-up costs constitute damages [indemnity] for insurance coverage purposes." *See Travelers Indem. Co. v. City of Richland,* No: 4:17-CV-5200-RMP, *p.* 10 (E.D. Wash., May 30, 2018) (citation omitted). In fact, where an agency order holds a party responsible for the performance of remediation and feasibility studies ("RI/FS"), "the costs of performing the RI/FS are damages [indemnity], rather than defense costs." *See Id.* at p. 11 (citation omitted). Here, the USEPA and NNEPA set the standards for remediation and provided direction to Red Hawk. Thereafter, Ohio Casualty paid the invoices for the work.[3]

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[3] Other courts have also held there should be a presumption that mandated costs are indemnity costs. *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co.*, 177 F.3d 210, 223-24 (3rd Cir., 2003) (citations omitted); *Sunoco, Inc. V. Illinois National Ins. Co.*, 503 F. Supp.2d 743, 754 (E.D. Pa., 2007) (holding that mitigation expenses such as remediation and feasibility studies are presumed to be indemnity expenses). The burden is on the policyholder and/or beneficiary to show the insurer derived an unjust benefit that relieved it of an expense it

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According to the sworn testimony before the District Court, Red Hawk managed and directed the activities of itself and the other environmental engineering firms, on behalf of Shiprock Construction. *See* Petition, Ex. A; Affidavit of Jill Crosbie. Ms. Crosbie, a disinterested third-party and witness with unrefuted knowledge about the remediation efforts and costs, provided a sworn statement that Ohio Casualty has paid in excess of $1,000,000.00. *See Id.* Accordingly, Ohio Casualty has provided sworn, unrefuted evidence of the nature of the costs and payments.

On the other hand, the NNDOJ has provided no proof to the contrary, and, remarkably, the NNDOJ's Site Characterization and Remediation Actions summary, which, again, was authored, in part, by the NNDOJ provides further confirmation that the clean-up work was paid by Ohio Casualty.

While both responses allege a factual dispute as to whether Ohio Casualty paid indemnity or defense costs, the District Court response fails to mention it had previously accepted the entire amount set forth in the 2011 Order as indemnity costs. *See* Petition, Ex. D at 9. Both responses fail to mention Ohio Casualty provided the only evidence of the nature of its payments. *See* Petition, Exs. A, B and C. Thus, under Rule 56(e), Ohio Casualty's Motion for Summary Judgment should have been granted.

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would have incurred under its obligation to defend. *Chemical Leaman Tank Lines*, 177 F.3d at 223-34. In this case, however, it is not the policyholders (the Felixes and Shiprock), who are contesting the characterization of costs. Here, the policyholders joined Ohio Casualty's arguments.

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A. As Noted Above, All Activities Were Overseen And Approved By the USEPA and/or the NNEPA.

The NNEPA and USEPA set standards for and directed activities at the Site. In fact, in June 2008, the USEPA contacted Red Hawk and ordered all further actions at the Site be submitted for approval by the USEPA. *See* Petition, Ex. A, ¶ 23. Accordingly, Red Hawk submitted a Work Plan and Complete Site Characterization Report. *Id.* at ¶ 24. The Work Plan and Complete Site Characterization Report were reviewed and approved by the USEPA. Red Hawk worked closely with the USEPA and NNEPA to develop the work plans, which were approved. *Id.* at ¶¶ 25-26. In fact, the Preliminary Site Assessment activities, i.e, delineation and planning activities, were completed by Red Hawk at the direction of the USEPA and NNEPA. *Id.* at ¶¶ 26-31. Again, all of Red Hawk's work was paid by Ohio Casualty.

Because the work billed by Red Hawk and the other environmental engineering companies was performed according to standards established by the USEPA and NNEPA, the costs are presumed to be for clean-up and, therefore, indemnity; the exact finding made by Judge Leroy Bedonie in 2011. When an agency directs a party to perform, feasibility studies and other actions, the costs of performing are presumed to be for indemnity. *See Chemical Leaman Tank Lines, Inc.*, 177 F.3d at 223-24; *Sunoco, Inc.*, 503 F. Supp.2d at 754.

