Doreen N. McPaul, Attorney General
The Navajo Nation

Paul Spruhan, Assistant Attorney General
Navajo Nation Department of Justice
Post Office Box 2010
Window Rock, Arizona 86515-2010
Telephone: (928) 871-6210
Facsimile: (928) 871-6177

Counsel for the Navajo Nation

IN THE SUPREME COURT OF THE NAVAJO NATION

Ohio Casualty Insurance Company,
Petitioner,

v.

Chinle District Court,
Respondent,

and concerning,

Navajo Nation, et al.,
Real Parties in Interest.

No.: SC-CV-07-19

NAVAJO NATION RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

Real Party in Interest Navajo Nation files its response to the Petition for a Writ Dismissing Ohio Casualty for Lack of Subject Matter and/or Personal Jurisdiction: and Enforcement of the Chinle District Court's Order of October 28, 2011 (Petition), filed by Ohio Casualty Insurance Company (Ohio).

INTRODUCTION

This case arises out of a complaint filed by the Navajo Nation (Nation) in the Chinle District Court (District Court) against a number of parties and their insurance companies. The Nation as landowner seeks damages for a catastrophic gas spill occurring in 2005 at the Pic-N-Run (PNR) gas station, located on tribal trust land in the central part of Chinle. Ohio insured the Navajo-owned business, Shiprock Construction (Shiprock), which, during renovations of the

station, cut an underground gas line, resulting in the spilling of more than 15,000 gallons of gasoline into the soil as well as the ground water of the Chinle community. That spill is still not fully cleaned up, and petroleum material remains and is spreading under the site.

After a 2009 U.S. Environmental Protection Agency (EPA) order failed to result in clean-up of the site, the Nation filed suit in 2013 seeking damages against the responsible parties and their insurance companies. Among other defendants, the Nation sued Ohio, contending Ohio had an obligation under its insurance policy with Shiprock to indemnify Shiprock for the accident. Complaint, Petition, Exhibit I, at ¶ 12, pg. 5. The Nation alleged in its Complaint that Ohio had not appropriately tendered the full amount of its policy to indemnify Shiprock, but instead had improperly credited defense costs, a separate category of money promised under the policy, as indemnity costs. *Id.* at ¶ 34, pg. 10. The Nation sought declaratory judgment that Ohio was required to indemnify Shiprock. *Id.*, ¶¶ 77-81, pg. 17-18.

Ohio has continually sought summary judgment finding it has paid all it is required to pay under its insurance policy. After being denied twice by the District Court, Ohio now asks this Court to overturn those interim denials of summary judgment. Ohio couches its argument as a jurisdictional issue, asking this Court to find that the District Court lacks jurisdiction to rule on the merits of Ohio's contractual obligations.

This Court should deny this attempt to evade the District Court's review of Ohio's promises under the policy, and allow that court to proceed to final judgment.

FACTS

The Petition contains significant omissions regarding the underlying facts and procedural history of this case. To remedy this flaw, the Nation states the following, which is based on the stipulated jurisdictional facts the Nation and Ohio submitted to the District Court, and undisputed

facts the Nation and Ohio submitted with their cross-motions for summary judgment[1]:

1. Ohio is an insurance company with its principal place of business in Boston, Massachusetts.
2. Ohio is not a registered corporate entity on the Navajo Nation.
3. Ohio's relationship to the subject litigation is its insurance policy with a co-defendant, its insured, Shiprock.
4. The Navajo Nation is not an insured and is not named in the policy between Shiprock and Ohio.
5. While the Shiprock policy establishes coverage for a business located at 126 Bishop Drive, Gallup, New Mexico, 87301-9403, Shiprock's mailing address had been amended to P.O. Box 1875, Chinle, Arizona, 86503-1875, by the time of the gas spill.
6. The Shiprock policy includes separate promises by Ohio to 1) defend and 2) indemnify Shiprock. The indemnity limit is $1 million. The defense provision has no stated limit. The coverage territory for the commercial general liability portion of the policy is the United States.
7. Shiprock is a Navajo-owned business which is not incorporated, but it is certified under the Navajo Business Opportunity Act for preferential treatment in the Navajo Nation as a Navajo-owned business.
8. The owners of Shiprock are Daniel and Dorothy Felix. Dorothy Felix is an enrolled member of the Navajo Nation.
9. On or about July 12, 2004, Defendant PNR contracted with Defendant Milam Building Associates, Inc. (Milam) for the renovation of PNR's existing gas station located at Indian Route 7 and C Street in Chinle, Arizona, on tribal trust land within the formal Navajo Indian Reservation (PNR Site). The renovation included replacing the underground petroleum storage tanks at the PNR Site with above-ground storage tanks (ASTs).
10. Milam, as the general contractor, entered into a subcontract with Shiprock, under which Shiprock would provide concrete work for PNR's project.
11. Sometime in March, 2005, while Shiprock was performing work at the PNR site, an employee of Shiprock damaged a fuel supply line that fed fuel from the ASTs to the fuel islands. Over 15,000 gallons of fuel were released on the site.
12. By letter of August 14, 2007, Ohio accepted coverage in connection with the PNR Site under Shiprock's policy.
13. According to the EPA, the petroleum release at the PNR Site has contaminated soil and has

