No. 08-3949

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMERIND RISK MANAGEMENT CORPORATION,

Plaintiff-Appellant,

v.

MYRNA MALATERRE, CAROL BELGARDE,
& LONNIE THOMPSON,

Defendants-Appellees.

Appeal from the United States District Court
for the District of North Dakota

Honorable Daniel L. Hovland
D.C. No. 4:07-cv-059

AMERIND'S ANSWERS TO THE COURT'S QUESTIONS

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On October 22, 2009, this Court directed both Amerind and the defendants to file simultaneous written responses to the questions set forth in the Court's letter dated October 13, 2009. Amerind's answers to those questions are therefore set forth below.

1. Can the panel consider Amerind's Corporate Charter because it is part of the record in the tribal court proceeding, or take judicial notice of it because tribal immunity, or not, is a matter of federal law and waiver of such immunity is a legislative act and legislative facts are ordinarily noticed by a court?

Yes. This Court may take judicial notice of Amerind's federal corporate charter because it constitutes a public record. *See e.g., United States v. Eagleboy*, 200 F.3d 1137, 1140 (8th Cir. 1999) (appellate court may take judicial notice of the Department of the Interior's policy statements, which are "akin to judicial opinions, treatises, law review articles, public records and the like"); *Omaha Tribe v. Miller*, 311 F. Supp. 2d 816, 819 n.3 (S.D. Iowa 2004) (district court took judicial notice of tribe's federal corporate charter); *cf. Melton v. City of Oklahoma City*, 879 F.2d 706 (10th Cir. 1989) (appellate court may take judicial notice of city charter for the first time on appeal).

Here, Amerind's federal corporate charter is publicly available from the Department of the Interior, which issued the charter under § 17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 477. Amerind also filed copies of the federal corporate charter in support of its motions to dismiss, which were based on

Amerind's sovereign immunity, in both the tribal court and the first federal court declaratory judgment proceedings.

2. With respect to the federal court proceedings, does the absence in the record of a corporate resolution waiving immunity under Section 16.4 of Amerind's Corporate Charter impact our jurisdiction or the jurisdiction of the district court to find, by implication, tribal court jurisdiction over Amerind?

No. By filing the present lawsuit in federal court, Amerind, as a plaintiff,[1] voluntarily waived its sovereign immunity for the limited purpose of resolving the claims set forth in its lawsuit. In *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241 (8th Cir. 1995), for example, this Court held that, by instituting a lawsuit in federal court, an Indian tribe consents to the court's jurisdiction to resolve the claims in that lawsuit:

> [B]y initiating this lawsuit, the Tribe 'necessarily consents to the court's jurisdiction to determine the claims brought adversely to it.' When the Tribe filed this suit, it consented to and assumed the risk of the court determining that the Tribe did not have title to the disputed tracts.

Id. at 1245 (citations omitted); *see also Cohen's Handbook of Federal Indian Law* 643, § 7.05[1][c] (Nell Jessup Newton *et al*. eds., 2005) ("Participation in other

[1] The circumstance in which an Indian tribe, as a plaintiff, files a lawsuit in federal court must be distinguished from the circumstance in which an Indian tribe, as a defendant, is haled into federal court. In the latter circumstance, this Court has explained that sovereign immunity is a "jurisdictional threshold matter" or a "jurisdictional prerequisite" that must be addressed before the merits. *See e.g., Hagen v. Sisseton-Wahpeton Community College*, 205 F. 3d 1040, 1044 (8th Cir. 2000); *In re Prairie Island Dakota Sioux v. Prairie Island Dakota Sioux*, 21 F.3d 302, 304-05 (8th Cir. 1994).

litigation [by an Indian tribe] can also effect a waiver for limited purposes, but counterclaims may not be asserted absent an explicit waiver . . . .") (footnotes omitted)); Conference of Western Attorneys General, *American Indian Law Deskbook* 307–08 (4th ed. 2008) ("[I]nitiation of a lawsuit limits the waiver 'to the issues necessary to decide the action brought by the tribe' and will not be construed as consent to suit on arguably related matters") (footnotes omitted)).