Here, the NNDOJ failed to rebut the presumption or counter the specific proof submitted by Ohio Casualty. *Nályéél* has been met and Ohio Casualty must be dismissed.

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B. In 2019, the NNDOJ Drafted the Site Characterization And Remediation Action Summary That Further Proves Ohio Casualty's Payments Were For Clean-up.

Not only has it offered no proof, the NNDOJ has taken an inconsistent position in this litigation. The NNDOJ provided the Site Characterization and Remediation Action summary ("SCRA"). *See* Petition, Ex. L. The SCRA describes the work paid for by Ohio Casualty. It even acknowledges that Ohio Casualty paid for testing and remediation, but the SCRA avoids mentioning the actual amounts paid. *See Id.*

The omission of the amounts paid is telling. The NNDOJ cannot acknowledge Ohio Casualty's role in testing and remediation efforts, then reasonably refuse to acknowledge the amounts paid. A cursory review of the invoices that correspond to the "dates" and "events" listed shows why – they prove Ohio Casualty has fulfilled *nályéél*.

To rectify the omission, Ohio Casualty drafted a "Site Characterization and Remediation Actions-REVISED" summary that includes the missing amounts. *See* Petition, Ex. M. Corresponding to the dated entries listed by the NNDOJ, Ohio Casualty provides notations, exhibits and invoice references (in red ink). *See Id.* These totals show Judge Leroy Bedonie was right. Ohio Casualty has done the right thing. It has paid for remediation and clean-up. *Nályéél* is satisfied.

IV. The NNDOJ Sought And Received An Impermissible Horizontal Appeal.

The 2011 Order temporarily denied Ohio Casualty's request for summary judgment, but accepted that Ohio Casualty was fulfilling *nályéél* and that all expenditures to date ($928,111.48) were for "remediation and clean-up costs." *See* Petition, Ex. D at p. 9. The 2011 Order also

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invited Ohio Casualty to renew its Motion upon its expenditure of additional payments. *See Id.* After Ohio Casualty renewed its Motion, in 2018, the NNDOJ submitted an Order, contrary to the 2011 Order. The District Court then, apparently, ignored its earlier decision and now argues to this Court that those same expenditures may be mixed indemnity and defense costs. *See* District Court Response at 16. Yet, given the finding that those expenditures were for "remediation and clean-up costs" when the 2011 Order was issued, their nature did not change just because the NNDOJ submitted a contrary order.[4]

According to Navajo law, if the NNDOJ believed the 2011 Order was in error, it should have filed an appeal. Instead, it submitted the proposed 2018 Order. Thus, the NNDOJ sought and obtained a horizontal appeal, causing the District Court to overturn itself.

This Court strongly disfavors horizontal appeals. *See Lee v. Tallman*, No. SC-CV-02-95, ¶ 43 (Navajo 11/27/1996). Indeed, Navajo fundamental and common law disfavor second-guessing a decision-maker. *Id.* The decision of a *naat'aanii*, made in good faith, is respected and followed. *Id.* Similarly, the word of a judge, propounding the way of things, is respected and followed. *Id.* There is a "presumption in favor of the rulings of the first judge." *Id.* The NNDOJ has never rebutted Judge Leroy Bedonie's conclusions, and the 2011 Order must remain effective. The payments were for "remediation and clean-up costs." *See* Petition, Ex. D at 9. In short, Ohio Casualty must be dismissed, even if this Court concludes that jurisdiction exists.

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[4] Unlike Ohio Casualty, the NNDOJ's Motions and Order were devoid of any admissible proof. There was no evidence by which Judge Rudy I. Bedonie could reverse Judge Leroy S. Bedonie.

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V. The Responses Misconstrue The Facts Regarding Personal Jurisdiction.