[1] This Court has limited responses by Real Parties in Interest to fifteen pages, which the Nation interprets to mean fifteen pages of argument, not including the certificate of service. Given the complexity of the case, the Nation suggests this Court request and review the full record of proceedings from the District Court to provide it a fuller background than can be adequately discussed within the page limit, or than was discussed in Ohio's Petition. At the very least, the Nation believes the stipulation of jurisdictional facts between Ohio and the Nation, and the Nation's and Ohio's statement of facts filed with their cross-motions for summary judgment, are essential to the Court's consideration of the Petition. The Nation files concurrently with this Response a Motion to Supplement the Record, which, if granted, would add those pleadings, along with several other District Court documents referenced in this Response, to the record before this Court.

affected groundwater on the Navajo Nation. See EPA Administrative Order issued under Section 7003 of the Solid Waste Disposal Act, commonly referred to as the Resources Conservation and Recovery Act, 42 U.S.C. § 6973, signed on August 27, 2009 and effective September 11, 2009.

14. In 2007, Defendant PNR filed a complaint in the District Court against Ohio and a number of other parties involved in the spill. The Nation was not a party to the case. One of PNR's claims against Ohio was for breach of a settlement agreement the two parties had entered into, which required Ohio to fund "remediation efforts."
15. Ohio challenged the subject matter and personal jurisdiction of the District Court and sought summary judgment on several merits claims, including that it fulfilled *nalyéél* under its settlement agreement with PNR, and its indemnity obligations under the policy.
16. In 2011, the District Court issued an order finding subject matter and personal jurisdiction over Ohio.
17. In the same order, the District Court concluded Ohio would fulfill *nalyéél* to PNR under the settlement agreement once it spent $1 million.
18. In that same order, the District Court denied summary judgment to Ohio on whether it fulfilled its indemnity obligation under its policy with Shiprock, as the court found there was a dispute of material fact as to whether Ohio's expenses were indemnity or defense costs.
19. In 2013, the Nation filed its own complaint in the District Court, against a number of defendants, including Ohio and several other insurance companies. The complaint sought declaratory judgment against the insurance companies that they had a responsibility under their policies to pay damages to the Nation, as the landowner of the trust land affected by the spill.
20. The Nation and Ohio filed cross-motions for summary judgment, and the District Court held a hearing.
21. After that hearing, at the request of the District Court, both parties filed proposed orders.
22. The District Court issued its order, based on the Nation's proposed order, granting partial summary judgment on several procedural issues, including subject matter and personal jurisdiction. It ruled there were disputes of material fact on the issue whether Ohio fulfilled its indemnity obligation under its policy with Shiprock.

I. A WRIT OF PROHIBITION IS INAPPROPRIATE IN THIS CASE, AND THEREFORE THE ALTERNATIVE WRIT SHOULD BE QUASHED AND THE PETITION DENIED.

Ohio seeks a writ of prohibition to overturn the September 10, 2018 order of the Chinle District Court granting partial summary judgment to the Nation. *See* Petition Ex. E (2018 Order). Such writ is only appropriate when a lower court exceeds its jurisdiction. *In re A.P.*, 8 Nav. R. 671, 678 (Nav. R. 2005). Further, there must be no adequate remedy on appeal. *Id.*