The Ninth and Tenth Circuit Courts of Appeals have also reached this same conclusion. *See McClendon v. United States*, 885 F. 2d 627, 630 (9th Cir. 1989) ("Initiation of a lawsuit [by an Indian tribe] necessarily establishes consent to the court's adjudication of the merits of that particular controversy."); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987) ("Although the Tribe's filing of the . . . litigation may have waived its immunity with regard to [a third-party]'s intervention in that suit, we cannot construe the act of filing that suit as a sufficiently unequivocal expression of waiver in subsequent actions relating to the same leases.").

Thus, by filing the instant lawsuit, Amerind consented to the jurisdiction of the district court and this Court for the limited purpose of resolving the federal questions set forth in its lawsuit; thus, the absence of a corporate resolution does not divest the district court or this Court of jurisdiction to review the tribal court's unlawful assertion of jurisdiction over Amerind under federal law.

3. With respect to the tribal court proceeding, does the absence in the record of a corporate resolution waiving immunity under Section 16.4 impact the tribal court's jurisdiction?

Yes. Amerind consistently asserted its sovereign immunity from suit in all tribal court proceedings based on: (a) the lack of a corporate resolution under Section 16.4 of Amerind's federal charter, or (b) in the alternative, Amerind's prior charter on the ground that Amerind operates as an arm of Indian tribal governments and carries out a governmental function on behalf of those tribal governments by administering an inter-tribal self-insurance risk pool to protect federally subsidized Indian housing. *See* Docket No. 25, Ex. 33 (Amerind's Amended Notice of Appeal); Docket No. 25, Ex. 14 (Amerind's Motion to Dismiss).

Amerind did not at any time expressly and unequivocally waive its sovereign immunity defense in the tribal court proceedings. Absent such waiver, Amerind's immunity barred the suit that Malaterre brought against it in the tribal courts. The tribal courts, thus, erroneously rejected Amerind's sovereign immunity defense.

4. **Does Amerind's stated corporate purpose (under Section 7.1 of the Charter) of "promot[ing] the social welfare of Native Americans . . . by providing a means for Members . . . of this Charter to indemnify and financially protect against any risk of loss *as may be agreed upon between any of them and the Corporation*, including, but not limited to. . . liability to third persons" impact the issues raised on appeal?**

No. Amerind's corporate purpose does not require either Amerind or the members of the risk pool to provide liability coverage for third parties, but merely leaves open the possibility that Amerind and the risk pool members may in the future jointly agree to provide certain types of coverage. The Risk Pool Membership Subscription Agreement between Amerind and the Turtle Mountain Housing Authority reinforces this concept:

> Amerind shall indemnify and financially protect each [risk pool] Member against any risk of loss ***as may be agreed upon*** by the Member and Amerind.

JA 26, Art. VIII (emphasis added).

In fact, here, Amerind and the Turtle Mountain Housing Authority have agreed not to provide coverage for third parties under the policy. The policy, for example, covers only the Housing Authority, but expressly excludes tenants and other third parties from coverage. *See* JA 39 (defining "covered person" as the "IHA designated in the Certificate of Coverage"); JA 32 (certificate of coverage designating Turtle Mountain Housing Authority as the "covered person"); JA 39 (excluding tenants and other third parties from definition of "covered person").

In sum, Amerind's corporate purpose merely provides an opportunity for Amerind and the risk pool members to provide coverage in the future if they should agree to do so. It does not impact any of the issues raised on appeal because the current policy plainly excludes coverage for third parties.

5. Does Amerind's status as a tribal entity, and the fact TMHA is a member of Amerind, affect our analysis of whether Amerind is a nonmember/non-Indian under Montana?

No. Amerind is a nonmember for jurisdictional purposes under *Montana v. United States,* 450 U.S. 544 (1981), for the following four reasons:

First, the district court correctly ruled that Amerind is a nonmember for jurisdictional purposes under *Montana*. *See Malaterre v. Amerind Risk Mgmt. Corp*., 373 F. Supp. 2d 980, 985 (D. N.D. 2005) ("Amerind Risk Management is a non-member which limits tribal court jurisdiction . . . ."); *Amerind Risk Mgmt. Corp., v. Malaterre*, 585 F. Supp. 2d 1121, 1126 (D. N.D. 2008) ("[T]he Turtle Mountain Tribal Court does not have jurisdiction over Amerind on Indian land unless one of the two recognized *Montana* exceptions is found to apply."). Moreover, the defendants have never contested Amerind's status as a nonmember for jurisdictional purposes under *Montana*.