As demonstrated by the Declarations Page, when the Policy was created and executed the physical address for Shiprock was listed as 126 Bishop Drive, Gallup, New Mexico 87301-9403, and the mailing address was P.O. BOX 4498, Gallup, New Mexico 87305. *See* Petition, Ex. K. This was not an insurance policy for a business on the Nation.

The responses argue Ohio Casualty knew it was insuring activities on the Nation because Shiprock changed its address before beginning work. The 2018 Order notes that, "[a]t the time of the incident, Shiprock's address on file with Ohio Casualty was on the Navajo Nation in Chinle, Arizona." *See* Petition, Ex. E at 3.

Regardless, such limited information is not enough to generate jurisdiction. The change of address would not have signaled to Ohio Casualty that the Nation's jurisdiction was triggered. Nothing in the insurance contract changed. It is not reasonable (nor legally appropriate) to require an insurer to check the ethnicity of applicants or determine whether a change of address signaled a change in jurisdiction to a separate sovereign like the Navajo Nation. A finding of jurisdiction requires something more substantial, such as a known relationship with a Nation member. *Plains Comm. Bank v. Long Family Land and Cattle*, 491 F.3d at 886.

The District Court also mistakenly alleges Ohio Casualty waived personal jurisdiction in its answer to Pic-n-Run's Complaint. A brief review of the original answer shows at paragraph 61, "Ohio Casualty raises the affirmative defense of lack of personal jurisdiction . . . ." Ex. 2. Ohio Casualty's Answer to Pic-n-Run's Amended Complaint at paragraph 49 states, "Ohio

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Casualty also preserves the affirmative defenses of lack of jurisdiction, both personal and subject matter." *See* Petition, Ex. H. Obviously, the defenses were not waived.

VI. Ohio Casualty Did Not Enter Into A Consensual Relationship With The Navajo Nation Or Its Members, And, Pursuant To *Montana*, The District Court Does Not Have Subject Matter Jurisdiction.

The responses also misinterpret the holding in *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894 (9th Cir. 2017). *Reeves* does not attempt to expand the limits of *Montana,* as the Ninth Circuit can not alter U.S. Supreme Court precedent. Instead, the Ninth Circuit merely applied the analysis required by *Montana* and held the tribal court had jurisdiction over two Arizona schools on Navajo Nation land. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d at 900-01

Unlike the schools in *Window Rock,* Ohio Casualty did not contract with the Nation or a member, when it did business with Shiprock as a New Mexico-based company. It issued a policy to a commercial enterprise that was not then organized under tribal law, which was not located on tribal lands and which did not present itself as a member of the Navajo Nation, when the policy was signed and issued. Ohio Casualty could not reasonably anticipate being drawn into litigation before the courts of the Navajo Nation when it issued the insurance policy. *See* Petition, Ex. H.

Although Shiprock Construction subsequently did business in Chinle, it was not Ohio Casualty's responsibility to monitor where its insureds do business. Ohio Casualty did not commit any tortious conduct on the Nation. Instead, Ohio Casualty is being used as a precautionary measure to "maximize insurance funds," because the Nation "could" be required to incur costs. *See* Petition, Ex. I.

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As noted above, the responses emphasize that Shiprock changed its address to a location in Chinle immediately prior to beginning work on the Site. Neither response explains how Ohio Casualty knew or should have known the changing location meant the policy was for a newly certified tribal business owned by a tribal member. Ohio Casualty had no meaningful notice it had entered into "consensual relationships with the tribe or its members." *See Montana*, 450 U.S. at 565.

The responses also argue Ohio Casualty has refused to pay full indemnity and claim this threatens the health and welfare of the Nation, "if proven." *See* NNDOJ Response at 12. Notably, the NNDOJ acknowledges it has failed to prove this allegation. *See Id.* Given this matter has been litigated for over ten years, it is revealing that the NNDOJ still has no proof for its allegation. Ohio Casualty, on the other hand, has provided evidence that shows it agreed to pay, took the lead in investigation and remediation of the Site, and did, in fact, pay, a conclusion preciously acknowledged by the Chinle District Court in 2011.