This Court previously denied two other insurance company's petitions for writs of

prohibition against the District Court in the same case brought by the Nation. *Employers Mutual Casualty Co. v. Chinle District Court*, No. SC-CV-11-18, Order Denying Permanent Writ of Prohibition (March 23, 2018); *Zurich American Insurance Company v. Chinle District Court*, No. SC-CV-14-18, Order Denying Permanent Writ of Prohibition (April 10, 2018). In those writs, both insurance companies, as here, sought writs of prohibition to challenge the subject matter jurisdiction of the District Court.[2] *See Employers*, No. SC-CV-11-18, Petition for Writ of Prohibition; *Zurich*, Petition for Writ of Prohibition. In both cases, this Court denied those petitions, stating:

> This Court is of the opinion that the Petitioner has a remedy at law by appeal after the merits of the case are fully determined in the Chinle District Court. This Court will not usurp the authority of the lower court to make determinations of merit at the district court level.
>
> This Court determined that "an original action concerning an extraordinary writ is not a substitute for an appeal." *Hurley v. To'hajiillee Family Court*, 8 Nav. R. 705, 708 n.1 (Nav. Sup. Ct. 2005).

Id.

All three petitions were filed by insurance company defendants from the same underlying case, and all three attacked the jurisdiction of the District Court. The same outcome should apply here as in the first two petitions; Ohio similarly attempts an end-run around the appellate rules to

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[2] After this Court denied its petition, Employers Mutual Casualty (EMC) filed a complaint in the Federal District Court of Arizona. *See EMC v. Branch*, No. 3:18-cv-08110. Under Ninth Circuit precedent, this Court's denial fulfilled EMC's requirement to exhaust tribal court remedies, thereby allowing EMC to go directly into federal court. *See Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1217 (2007). The federal district court recently ruled the District Court lacked subject matter jurisdiction over EMC. Order Granting Summary Judgment, No. 3:18-cv-08110 (April 4, 2019). The Nation filed an appeal with the Ninth Circuit Court of Appeals on April 22, 2019. *See* Notice of Appeal, No. 19-15835. However, as noted above, the facts relevant to EMC and Zurich are different from this case, as both insured non-Indian entities, while Ohio insured Shiprock, a Navajo-owned business, and therefore a "member" for jurisdictional purposes. *See* Facts, ¶¶ 7, 8, *supra*, at 3.

usurp the authority of the District Court in an ongoing case.

As the Court has already granted an alternative writ in this case, the Nation requests the Court quash that writ and dismiss the Petition. At the very least, the Court should deny a permanent writ.

Regardless, the Nation believes only two of the arguments Ohio raises are actually jurisdictional in nature, and therefore properly considered for a writ of prohibition. Ohio argues that as a non-Indian insurance company, the District Court lacks subject matter jurisdiction under U.S. Supreme Court case law limiting tribal nations' authority over non-members. Petition, at 9-13. Ohio also asserts that the District Court lacks personal jurisdiction due to the alleged lack of insuring any "person" or "risk" on the Nation. *Id.*, at 13-14.

However, Ohio also seeks to overturn the District Court's interpretation of the insurance policy, which has no relation to personal or subject matter jurisdiction. Ohio argues the court lacks subject matter jurisdiction because Ohio claims it tendered $1 million under its policy with Shiprock. Petition, at 2-5. The District Court denied Ohio's motion for summary judgment on that merits issue twice, once in 2011 and again in 2018. *See Pic-N-Run v. Milam Building Associates*, No. CH-CV-359-07, Order, October 28, 2011 (2011 Order), Petition Exhibit D, at *9-10; 2018 Order, at 14-18. The court ruled both times that there were disputes of material fact that precluded summary judgment on whether Ohio fulfilled its indemnity obligations under the policy. *Id.*

In its Petition, Ohio distorts the 2011 ruling of the District Court, suggesting that court held Ohio had fulfilled its contractual obligations to Shiprock under its policy. Petition, at 4. As noted in the 2018 Order, the District Court in 2011 ruled that Ohio had fulfilled *nalyéél as to PNR's separate contract claims*. 2011 Order, Petition Ex. D, at *2, 8 ("Ohio's *nalyeeh* argument is an interesting one considering the foundational complaint [PNR] alleges against Ohio which is that

Ohio failed to provide testing and remediation *as agreed pursuant to the Agreement*." (emphasis added)); 2018 Order, Petition, Ex. E, at 14-15. The finding concerning *nalyéél* clearly applied to a claim by PNR that Ohio breached specific language in a settlement agreement *between those parties*. *See* 2011 Order, at *2, 8. The District Court did not rule that Ohio's alleged expenditure of close to $1 million fulfilled its obligations *under its insurance policy with Shiprock*; if it had, the later denial of summary judgment in the same order would have been unnecessary. *See id.*, at *9-10. The settlement agreement and the policy have different language, and therefore different obligations for Ohio. Facts, ¶¶ 6, 14, *supra*, at 3, 4.[3] As such, the fulfillment of the agreement did not necessarily mean fulfillment of the policy. As in the later 2018 Order, the court ruled it could not grant summary judgment on Ohio's claim related to the policy, because there were disputed questions of fact whether the amount spent was for indemnity or defense costs. *Id.* Those factual disputes remain before the District Court while Ohio seeks improper interim relief from this Court.

