IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Amerind Risk Management Corporation, Plaintiff, vs. Myrna Malaterre, Carol Belgarde, and Lonnie Thompson, Defendants.	Case No: 4:07-cv-059 **DEFENDANTS' RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

Defendants Myrna Malaterre, Carol Belgarde, and Lonnie Thompson (Malaterre) submit this response in opposition to AMERIND Risk Management's Motion for Summary Judgment. As shown below, the Motion is without merit.

I. STATEMENT OF UNDISPUTED MATERIAL FACTS

(1) On October 19, 2002, a fire occurred at Housing Unit #1221 on the Turtle Mountain Indian Reservation. (Ex. 1).

(2) The housing unit was owned by the Turtle Mountain Housing Authority (TMHA). (*Id.*).

(3) Stacy Bruce and Ruth Poitra died as a result of the fire. (*Id.*).

(4) Lonnie Thompson was seriously injured in the fire. (*Id.*).

(5) On January 23, 2003, a wrongful death lawsuit was commenced in Turtle Mountain Tribal Court. (*Id.*).

(6) On February 19, 2003, TMHA filed a Motion to Dismiss, claiming sovereign immunity. (Ex. 3).

(7) On April 10, 2003, TMHA submitted a second brief on the sovereign immunity issue. (Ex. 4).

(8) On July 10, 2003, a hearing was held regarding TMHA's failure to respond to discovery requests and failure to produce the AMERIND Risk Management (AMERIND) insurance policy. The Motion to Compel was granted.

(9) On July 15, 2003, counsel for Malaterre wrote to TMHA:

> It is pretty apparent that the *St. Claire* decision will have a strong bearing on this case. Rather than serve an Amended Complaint on Amerind, I would ask that we first sit down and try to settle the case. We have an extremely strong case and it is clear that based on *St. Claire*, this case will go forward, regardless of who is the named defendant. Amerind will be part of the case, either as the insurer or as the named defendant. (Emphasis added.) (Ex. 5).

(10) On July 21, 2003, the Turtle Mountain Tribal Council formally adopted a Resolution (No. TMBC 2454-07-03) waiving sovereign immunity for the TMHA, to the extent of insurance coverage. (Ex. 39).

(11) On July 21, 2003, the Tribal Court issued an order compelling TMHA to produce the requested discovery information pertaining to insurance coverage. (Ex. 6).

(12) On August 13, 2003, attorney Ronald Hodge filed a Notice of Appearance on behalf of AMERIND. (Ex. 8).

(13) On September 5, 2003, the plaintiffs served their First Amended Complaint. The new pleading added Lonnie Thompson as a plaintiff and AMERIND as a defendant. (Ex. 9).

(14) On October 13, 2003, the First Amended Complaint was served on attorney Ronald Hodge, counsel for AMERIND.

(15) On October 24, 2003, AMERIND submitted its Answer. (Ex. 10).

(16) On October 24, 2003, TMHA submitted a third brief on the sovereign immunity issue. (Ex. 11).

(17) On January 29, 2004, AMERIND filed a Motion to Dismiss, claiming lack of personal and subject matter jurisdiction. (Ex. 14).

(18) On January 30, 2004, TMHA filed its fourth brief requesting that the case be dismissed on the grounds of sovereign immunity. (Ex. 15).

(19) On March 11, 2004, Malaterre opposed the Motion to Dismiss by stating, in part:

> "… it should be noted that neither Amerind nor Defendant Turtle Mountain Housing Authority ("TMHA") has ever produced a copy of the relevant insurance policy." (Ex. 16).

(20) On July 1, 2004, Malaterre filed a Declaratory Judgment action in U.S. District Court. See *Malaterre v. AMERIND Risk Management* (Civ. No.: A4-04-088).[1] (Ex. 17).

(21) In October of 2004, AMERIND provided unsigned discovery responses. (Ex. 38).

(22) On January 6, 2005, the United States Magistrate ordered AMERIND to produce the relevant insurance policy in effect on the date of the fire. (Ex. 18). Two years after this lawsuit began, AMERIND finally produced the insurance policy.

(23) On April 6, 2005, TMHA served responses to the Malaterre plaintiffs' Subpoena Duces Tecum (Ex. 37).

(24) On April 29, 2005, TMHA served supplemental responses to the Malaterre plaintiffs' Subpoena Duces Tecum. (Ex. 36).

