No. 08-3949

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMERIND RISK MANAGEMENT CORPORATION,
Plaintiff-Appellant,

v.

MYRNA MALATERRE, CAROL BELGARDE,
and 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 REPLY BRIEF

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A. Federal regulations require a nonprofit risk pool to cover the losses of an Indian housing authority, not the losses of third parties who have released the housing authority from liability.

Section 1000.136(a) requires an Indian housing authority to obtain "insurance in adequate amounts *to indemnify the recipient [housing authority] against loss* from fire, weather, and liability claims for all housing units." 24 C.F.R. § 1000.136(a) (emphasis added). Nothing in the regulation—or any other federal law—hints at the notion that the insurance is for the purpose of covering the losses of third parties. Nevertheless, the Tribal Court ruled that HUD "*designed [this regulation] to cover the losses of tenants" and other third parties* so that tribal members—who had previously stipulated to the Housing Authority's dismissal—could still bring a direct action claim against Amerind, a federally regulated nonprofit risk pool, for the housing authority's alleged negligence. As Amerind argued in its opening brief, the Tribal Court's reading of §1000.136(a) is erroneous. The district court therefore erred in following it.

1. Malaterre knowingly and voluntarily dismissed the Housing Authority from liability.

Regretting the decision to dismiss the Housing Authority, Malaterre asks this Court to assume that the "sole remedy" was to sue Amerind directly because the Housing Authority was immune from suit. Appellee's Br. 1. But the record shows

that Malaterre's attorneys freely and knowingly abandoned Malaterre's remedies against the Housing Authority.

First, the record shows that Malaterre's attorneys agreed to dismiss the Housing Authority with prejudice *before* obtaining a ruling on the Housing Authority's immunity. The Tribal Court of Appeals confirmed that the Housing Authority's immunity was an open question, but stated that it would not address that issue because Malaterre had already dismissed the Housing Authority:

> The Court first notes that the question of the right of Indian Housing Authorities to be shielded [by] sovereign immunity is an issue of much contemporary dispute. . . . *This issue is not directly presented by this case, however, because the Plaintiff [Malaterre] voluntarily dismissed the Housing Authority from this suit.*

J.A. 000093–94 (emphasis added).

Second, the record shows that Malaterre's attorneys unabashedly confessed that they agreed to dismiss the Housing Authority based solely on a hunch that the Tribal Court might rule against Malaterre:

> And the reason Turtle Mountain Housing was dismissed in open court, which we do all the time—we dismiss claims. We dismiss parties. We do it all the time—*was because I was going to lose the motion for summary judgment. It was that simple . . . .*

Transcript of Proceeding at 33-34, *Amerind Risk Management Corp. v. Malaterre*, No. 4:07–cv–59 (D. N.D. Nov. 12, 2008) (emphasis added).

Third, the record shows that while Malaterre's claim was pending in the Tribal Court, the Tribal Council, the governing body of the tribe, enacted a

resolution waiving the Housing Authority's immunity from suit, J.A. 000172, which Malaterre now claims was not retroactive. Appellee's Br. 8. But, as shown above, Malaterre's attorneys never waited for the Tribal Court to rule on the sovereign immunity issue, choosing instead to stipulate to the Housing Authority's dismissal. As noted below, it is generally accepted that a direct action against an insurer is likely to produce a larger verdict than a standard tort suit. Here, Malaterre's attorneys may have wanted to avoid local jurors ties to the Housing Authority or its employees, which might have made a defense verdict or lower damage award more likely.

The Housing Authority is the only party that could possibly be found liable, but the Housing Authority is no longer a party to this action. Malaterre's attorneys' current strategy is to portray Malaterre as a victim of circumstances. But the record shows that Malaterre is instead the victim of poor litigation strategy.

2. The policy obligates Amerind to provide coverage solely to the Housing Authority.

Malaterre contends that Amerind "should have to honor the terms of its insurance contract." Appellee's Br. 1. Amerind agrees. The contract, by its express terms, obligates Amerind to cover only the Housing Authority:

> We cover damages [the Housing Authority] 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.

J.A. 000054.

