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UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

Amerind Risk Management Corporation, A Section 17 Federally Chartered Corporation	§	**Case No. 1:15-cv-00072-WJ-KBM**
Plaintiff,	§	
v.	§	
Blackfeet Housing, et al.,	§	
Defendants.	§	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM

Plaintiff, AMERIND Risk Management Corporation ("AMERIND") submits its Response to Defendants' Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim Upon Which Relief Can Be Granted and for Failure to Exhaust Tribal Court Remedies.

I. INTRODUCTION

Blackfeet Housing and Blackfeet Housing Limited Partnerships Nos. 1 through 4 (hereinafter "Defendants")[1], bring their Motion to Dismiss in an attempt to argue the merits of

[1] AMERIND dismissed Defendants Native American Housing Funds I, II, IV and V pursuant to a Stipulation that was filed with the Court on March 23, 2015. (*See* Clerk's Docket No. 15).

the underlying action and distract this Court from the actual legal issue before it: do the sovereign parties have a right to enter into inter-tribal agreements providing for alternative dispute resolution mechanisms, including binding arbitration, and if so, should this Court compel specific performance? This question necessarily implicates issues concerning Tribal sovereignty under the U.S. Constitution's Indian Commerce Clause, the inherent sovereignty of Tribes to make their own laws and be ruled by them, and federal Indian law, including Section 17 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 477. The only rights to be adjudicated in this declaratory action are the rights of the sovereign Tribal parties to bind themselves to alternative dispute resolution mechanisms. Any decision relating to the merits of any claim under the inter-tribal agreements must wait until the time of arbitration.

The parties agree that AMERIND is a Tribally owned and federally chartered Section 17 corporation and that each of the Defendants are also Tribally owned entities. (*See* Plaintiff's Complaint for Declaratory Relief ("Complaint") filed on January 28, 2015, Doc. No. 1 at ¶ 1; *see also* Defendant's Memorandum in Support of Motion to Dismiss ("Motion to Dismiss") filed on March 23, 2015, Doc. No. 18 at p. 5). AMERIND and the Defendants are all sovereign self-determining Tribal entities that possess sovereign immunity, and they all have utilized that sovereignty to enter into inter-tribal agreements that provide for alternative dispute resolution mechanisms in case the parties have a dispute. (*See* Complaint at ¶¶ 13-17). None of the parties have agreed to waive sovereign immunity to proceed in any other forum besides those specified in their inter-tribal agreements. (*Id.*).

Nevertheless, Defendants essentially suggest that the parties are not self-determining sovereign entities—that they do not have authority to enter into and be bound by their Inter-Tribal agreement to arbitrate disputes. In other words, Defendants are attempting to have this

Court undermine the sovereign entities' ability to enter into and be bound by their inter-tribal agreements. Simply put, this Court cannot dismiss AMERIND's Complaint (seeking declaratory relief and specific performance to compel arbitration), without the Court first finding that the parties do not possess the authority to enter into inter-tribal agreements allowing for binding arbitration. To do so, this Court would have to disregard federal law concerning Indian affairs as well as federal laws and policies favoring arbitration.

II. FACTUAL AND PROCEDURAL BACKGROUND

AMERIND is a federally chartered corporation pursuant to Section 17 of the IRA, 25 U.S.C. § 477, and has been approved as such by the U.S. Secretary of the Interior. (*See* Complaint at ¶ 1). AMERIND is chartered by three federally recognized Tribes: the Red Lake Band of Chippewa Indians; the Confederated Salish and Kootenai Tribes of the Flathead Reservation; and the Pueblo of Santa Ana ("Charter Tribes"). (*Id.*). AMERIND possesses the same privileges and immunities as its charter Tribes, including sovereign immunity. (*Id.*). The Eighth Circuit has recognized that AMERIND, as a Tribal entity, possesses sovereign immunity:

> We also note that Amerind is not an ordinary insurance company. Indeed, Amerind's purpose is to administer a *self-insurance* risk pool for Indian Housing Authorities and Indian tribes. *See* Self-Insurance Plans Under the Indian Housing Block Grant Program, 71 Fed. Reg. 11464, 11464 (proposed Mar. 7, 2006) ("AMERIND continues to administer the approved self-insurance plan for properties funded under NAHASDA, pursuant to 24 CFR 1000.138."). Because Amerind is a § 477 corporation that administers a tribal self-insurance risk pool, we hold that Amerind "serves as an arm of the [Charter Tribes] and not as a mere business and is thus entitled to tribal sovereign immunity." Hagen, 205 F.3d at 1043.

Amerind Risk Mngt. Corp. v. Malaterre, 633 F.3d 680, 685 (8th Cir. 2011), cert. denied, 132 S. Ct. 1094 (2012) (italics and alterations in original).