(25) On June 20, 2005, the Honorable Judge Daniel Hovland issued an "Order Granting Defendant's Motion to Dismiss" in the declaratory judgment action. (Ex. 19).

(26) On June 22, 2005, counsel for Malaterre wrote to AMERIND and TMHA. One of the options being considered in the tribal court action was:

> "We could stipulate to dismiss TMHA and proceed only against Amerind Risk Management." (Ex. 20).

(27) On September 9, 2005, a hearing notice for all pending motions was served upon AMERIND and TMHA. (Ex. 21).

(28) On September 20, 2005, an Amended Notice of Hearing was served on AMERIND and TMHA. (Ex. 22).

(29) On September 23, 2005, TMHA served its Response to Plaintiff's Notice of Hearing on AMERIND and the plaintiffs. (Ex. 23).

(30) On September 23, 2005, TMHA informed AMERIND that a stipulation was being discussed. The stipulation stated, in part:

> 2. Pursuant to the decision entitled St. Claire v. Turtle Mountain Chippewa Casino, (TMAC 97-013), the Plaintiffs amended their Complaint and added Amerind Risk Management as a

[1] See *Malaterre v. AMERIND Risk Management*, 373 F. Supp.2d 980 (D.N.D. 2005). This file contains a fairly lengthy recitation of all the underlying facts in this case.

named Defendant. (A copy of the St. Claire case is attached to this Stipulation.)

3. In reliance upon the St. Claire decision, Plaintiffs will proceed with their civil action against Amerind Risk Management.

4. In reliance upon the St. Claire decision, the Plaintiffs stipulate to dismiss the Turtle Mountain Housing Authority as a named Defendant from this action. (Ex. 26).

(31) On September 29, 2005, the Tribal Court entered its "Order to Reschedule" the hearing on all parties, including AMERIND. The hearing was scheduled for October 20, 2005. (Ex. 24).

(32) On October 19, 2005, TMHA requested to appear at the hearing by telephone. (Ex. 25).

(33) On October 20, 2005, a hearing was held in Turtle Mountain Tribal Court. AMERIND appeared and was represented by attorney Ronald Hodge. As correctly stated by TMHA's counsel during the hearing:

> "Our understanding of this document is, in effect, it would be in response to the Turtle Mountain Housing Authority relative to dismiss, which has been pending for quite a while before the Court and -- and this would simply be plaintiffs' response not to contest that motion.

Pertaining to the stipulation to dismiss, the Court stated:

> "Okay. Again, in light of the motion to dismiss the Turtle Mountain Housing Authority, the Court is going to go ahead and grant that motion." (Ex. 27, pp. 5, 8).

(34) The Tribal Court signed the Order dismissing TMHA on October 20, 2005. (Ex. 26).

(35) On November 11, 2005, AMERIND filed a second Motion to Dismiss. (Ex. 28).

(36) On November 23, 2005, the Turtle Mountain Tribal Court served notice that a hearing would be held on AMERIND's Motion to Dismiss. (Ex. 29).

(37) On November 29, 2005, a hearing was held on AMERIND's Motion to Dismiss. The Motion to Dismiss was denied.

(38) On December 15, 2005, the Tribal Court issued its written Order Denying AMERIND's Motion to Dismiss. (Ex. 30).

(39) On January 6, 2006, AMERIND filed a Notice of Appeal to the Turtle Mountain Tribal Court of Appeals. (Ex. 31).

(40) On March 10, 2006, the Tribal Court of Appeals granted the AMERIND appeal. (Ex. 32).

(41) On March 17, 2006, AMERIND filed an Amended Notice of Appeal to the Court of Appeals. (Ex. 33).

(42) On July 9, 2007, the Turtle Mountain Tribal Court of Appeals issued its opinion rejecting AMERIND's arguments. (Ex. 35).

(43) On September 4, 2007, AMERIND commenced this declaratory judgment action in United States District Court.

(44) Luverne Richard (Dicky) Schroeder is the Business Manager for TMHA. (Ex. 40-1, p. 8). He has worked for TMHA since 1991 and is in charge of insurance claims. (Ex. 40-1, pp. 8, 43). Schroeder attends annual meetings presented by AMERIND, which are not open to the general public, and relays this information to the TMHA Board of Directors. (Ex. 40-1, pp. 55, 91). Besides Schroeder, other employees of TMHA also attend the AMERIND annual meetings including the executive director, housing unit inspectors, and tenant service representatives. (Ex. 40-1, p. 90). Schroeder is also an alternate board of director's member for AMERIND. (Ex. 40-1, pp. 50-52).