The contract does not require Amerind to indemnify third parties, including Malaterre, who agreed that the Housing Authority should be dismissed. The Tribal Court, however, unilaterally rewrote the contract to require Amerind to cover Malaterre's claims. There, however, can be no "damages [the Housing Authority] is legally obligated to pay" because the Housing Authority has been released from any alleged negligence. The district court erred in following the Tribal Court's misguided interpretation of the policy.

B. Federal law requires an Indian housing authority to procure insurance to protect it and the Federal Government's interest in federally subsidized housing—not to protect the general public.

Section 1000.136(a) requires an Indian housing authority receiving federal funds to provide insurance for housing:

> The recipient [Indian 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 [Indian housing authority] against loss from fire, weather, and liability claims* for all housing units owned or operated by the recipient.

(emphasis added). 24 C.F.R. § 1000.136(a).

Banking on the Tribal Court's reasoning, Malaterre says that the phrase "liability claims," "clearly shows that Congress intended coverage for injured third parties." Appellee's Br. 33. But the federal regulatory scheme shows that the

purpose of the insurance is to protect the Federal Government's financial investment in Indian housing activities and property, not the general public.

First, the text of § 1000.136(a) plainly requires an Indian housing authority to obtain insurance to protect itself from certain property and liability risks, but nothing in the text requires coverage for third parties. That the required insurance is not intended for the benefit of third party claimants is further made plain by the wording of 24 C.F.R. § 1000.136(b), which makes the requirement to carry insurance inapplicable if there is "no risk of loss or exposure" on the part of the housing authority. Finally, NAHASDA's statutory text, the best source of Congressional intent, makes no mention of an obligation to cover third parties. *See* 25 U.S.C. § 4133(c) ("Each recipient [Indian housing authority] shall maintain adequate insurance coverage *for housing units* that are owned and operated or assisted with grant amounts provided under this chapter.") (emphasis added); 25 U.S.C. § 4112(c)(5)(B) ("Evidence of compliance which shall include, as appropriate . . . a certification that the recipient [Indian housing authority] will maintain insurance coverage *for housing units* that are owned and operated or assisted with grant amounts provided under this chapter . . . .") (emphasis added).

Second, HUD's insurance guidebook states that the purpose of insurance is "to provide the minimum insurance needed to protect the federal interest in H[ousing] A[uthority] properties and operations." *See* Public and Indian Housing

Property/Casualty Insurance Requirements Guidebook § 1-2 (HUD 1996), *available at* http://www.hud.gov/offices/pih/programs/ph/am/pci.cfm;[1] *see also* 24 C.F.R. § 1000.140 (stating that grant funds may be used "to protect NAHASDA grant amounts spent on that housing").[2] To be sure, the purpose stated in the guidebook parallels the purpose set forth in 24 C.F.R. § 1000.138—"to protect the financial stability of the recipient's IHBG [Indian Housing Block Grant] program." Indeed, requiring insurance to ensure the financial stability of an Indian housing authority, rather than to compensate third parties, best protects the Federal Government's financial interest in federally subsidized housing. The district court's ruling is at odds with these federal policies.

Third, there can be no "liability claim" where the only potentially negligent actor—the Housing Authority—has been dismissed from the suit. In other words, there is no "loss" against which Amerind can indemnify the Housing Authority.

Alternatively, Malaterre begs this Court to overlook her attorneys' voluntary dismissal of the Housing Authority, contending that the claim will not harm

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[1] HUD's website states that HUD is in the process of updating the guidebook. Although the guidebook originated under United States Housing Act of 1937, the insurance requirements applicable to Indian housing authorities under that Act remain the same under NAHASDA.

[2] Section 1000.140 provides in full: "May a recipient use grant funds to purchase insurance for privately owned housing *to protect NAHASDA grant amounts* spent on that housing? Yes. All purchases of insurance must be in accordance with §§ 1000.136 and 1000.138."

Amerind because it does not seek damages from *both* Amerind and the Housing Authority. Appellee's Br. 16–17. But Malaterre misses the point. Amerind's obligation to pay damages is, in accordance with § 1000.136(a), contingent on the Housing Authority incurring a liability. Here, the Housing Authority can never be found liable—Malaterre's attorneys released all claims against the Housing Authority. *Cf.* 8 *Moore's Federal Practice* § 41.34[6][c] n. 49 (3d ed. 2008) ("When a stipulation is made with prejudice, the voluntary dismissal has the same res judicata effect as a final adjudication on the merits favorable to the defendant.") (citing cases)). The Tribal Court's ruling fabricates coverage and then siphons funds from Amerind, which is *not* a commercial insurance company but a federally regulated nonprofit risk pool comprised of Indian housing authorities whose chief source of funds are federal grants. The district court erred in condoning the Tribal Court's erroneous ruling.