AMERIND's purpose is to serve federally recognized Tribes, Tribally owned entities, and Tribally Designated Housing Entities, by providing affordable and sustainable insurance programs, products, and services that protect people, housing, government infrastructure, and economic enterprises in Indian Country.[2] (*See* Complaint at ¶ 1). The Charter Tribes have delegated their ownership authority to the more than 400 Tribes and Tribal entities that AMERIND serves, including the Defendants. (*Id.* at ¶ 13; *see also* Motion to Dismiss, Doc. 18 at Exhibit 1, AMERIND's Charter, Article 5, section 5.3 ("The authority of each Charter Tribe to manage the business affairs of the Corporation is by ratification of this Charter delegated to the Members of the Corporation as provided in this Charter.")).

Defendants are also Tribal entities formed by the Blackfeet Tribe, as Defendants admit in their Motion to Dismiss. (Motion to Dismiss at p. 5). The Defendants have an inter-tribal relationship with AMERIND as Members of AMERIND through various insurance agreements. (*See* Complaint at ¶¶ 3-9). These inter-tribal agreements provide for binding arbitration whenever there is a dispute arising out of those agreements.

The inter-tribal agreement establishing a relationship between AMERIND and the Defendants is a March 30, 2012 Tribal Operations Protection Plan Participation Agreement ("TOPP" or "Participation Agreement"). (*See* Complaint at Exhibit A). As a "Participant," each Defendant has agreed to join with other Tribal Participants in the TOPP to "jointly pool their financial resources to share in and protect against financial risks common among them." (*Id.* at p.

[2] Contrary to Defendants' assertions, AMERIND is not a "risk management group" as defined by the McCarran Ferguson Act, 15 U.S.C. § 3901, et al. That Act defines a "risk retention group" as one organized under state laws and engaged in the business of insurance under state laws. *Id.* AMERIND is a Tribally owned and Tribally regulated entity organized under federal laws and does business within Indian Country. Also, contrary to Defendants' assertions in the Blackfeet Tribal Court, AMERIND is not a New Mexico corporation.

1). As part of their duties under the Agreement, Defendants are Members of AMERIND and take part in the governance of AMERIND through its regional representation on AMERIND's Board of Directors. (Motion to Dismiss at Exhibit 1, AMERIND's Charter, Article 5 Section 5.3, and Article 11). AMERIND Members agree to all inter-tribal agreements and insurance policies through their regional representatives on AMERIND's Board of Directors, each of whom are elected by Members of each region. (*Id.*).

In the Participation Agreement, the parties agreed to an explicit arbitration clause that includes the following provisions: the parties will chose one arbitrator; the rules of the American Arbitration Association shall govern the arbitration; the arbitration shall be held in Albuquerque, New Mexico; and the parties agree to the United States District Court for the District of New Mexico, the Second Judicial District Court of the State of New Mexico, or the Pueblo of Santa Ana Tribal Courts as courts of competent jurisdiction, and these courts are only to be used for limited purposes, including the right to compel arbitration. (*See* Complaint at ¶ 17).

By way of the Participation Agreement, Defendants purchased TOPP insurance products under four different coverage documents. (*See* Complaint at Exhibit B, TOPP Scope of Coverage ("Scope of Coverage").[3] The TOPP Scope of Coverage also calls for arbitration of any dispute between the parties, but provides less detail and even contradictory terms in comparison with the arbitration provision in the Participation Agreement, such as provisions requiring the use of 3 arbitrators pursuant to the Rules of the Center for Public Resources ("CPR"). (Complaint at ¶¶ 17-18). Regardless of their inconsistencies, the Participation Agreement and the Scope of

[3] Exhibits C through F of the Complaint are the particular certificates of coverage and endorsements relevant to the underlying claim.

Coverage both agree that the parties shall submit disputes to binding arbitration in New Mexico.[4] Likewise, neither agreement requires or limits which arbitration company shall undertake the arbitration.[5]

Although the merits of the underlying insurance dispute are not before this Court, for the sake of completeness, some background may be helpful. In August and September of 2013, Defendants submitted claims to AMERIND concerning water and mold damage in 110 of its housing units, which are included in the TOPP. (*See* attached Exhibit A (March 14, 2014 Denial of Claim Letter from AMERIND to Ms. Terryl Matt) at p.4). Four claim numbers were opened by AMERIND to investigate. (*Id.* at pp. 1-2). AMERIND found that all of the parties' respective investigators gave similar opinions that the water and mold damage was caused by faulty construction, normal wear and tear, and maintenance issues, which are excluded by the TOPP. (*Id.* at pp. 4-7). As a result, AMERIND denied the claims in March of 2014. (*Id.*). Defendants have disputed the denial of these claims.

Instead of proceeding pursuant to the dispute resolution provisions contained in the parties' agreements, on April 18, 2014, individual Defendant Blackfeet Housing filed a complaint against AMERIND in the Blackfeet Tribal Court of the Blackfeet Indian Reservation in Browning, Montana, *Blackfeet Housing v. AMERIND Risk Management Corporation*, Case Number 2014CA60 (hereinafter "Tribal Court Lawsuit"). (*See* Motion to Dismiss at Exhibit 3). In the Tribal Court Lawsuit, Blackfeet Housing brings multiple causes of action against

[4] The Participation Agreement states that it and the Scope of Coverage documents constitute the entire agreement between the parties. (*Id.* ¶ 19).