Second, the defendants properly acknowledged, at oral argument held on October 22, 2009, that Amerind is a nonmember under *Montana* because Amerind is not an agency of the Turtle Mountain Band of Chippewa Indians. Rather

Amerind exists independently as a federal corporation under the laws of the United States.

Third, Amerind is a nonmember under *Montana* because it cannot participate in tribal government. *See Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 128 S. Ct. 2709, 2724 (2008) ("[N]onmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory.").

Finally, Amerind is a nonmember under the Ninth Circuit Court of Appeals' decision in *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006)—the only federal court to address this precise issue. There, the Ninth Circuit stated the mere ownership of an entity by tribal members does not automatically convert that entity into a tribal member for jurisdictional purposes under *Montana*:

> [N]ot every enterprise that is owned or staffed by members of a tribe may be considered a tribal entity for purposes of tribal jurisdiction [under *Montana*].

Id. at 1133 (emphasis added). The Ninth Circuit instead focused on whether the tribe controlled the enterprise, finding that the enterprise—a college—was a tribal member under *Montana* for the following four reasons:

(1) The Salish & Kootenai Tribal Council organized the college as a corporation under the Salish & Kootenai tribal law;

(2) The college's bylaws required the board of directors to be Salish & Kootenai tribal members;

(3) The Salish & Kootenai Tribal Council retained authority to appoint and remove the college's board of directors; and

(4) The college was located entirely on the Salish & Kootenai reservation.

434 F.3d at 1135.

In stark contrast, neither the Turtle Mountain Band of Chippewa Indians nor the Turtle Mountain Housing Authority exercises any control over Amerind.

First, the three Indian tribes,[2] which incorporated Amerind, on behalf of other Indian tribes and Indian housing authorities, organized Amerind as a federal corporation under § 17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 477, ***not*** under the laws of the Turtle Mountain Band of Chippewa Indians. Even before converting to a federal corporation in 1986, the National American Indian Housing Council—at the direction of and with funding from the United States Department of Housing and Urban Development—incorporated Amerind under the laws of the Red Lake Band of Chippewa Indians:

> Because of difficulties of procuring adequate housing insurance, HUD encouraged the National American Indian Housing Council to form a risk pool composed solely of IHAs to provide the legally-required insurance coverage for HUD-assisted housing on tribal lands. HUD provided federal funds to assist with the creation of this risk pool. *AMERIND Risk Management Corporation was incorporated in 1986 under the laws of the Red Lake Band of Chippewa Indians (Minnesota) as a self-insurance risk pool for IHAs and Indian tribes*

[2] The Pueblo of Santa Ana (New Mexico), the Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation (Montana), and the Red Lake Band of Chippewa Indians (Minnesota).

> *pursuant to an intergovernmental agreement. HUD approved the self-insurance plan as a means of protecting federally subsidized Indian housing units*. AMERIND continues to administer the approved self-insurance plan for properties funded under NAHASDA, pursuant to 24 CFR 1000.138.

71 Fed. Reg. 11464 (March 7, 2006) (emphasis added).

Second, Amerind's charter authorizes the corporation's membership, which collectively represents over 500 Indian tribes, to appoint employees or officials from any one of these tribes to the board of directors, but none of these employees or officials is required to be a member of the Turtle Mountain Band of Chippewa Indians. Amerind's Federal Charter, art. 12, §§ 12.2, 12.4.2 & 12.6.

Third, only Amerind's members are authorized to appoint and remove Amerind's board of directors. Neither the Turtle Mountain Band of Chippewa Indians nor the Turtle Mountain Housing Authority has any authority to appoint or remove Amerind's board of directors. *Id*.

Finally, Amerind is domiciled and headquartered in New Mexico, and maintains no offices or employees on the Turtle Mountain Indian Reservation. Docket No. 20, Ex. D, ¶ 7 (Declaration of Kent Paul); Amerind's Federal Charter, art. 2, § 2.1.

In short, the Turtle Mountain Band of Chippewa Indians exercises no control over Amerind, and Amerind is therefore a nonmember of that tribe.