The district court's grant of summary judgment to Malaterre harms Amerind risk pool in other significant ways:

(1) Amerind's policies with Indian housing authorities, which comport with and are funded by federal law, can now be unilaterally rewritten by tribal courts throughout the nation, which imperils the national uniformity of the federal regulations and the financial stability of both Indian housing authorities and Amerind.

(2) Tribal court direct actions allow Amerind to be sued where an Indian housing authority's liability has not been established, and even where, as here, the housing authority has been released from liability.

(3) Tribal court direct actions result in the loss of critical legal defenses that Amerind risk pool may have against Indian housing authorities that have failed to cooperate or give notice of claims, have entered into settlements and releases without Amerind's consent, or have otherwise violated the terms of the policy. *See e.g., Snell v. Stein*, 259 So. 2d 876 (La. 1972); *Stippich v. Morrison*, 107 N.W. 2d 125 (Wis. 1961).

(4) Finally, direct actions require Amerind to appear as the sole defendant, which implicitly reveals the existence of insurance coverage—a prejudicial factor often resulting in larger damage awards. *See e.g*., *Ulrigg v. Jones*, 274 Mont. 215, 225, 907 P.2d 937, 943 (1995) (prohibiting direct action against the insurer based on the potential prejudice to the insurer and the insured).

C. Under *Montana v. United States* and its progeny, the Tribal Court presumptively lacks subject matter jurisdiction over direct action claims against Amerind, a nonmember of the tribe.

1. Amerind's consensual relationship with the Housing Authority does not extend to Malaterre.

The Supreme Court has held that a "consensual relationship *must stem from* 'commercial dealing, contract, leases, or other arrangement.'" *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) (quoting *Montana v. United States*, 450

U.S. 544, 565 (1981) (emphasis added)). Because Malaterre cannot show a consensual relationship with Amerind based on any of these types of bi-lateral commercial arrangements, Malaterre contends that Amerind's consensual relationship with the Housing Authority should be extended to her individually. Malaterre offers no legally persuasive reason why the Court should extend the notion of consensual relationship this way. Indeed, there is no such reason. The Supreme Court and other federal courts have ruled in the following cases that a consensual relationship in one area cannot stand as a surrogate for the lack of a consensual relationship in another.

- In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the plaintiff, a nonmember resident of the reservation, sought tribal court jurisdiction over her tort claim against an employee of a nonmember construction company contracting with Indian tribes on the reservation. The Supreme Court, however, refused to extend the company's consensual relationship with the tribes to the plaintiff:

> Although A-1 was engaged in subcontract work on the Fort Berthhold Reservation, and therefore had a 'consensual relationship' with the Tribes, 'Gisela Fredricks was not party to the subcontract and the [T]ribes were strangers to the accident.'

Id. at 457. Similarly, here, it is undisputed that Malaterre is not a party to the contract between Amerind and the Housing Authority. Moreover, the Housing Authority is also a "stranger" to Malaterre's direct action claim against Amerind. By Malaterre's own admission, the Housing Authority's "further appearance was

not necessary so it was dismissed after Amerind was named as a defendant." Appellee's Br. 16.

- In *Phillip Morris USA, Inc. v. King Mountain Tobacco Co*., 552 F. 3d 1098 (9th Cir. 2009), the plaintiff, a tribal member, sought tribal court jurisdiction over its declaratory judgment action against a nonmember tobacco company based on the company's contracts with other tribal members on the reservation. The Ninth Circuit refused to extend the company's consensual relationships with other tribal members to the plaintiff:

> Philip Morris acknowledges that as part of its business, it has consensual relationships with tribal members. Stores located on the reservation and operated by tribal members sell Marlboro cigarettes. Although the stores purchase from distributors rather than from Philip Morris, they have marketing arrangements with Philip Morris. The first question, however, is whether there is a contract or consensual relationship between Philip Morris and King Mountain, the tribal member. The answer is undisputably no.