(45) AMERIND provides insurance coverage for the housing units maintained or managed by TMHA. (Ex. 40-1, p. 47). The federal funding received through HUD is used, in part, to pay insurance premiums. (Ex. 40-1, p. 35).

(46) Schroeder does not recall anyone from TMHA telling AMERIND that sovereign immunity should not be waived in this case. (Ex. 40-1, pp. 95-97).

II. INTRODUCTION

AMERIND's argument (supported by an affidavit from Kent E. Paul, Chief Executive Officer of AMERIND) that it was unaware of the stipulation to dismiss TMHA is patently false. The undisputed evidence shows that AMERIND was represented by counsel at the hearing where the stipulation was discussed by the parties, including AMERIND, in open court. Rather than asking the court to deny the motion for

submitting a false affidavit, Malaterre would prefer the Court to decide the Motion for Summary Judgment on the merits. However, Malaterre reserves the right to seek sanctions and attorney's fees at the conclusion of the case.

III. THE *ST. CLAIRE* DECISION

In *St. Claire v. Turtle Mountain Chippewa Casino*, the Turtle Mountain Court of Appeals balanced the principles of sovereign immunity with the right of an injured person to seek redress for personal injury.[2] (Ex. 7). The trial court ruled that the Tribal entity waived sovereign immunity up to its insurance policy limits. The *St. Claire* court reversed that decision and held that the Turtle Mountain Chippewa Casino did not waive sovereign immunity by purchasing liability insurance. However, the Court of Appeals further stated:

> Several courts, including the North Dakota Supreme Court, see James v. Young, 43 N.W.2d 692 (N.D. 1950), have held that when the procurement of liability insurance is statutorily mandated, the primary purpose of the insurance is to protect third parties and not to indemnify the insured. (Citations omitted). Other courts have held that an insurance carrier may be joined as a party defendant even absent the joinder of the insured. (Citations omitted).
>
> ***
>
> Therefore, if the insurance procured by the Casino in this case is mandated by tribal or federal law, the Plaintiff may proceed directly against the Casino's insurance carrier, notwithstanding the inability of the Plaintiff to join the Casino as a party defendant.

(Ex. 7, pp. 7-8). Thus, the *St. Claire* decision established, in 1998, the following legal principles in Turtle Mountain:

(1) If a tribal or federal regulation mandated insurance coverage for the tribal entity, then a direct action would lie against the insurance carrier; and

(2) The tribal entity could be dismissed from the case.

[2] It should be noted that Malaterre's counsel in this case was also lead counsel in *St. Claire*.

The *St. Claire* court recognized the harshness of the sovereign immunity doctrine particularly when the tribal entity was mandated to purchase liability insurance coverage. Therefore, the *St. Claire* court held that an injured plaintiff could bring an action against the insurance carrier if insurance coverage was mandated by law. That precedent was followed in the *Malaterre* case.

IV. THE *MALATERRE* DECISION

In *AMERIND Risk Management v. Malaterre* (TMAC 06-003), the Turtle Mountain Court of Appeals once again balanced the principles of sovereign immunity with the right of a plaintiff to have her day in court. As stated by the *Malaterre* court:

> The Appellees [Malaterre] should have the opportunity to demonstrate that the Housing Authority and its employees were negligent and that this negligence resulted in a liability subject to indemnification.

(Ex. 35, p. 2). The *Malaterre* court also examined the applicable policy provisions in the AMERIND policy. The court stated:

> The Court has reviewed the policy and finds nothing therein excluding liability claims arising from losses sustained by tenants or guests in Housing units.[3]

(Ex. 35, p. 9). The ultimate holding of *Malaterre* was a simple affirmation of fairness and due process:

[3] This is the same conclusion reached by the United States District Court in *Malaterre v. AMERIND Risk Management*, 373 F. Supp. 980, 985, n. 5 (D.N.D. 2005), where the District Court stated:

> The Court would note in passing that coverage in this case appears to be relatively clear. The Amerind Risk Management policy was purchased by the Turtle Mountain Housing Authority with federal funds and appears to provide coverage for the claims presented. Federal law requires the purchase of liability coverage by the Turtle Mountain Housing Authority to operate this type of housing project. The liability policy expressly covers third party claims for personal injury or "bodily injury" as defined within the policy. None of the exclusions or defenses under the policy appear to have been triggered. Further, the claims of sovereign immunity asserted by Amerind to avoid coverage appear to be questionable at best. Nevertheless, this Court will afford the tribal courts the first opportunity to address such matters.