[5] Defendants have incorrectly asserted that AMERIND is precluded from bringing arbitration before the AAA. However, neither of the arbitration provisions demand or foreclose the use of any specific arbitration company.

AMERIND for allegedly violating various duties and obligations arising out of the Participation Agreement and TOPP Coverage Documents. (*Id.*).

On October 17, 2014, AMERIND made a special limited appearance in the Tribal Court Lawsuit to move the Blackfeet Tribal Court to dismiss the matter for lack of jurisdiction over subject matter, lack of jurisdiction over person, insufficiency of process and insufficiency of service of process, and failure to join an indispensable party. (*See* attached Exhibit B (AMERIND Motion to Dismiss the Tribal Court Lawsuit) filed on October 17, 2014.[6] A hearing on the motion occurred five months later on March 24, 2015, and the Tribal Court requested further briefing on two issues from Blackfeet Housing and AMERIND. On March 26, 2015, the Blackfeet Tribal Court ordered Blackfeet Housing to brief additional issues by April 13, 2015. AMERIND's response is due on April 27, 2015. The Tribal Court has not stated how quickly it will determine whether or not it has jurisdiction over that action.

The Blackfeet Tribal Court does not have jurisdiction over AMERIND because AMERIND has not waived its sovereign immunity, and there is no federal law abrogating AMERIND's immunity. *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 111 S. Ct. 905, 909 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670 (1978); *Cherokee Nation v. Georgia*, 30 U.S. 1, 8 L. Ed. 25 (1831). Thus, AMERIND properly submitted the parties' dispute to binding arbitration in accordance with the parties' agreements. On December 17, 2014, AMERIND submitted a demand for arbitration to the American Arbitration Association ("AAA") in accordance with the Participation Agreement, as it was the most detailed agreement governing the parties' inter-tribal relationship.

[6] Exhibit B includes only one of its original exhibits (Exhibit A (Affidavit of Phil Bush)), as the remaining exhibits are duplicative of exhibits filed by Defendants in this case, such as AMERIND's Charter and the Participation Agreement.

Even though no arbitrator had been chosen, on January 5, 2015, Defendants filed a motion to dismiss the AAA arbitration because "neither the Tribal Operation Protection Program nor the Tribal Operations Protection Plan Participation Agreement . . . authorizes [AMERIND] to file with the American Arbitration Association."[7] (*Id.*). Because the AAA could do nothing about the motion without a chosen arbitrator, the parties mutually agreed to stay the arbitration to allow a court of competent jurisdiction to determine the parties' sovereign rights under the inter-tribal agreements. This declaratory action was commenced shortly thereafter.

III. STANDARD FOR MOTION TO DISMISS

Defendants' Motion to Dismiss raises arguments under both Rule 12(b)(1) and Rule 12(b)(6), Federal Rules of Civil Procedure. Generally, Rule 12(b)(1) motions take two forms: (1) a "facial attack" on the legal sufficiency of the complaint's allegations as to subject matter jurisdiction, and (2) a "factual attack" that challenges the complaint's factual allegations upon which jurisdiction depends. *Holt v. U.S.*, 46 F.3d 1000, 1002 (10th Cir. 1995); *see also United States ex rel. Baker v. Cmty. Health Sys.*, 709 F. Supp. 2d 1084, 1094 (D.N.M. 2010).

When reviewing a facial attack on a complaint, the court must accept the allegations of the complaint as true. *Holt*, 46 F.3d at 1002. By contrast, when reviewing a "factual" attack on a complaint, "a court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id.* at 103. In other words, the Court can make its own findings of fact. However, a court's reference to evidence outside the pleadings does not necessarily convert a Rule 12(b)(1) motion to a Rule 56 motion. *Id.* (citing *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir. 1987)).

[7] *See* footnote 5, *supra*.

To the extent Defendants have challenged whether AMERIND qualifies as an "Indian tribe or band" for the purposes of 28 U.S.C. § 1362, the Court may find that Defendants have made a "factual" attack against federal jurisdiction. (*Id.* at pp. 9-10). To resolve this legal question, this Court may need to refer to evidence outside the pleadings and make factual determinations concerning whether the parties qualify as sovereign Indian tribes for the purposes of § 1362, and as such, whether they could enter into an Inter-Tribal Agreement providing that this Court would have jurisdiction over any disputes arising out of that Agreement. However, for the reasons outlined above, this can be done without converting Defendants' Motion to a Rule 56 Motion.

Defendants' "facial" attack on federal jurisdiction must be decided under a traditional Rule 12(b)(6) standard—that is, this Court must assume the truth of all allegations set forth in Plaintiff's Complaint. *See Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002) (deciding a "facial" attack under a Rule 12(b)(6) standard). Under this standard, Defendants' Motion to Dismiss "may be granted only if it appears beyond a doubt that [Plaintiff] is unable to prove any set of facts entitling [it] to relief under [its] theory of recovery." *Id.* at 1181 (alterations added).