Ohio seeks appellate review of the District Court's summary judgment rulings on a merits issue of contract interpretation. That issue is not jurisdictional, and Ohio makes no actual argument to support its assertion that the District Court lacks *subject matter jurisdiction* to decide the question. It simply seeks this Court to engage in premature review of its contract claims it raised in its summary judgment motions, despite being denied twice due to disputes of material facts, that have not yet been resolved by the District Court.[4]

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[3] Even if the language in the agreements were the same, PNR did not contest whether the expenses fulfilled the Ohio's obligation to fund "remediation efforts" under the settlement agreement. 2011 Order, at *8. In this case, the Nation does contest the claim that all of Ohio's expenses are properly indemnity, as opposed to defense costs, under the policy.

[4] Ohio accuses the Nation of improperly seeking a "horizontal appeal" of the 2011 Order. Petition, at 4-5. However, by Ohio's own factual assertions in the Petition, the Nation could not seek any kind of "appeal;" it was not even a party to that case, as its complaint was filed in 2013. *Id.*, at 8. Even so, as discussed above, the District Court did not, in fact, rule that Ohio fulfilled *nalyéél* as

Even if this Court entertains its other arguments, Ohio cannot argue anything related to *nalyéél* or its alleged tendering of the full amount of its indemnity obligation under the policy, as those matters do not implicate the District Court's subject matter or personal jurisdiction. The District Court's ruling on the policy was fundamentally a merits decision, not a jurisdictional one, and therefore not a proper subject for a petition for a writ of prohibition.

II. THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION OVER OHIO.

Contrary to Ohio's arguments, the District Court correctly held it had subject matter jurisdiction over Ohio. The District Court found jurisdiction under both the Treaty of 1868 and the first and second exceptions to *Montana v. United States*, 450 U.S. 544 (1981). 2018 Order, Petition Ex.t E, at 6-10.[5]

A. The District Court has subject matter jurisdiction under the Treaty of 1868.

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it relates to its policy with Shiprock, but as it relates to a wholly separate settlement agreement with PNR, to which the Nation was not a party. Therefore, even if the Nation was a party at the time of the 2011 Order, it would have no need to "appeal" that ruling, as it had nothing to do with the Nation's claims concerning indemnity costs under Shiprock's policy. Indeed, as noted above, the 2011 ruling of the District Court denying Ohio's summary judgment on indemnity is entirely consistent with the 2018 ruling, and therefore there is no actual contradiction on the issue before this Court. It is in fact Ohio that sought, through its cross-motion for summary judgment, a "horizontal appeal" on the issue whether there was a dispute of material fact on whether its expenses were properly indemnity or defense costs.

[5] Ohio similarly had challenged subject matter and personal jurisdiction of the District Court in the prior litigation with PNR. *See* Facts, ¶ 15, *supra*, at 4. In the 2011 Order, which Ohio relies on for its incorrect assertion that it prevailed on its policy claims, the District Court noted Ohio had already *conceded* subject matter jurisdiction in a motion filed in 2008. 2011 Order, Petition Ex. D, at *4. The District Court also found jurisdiction under the Treaty of 1868, under the same analysis the Nation provides here, and which the District Court again accepted in the 2018 Order. *Id.* at *3-4. The court also found personal jurisdiction, and noted that the court had denied a similar motion by Ohio in 2008. *Id.* at *5-6. Ohio then raised the exact same defenses in the Nation's case already resolved by the Chinle District Court in the PNR case, and that it asks this Court to accept now. Therefore, it is again Ohio that actually sought a "horizontal appeal" from the District Court, not the Nation, as discussed in note 4, *supra*.

Ohio does not mention the Treaty at all in its Petition, relying solely on its interpretation of *Montana*, despite the District Court's discussion of the Treaty as a separate and independent source of jurisdiction. *See id.*, at 6; Petition, at 9-13.