> The Court therefore concludes that the lower court did not err in finding that a direct action could lie against Amerind if the Appellees can demonstrate that the Turtle Mountain Housing Authority was negligent and that said negligence breached a duty of care owed to them.

(Ex. 35, p. 10). In *St. Claire* and *Malaterre*, the Turtle Mountain Court of Appeals balanced the respect for traditional principles of sovereign immunity with the fundamental fairness of allowing injured Native Americans their day in court. In North Dakota, a person injured by the Burleigh County Housing Authority is allowed their day in court. In North Dakota, a person injured by the State of North Dakota is allowed their day in court. In North Dakota, a person injured by the United States is allowed their day in court. The *St. Clair* and *Malaterre* decisions simply ensure that Native Americans on the Turtle Mountain Indian Reservation similarly have their day in court.

Moreover, absent the *St. Claire* decision, the *Malaterre* action would have continued as a "typical" wrongful death and personal injury lawsuit against TMHA. However, TMHA's further appearance was not necessary under *St. Claire* so it was dismissed after AMERIND was named as a defendant. The stipulation dismissing TMHA from the underlying lawsuit referenced the *St. Claire* decision and made it clear that the parties were relying upon that decision in the proceeding.

The *Malaterre* Court considered AMERIND's arguments and rejected them after careful consideration. AMERIND does not agree with the *Malaterre* court's decision so it is seeking an order from the federal court.[4] Federal courts must defer to tribal court decisions unless the tribal court did not have jurisdiction to hear the dispute. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

[4] If a party was permitted to challenge a tribal court of appeal's decision in federal court every time it did not agree with the tribal court ruling, there would be little certainty within the tribal court system.

V. TURTLE MOUNTAIN TRIBAL COUNCIL RESOLUTION

On July 21, 2003, the Turtle Mountain Tribal Council formally adopted a resolution waiving sovereign immunity for the TMHA, to the extent of insurance coverage. TMBC 2454-07-03 states, in relevant part:

> WHEREAS, tribal members may be injured by purposeful or neglectful actions by the TMHA or its staff; and
>
> WHEREAS, the Tribe has absolute immunity from suit, and the Turtle Mountain Housing Authority is a political subdivision of the Tribe, therefore is cloaked in the Tribe[']s sovereign immunity; now
>
> THEREFORE BE IT RESOLVED that the Turtle Mountain Housing Authority is cloaked in the Tribe[']s sovereign immunity and to the extent that an insurance policy may have waived its immunity, that it be waived only to the scope of the insurance policy.

(Ex. 39). The Turtle Mountain Tribal Council recognized the unfairness associated with sovereign immunity and allowed tribal members to recover damages for the purposeful or negligent actions by the TMHA.

VI. THE AMERIND INSURANCE POLICY

The relevant portion of the AMERIND Insurance policy states:

> Business Liability Coverage
>
> **We** cover damages a **covered person** is legally obligated to pay for **advertising injury, personal injury** or **property damage** which take place anytime during the term of coverage and are caused by an **occurrence**, unless stated otherwise or an exclusion applies. Exclusions to this coverage are described in the Cause of Loss Exclusions Section.
>
> * * *
>
> **Personal Injury** means injury arising out of one or more of the following:
>
> 1. **Bodily injury**;
>
> **Bodily Injury** means physical injury to one's body, sickness or disease sustained by a person, mental anguish, including death resulting from any of these at any time.

(Exhibit C attached to AMERIND's Memorandum in Support of Motion for Summary Judgment, pp. 111, 120, 122). AMERIND also provided TMHA with a "covered" summary which states:

> Amerind Risk Management Corporation (AMERIND) provides five basic types of coverage to each member Indian Housing Authorities:
>
> - Liability coverage – if the IHA has a claim brought against it by a third party who is claiming bodily injury or property damage arising out of the housing authority's negligence, Amerind will pay if the courts find that IHA was negligent.