In the present case, Defendants have primarily made a "facial" attack under Rule 12(b)(1) by arguing that Plaintiff's claims do not arise under the "Constitution, laws, or treaties of the United States." In essence, Defendants' entire Motion to Dismiss hinges on a single (flawed) legal argument—i.e., that the parties to this case cannot and could not legally enter into an arm's length contract containing written, agreed upon dispute resolution provisions, including terms pertaining to choice of law, venue, arbitration, waiver of tribal sovereign immunity, and waiver of exhaustion of Tribal remedies.

By arguing that the parties' arbitration provisions are unenforceable, Defendants raise issues that are necessarily intertwined with the merits of Plaintiff's action for declaratory relief (i.e., Plaintiffs' request for specific performance requiring arbitration). In this situation, the court must adopt and apply a Rule 12(b)(6) standard of review. *See Swepi, LP v. Mora Cnty., N.M.*, No. CIV 14-0035 JB/SCY, 2015 U.S. Dist. LEXIS 13496, 2015 WL 365923, at *95 (D.N.M. Jan. 19, 2015) ("Where, however, the court determines that jurisdictional issues raised in a rule 12(b)(1) motion are intertwined with the case's merits, the court should resolve the motion under either rule 12(b)(6) of the Federal Rules of Civil Procedure or Rule 56 of the Federal Rules of Civil Procedure."); *see also Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1129 (10th Cir. 1999); *Tippett v. United States*, 108 F.3d 1194, 1196 (10th Cir. 1997). "When deciding whether jurisdiction is intertwined with the merits of a particular dispute, 'the underlying issue is whether resolution of the jurisdictional question requires resolution of an aspect of the substantive claim.'" *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1296 (10th Cir. 2003) (quoting *Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002)).

To the extent Defendants' Motion to Dismiss raises arguments that do not challenge subject matter jurisdiction, this Court should proceed under a traditional Rule 12(b)(6) standard of review. That is, this Court must test "'the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true.'" *Swepi, LP, supra*, at p. 95 (citing *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994)). "The sufficiency of a complaint is a question of law, and when considering a rule 12(b)(6) motion, a court must accept as true all well-pled factual allegations in the complaint, view those allegations in the light most favorable to the non-moving party, and draw all reasonable inferences in the plaintiff's favor." *Id.* at pp. 95-96; *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499 (2007)

("[O]nly if a reasonable person could not draw . . . an inference [of plausibility] from the alleged facts would the defendant prevail on a motion to dismiss.") (alterations in original).

Based on the foregoing, this Court must accept as true Plaintiff's allegations that the respective parties are sovereign Indian tribes who entered into a contract with express alternative dispute provisions requiring the parties to arbitrate in a particular forum and waive any obligation to exhaust legal remedies before any tribal court. Because this Court must accept these allegations as true, this Court should deny Defendants' Motion to Dismiss and proceed by ruling on the merits of Plaintiff's claim for declaratory relief.

IV. SUBJECT MATTER JURISDICTION

This Court possesses subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362 because this action arises under federal law and AMERIND is a "Tribe" under § 1362. Under § 1331, federal district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[8] § 1362 states:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Moreover, the well-pleaded complaint rule will not apply to AMERIND's action brought under the Declaratory Judgment Act. Instead, the Court must determine whether the Defendants could bring an action under federal law. "Under the 'well-pleaded complaint' rule, a suit arises under federal law only when the plaintiff's statement of his own cause of action shows that it is based on federal law." *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1202-04 (10th Cir. 2012) (citation omitted). The well-pleaded complaint rule makes the

[8] Defendants have cited a version of 28 USC § 1331 that was deleted in 1980.

plaintiff the master of the claim. *Id.* at 1202. However, these dynamics change somewhat in the context of an action under the Declaratory Judgment Act when it is the character of the defendant's actions that determines whether there is federal question jurisdiction. *Id.* at 1202-03 (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 19, 103, S. Ct. 2841 (1983) *superseded by statute on other grounds* ("Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.").

For this Court to determine whether to compel arbitration, it must first determine that the sovereign parties have the authority to enter into an inter-tribal agreement providing for binding arbitration, and whether AMERIND has waived its sovereign immunity to allow suit in Blackfeet Tribal Court. These questions depend on federal law applicable to Indian affairs. "The federal nature of the right to be established is decisive of whether the action arises under federal law." *Forest County Potawatomi Cmty. v. Norquist*, 45 F.3d 1079, 1082 (7th Cir. 1995) (citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 116, 57 S. Ct. 96 (1936)). AMERIND's Complaint is not a simple contract claim but arises from questions of complex federal common law regarding Indian affairs.[9] *See Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1474 (9th Cir. 1989) (distinguishing *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980) as a simple contract claim).

[9] Defendants argue that "this is a cause of action for breach of contract and bad faith that arises solely under the laws of the Blackfeet Nation, and jurisdiction is in the Blackfeet Tribal Court." (Motion to Dismiss at p. 6). This is Blackfeet Housing's claim in the separate action in Blackfeet Tribal Court; this is not the claim that AMERIND raises in its Complaint before this Court. AMERIND has not sought to enjoin the Tribal Court Lawsuit in federal court at this time.