The absence of any challenge to the District Court's ruling concerning the Treaty should be dispositive; whether or not *Montana* is fulfilled, Ohio makes no argument that jurisdiction is lacking under the Treaty. Nor could it under this Court's consistent holdings that the ultimate source of the Nation's jurisdiction over non-Indians is the Treaty. *See* 2018 Order, at 6 (collecting cases). Since Shiprock was present and caused damage on tribal trust land, and Ohio promised to indemnify Shiprock for causing that damage, the Treaty right to exclude vests the District Court with authority to decide Ohio's contractual obligations under its policy. *See id.*; Treaty of 1868, Art. II. Ohio makes no attempt to argue around these precedents; indeed, it fails to even acknowledge their existence. *Cf.* Navajo Rules of Professional Conduct, Rule 3.3(a)(3) (requiring disclosure of adverse legal authority to the tribunal).

B. Assuming *Montana* applied, the District Court has jurisdiction under both exceptions.

Even if the Treaty were not dispositive, Ohio's mischaracterizes the effect of *Montana*. Ohio argues, without any analysis, that the *Montana* rule applies, even though the site of the spill, and therefore the locus of the dispute, is on tribal trust land. Without acknowledging the significance of the status of the land, Ohio asserts that the Nation presumptively lacks jurisdiction unless one of the two exceptions to that presumption are fulfilled, citing *Montana*.[6] Petition, at 10. Ohio fails to discuss or, indeed, mention case law from this Court, or even case law from the Ninth

[6] The U.S. Supreme Court has stated that the status of land may be dispositive in some cases under the *Montana* framework. *Nevada v. Hicks*, 533 U.S. 353, 359 (2001). Though Ohio cites *Hicks* once in its Petition for a different proposition, it does not mention this point. *See* Petition, at 10.

Circuit, including *Window Rock Unified School Dist. v. Reeves*, which states that fulfillment of *Montana* is not required for actions arising on tribal trust land. 861 F.3d 894, 904-05 (2017); *Dale Nicholson Trust v. Chavez*, 8 Nav. R. 417, 428-29 (Nav. Sup. Ct. 2004).

As the District Court correctly held, regardless of whether *Montana* applies, it has subject matter jurisdiction over Ohio, because its insured acted on tribal trust land, and Ohio has promised by contract to pay for damage caused by the gas spill. 2018 Order, at 6-7. Whether Ohio has done so in the amount promised to indemnify Shiprock, is therefore clearly within the District Court's power to decide.

1. Ohio's policy with Shiprock fulfills the first *Montana* exception.

Even assuming *Montana* does apply,[7] the District Court had proper jurisdiction. Ohio claims that the Nation conceded the first exception, that a tribal court has jurisdiction when a non-Indian has a "consensual relationship" with the Nation or a member of the Nation. Petition, at 11. However, its citation for that alleged concession is to a statement made in pleadings involving *a different defendant*, Zurich Insurance Company (Zurich), and not in the pleadings filed in the cross-motions for summary judgment between the Nation and Ohio.[8] Zurich insured PNR, a non-

[7] In its last opinion on subject matter jurisdiction, this Court required the district courts to analyze the question under both the Treaty and *Montana*, even if the underlying action arose on trust land. *Doe BF v. Diocese of Gallup*, 9 Nav. R. 527-530 (2011). The Ninth Circuit similarly has suggested that tribal jurisdiction over non-Indian conduct that affects tribal trust land can exist under either framework. *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 2019 WL 1781404 (2019). That court held that even if jurisdiction did not exist under the right to exclude, the tribe may still have jurisdiction if the facts meet either *Montana* exception. *Id.* at *9. Consistent with this Court's ruling in *Doe* and the Ninth Circuit's approach in *Knighton*, the Nation argues here there is jurisdiction under both frameworks.

[8] As noted on page 5, *supra*, Zurich is one of the two other insurance company defendants who filed, but were denied, a writ of prohibition against the District Court in this same case. The reference to the Nation's concession is to a response filed by the Nation to Zurich's motion to dismiss in the district court. Petition, at 11. That motion to dismiss was ultimately denied, Order, February 8, 2018, Motion to Supplement Record, Exhibit 4, after the Nation sought a writ of

Indian business. *See* Order, February 8, 2018, at 3 (attached to Motion to Supplement Record, Ex. 4). Under such circumstances, the Nation correctly noted that Zurich lacked a consensual relationship with the Nation or its members, and therefore the first exception did not apply. *Id.*, ¶ 4.