Notwithstanding TMHA and AMERIND's assertion of sovereign immunity, the insurance policy provisions are clear:

> **2. Immunity**
>
> **a. Government**
> **We** will waive, both in the adjustment of claims and in the defense of suits against **you**, any government immunity **you** may be entitled to unless **you** request **us** to raise such legal defense prior to our defending **you** in any claim of negligence.
>
> Waiver of immunity as a defense will not subject **us** to liability for any portion of a claim or judgment in excess of the applicable amount of coverage shown in the **Certificate of Coverage.**
>
> **b. Sovereign**
> In the event of a claim or suit, **we** agree to treat it as any other Tort Liability and **we** will not avail the defense of sovereign immunity to which **you** may be entitled by reason of being a Sovereign Indian Nation or Tribal Organization unless **you** request **us** to raise such legal defense prior to **our** defending **you** in any claim of negligence.
>
> Waiver of sovereign immunity as a defense will not subject **us** to liability for any portion of a claim or judgment in excess of the applicable amount of coverage shown in the **Certificate of Coverage.**

> **You** agree to hold **us** harmless and release **us** from any liability because of **our** failure to raise the defense of sovereign immunity, except in those cases where **you** specifically request **us** to do so.

(Ex. C., p. 118). The AMERIND insurance policy clearly states that sovereign immunity is automatically waived in negligence cases **unless** the TMHA requests AMERIND to raise the defense.[5] Moreover, this request must happen before AMERIND assumes defense of the claim.

There is no evidence that TMHA ever requested AMERIND to raise the sovereign immunity defense in the underlying lawsuit. The plaintiffs specifically requested this information from both AMERIND and TMHA. AMERIND responded to the discovery request as follows:

> REQUEST NO. 2: Please provide a copy of all written communications, including e-mails, between Amerind Risk Management and Turtle Mountain Housing Authority from January 1, 1995, to the present.
>
> ANSWER: There are no written communications or email correspondence between AMERIND Risk Management Corporation and Turtle Mountain Housing Authority.

(Ex. 38). TMHA responded as follows:

> REQUEST NO. 4: All documents, written communication, and electronic communications between Turtle Mountain Housing Authority and Amerind Risk Management, from January 1, 2001, to present, including information exchanged between legal counsel for either party.
>
> SUPPLEMENTAL RESPONSE TO REQUEST NO. 4: The Housing Authority objects to Request No. 4 on the ground that it is beyond the scope of the Court's Order in that it is not reasonably related to the issues of sovereign immunity of the Turtle Mountain Housing Authority or of the Defendant, furthermore, it is overly broad, unduly burdensome, and oppressive and seeks some materials that are subject to claims of attorney work product of attorney-client privilege. However, without

[5] This tragic fire occurred on October 19, 2002. The words "justice delayed is justice denied" certainly have never run truer than in this case. Why did it take two years of litigation and a Federal Magistrate's Order to produce a simple liability insurance policy? Why does AMERIND argue that it is entitled to sovereign immunity when the policy clearly states otherwise?

> waiving its objection, the housing authority has made a response, see attached response no. 5.

(Ex. 36). None of the documents or information produced by TMHA or AMERIND included a request to invoke the sovereign immunity defense. If TMHA had requested AMERIND to invoke this defense, it is reasonable to believe that some type of documentation would exist to confirm the request. Further, the TMHA employee in charge of insurance claims, Luverne "Dicky" Schroeder, does not recall anyone from THMA telling AMERIND that sovereign immunity should not be waived in this case. (Ex. 40-1, pp. 95-97). AMERIND is simply not in a position to raise sovereign immunity as a defense in this action.[6]

VII. TRIBAL COURT JURISDICTION

AMERIND relies heavily upon *Montana v. United States, Strate v. A-1 Contractors,* and *Nevada v. Hicks* in support of its arguments regarding the absence of tribal court jurisdiction. This reliance is misplaced.

Montana v. United States, 450 U.S. 544 (1981) *reh'g denied* (June 1, 1981), involved a tribe's attempt to regulate hunting and fishing by non-Indians on non-Indian land within the reservation. The *Montana* court stated, among other things, that the attempted regulation was improper as there was no clear relationship between the regulation and the tribal self-government or internal relations. The *Montana* decision is

[6] AMERIND's legal positions in this matter have evolved since this tragedy occurred almost six years ago.