AMERIND alleged federal questions in its Complaint by reciting facts concerning the parties' status as sovereign entities and incorporating those facts into its claims for relief. The Court can draw a reasonable inference from AMERIND's statement of facts regarding the parties' sovereign status that federal Indian law and Tribal sovereign immunity would be at issue in this case. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ("[T]he pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. . . . To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.").

Again, Defendants admit that they are Tribally owned entities and that AMERIND is a Tribally owned entity. (Motion to Dismiss at pp. 2, 5). Defendants' Motion ignores the fact that AMERIND is immune from suit in Blackfeet Tribal Court. As explained in Section II above, the Eighth Circuit has previously ruled that AMERIND is a sovereign Tribal entity possessing sovereign immunity. *Malaterre*, *supra*, 633 F.3d at 685 ("[W]e hold that Amerind serves as an arm of the [Charter Tribes] and not as a mere business and is thus entitled to sovereign immunity.") Because of the parties' sovereign immunity, they agreed to alternative dispute resolution, including binding arbitration. Defendants have provided no evidence to show that AMERIND waived its immunity and consented to suit in Blackfeet Tribal Court. This Court's determination of the parties' rights under the arbitration provisions is dependent on federal law regarding the parties' status as sovereign Tribally owned entities.

In their argument concerning exhaustion of Tribal Court remedies,[10] Defendants seek to subject AMERIND to Blackfeet Tribal Court jurisdiction even though AMERIND has not waived its immunity to suit in the Tribal Court. The scope of Tribal court jurisdiction is a matter of federal law: "If a declaratory judgment action requires resolution of an issue of federal law or precludes the assertion of a federal right by a responding party, there is jurisdiction over it." *Gaming World Int'l v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 847 (8th Cir. 2003) (citing *Franchise Tax Bd.*, *supra*, 463 U.S. at 19). Further, "the existence of tribal court jurisdiction itself presents a federal question within the scope of 28 U.S.C. § 1331." *Id.* at 848 (citing *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1421-22 (8th Cir. 1996)). Defendants' current actions are proof that AMERIND's declaratory action is pointed directly to Defendants' claims arising under federal law. Analysis of federal laws related to Tribal sovereign immunity and Section 17 corporations is required before this Court can determine whether it should compel the parties to binding arbitration in accordance with their agreements.

Moreover, AMERIND, as a Section 17 corporation, is considered a "Tribe" as contemplated by 28 U.S.C. § 1362. Defendants' reliance on *Navajo Tribal Util. Auth. v. Ariz. Dep't of Revenue*, 608 F.2d 1228 (9th Cir. 1979) is misplaced.[11] The Navajo Tribal Utility case

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[10] *See* Defendants' exhibits attached to the Motion to Dismiss, including their Complaint in Tribal Court, Motion to Stay the Arbitration Proceeding in Tribal Court, and Motion to Dismiss the arbitration proceeding before AAA, which raise complex federal Indian law issues.

[11] At pages 2 and 9 Defendants allege that AMERIND's Charter Tribes have no say on decisions of AMERIND and receive no benefits from AMERIND and therefore AMERIND is not a "Tribe" under 28 U.S.C. § 1362. Section 17 does not require that the Charter Tribes must make decisions for, or receive benefits from AMERIND. The purpose of federal incorporation under Section 17 is to separate Tribal political affairs from the corporation's business decisions, and to segregate assets to protect the Tribal treasury. Moreover, the U.S. Secretary of Interior has approved AMERIND's Charter. Courts have been very clear why a Section 17 corporation maintains the Tribe's privileges and immunities, including sovereign immunity. A Section 17 corporation is a closely held Tribal entity with distinctive characteristics of a Tribe, including:

concerns a Tribal entity chartered under Tribal laws, not Section 17 of the IRA. In *White Mountain Apache Tribe v. Williams*, the Ninth Circuit observed:

> The plain language of section 1362 authorizes actions 'brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior': it does not distinguish between the 'governmental' tribe provided for in IRA section 16 and the 'incorporated tribe' provided for in section 17. Moreover, nothing in section 1362's legislative history indicates that it was intended to apply only to tribes acting in a sovereign or governmental capacity. When Congress passed section 1362 in 1966, it was fully aware that Indian tribes could act in both sovereign and proprietary capacities. **Therefore, its failure to limit explicitly the scope of section 1362 to actions brought by tribes in their governmental capacity suggests that it intended the provision to encompass actions brought by tribes in their corporate capacity as well.** Furthermore, this court has held that 'statutes passed for the benefit of Indian tribes, such as section 1362, are to be liberally construed, with doubtful expressions being resolved in the Indians' favor.'

810 F.2d 844, 868 (9th Cir. 1984) (citations omitted and emphasis added).

Defendants seek to have this Court violate the sovereign rights of Tribal entities to enjoy self-determination and self-governance, contrary to Federal Indian policy, which supports Tribal self-determination and a Tribe's ability to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959); *National Farmers*, 471 U.S. at 856 ("Congress is committed to a policy of supporting tribal self-government and self-determination.").