Moreover, if the presence of the Turtle Mountain Housing Authority, as one of Amerind's 280 members, is sufficient to convert Amerind from a nonmember to a tribal member for jurisdictional purposes under *Montana*, then a tribal court could exercise jurisdiction over any non-resident corporation, such as General Motors, simply because a tribal member or the tribe may happen to own stock in the corporation. Such a result would contravene *Montana*'s rule that Indian tribes lack jurisdiction over nonmembers.

6. Does the doctrine of tribal exhaustion prevent us from addressing the "stands as an obstacle" preemption claim?

No. This Court may address Amerind's preemption claim for the following four reasons:

First, Amerind has exhausted tribal remedies because the Turtle Mountain Court of Appeals, the Tribe's highest court, on interlocutory appeal, addressed the question of "whether a tribal court has the power to exercise civil subject matter jurisdiction over non-Indians [under *Montana*"]. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). Two other federal circuits have held that a litigant exhausts tribal remedies under *National Farmers Union* when the tribe's highest court on interlocutory appeal has addressed the *Montana* issue. S*ee Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932. 945 n.2 (9th Cir. 2009) ("[A party] will be deemed to have exhausted its tribal remedies once the [tribe's highest court] either resolves the jurisdictional issue or denies a petition

of discretionary interlocutory review pursuant to [tribal law.]") (*quoting Ford Motor Co. v. Todecheene*, 488 F. 3d 1215, 1217 (9th Cir. 2007)); *see also Enlow v. Moore*, 134 F.3d 993, 995-96 (10th Cir. 1998) (tribal remedies are exhausted when tribal court of appeals rules on *Montana* issue even though tribal court did not reach merits of the case). In addition, Amerind argued before the tribal courts that the governing federal regulations were intended to make low cost coverage available for Indian housing and that direct actions would burden the housing program with additional costs. *See* Amerind's Brief in Chief 16-17, *Malaterre v. Amerind Risk Mgmt. Corp*., No. TMAC-06-003 (filed Apr. 28, 2006, Turtle Mountain Tribal Ct. App.).

Second, Amerind's preemption claim concerns a question of federal law, which is reviewed *de novo* by the federal courts. *Prescott v. Little Six, Inc*., 387 F. 3d 753, 757 (8th Cir. 2004) ("It is only when the tribal court applies federal law that the tribal court's determinations are accorded no deference and are reviewed . . . *de novo*."). Because no deference would be given to the tribal court's ruling on Amerind's federal preemption claim, it would be imprudent and a waste of judicial resources to require Amerind to return to tribal court, especially in light of the fact that Amerind has exhausted the federal question raised by *Montana*.

Third, Amerind's preemption claim is based in part on a recent federal regulation, 24 C.F.R. § 1000.139, governing federally regulated self-insurance risk

pools, which HUD promulgated at the same time the tribal court of appeals issued its decision in this case. *See* 72 Fed. Reg. 29738 (May 29, 2007). In the preamble to the proposed regulation, HUD specifically intended to preempt any state and local laws imposing regulatory burdens on federally regulated self-insurance risk pools, such as Amerind, resulting in a diversion of federal funds from housing to insurance purposes:

> This proposed rule is intended to ensure that NAHASDA's statutory requirement of adequate insurance is met in a cost-effective manner by regulating the provision of insurance for IHBG-assisted properties. . . . The cost of compliance with duplicative or conflicting state or local requirements would cause IHBG recipients to divert scarce IHBG funds for affordable housing and limit the recipients' options, thereby failing to fulfill the intent of Congress 'to assist and promote affordable housing activities' (section 201(a) of NAHASDA, 25 U.S.C. 4131(a)(1)).

71 Fed. Reg. 11464, 11465 (March 7, 2006); *cf.* Memorandum from Kathleen M. Bialas, Asst. General Counsel, HUD, to Rodger Boyd, Deputy Asst. Secretary, HUD (June 30, 2009) (explaining how compliance with costly and conflicting state workers compensation laws can divert federal funds from housing to liability claims in violation of federal law). Given that Amerind's preemption claim is based on a recent federal regulation, again it would be imprudent and a waste of judicial resources to require Amerind to return to tribal court.