(1) The tribal court did not have jurisdiction over the underlying dispute. (Ex. 18).

(2) AMERIND did not do business on the Turtle Mountain Indian Reservation. (Ex. 10, 14);

(3) AMERIND was an entity of the Turtle Mountain Indian Tribe and thus entitled to sovereign immunity. (Ex. 28, 33);

(4) It is unfair to dismiss Turtle Mountain Housing Authority (its insured) from the lawsuit. (Ex. 28, 31); and

(5) The case was heard by the wrong judge. (Ex. 31, 33).

The argument regarding an action against AMERIND is the strangest as this has been the law in Turtle Mountain for ten years.

not helpful in the analysis here as the underlying case does not involve the TMHA's attempt to regulate a non-Indian on non-Indian land within the reservation. Instead, the underlying lawsuit involves a tribal member's claim for wrongful death or personal injury damages from an insurance company arising from a fire at a housing unit owned by TMHA and located on the reservation. The tribal court clearly has jurisdiction over the subject matter as the circumstances giving rise to the underlying lawsuit include tribal members injured in tribal property located on tribal land.

Strate v. A-1 Contractors, 520 U.S. 438 (1997), is also not helpful as it involved a two-vehicle accident on a state-owned highway where non-tribe members were injured. The *Strate* court reaffirmed the "general rule" in *Montana* that absent Congressional direction, Indian tribes lack civil authority over the conduct of non-members on non-Indian land within the reservation. The United States Supreme Court stated:

> *Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health or welfare.

Id. at 446. As further stated in *Strate*:

> Such cases, we hold, fall within state or federal regulatory and adjudicatory governance; tribal courts may not entertain claims against nonmembers arising out of accidents on *state* highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question. (Emphasis added.)

Id. at 442. The holding of these cases was clearly limited to "non-Indian land." The present case involves a member's claim for wrongful death or personal injury damages from an insurance company arising from a fire at a housing unit owned by TMHA and

located on the reservation. Since the relevant housing unit in this case is located on tribal land, the *Montana* and *Strate* decisions do not support AMERIND's arguments regarding tribal court jurisdiction.

Further, *Nevada v. Hicks*, 533 U.S. 353 (2001) involved federal and tribal law claims filed in tribal court against Nevada state employees who executed a search warrant against a tribe member for suspected criminal activity outside of the reservation. The court held that the state of Nevada had "considerable" interest in criminal violations that occurred on state land and outside of the reservation. The court also held that the tribal courts do not have "general jurisdiction" to hear claims based upon federal law, specifically 42 U.S.C. § 1983. The underlying case does not involve criminal violations that allegedly occurred off the reservation. Likewise, the plaintiffs in the underlying action are not asserting any claims based upon federal law. The *Nevada* opinion is not helpful in deciding the issues in the present case.

A. TMHA's Federal Funding and Premium Payments to AMERIND.

Notwithstanding that it *only* does business on Indian reservations, AMERIND contends there is no tribal court subject matter jurisdiction in the underlying case. This argument is without merit.

As shown above, AMERIND interacts regularly with TMHA employees and holds annual meetings for those employees. (Ex. 40-1, p. 55). Moreover, TMHA has obtained federal funds from the Department of Housing and Urban Development (HUD) for its block grants in the past several years: 2000 - $5,905,493; 2001 - $6,191,618; 2002 - $5,926,446; 2003 - $5,191,183; and 2004 - $5,378,334. (Ex. 40-1, pp. 34-37, 39-41). TMHA has used these federal funds to purchase liability insurance coverage

through AMERIND as required by federal law: 2000 - $314,160; 2001 - $324,704; 2002 - $370,380; 2003 - $453,109; and 2004 - $418,489. (Ex. 40-1, p. 57, 60, 62-64, 66-67). AMERIND certainly availed itself to the tribal court's jurisdiction as the Malaterre plaintiffs' claims are based, in part, on the insurance policy issued to TMHA by AMERIND which covers activities and units located on the reservation. (Ex. 9).

VIII. FEDERAL DIRECT ACTION

AMERIND is relying upon federal case law and statutes to claim that the Malaterre plaintiffs cannot maintain a direct action against it.[7] This reliance is misplaced as the Malaterre plaintiffs are relying upon established tribal court law, *St. Clair v. Turtle Mountain Chippewa Casino*, in naming AMERIND as a defendant in the tribal court action.