There is nothing under Blackfeet Tribal Law that prevents Defendants from entering into an inter-tribal agreement and choosing less adversarial forms of dispute resolution. In fact, it benefits both sides of an inter-tribal agreement to choose an objective forum that is not related to one of AMERIND's 400-plus Member Tribes.

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(1) its powers are approved by the Secretary of the Interior; (2) its charter can be revoked only by an act of Congress; (3) it can have the power to purchase restricted lands; and (4) it cannot alienate its stock and certain land holdings. *Uniband Inc. v. Commr.*, 140 T.C. 230, 264 (2013) (discussing how Uniband as a state incorporated entity is different from a § 17 corporation).

V. EXHAUSTION OF REMEDIES

A. The Parties Contractually Agreed to Waive Exhaustion of Tribal Remedies

The Defendants contractually waived any required exhaustion of Tribal remedies and this Court must uphold that waiver. Section 8(a)(9) of the Participation Agreement provides: "To the extent permitted by law, the Participant waives the exhaustion of tribal remedies." Similar to the requirement that a waiver of tribal sovereign immunity must be expressed unequivocally, (*see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)), the waiver of exhaustion of Tribal remedies is expressed clearly in the Participant Agreement by all parties to the agreement.

Federal courts should not interfere with an inter-tribal agreement's waiver of exhaustion of Tribal remedies, just as it would not interfere with an express waiver of sovereign immunity. Instead, this Court must give Tribal waivers full force and effect consistent with the Federal Arbitration Act (hereinafter, "FAA"), 9 U.S.C. §§ 1-16, which strongly upholds "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

In *Navajo Nation v. Intermountain Steel Bldgs.*, 42 F. Supp. 2d 1222 (N.M. 1999), the Navajo Nation sought to litigate an insurance claim against non-Indian parties based on Navajo law and custom in a federal court. *Id.* at 1227. The Indian Nation and non-Indian parties had not made a prior agreement to waive exhaustion of Tribal remedies and the Court determined as a matter of comity, the federal case should be dismissed and brought instead in the Tribal Court. The present case is easily distinguishable from *Navajo Nation* because both parties in this case are sovereign Tribal entities that have agreed to waive exhaustion of Tribal remedies.

Defendants cite to *Gaming World Int'l v. White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003), Bank One, N.A. v. Shumake, 281 F.3d 507 (5th Cir. 2002), *Basil Cook*

Enters., Inc. v. St. Regis Mohawk Tribe, 117 F. 3d 61 (2d Cir. 1997), and *Stock West Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221 (9th Cir. 1989), for the proposition that the Tribal exhaustion doctrine requires exhaustion in the context of an arbitration clause. However, all of these cases are distinguishable from this case: (1) AMERIND has not waived its immunity to be subject to Blackfeet Tribal Court jurisdiction, and (2) the parties have consented to binding arbitration in New Mexico. Because of the sovereign parties' agreement to arbitrate disputes, there are no comity concerns. In fact, federal law regarding Tribal sovereign immunity should take precedence over the exhaustion rule because AMERIND's sovereign immunity determines whether there is Blackfeet Tribal Court jurisdiction. *See Luckerman v. Narragansett Indian Tribe*, 965 F. Supp. 2d 224, 229 (D.R.I. 2013) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8, 107 S. Ct. 971 (1987)) ("Unlike sovereign immunity, the tribal exhaustion doctrine is not jurisdictional in nature, but, rather, is a product of comity and related considerations.").

In *FGS Constructors v. Carlow*, the Eighth Circuit held that where the Tribe consented to allow disputes in Tribal or federal court, there were no comity concerns that justified dismissal of the federal court action to proceed to Tribal court:

> We do not agree with the district court's determination that FGS must first exhaust its remedies in the tribal court. The contracting parties agreed that a plaintiff could sue either in the federal district court of South Dakota (a court of competent jurisdiction) or in the tribal court. By this forum selection clause, the Tribe agreed that disputes need not be litigated in tribal court. The district court, therefore, had no significant comity reason to defer this Miller Act litigation first to the tribal court.

64 F.3d 1230, 1233 (8th Cir. 1995).

Similarly, in *Bruce H. Lien Co., supra,* the Eighth Circuit noted that where a contract involving the Tribal entity is legally valid, the court's course is simple:

> This is a troubling action in that it presents a 'tale of two cases' quandary. If the management contract is legally valid, our course is simple. The Tribes have clearly and unequivocally waived their sovereign immunity under the contract and the parties have chosen binding arbitration as a dispute resolution procedure. The District Court of North Dakota was the selected forum in which to bring an action for injunctive relief and that forum would clearly have jurisdiction to enforce the provisions of the contract.

93 F.3d at 1416-17. The Eighth Circuit ultimately found, however, that there was a dispute over the validity of the entire underlying agreement (based on a purported lack of authority to sign), but this situation is not present in the instant case. Here, Defendants are simply not happy with their agreement and their lack of payment for an invalid claim, so they have sought to circumvent their obligations by challenging this Court's authority to enforce the parties' previously agreed upon dispute resolution provisions.