Ohio, however, insures Shiprock, which, at the time of the gas spill, was registered with the Nation's Business Regulatory Department as a priority business under the Navajo Business Opportunity Act, and therefore held itself out to be a business owned by an enrolled Navajo. Facts, ¶ 7, *supra*, at 4; 5 N.N.C. § 204(A)(1) (2005). As such, the Nation did not concede the first *Montana* exception against Ohio. The Nation argued, and the District Court agreed, that the Navajo ownership of Shiprock created a consensual relationship. 2018 Order, at 7-8. As found by the District Court, Ohio has a consensual relationship, the insurance policy, with a Navajo member, Shiprock, and therefore there is jurisdiction under the first exception of *Montana*.

2. Ohio's and Shiprock's conduct fulfills the second *Montana* exception.

As the District Court also correctly found, the catastrophic nature of the spill, and Shiprock's conduct in causing it, fulfills *Montana's* second exception.[9]

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mandamus from this Court. *See Navajo Nation v. Chinle Dist. Ct.*, No. SC-CV-03-18. Though not mentioned by Ohio, the District Court found jurisdiction over Zurich under the Treaty and the second *Montana* exception, and therefore the Nation's concession concerning the first exception did not mean the Court lacked jurisdiction over Zurich under the other two analyses. Order, *supra*, at 5-7.

[9] Ohio argues, through unsubstantiated allegations not yet vetted by the District Court, that Shiprock is only responsible for ".066%" of the contamination, other spills prior to 2005 account for most of the pollution under the site, and that another defendant, Spencer Riedel, was actually primarily responsible for the spill. Petition at 7. These are all disputed assertions of fact for the District Court to resolve, but, even if true, none of them speaks to jurisdictional questions nor do any absolve Shiprock, and therefore Ohio, from the obligation to provide compensation to the Nation for the damage. Shiprock is, at the very least, partially responsible for the spill and the continuing damage to the Nation's land and water.

Montana's second exception recognizes the Nation's jurisdiction if the non-member's "conduct threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe." 450 U.S. at 566. The U.S. Supreme Court has described the exception as applying when it is "necessary to protect tribal self-government or to control internal relations." *Atkinson Trading Post v. Shirley*, 532 U.S. 645, 658 (2001). It has further described the exception, in dicta, as applying when the non-member's conduct "imperils the subsistence of the tribal community." *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 341 (2008).

Ohio contends its only conduct relevant to the litigation is its agreement to insure Shiprock and its payment of funds in accordance with the insurance policy. Petition, at 12-13. However, even if, despite that conduct, Ohio could somehow escape the Nation's jurisdiction, it is not merely insuring Shiprock or paying something related to the spill that directly affects the political integrity, economic security, or the health or welfare of the Nation. It is, as alleged in the Nation's complaint, also the refusal to pay full indemnity under the policy — by improperly crediting defense costs as indemnity costs — that is impacting the health and welfare of the Nation.

Specifically, Ohio's refusal to accept full liability coverage, if proven, threatens the health and welfare of the Nation because it impairs the ability of the Nation to remedy the damage done to its lands and groundwater. The provision of clean land and water is vital to the Nation's continued existence. Given the nature of the damage, Ohio's denial of full liability coverage also imperils the Nation's subsistence; nothing is more fundamental to the Nation's subsistence than clean land and water. It is therefore essential to the Nation's self-government for its courts to establish Ohio Casualty's duty to indemnify its insured.

Further, the gasoline spill itself independently impacts the political integrity, economic

security, and health and welfare of the Nation, and all those responsible to remediate that spill are therefore properly under the District Court's jurisdiction, including insurers. The promise to indemnify Shiprock in the policy connects Ohio to the underlying event. Indeed, it is necessary for tribal self-government to be able to bring before the District Court all parties with a responsibility to pay damages, including insurers, because otherwise the Nation cannot effectively remedy the ongoing pollution to its land and water and protect the health and welfare of the Navajo people. An insurance company, by characterizing its own defense costs as indemnity costs for damage done by its insured to Navajo Nation lands, directly affects the responsible party's ability to pay for that damage and so is appropriately joined as a defendant. An insurer with a responsibility to assist its insured in paying for such damage therefore is appropriately under the Nation's jurisdiction.