Id. at 1107. Likewise, Malaterre has no contract or other consensual relationship with Amerind.

- In *Dolgen Corp., Inc. v. Mississippi Band of Choctaw Indians*, 2008 WL 5381906 (D. Miss.), the plaintiffs, tribal members, sought tribal court jurisdiction over their tort claim against a nonmember manager based on his corporate employer's lease and business license with the tribe on the reservation. The district court, however, refused to extend the corporate employer's consensual relationship to the manager:

> As Townsend [the nonmember manager] notes in his own motion for injunctive relief, each of the putative consensual relationships identified by the Tribal Court was a consensual relationship between the Tribe and the Does *with Dolgen* [the corporate employer]. None involved a consensual relationship between the Tribe or the Does *and Townsend.* He concludes, therefore, that the Tribal Court has no jurisdiction over him. The court agrees.

Id. at * 7 (emphasis in original).

These cases demonstrate that Amerind's consensual relationship with the Housing Authority cannot be extended to Malaterre under the teachings of *Montana*. To allow such an extension would undermine the Supreme Court's recent admonition—"These [*Montana*] exceptions are 'limited' ones and cannot be construed in a manner that would 'swallow the rule,' or 'severely shrink' it." *Plains Commerce Bank v. Long Family Land & Cattle Co*., 128 S. Ct. 2709, 2720 (2008). The district court thus erred in its ruling.

2. Malaterre's direct action against Amerind does not arise out of any preexisting consensual relationship.

The Supreme Court has further held that the "consensual relationship exception requires that the tax or regulation imposed by an Indian tribe *have a nexus* to the consensual relationship. . . . A nonmembers' consensual relationship in one area thus does not trigger tribal civil authority in another—it is not 'in for a penny, in for a pound.'" *Atkinson Trading Co. v. Shirley*, 532 U.S. at 656 (emphasis added). Malaterre contends that *Montana*'s consensual relationship exception only requires the lawsuit to be "related to" the consensual relationship

between Amerind and the Housing Authority to which she is not even a party. Appellee's Br. 24. Malaterre is incorrect.

In keeping with the Supreme Court's directive that *Montana's* consensual relationship exception is limited, the federal courts require a "direct" nexus between a tribal court action and a preexisting consensual relationship. As the following precedents demonstrate, no such direct nexus exists in the instant case.

- In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, for example, this Court held that a tribal member-owned company's "discrimination claim *arose directly* from their preexisting commercial relationship" with a nonmember bank, based on loans from the bank to the company. 491 F. 3d 878, 887 (8th Cir. 2007), *rev'd on other grounds*, 128 S. Ct. 2709 (2008). Here, by contrast, Amerind had no preexisting commercial relationship of any kind with Malaterre. Moreover, Malaterre's direct action claim against Amerind is predicated on the Tribal Court's misinterpretation of NAHASDA and 24 C.F.R. § 1000.136(a), not on any commercial relationship with Amerind.

- In *Phillip Morris USA*, *supra*, the Ninth Circuit held that a tribal member's declaratory judgment action against a nonmember tobacco company in tribal court did not "arise out of" the nonmember's marketing contracts with other tribal members.

> The mere fact that a nonmember has some consensual commercial contacts with a tribe does not mean that the tribe has jurisdiction over

> all suits involving that nonmember, or even over all such suits that arise within the reservation; *the suit must also arise out of those consensual contacts*.

552 F. 3d at 1107 (emphasis added).

- In *MacArthur v. San Juan County*, tribal members sought tribal court jurisdiction over a declaratory judgment action against the county's insurance carrier's attorney based on his membership in a tribal bar association. The Tenth Circuit refused to recognize tribal court jurisdiction because the claim did not arise directly out of the tribal bar membership:

> We agree that Ickes's membership in the Navajo Nation Bar Association and his practice before the Navajo district court constitute a consensual relationship with the Navajo Nation. However, our *Montana* inquiry does not end with this determination. As was the case with respect to Truck Insurance, *the requisite nexus between the consensual relationship and the exertion of tribal authority is missing*.