Ohio Casualty has done nothing to threaten the health and welfare of the Nation. Its actions, through its payments, have benefitted the Nation.

The NNDOJ asserts the Treaty of 1868 is a separate source of jurisdiction, independent of Montana and its progeny. NNDOJ Response at 9. The Supreme Court, in *Ford Motor Co. v. Kayenta District Court*, noted the Treaty could be a basis for jurisdiction. *See Ford Motor Co. v. Kayenta District Court*, No. SC-CV-33-07 (Navajo 12/18/2008) (citing *Montana*, 450 U.S. at 558). Nonetheless, the NNDOJ has not shown that any on reservation conduct caused any reservation harm. Doing so, is necessary to establish jurisdiction under *Montana* and the Treaty.

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Finally, the District Court alleges Ohio Casualty conceded subject matter jurisdiction in a 2008 Motion to Dismiss. Response at 13. This is another attempt to confuse the issues. As a matter of law, a party can not "concede" jurisdiction. *Pliuskaitis v USA Swimming* (10th Cir., 2018). Moreover, even if the parties do not dispute jurisdiction, an appellate court has an independent obligation to assess both its own and the District Court's jurisdiction. *Herklotz v. Parkinson*, 848 F.3d 894 (9th Cir., 2017).

Either subject matter jurisdiction exists or it does not. From its Answer through the many motions to this Writ, Ohio Casualty has raised, preserved and challenged subject matter and personal jurisdiction.

VII. Conclusion: The Claims Against Ohio Casualty Must Be Dismissed.

When the insurance policy was executed and issued, it was to a commercial enterprise that was not organized under tribal law, not located on tribal lands, and, there was no suggestion of on reservation work. The facts and law provided above show Ohio Casualty had no notice it had entered into a consensual relationship with the Navajo Nation or its members. Jurisdiction does not exist.

Ohio Casualty can also be dismissed, as a matter of Navajo law. It has fulfilled *nályéél*. The NNEPA and USEPA set the standards for and directed activities at the Site. Red Hawk, the primary environmental engineering firm, worked at these Agencies' direction, and supervised activities pursuant to these Agencies' orders. Ohio Casualty paid for those efforts. It has done the right thing, bringing only benefit to the Nation. Ohio Casualty has satisfied *nályéél* and must be dismissed.

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RESPECTFULLY SUBMITTED this 16th day of May, 2019.

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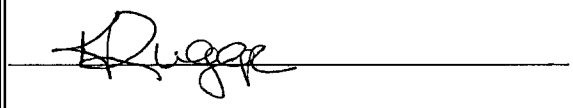

Exhibit 1

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IN THE DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF CHINLE

NAVAJO NATION, Plaintiff, v. PIC-N-RUN, INC., ESTATE OF SYBIL BALDWIN, WALTER BALDWIN, ~~VERNON AND STELLA ELDRIDGE,~~ MILAM BUILDING ASSOCIATES, INC., DANIEL AND DOROTHY FELIX, dba SHIPROCK CONCRETE, SPENCER RIEDEL, SERVICE STATION EQUIPMENT AND SALES, INC., PETRO-WEST, INC., AMCO INSURANCE CO., AUTO-OWNERS INSURANCE CO., EMPLOYERS MUTUAL CASUALTY INSURANCE CO., OHIO CASUALTY INSURANCE CO., and ZURICH AMERICAN INSURANCE CO., Defendants.	No. CH-CV-166-13 **OHIO CASUALTY GROUP'S MOTION FOR SUMMARY JUDGMENT** **(Oral Argument Requested)**

Ohio Casualty Group ("Ohio Casualty"), through counsel and pursuant to Rule 56, Navajo Rules of Civil Procedure, submits this Motion for Summary Judgment and

offer victims adequate opportunity for compensation from the truly responsible parties. *See, e.g., Cadman v. Hubbard*, 5 Nav. R. 226, 230 (Crownpoint Dist. Ct. 1984).

