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IN THE UNITED DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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| AMERIND RISK MANAGEMENT CORPORATION, a Section 17 federally chartered corporation,<br><br>Plaintiff,<br><br>v.<br><br>BLACKFEET HOUSING, BLACKFEET HOUSING LIMITED PARTNERSHIP #1, BLACKFEET HOUSING LIMITED PARTNERSHIP #2, BLACKFEET HOUSING LIMITED PARTNERSHIP #3, BLACKFEET HOUSING LIMITED PARTNERSHIP #4,<br><br>Defendants. | CASE NO. 15-CV-00072<br><br>**REPLY BRIEF** |

Comes now Blackfeet Housing, et. al. and files this Reply Brief.

**I. Arbitration Clause Does Not Preclude Tribal Exhaustion of Remedies.**

This case involves the question of whether a federal court should enforce an arbitration clause in an insurance policy between a federally recognized an Indian Housing Authority chartered by a federally recognized tribe and an insurance company chartered under Section 17 of the Indian Reorganization Act by three federally recognized Indian

Tribes doing business on and off Indian Reservations throughout the United States. In cases involving contracts with tribes and the question of whether a federal court should enforce an arbitration clause, the courts uniformly have held that such clauses do not preclude exhaustion of tribal remedies. In fact, meaningful tribal remedies are routinely viewed as a prerequisite to federal courts proceedings with such cases. *Grand Canyon Skywalk Development, LLC v. Hualapai Indian Tribe of Arizona,* 966 F. Supp. 2d 876 (D. Ariz. 2013*; LECG, LLC v. Seneca Nation of Indians,* 518 F. Supp. 2d 274 (D.D.C. 2007*; Stock West, Inc. v. Confederated Tribes of the Colville Reservation,* 873 F.2d 1221 (9th Cir. 1989*; Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe,* 117 F.3d 61 (2d Cir. 1997).

The United States Court of Appeals for the Eighth Circuit, in *Gaming World Intern., Ltd. V. White Earth Bank of Chippewa Indians*, 317 F.3d 840, 852, 186 A.L.R. Fed. 581( 8th Cir. 2003) ruled that the federal district court held the district court erred by not deferring its exercise of jurisdiction to allow for exhaustion of tribal court remedies and by proceeding to rule on a motion to compel arbitration. The Eighth Circuit ruled that exhaustion is required when a party tries to avoid tribal court jurisdiction by seeking an order to compel arbitration in federal court. See *Id*. This is especially true if the underlying dispute involves activities undertaken by the tribal government within reservation lands.

Moreover, most courts hold that the tribal exhaustion doctrine should be given more weight than provisions contained within the four corners of a contract. *Heldt v. Payday Financial, LLC,* 12 F. Supp. 3d 1170 (D.S.D. 2014). Where it would otherwise be applicable, the tribal courts should be initially given the opportunity to review a controversy. Furthermore, federal appellate courts have found the parties cannot waive

the exhaustion of tribal court remedies. *Town Pump, Inc. v. LaPlante,* 394 Fed. Appx. 425, 427 (9th Cir. 2010).

This court has said even when the parties stipulate to federal court jurisdiction, the federal court must defer to tribal court and require exhaustion of tribal court remedies. *Navajo Nation v. Intermountain Steel*, 42 F. Supp. 2d 1222, 1226; 1999 U.S. Dist. LEXIS 4003, (1999.)

Under the tribal exhaustion doctrine, when a colorable claim of tribal court jurisdiction has been asserted, federal court may, and ordinarily should, give tribal court precedence to afford it full and fair opportunity to determine the extent of its own jurisdiction over particular claims. *Luckerman v. Narragansett Indian Tribe,* 965 F. Supp. 2d 224 (D.R.I. 2013). The Eighth Circuit Court of Appeals held that though the federal district court had federal question jurisdiction over an action regarding contract issues and arbitration of a tribal casino's license fees and construction costs, comity required dismissal pending exhaustion of tribal court remedies. The court found that tribal exhaustion was especially appropriate when most of the parties were tribal entities or members and the dispute arose from tribal governmental activity involving a project located within reservation borders.

Similarly, the Eighth Circuit Court concluded that questions of tribal court jurisdiction and the validity of the management contract were issues relating to the tribal court's jurisdiction, which first had to be dealt with by the tribal court itself. *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996).

In this case, Blackfeet Housing is a tribally owned business operating solely on the Blackfeet Indian Reservation. Amerind is an entity that was chartered by three tribes

to sell insurance and Amerind chose to insure Blackfeet Housing property located on the Blackfeet Indian Reservation on tribal land held in trust by the United States. While the insurance policy contains an arbitration clause, this issue is properly in front of the Blackfeet Tribal Court. Further, the question of whether Amerind is immune from suit is also before the Blackfeet Tribal Court. Thus, Blackfeet Housing respectfully requests this court dismiss based on the principle of exhaustion of tribal court jurisdiction. Alternative, dismissal is appropriate based on federal court enunciated doctrine of comity; Amerind should be required to exhaust its tribal court remedies.

**II. The Question of Whether Amerind is Immune From Suit is a Matter Properly In Front of the Blackfeet Tribal Court**

Amerind argues that because it claims to be an Indian entity that it is immune from suit and, thus, this court has jurisdiction.[1] This is not the law; in fact even state entities may not be immune in tribal court.