III. THE DISTRICT COURT HAS PERSONAL JURISDICTION OVER OHIO.

Despite clear statutory law to the contrary, Ohio asserts the District Court lacks personal jurisdiction over it. Ohio argues that when it issued its policy, Shiprock's business address was in Gallup, and therefore its policy with Shiprock was not "a Navajo Nation insurance policy," a term left undefined. Petition, at 13-14.

The Nation's Long Arm Statute bars this argument, as the District Court properly held. That statute recognizes personal jurisdiction over a party that "contract[s] to ensure any person, property, or risk located within the Nation." 7 N.N.C. § 253a(c)(6) (2005). Ohio appears to argue that a business address on a policy is dispositive of whether it insured a "person" or "risk" within the Nation. However, Ohio clearly insured Shiprock's activities at the PNR site, as it *accepted coverage for the spill*. Therefore, it clearly contracted to insure Shiprock as a "person" and insured the "risk" of Shiprock's activities within the Nation. Ohio fails to explain how it could

simultaneously accept coverage for Shiprock's conduct within the Nation yet not be "contracting to insure" Shiprock within the Nation. That argument has no merit.

Moreover, Ohio omits a key fact known to the District Court: Shiprock changed its mailing address under the policy to Chinle, and notified Ohio accordingly, before the spill occurred. Facts, ¶ 5, *supra*, at 3. Therefore, Ohio knew then, as it knew when it filed its Petition with this Court, that Shiprock's business mailing address under the policy at the time of the spill was "within the Nation."

Further, Ohio's policy covered Shiprock's activities anywhere in the United States, which includes the PNR site in Chinle. Facts, ¶ 6, *supra*, at 3. Therefore, there can be no reasonable debate that, even adopting Ohio's narrow interpretation of Section 253a(c)(6), it contracted to insure Shiprock "within the Nation."[10]

As noted by the District Court, though without mention or comment by Ohio in its Petition, this Court requires further analysis beyond the Long Arm Statute as to whether assertion of jurisdiction is fair under Navajo Due Process. *See Navajo Transport Services v. Schroeder*, 8 Nav. R. 103, 106 (Nav. Sup. Ct. 2007). The act of insuring a Navajo business that engaged in business on tribal trust land within the Nation with an address on the Nation is sufficient to fairly bring Ohio under the jurisdiction of the Nation's courts. Ohio makes no argument otherwise in its Petition.

IV. THE DISTRICT COURT PROPERLY DENIED OHIO'S SUMMARY JUDGMENT ON *NALYEEH*.

Even if the Court entertains Ohio's merits arguments that it has fulfilled its contractual obligations under Shiprock's policy by tendering $1 million, the District Court correctly ruled,

[10] Ohio also argues that there is no personal jurisdiction because the Nation is not an insured under the policy. Petition, at 12-14. There is no requirement that the Nation be an insured for personal jurisdiction to apply, and Ohio provides no legal authority for that assertion. The Long Arm Statute indisputably applies as long as the insurance company insures *any* person or risk within the Nation.

twice, that there are factual disputes that need to be resolved. 2011 Order, at *9-10; 2018 Order, at 18.

As the District Court correctly interpreted the policy, only indemnity costs are subject to the $1 million limit; there is no equivalent limit for defense costs. 2018 Order, at 17-18; Facts, ¶ 6, *supra*, at 3. As such, *nalyéél* for the Nation, and therefore to the Navajo People, whose land and water have been damaged, is only satisfied when Ohio has spent $1 million on indemnity. Ohio is therefore required to show that its expenses are properly indemnity costs, and not defense costs, which means, when the nature of Ohio's expenses are disputed, actual facts in the District Court record, as resolved in an evidentiary hearing. *See id.* The District Court has told Ohio that twice, once in 2011, and once in 2018, but instead of moving forward to that hearing on the issue, Ohio seeks to override the District Court's role and have this Court rule that the District Court lacks any jurisdiction to make those findings. As discussed above, that is not a proper use of a writ of prohibition. But even if this issue were of jurisdictional significance, there are unresolved disputes of material fact, and the District Court is the appropriate forum to resolve them. Ohio's argument as to fulfillment of *nalyéél* may conceivably have some merit. However, it has yet to show that through the appropriate process in the District Court. As there continue to be unresolved factual disputes, Ohio's appropriate remedy lies with the District Court, and not this Court.

CONCLUSION

Based on the above, the Petition should be denied.

Respectfully submitted this 28th of April 2019, *Nunc Pro Tunc*, for April 26, 2019.