Where the sovereign Tribal entities themselves have agreed to alternative dispute resolution and a waiver of rights to exhaustion of Tribal remedies in order to pursue those alternative remedies, those inter-tribal agreements should be given respect and deference by a federal court, and the federal policy favoring arbitration, and tribal self-government, should be paramount. "A federal court's exercise of jurisdiction over matters relating to reservation affairs can . . . impair the authority of tribal courts." *Iowa Mutual*, 480 U.S. at 15, citing *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 105 S. Ct. 2447 (1985). To upend Tribal self-determination and create a new common law rule negating dispute resolution provisions in an inter-tribal agreement would be unprecedented and offensive to Tribal sovereignty. In fact, the U.S. Supreme Court has consistently recognized "the Federal Government's long-standing policy of encouraging tribal self-government," and noted that "tribal courts play a vital role in tribal self-government." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15, 94, 107 S. Ct. 971

(1987). "Congress is committed to a policy of supporting tribal self-government and self-determination." *National Farmers*, *supra*, 471 U.S. at 856.

This Court should not require exhaustion of Tribal remedies between two Tribal sovereigns where they have entered into a binding agreement to handle disputes through alternative dispute resolution mechanisms and have provided an express waiver of exhaustion.

B. Exceptions to Exhaustion Rule

Even if this Court does not agree that two sovereign entities can agree to a waiver of Tribal exhaustion rights in order to resolve a dispute through alternative dispute resolution mechanisms, there are still several exceptions to the Tribal exhaustion rule that would apply in this case. The federal common law rule requiring a federal court to stay its hand until a Tribal Court has had a full opportunity to determine its own jurisdiction derives from *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985) and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). However, there are exceptions to this rule: (1) where "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith"; (2) "where the action is patently violative of express jurisdictional prohibitions"; and (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers*, 471 U.S. at 857. In addition, where it is clear that the tribal court lacks jurisdiction and that its proceedings would serve "no purpose other than delay," a federal court may excuse exhaustion. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001).

Generally, Tribal Courts rarely lose the first opportunity to determine jurisdiction. However, "[c]ases in which tribal courts are not given the first opportunity to determine their jurisdiction typically involve situations where the federal court has exclusive jurisdiction, see *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094, 1097-98 (8th Cir. 1989), **or where tribal**

jurisdiction is foreclosed by sovereign immunity, see *United States v. Yakima Tribal Court*, 806 F.2d 853, 860-61 (9th Cir. 1986)." *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1502 (10th Cir. N.M. 1997) (emphasis added).

U.S. v. Yakima Tribal Court, 806 F.2d 853 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987), held that Tribal exhaustion was pointless because Tribal Court jurisdiction was clearly foreclosed by the sovereign immunity of the United States. AMERIND is a Section 17 corporation immune from suit and it has not waived its sovereign immunity to proceed in Blackfeet Tribal Court. Thus to require exhaustion of Tribal Court remedies will do nothing but delay the inevitable arbitration that must take place between the parties.

Furthermore, Defendants have failed to even mention AMERIND's sovereign immunity in their Motion to Dismiss, let alone prove that AMERIND has provided an express waiver. Absent Congressional action, or Tribal consent or waiver, an Indian Tribe and its Section 17 corporations may not be subject to suit in any court. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58, (1978); *see also AMERIND v. Malaterre*, *supra*, 633 F.3d at 680. AMERIND's sovereign immunity encompasses both *whether* it may be sued and *where* it may be sued. *Kiowa Tribe of Okla. V. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.") Therefore, jurisdiction over AMERIND in Blackfeet Tribal Court is not "colorable" or "plausible." *See Stock West Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992) ("By colorable we mean that on the record before us, the assertion of tribal court jurisdiction is plausible and appears to have a valid or genuine basis."). The Defendants have the burden to show how AMERIND clearly and unmistakably waived its sovereign immunity to allow assertion of Blackfeet Tribal Court jurisdiction. *Malaterre,* 633 F.3d at 682.

The only waiver that AMERIND has provided is through the arbitration provision and this is a *limited* waiver of sovereign immunity that AMERIND made in *reliance* upon the parties' agreement to arbitrate their claims. The limited waiver of sovereign immunity provides for binding arbitration and only for submission to the following jurisdictions and for limited circumstances: United Stated District Court for the District of New Mexico, the Second Judicial District Court of the State of New Mexico, or the Pueblo of Santa Ana Tribal Court to (i) compel arbitration, (ii) determine the validity of this agreement … (iii) determine the authority of the signatories to this agreement, or (iv) determine whether tribal sovereign immunity or tribal remedies has been waived." (*See* Participation Agreement, sections (a)(5) and (a)(9)).

AMERIND's Charter clearly states that it can sue and be sued only subject to enumerated limitations requiring a resolution of its board of directors, among other things. (*See* Motion to Dismiss at Exhibit A (Charter), Article 8, § 18, and Article 16). AMERIND's *limited* waiver of sovereign immunity was enumerated and limited by the terms of the arbitration provision as described above. *See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (holding that Tribe had waived its immunity from suit for arbitration as provided in the parties' agreement, which included enforcement of the arbitral award "in any court having jurisdiction thereof").