309 F. 3d 1216, 1223 (10th Cir. 2002).

- Finally, in *Dolgen Corp.*, *supra*, the federal district court held that a tribal member's negligent hiring claim against a nonmember corporation operating a store on the reservation did *not* directly arise out of its lease or business license with the tribe, but instead arose out of its employment-type relationship with the tribal member. 2008 WL 5381906 at * 4 ("[T]here must be a *direct logical relationship* between the consensual relationship and the injury.").

These cases demonstrate that a direct nexus must exist between the tribal court lawsuit and a preexisting consensual relationship. Here, as shown above,

there is no preexisting consensual relationship. Moreover, for the following three reasons, there is no direct nexus between Malaterre's direct action and the contract between Amerind and the Housing Authority.

- Malaterre is not a party to the contract between Amerind and the Housing Authority.

- The Tribal Court predicated its decision allowing a direct action against Amerind based on a misinterpretation of NAHASDA and its implementing regulations, not based on the contract between Amerind and the Housing Authority.

- The direct action claim arose outside the contract because the contract, by its terms, provides coverage only when the Housing Authority is held legally liable to pay a loss. But, here, the Housing Authority can never be found liable because Malaterre dismissed all claims against it.

In sum, because there is no direct nexus between Malaterre's direct action claim and Amerind's contract with the Housing Authority, the Tribal Court lacked jurisdiction, and the district court erred in adopting the tribal court's ruling.

D. The conformity clause by its terms does not apply here and is thus irrelevant to the outcome of this litigation.

"[A] provision must be in *direct conflict* with the particular statute before the conformity clause operates to substitute statutory provisions for the policy provisions." 15 Eric Mills Holmes, *Holmes' Appleman on Insurance 2d* § 113.4,

440–441 (2000) (emphasis added) (footnote omitted). Referencing two policy provisions, the district court stated, and Malaterre contends, that Amerind consented to direct actions "by a third party" in the tribal court through a conform-to-law clause set forth in the policy between Amerind and the Housing Authority. Appellee's Br. 30–32; *see also* Add. at 14 (citing Docket No. 20–4, pp. 93, 135).

But the conform-to-law clause, by its express terms, only operates when there is a conflict between a policy provision and tribal law:

> If any provision of this policy *conflicts* with the tribal laws of your tribe, this policy is amended to conform to those laws.

J.A. 000036, ¶ 7 (emphasis added).

It is evident, however, that the two policy provisions relied on by district court do not conflict with tribal court direct actions:

(1) The first provision, for example, only prohibits the Housing Authority—not third parties—from suing Amerind until the Housing Authority has complied with all other policy provisions:

> *You agree not to bring legal action against us* unless you have first complied with all conditions of this Scope of Coverage document. You also agree to bring any action against us within one year after a loss occurs, but not until thirty (30) days after the Settlement Agreement has been filed with us.

J.A. 000036, ¶ 2 (emphasis added). The policy then defines the term "You" as "the Tribe, IHA or TDHE named in the certificate of coverage." J.A. 000038.

This provision does not conflict with tribal law. The district court thus erred in finding a conflict and in applying the conformity clause.

(2) The second provision only applies to the Tribal Housing Officials Liability Coverage Part of the policy, not the part at issue in this case—the Business Liability Part. *See* Docket No. 20–4, p. 135, at J.A. 000078, ¶ E. Moreover, the second provision prohibits a direct action against the "Insurer," which is designated as the United States Fire Insurance Company, the reinsurer for this part of the policy. *See* J.A. 000072 ("Insurer means United States Fire Insurance Company, New York, New York"). Neither does this provision conflict with tribal law. The district court likewise erred in finding a conflict and in applying the conformity clause. Further, a conform-to-law clause can neither confer jurisdiction upon a court that does not have it nor allow the application of a state or local law that is otherwise preempted. *Cf. Fabjancic v. Union Central Life Ins. Co*., 2006 WL 2406268 (D. Colo.).

Because the conform-to-law clause is inoperative, there is no contractual agreement on Amerind's part to be bound by the Tribal Court of Appeal's decision to the exclusion of its right to assert federal law rights. *See* Amerind's Opening Brief, Section II.C.

E. NAHASDA and its implementing regulations preempt tribal court direct action claims because they conflict with federal regulations and obstruct federal purposes and objectives to protect federally regulated nonprofit risk pools.