In *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), an insurance company sought a declaratory judgment against members of the Blackfeet Indian tribe, claiming it had no duty to defend or indemnify its insureds. The Supreme Court repeated the "longstanding policy of encouraging tribal self-government." *Id.* at 14. The court also explained that tribal courts play a vital role in tribal self-government and the federal government has consistently encouraged their development. *Id.* at 15. Ultimately, the *Iowa Mutual* court stated that unless the tribal court lacked jurisdiction, the federal court must defer to the tribal court system and refrain from relitigating the issues decided in the tribal court. *Id.* at 19. *See also, Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006) (unless the district court finds that the tribal court lacked jurisdiction, it must

[7] Remarkably, AMERIND argues that the federal statutes and regulations are only designed to protect Indian housing authorities from liability claims. There is no evidence that Congress intended to only protect housing authorities and preclude the public from recovering damages caused by a housing authority's negligent conduct. Why would Congress limit the protection to the housing authorities and ignore the victims of the housing authority's negligence?

enforce the tribal court judgment without reconsidering issues decided by the tribal court).

Unless the federal court determines that the tribal court lacked jurisdiction, proper deference to the tribal court system precludes relitigation of issues raised and resolved in the tribal forum. *See U.S. ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F. 2d. 1273, 1277 (8th Cir. 1987) and *Smith v. Babbitt*, 875 F. Supp. 1353, 1366 (D. Minn. 1995) (tribal courts play a vital role in encouraging tribal self-government and the federal government has repeatedly encouraged their development).

A. Federal Law.

24 C.F.R. § 1000.136(a) states:

> The recipient [housing authority] shall provide adequate insurance either by purchasing insurance or by indemnification against casualty loss by providing insurance in adequate amounts to indemnify the recipient against loss from fire, weather, and liability claims for all housing units owned or operated by the recipient.

The term "liability insurance" generally refers to the insured's responsibility to a third party. *Continental Western Ins. Co. v. Heritage Estates Mut. Housing Ass'n, Inc.*, 77 P.3rd 911, 913 (Colo. App. 2003). As stated in APPLEMAN ON INSURANCE 2d, Section 111.1, p. 10:

> Liability insurance may fittingly be described as general liability insurance insuring either the direct or contingent liability of the insured. As explained in the next section, liability can be classified as third-party insurance because liability insurance does not directly recompense the insured for the insured's own loss. Rather, liability insurance protects the insured against damages which he may be liable to pay third parties arising out of the insured's conduct. In other words, liability insurance protects the insured against monetary consequences of the insured's own tortious conduct as provided for in the liability insurance policy.

Thus, federal law states that TMHA "shall" provide adequate insurance for liability claims. The inclusion of language specifically referencing "liability claims" in 24 C.F.R. § 1000.136(a) clearly shows that Congress intended coverage for injured persons. It is obviously impossible for an insured to file a liability claim against itself so the language only makes sense if it applies to third-party claims.

24 C.F.R. § 1000.138 states:

> Insurance is adequate if it is a purchased insurance policy from an insurance provider or a plan of self-insurance in an amount that will protect the financial stability of the recipient's IHBG [Indian Housing Block Grant] program. Recipients may purchase the required insurance without regard to competitive selection procedures from nonprofit insurance entities which are owned and controlled by recipients and which have been approved by HUD.

Why would the federal regulations require insurance "in adequate amounts to indemnify the recipient against loss from fire, weather, and liability claims" if liability payments were not expected? Why would Congress require Indian tribes to "maintain adequate insurance coverage to protect the financial stability of the housing program" if liability payments were not expected? Why would Congress require in the Scope of Coverage Agreement that the insurer provide coverage for "damages [the housing authority] is legally obligated to pay for … personal injuries" if liability payments were not expected? 24 C.F.R. §§ 1000.136(a) and 1000.138 encompass third-party claims involving the public. Congress clearly contemplated liability insurance coverage for individuals injured as a result of a housing authority's negligence.

Malaterre has never contended that a federal regulation provides a direct action in the underlying case. Likewise, the Tribal Court of Appeals never held a federal statute provided the statutory basis for the direct action. Instead, the Turtle Mountain

Court of Appeals in *St. Claire* and *Malaterre* held that if the tribal entity is mandated to have insurance coverage, then the injured person may bring a direct action against the insurance company. Under 24 C.F.R. §§ 1000.136(a) and 1000.138, federal law mandates insurance coverage for housing authorities, like TMHA, so the plaintiffs can make a claim against AMERIND under tribal law.