Alternative dispute resolution, including binding arbitration, allows the sovereign Tribal parties to limit the adversarial nature of their disputes, and obtain an objective forum for resolution. AMERIND cannot be sued in Blackfeet Tribal Court under these facts and pursuant to current federal law—and Defendants have not proved otherwise. Therefore, this Court cannot dismiss this action to allow exhaustion of remedies before the Blackfeet Tribal Court. The Blackfeet Tribal Court does not have jurisdiction to hear the claim because AMERIND has not

waived its sovereign immunity. *See Starkey v. Boulder County Soc. Servs.*, 569 F.3d 1244, 1260 (10th Cir. Colo. 2009) (stating that a court will not have the authority to decide the merits of the claim unless it has jurisdiction to hear it)

VI. INAPPLICABILITY OF BLACKFEET TRIBAL LAW

Blackfeet Tribal Laws do not support jurisdiction over AMERIND. In fact, according to the Blackfeet Tribe's own Constitution and laws, the Blackfeet Tribe Courts possess only "limited jurisdiction." For example, the Blackfeet Constitution, Art. VI, § 1(k), limits the jurisdiction of the Tribal Court to "the adjudication of claims or disputes arising *amongst members of the tribe*." (emphasis added). (*See* attached Exhibit C (Blackfeet Constitution), Art. VI, and attached Exhibit D (Blackfeet Tribal Law and Order Code, Chapt. 2, Sections 1 and 2).) In addition, the Blackfeet Tribal Law and Order Code, Chapter 2, Civil Action, Section 1, only provides for "jurisdiction of all suits wherein the defendant is a member of the Tribe." *Id.* AMERIND is not a member of the Blackfeet Tribe and resides within the Pueblo of Santa Ana. Thus, the Blackfeet Tribal Court cannot exercise jurisdiction over AMERIND without violating the Blackfeet Tribe's own constitutional and statutory framework.

Defendants also make a legally unfounded and wholly conclusory argument that the Blackfeet Nation has a statute that adopts Montana's choice of venue prohibition in an insurance contract. Noticeably, Defendants fail to cite the actual language or provide any analysis of any such purported statute. The Blackfeet Law and Order Code, Chapter 2, section 2, cited to by Defendants, states:

> In all Civil cases and in all cases arising under Chapters 3 and 7, the Court shall apply any Law of the United states that may be applicable, any authorized regulations of the Interior Department, and any ordinances or customs of the Tribe, not prohibited by such Federal Law. Where any doubt arises as to the customs and usage of the Tribe, the Court may

> request the advice of counselors familiar with these customs and usages. Any matters that are not covered by the traditional customs or by ordinances of the Tribal Court, shall be according to the law of the State. The Tribal Court shall, in its discretion, turn over to other Courts of record such cases as it deems necessary.

Id. The Blackfeet Tribal Law and Order Code sets forth a hierarchy of application of federal law first, Blackfeet Tribal law and custom, and if there is no other law, then Montana state law. In other words, federal law takes precedence over other law.

Even assuming, for the sake of argument, that Montana law was somehow applicable, the Montana statute relied upon by Defendants would be preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, as the United States Supreme Court has made it clear that any state law which bars or limits arbitration is preempted by the FAA:

> As this Court reaffirmed last Term, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility LLC v. Concepcion,* 563 U.S. __, 131 S.Ct. 1740, 1747, 179 L.Ed.2d 742 (2011). That rule resolves these cases. West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA. See *ibid.* See also, *e.g., Preston v. Ferrer,* 552 U.S. 346, 356, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008) (FAA pre-empts state law granting state commissioner exclusive jurisdiction to decide issue the parties agreed to arbitrate); *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 56, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (FAA pre-empts state law requiring judicial resolution of claims involving punitive damages); *Perry v. Thomas,* 482 U.S. 483, 491, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) (FAA pre-empts state-law requirement that litigants be provided a judicial forum for wage disputes); *Southland Corp. v. Keating,* 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (FAA pre-empts state financial investment statute's prohibition of arbitration of claims brought under that statute).

Marmet Health Care Ctr., Inc. v. Brown, —U.S. —, —, 132 S. Ct. 1201, 1203-04, 182 L. Ed. 2d 42 (2012).

In addition, Montana state law cannot be read to interpret an inter-tribal agreement. *See Williams v. Lee*, 358 U.S. 217, 223 (1959) (denying state court jurisdiction over contract dispute between non-Indians on reservation, reasoning that the Court had "consistently guarded the authority of Indian governments over their reservations"). State laws cannot provide regulatory jurisdiction over Tribes unless Congress has so allowed.

VII. CONCLUSION

Based on the foregoing, AMERIND respectfully requests that this Court deny Defendants' Motion to Dismiss and require Defendants to submit their answer.

RESPECTFULLY SUBMITTED this 9th day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2015, I filed the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM** electronically with the Clerk's Office using the CM/ECF System, which caused all parties or counsel to be served by electronic means.

/s/ Jodie B. Mize
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