Conflict preemption arises when either compliance with both local law and federal law cannot be accomplished, or where the local law obstructs the congressional objective of the federal legislative or regulatory scheme. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000). Malaterre contends that there is no express congressional intent to preempt tribal court direct action suits against federally regulated nonprofit risk pools such as Amerind. Appellee's Br. 36–44. The Supreme Court, however, has held that a "narrow focus" on congressional intent to preempt is "misdirected." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982). Preemption may be by agency regulation, and a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Id*. Rather, the proper focus should be placed on whether the agency effecting the preemption "has exceeded [its] statutory authority or acted arbitrarily." *Id*. at 142 Accordingly, this Court has held that it "will find that an agency intends for a [federal] regulation to preempt state law when a regulation conflicts with a state law." *Wuebker v. Wilbur-Ellis Co*., 418 F. 3d 883, 887 (8th Cir. 2005). Malaterre makes neither of

those arguments.[3]

There is a conflict here, an irreconcilable one, between the federal regulation and the decision of the Tribal Court of Appeals. The federal regulation, 24 C.F.R. § 1000.136(a), requires property and liability insurance "to indemnify the recipient [Indian housing authority] against loss from fire, weather, and liability claims for all housing units." By contrast, the Tribal Court of Appeals, in rewriting this regulation, requires insurance to indemnify the Indian housing authority from third party claims even when those third parties have released the Indian housing authority from liability. There is nothing "speculative" about this conflict or the harm here. Appellee's Br. 36. If there are direct action claims, the Amerind risk pool's coverage document must provide procedures for it, its underwriting must take the resulting additional risks into account, and its members must pay for that risk. But the federal regulation only provides for risk pools to cover *losses* of an Indian housing authority, and only requires housing authorities to use federal funds pay for that coverage. The tribal courts cannot unilaterally rewrite federal regulations and concomitant risk pool coverage terms to accommodate both.

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3 Malaterre's extensive discussion of *Martin v. Midwest Express Holdings, Inc.*, 2009 WL 292583 (9th Cir.), is misplaced. Amerind does not contend that tort claims against the Housing Authority are preempted, only that allowance of direct actions against the Amerind risk pool is prohibited by the regulations governing Indian housing insurance and nonprofit Indian housing risk pools.

Moreover, HUD surely did not intend for federal funds to be distributed by federally regulated nonprofit risk pools, like Amerind, on claims for which Indian housing authorities have been released from liability. Federal law requires Amerind "to operate[] on a nonprofit basis," 24 C.F.R. § 1000.139(c)(3), and Amerind has no source of funds to pay for such claims other than federal funds from the Indian housing authorities. Contrary to Malaterre's unfounded assertion, Amerind will not be able stay in business for long if tribal court direct action suits are allowed to continue in this fashion. It must be remembered that HUD helped create and fund Amerind because neither HUD nor Indian housing authorities could find commercial insurance companies willing to provide affordable insurance coverage for federally subsidized housing. 71 Fed. Reg. 11464 (Mar. 7, 2006).

Further, Amerind's opening brief explains in more detail how the Tribal Court's decision obstructs federal purposes and objectives embedded in NAHASDA and its implementing regulations which are to protect the financial stability of Indian housing authorities, to protect federally regulated nonprofit risks, and to protect against the diversion of federal funds from housing activities to third parties who have released Indian housing authorities from liability. *See* Amerind's Opening Brief, Section III. As shown there, federal law preempts tribal court direct action claims that obstruct these federal objectives and goals.

CONCLUSION

Federal law prohibits a tribal court from unilaterally rewriting federal regulations to allow third parties to proceed against federally regulated nonprofit risk pools, especially where those third parties have released the only potentially negligent actor—the Housing Authority—from liability. For all of the foregoing reasons, and for the reasons stated in Amerind's Opening Brief, this Court should reverse the decision of the district court and direct it to enter summary judgment in favor of Amerind.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,538 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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March 30, 2009

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Lee Bergen

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 28A(d)(2)

I certify that a digital version of the foregoing Reply Brief is sent with this brief on CD-ROM and the file copied to the CD-ROM has been scanned for viruses and is virus-free.

March 30, 2009

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Reply Brief of Appellant, one CD-ROM of the Reply Brief were served by first class mail to the following on March 30, 2009:

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