Paul Spruhan, Assistant Attorney General
NAVAJO NATION DEPARTMENT OF JUSTICE
Post Office Box 2010
Window Rock, Arizona 86515-2010

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2019, the original of this Response was filed in person to:

Clerk of the Court
Navajo Nation Supreme Court
Window Rock (Navajo Nation) Arizona 86515

and a copy of the foregoing was mailed by email (to those whose email address is known) and U.S.P.S. 1st class mail to:

Samantha B. Kelty, Esq.
C. Benson Hufford, Esq.
Nathan D. Schott, Esq.
HUFFORD HORSTMAN MONGINI PARNELL & TUCKER, P.C.
120 North Beaver
Post Office Box B
Flagstaff, Arizona 86001

Counsel for Pic-N-Run, Inc.

David Armstrong, Esq., Pro Hac Vice
Craig C. Hoffman, Pro Hac Vice
BALLARD SPAHR, LLP
1 East Washington Street, Suite 2300
Phoenix, Arizona 85004

Counsel for Pic-N-Run, Inc.

Sampson Martinez, Esq.
THE LAW OFFICES OF SAMPSON MARTINEZ
Post Office Box 2415
205 South Second Street
Gallup, New Mexico 87301

Counsel for Estate of Sybil Baldwin and Walter Baldwin

Jason Boblick, Esq., Pro Hac Vice
SHORALL McGOLDRICK BRINKMAN
1232 East Missouri Avenue
Phoenix, Arizona 85014

Counsel for Daniel Felix and Dorothy Felix

Howard Brown, Esq.
Tom Shorall, Esq., Pro Hac Vice

SHORALL McGOLDRICK BRINKMAN
1232 East Missouri Avenue
Phoenix, Arizona 85014

Counsel for Felix and Ohio Casualty Insurance Co.

John Trebon, Esq.
THE LAW OFFICES OF JOHN TREBON, P.C.
308 North Agassiz Street
Flagstaff, Arizona 86001

Counsel for Spencer Riedel

Kevin C. Barrett, Esq. Pro Hac Vice
BARRETT | MATURA
8925 E. Pima Center Parkway, Suite 100
Scottsdale, Arizona 85258

Counsel for Auto-Owners Insurance Company

Erin E. Byrnes, Esq.
THE STOREY LAWYERS, PLC
8096 N. 85th Way, Suite 105
Scottsdale, Arizona 85258

Counsel for Auto-Owners Insurance Company

Barry Klopfer, Esq.
LAW OFFICE OF BARRY KLOPFER P.C.
224 West Coal Avenue
Gallup, New Mexico 87301

Counsel for Employers Mutual Casualty Insurance Company

Mike Raymond, Esq.
RAYMOND, GREER & McCARTHY, P.C.
7373 N. Scottsdale Road, Suite D-210
Scottsdale, Arizona 85253

Counsel for Employers Mutual Casualty Insurance Company

James E. Ledbetter, Esq.
THE LEDBETTER LAW FIRM, P.L.C.
1003 North Main Street
Cottonwood, Arizona 86326

Counsel for Ohio Casualty Insurance Company

Kenneth H. Brendal, Esq.
Clyde P. Halstead, Esq.
MANGUM, WALL, STOOPS & WARDEN, P.L.L.C.
112 N. Elden Street
Flagstaff, Arizona 86001

Counsel for Zurich American Insurance Company and Robert Farr

Keith C. Smith, Esq.
SMITH & SHELLENBERGER, LLC
11990 Grant Street, Suite 100
Northglenn, CO 80233

Counsel for Liberty Mutual

Dominica C. Anderson, Esq.
DUANE MORRIS LLP
Spear Tower
One Market Plaza, Suite 2200
San Francisco, CA 94105-1127

Counsel for Colorado Casualty Insurance Company

Michael P. Upshaw, Esq.
MARGRAVE CELMINS, P.C.
8171 East Indian Bend Road, Suite 101
Scottsdale, Arizona 85250

Counsel for Eldridge and Milam Building Associates, Inc.

Dean R. Cox, Esq.
DEAN R. COX, L.L.C
107 North Cortez, Suite 201
Prescott, Arizona 86301

Counsel for Vernon and Stella Eldridge and Milam Building Associates, Inc.

SHIPROCK CONSTRUCTION COMPANY
Post Office Box 3089
Shiprock, New Mexico 87420

By: _____
Dana Martin, Senior Legal Secretary
Navajo Nation Department of Justice