With all due respect to this federal court, the viability of the plaintiffs' civil claim has been made by the appropriate court – the Turtle Mountain Court of Appeals. Just as the North Dakota Supreme Court can recognize the right of a victim to sue a manufacturer in strict liability so too can the Turtle Mountain Court of Appeals recognize civil claims such as this one. This Court should defer to the Tribal Court of Appeals and refrain from re-litigating the matter that was already resolved in the tribal system. *Iowa Mutual,* 480 U.S. at 19.

IX. FEDERAL CONFLICT PREEMPTION[8]

AMERIND devotes considerable attention to the creation and development of risk pools for Indian housing authorities. (Brief, pp. 16-24). The history is irrelevant to the issues present in this case and AMERIND's arguments are based on pure speculation.

AMERIND presented no evidence in support of its argument that allowing a lawsuit against it will prevent tribes from obtaining liability insurance. AMERIND presented no evidence that TMHA will not continue in the risk pool as it has done in the past or that TMHA will be prevented from participating in the risk pool in the future. AMERIND presented no evidence that the *St. Claire* and *Malaterre* decisions will prevent compliance with any federal law or regulation. AMERIND presented no evidence that the *St. Claire* and *Malaterre* decisions will be obstacles to Congress's

[8] The defendants will not repeat the arguments set forth in Sections, III, IV, VI, VII, and VIII above.

objectives for housing authorities. AMERIND has not shown that any of HUD's objectives – adopted after the fire in 2002 and apparently applying only to "state" laws – will be adversely affected by this case in the Turtle Mountain Tribal Court. Further, AMERIND presented no evidence that the tribal court's decision will interfere with TMHA's ability to procure low cost insurance. According to the Membership Subscription Agreement, the premium cost is calculated upon the following factors: initial reserve contribution, subsequent reserve contribution, investment surplus, operating surplus, and claims history. Like any insured, TMHA's premium cost is based upon various underwriting considerations so the variables are not unique to TMHA or AMERIND.

AMERIND makes the bizarre argument that allowing it to be named as a defendant in the underlying lawsuit will somehow result in "sweeping no-fault insurance coverage in cases where the tribes are not liable." This argument is without merit as the *Malaterre* court specifically stated that "a direct action could lie against AMERIND if the appellees can demonstrate that the Turtle Mountain Housing Authority was negligent and that said negligence breached a duty of care owed to them." Allowing the lawsuit to go forward against AMERIND will not result in "no-fault coverage" as any damage award is contingent upon a finding of negligence and proximate cause against TMHA. This is not a situation where AMERIND will automatically pay any damage award as the plaintiffs still must prove the elements of their claims. Quite simply, any payment by AMERIND will be based upon the negligence of TMHA, like any typical wrongful death or personal injury lawsuit.

X. CONCLUSION

The defendants respectfully request that this Court deny the Motion for Summary Judgment. First, the tribal court had jurisdiction to decide the matter so this Court should defer to the tribal court's judgment and refrain from re-litigating the issues. Second, neither AMERIND nor TMHA is entitled to raise sovereign immunity as a defense to the Malaterre claims. Third, AMERIND failed to produce any evidence in support of their arguments regarding subject matter jurisdiction, direct action and federal preemption. If this Court grants AMERIND's motion for summary judgment, it would be interfering with the tribal court's ability to develop its own law. Finally, it would be a miscarriage of justice if this Court granted the motion for summary judgment as the Malaterre plaintiffs would be penalized by following established tribal court precedent.

Dated: August 29, 2008.

MARING WILLIAMS LAW OFFICE, P.C.

s/ Daniel J. Dunn
Daniel J. Dunn
1220 Main Avenue, Suite 105
P.O. Box 2103
Fargo, North Dakota 58107-2103
Telephone: (701) 241-4141
ND License No. 04869

and

Thomas A. Dickson
DICKSON LAW OFFICE
107 West Main. P.O. Box 1896
Bismarck, ND 58502-1896
Telephone: (701) 222-4400
ND License No. 03800
ATTORNEYS FOR DEFENDANTS