Finally, because tribal courts are not courts of general jurisdiction, unlike state courts, the Supreme Court has stated that tribal courts have no constitutional authority to adjudicate federal questions, unless expressly granted by federal

statute or federal common law. *Nevada v. Hicks*, 533 U.S. 353, 366-68 (2001). Here there is no source of federal law that grants that authority to the tribal court.

7. Would the sovereign immunity jurisdiction defense raised by Amerind in the tribal court and in the first request for declaratory judgment in the federal district court be lost by failure of Amerind's lawyers to not specifically renew this jurisdictional defense in the second request for declaratory judgment, if it actually did so? And, in this regard, would Amerind's lawyers be authorized to waive a sovereign immunity defense if not authorized to do so by Amerind's legislative body as required by its Charter?

No. Amerind's sovereign immunity defense—which can be raised at any time, even for the first time on appeal—cannot be lost merely because its attorneys did not raise it as a defense in one proceeding, especially in this case where the district court granted summary judgment *sua sponte* in favor of the defendants without notice to Amerind. Moreover, Amerind's attorneys lack inherent authority to waive Amerind's sovereign immunity defense. Rather, Amerind's sovereign immunity may only be waived expressly and unequivocally by its board of directors, not impliedly as suggested above.

In *United States v. United States Fidelity & Guaranty*, 309 U.S. 506 (1940), for example, the Supreme Court held that federal attorneys who represented an Indian tribe could not waive the tribe's sovereign immunity by failing to raise it as a defense to a cross claim in an initial suit but raised it later in a subsequent related suit. *See also Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 170 n. 9 (1977) (although Solicitor General while representing tribe did not raise the tribe's

immunity, "Congress has not given the Solicitor General authority to waive the immunity of an Indian tribe"). Moreover, the Supreme Court emphasized that only the sovereign itself—not its attorneys—could waive sovereign immunity:

> Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of [the attorneys] to seek review cannot give force to this exercise of judicial power.

United States Fidelity & Guaranty, 309 U.S. at 514.

This Court has similarly held that a tribal attorney cannot waive an Indian tribe's sovereign immunity in prehearing submission to an arbitrator. *Missouri River Services v. Omaha Tribe*, 267 F.3d 848 (8th Cir. 2001) (citing *United States Fidelity & Guaranty*).

Further, a waiver of tribal sovereign immunity cannot be implied, it must be express and unequivocal. *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040,1043 (8th Cir. 2000) (tribal college did not waive sovereign immunity by failing to answer complaint).

Section 8.18 of Amerind's federal corporate charter states that the corporation's immunity may only be waived by resolution:

> To sue and be sued in the Corporation's name in courts of competent jurisdiction . . ., ***but only to the extent provided in and subject to the limitations stated in Article 16*** of this Charter.

See Amerind's Federal Charter, § 8.18 (emphasis added).

Article 16 of Amerind's federal charter in turn requires a resolution passed by the board of directors expressly waiving the corporation's sovereign immunity. Amerind's Federal Charter, § 16.4; *Sanchez v. Santa Ana Golf Club, Inc*., 136 N.M. 682, 686, 104 P.3d 548, 552 (Ct. App. 2004) (under federal charter, waiver of corporation's sovereign immunity cannot be activated without resolution of board of directors).

Following the exhaustion of tribal court remedies, this case took an unusual turn when the district court granted summary judgment *sua sponte* for the defendants without notice to Amerind. *See Amerind Risk Mgmt. Corp., v. Malaterre*, 585 F. Supp. 2d at 1130 ("[T]he Court, *sua sponte* grants summary judgment in favor of the Defendants"); *but see Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (court may grant summary judgment *sua sponte*, but must notify the party against whom it intends to enter judgment and allow the party an opportunity to oppose the judgment). The district court's *sua sponte* grant effectively prevented Amerind from raising its sovereign immunity defense—which Amerind would have been able to assert had the district court not granted summary judgment *sua sponte*—by creating a final judgment that Amerind was compelled to appeal.

For the foregoing reasons, and for the reasons advanced in the brief and at oral argument, the Court should reverse the judgment of the district court.

Respectfully submitted,

/s/

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CERTIFICATE

I certify that the original of the foregoing was signed by the undersigned attorney, and that, on November 6, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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