Here, the ability of the insurance company to pay is dictated by its policy limits, which Ohio Casualty has readily tendered on behalf of its insured. SSOF ¶¶ 14-15. The Navajo Nation must accept Ohio Casualty's willingness to do the right thing and release it from this litigation; indeed, the "money bag" is exhausted. *Id.*

Directly stated, the Navajo law of *nályéél* has been fulfilled, and, for this reason alone, the claim against Ohio Casualty must be dismissed. Everyone has benefitted from Ohio Casualty's tendering of a "money bag," and Navajo courts recognize that parties, who comply with *nályéél,* should be dismissed from the case. *See Allstate v. Blackgoat*, 8 Nav. R. 660 (Nav. Sup. Ct. 2005); *Benally v. First National Ins. Co.*, 7 Nav. R. 329, 337-338 (Nav. Sup. Ct. 1998).

B. A Navajo Court Has Already Decided That Ohio Casualty Has Satisfied *Nályéél*, And Paid Its Policy Limits; Therefore, Collateral Estoppel Precludes This Court From Readjudicating The Same Issue.

Collateral Estoppel, also known as issue preclusion, is a common law estoppel doctrine that prevents a party from relitigating an issue. *See Peabody Western Coal Co. v. Navajo Nation Labor Commission*, No. SC-CV-14-03 (Navajo 08/01/2003). Once a court has decided an issue of fact or law necessary to its judgment, that decision precludes relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Id.*

The Navajo Nation District Court in CH-CV-359-07 has previously decided the same issues litigated by Pic-N-Run against Ohio Casualty that the Navajo Nation is trying to relitigate here. In the Pic-N-Run case, Ohio Casualty filed a Motion for Summary Judgment because it had satisfied *nályéél* and tendered its entire policy limits

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Exhibit 2

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IN THE DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF CHINLE, ARIZONA

PIC-N-RUN, INC., an Arizona corporation,

Plaintiff,

vs.

MILAM BUILDING ASSOCIATES, INC., a Texas corporation; STELLA JEANETTE ELDRIDGE and VERNON W. ELDRIDGE, in the individual capacities and as officers of MILAM BUILDING ASSOCIATES, INC., and/or dba MILAM BUILDING ASSOCIATIONS, INC.; SHIPROCK CONCRETE CO., INC., a New Mexico corporation; DANNY FELIX and DOROTHY FELIX, in their individual capacities and as officers of SHIPROCK CONCRETE CO., INC., and/or dba SHIPROCK CONCRETE CO., INC.; DOE 1 AND/OR DOES 2-21, individuals; OHIO CASUALTY GROUP; and DOES 2 – 21 inclusive,

Defendants.

No. CH-CV-359-07

DEFENDANT OHIO CASUALTY'S ANSWER

8.14

59. Ohio Casualty affirmatively alleges that Plaintiff is itself responsible for all or part of its alleged damages, and that the Court is permitted to apply comparative fault principles on account of Plaintiff's contributory fault.

60. Ohio Casualty affirmatively alleges that other parties in this matter and relevant non-parties are or may be responsible for all or part of Plaintiff's alleged damages, and that the Court is permitted to apply comparative fault principles on account of these parties and non-parties' contributory fault.

61. Ohio Casualty reserves the right to raise the defenses enumerated in Rules 8(c) and 12(b), Nav. R. Civ. P., should continuing discovery reveal their relevance to this lawsuit. Presently, Ohio Casualty specifically raises the affirmative defenses of lack of personal jurisdiction, and that Plaintiff's Complaint fails to state a cause of action for which relief may be granted.

WHEREFORE, Defendant Ohio Casualty Group prays for judgment as follows:

a. That Plaintiff's Complaint be dismissed, and that Plaintiff take nothing thereby;

b. That Ohio Casualty be awarded its taxable costs; and

c. Such other and further relief as this Court deems just and equitable.

DATED this 14th day of August, 2008.

SHORALL McGOLDRICK BRINKMANN

By _____
Howard L. Brown
Attorneys for Defendants Ohio Casualty and Felix