In, *Fort Yates Public School District, v. Murphy*, 997 F. Supp. 2d 1099, (2014), a state school district and the school's insurer argued to federal district court on a motion for a preliminary injunction to prevent execution of a default judgment, that it sought to invoke the jurisdiction of the federal court under 28 USC § 1331 of the Judicial Code, a

[1] Blackfeet Housing does not argue with Amerind that a charter from three different tribes created it, but Blackfeet Housing argues that Amerind is not entitled to sovereign immunity, as it is not an arm of any of these tribes providing essential government services to these tribes. It essentially operates as any corporation that receives a charter from a government and most importantly, Amerind does not provide any essential governmental services to these incorporating tribes. The insurance it provides can just as readily be provided by any insurance company such as Allstate, etc, as the tribes have absolutely no ownership in this corporation. Amerind will argue that its charter says the three tribes own this company; however, in the next paragraph in the charter it states unequivocally that the tribes have no management or ownership rights in this company. The question of whether Amerind is considered an arm of any tribe is pending before the Blackfeet Tribal Court.

Tribal Court had no power to enter a judgment against them. It claimed the federal law had divested the tribe of sovereign jurisdiction over such matters occurring on its reservations. The federal district court found the tribal court had jurisdiction. See *Id.* at 1016. The United States Supreme Court concluded that the existence and extent of tribal court jurisdiction requires a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, and a detailed study of relevant statutes, treaties, administrative and judicial decisions. The court held such examination should be conducted in the first instance in tribal court itself. *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). Furthermore, with the exception of one case[2], the United States Supreme Court has applied the Montana test "almost exclusively to questions of jurisdiction arising on non-Indian land or its equivalent." *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013).

Along with this factor there are two other significant principles that have not been abrogated by the Supreme Court: (1) the federal policy of promoting tribal self-government, which necessarily encompasses the development of a functioning tribal court system, *Iowa Mut. Ins. Co*., 480 U.S. at 16-17; and (2) because "tribal courts are competent law-applying bodies, the tribal court's determination of its own jurisdiction is entitled to 'some deference.'" *Water Wheel Camp Recreational Area, Inc. v. LaRance,* 642 F.3d 802, 808 (9th Cir. 2011) (quoting *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990)).

[2] *Nevada v. Hicks*, 533 U.S. 353 (2001(.

Using the Montana test as the guiding light in this case, the question is not whether Amerind is immune but what is the status of the land where the homes sit that Amerind insured. *Montana v. United States,* 450 U.S. 544, 565, (1981). The homes sit on tribal trust land. Thus, based on this rule, articulated and cited above, this court should dismiss this case as the status of the land favors tribal court jurisdiction in the first instance.

Amerind claims to be an Indian entity. (See Amerind's complaint, Doc #1) Thus, this is a case where Amerind expected to be involved in a case that is tribal in nature. Federal policy supports tribal self-determination. Tribal court determination of whether Amerind is immune from suit, rather than a federal court, making that determination, furthers federal policy.

Noteworthy is the fact that not one of the chartering tribes is a party to this lawsuit. Amerind, an insurance company is the party. There is no dispute that Amerind sells insurance around the country. It is an entity that operates as a commercial non-profit corporation selling insurance to Indian housing authorities throughout the country. Amerind operates in the open market but would like this court to find it is immune from any claim should a claim be brought by those individuals it insures. This flies in the face of the insurance industry that by its very nature expects to be in court from time to time involving its insurance policies. It would be a misrepresentation of the facts to suggest that it will provide insurance only if it is actually immune from suit. Amerind's board of directors is made up of Indians and non-Indians. Many of Amerind's staff are non-Indians. Amerind's board is not selected by the three chartering tribes but is instead

selected by Indian housing authorities, who may or may not be members of federally recognized tribes. (Pl. Exh 1, Article 12).

In this case the Tribal Operations Protection Program ("TOPP") coverage does not extend to Indian Housing Authorities homes covered by the Native American Housing Self-Determination Act ("NAHSDA") funds but is used to insure all non-NAHSDA property. (See Def. Exh. 2, p.1 & PL Exh. B) Therefore, Amerind, while an entity that is incorporated by three tribes, it is not an arm or sub entity of these tribes. Since sovereign immunity of tribes extends only to sub-entities or enterprises of a tribe. Amerind is not entitled to sovereign immunity and. therefore, is not immune from suit. *See Ramey Constr. Co., Inc. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315, 320 (10th Cir. 1982)* (Held trial court's finding that resort was a sub-entity of the tribe rather than a "separate corporate entity," resulted in the conclusion the resort was "clothed with the sovereign immunity of the Tribe"); *S. Unique Ltd. v. Gila River Pima-Maricopa Indian Cmty., 138 Ariz. 378, 674 P.2d 1376, 1379 (Ariz. App. 1983)* (absent an express waiver, subordinate economic organizations of Indian tribes are immune from suit). By contrast, in this case, Amerind is not an arm or sub entity of any tribe but rather is a wholly separate corporate entity. *See Ramey, 673 F.2d at 320.* Accordingly, Amerind is not immune from suit. However if there is still a question of whether Amerind is immune, this matter is properly before the Blackfeet Tribal Court.

**CONCLUSION**

In accordance with the doctrine of tribal exhaustion of remedies or alternatively the principles of comity, this court should dismiss this case in favor of the courts of the Blackfeet Tribe. Further, these federal doctrines resulting in deference to tribal court to

determine whether Amerind is entitled to sovereign immunity mandates remanding the parties to the Blackfeet Tribal Court for that determination.

Dated this 27th day of April 2015.

___/s/_Terryl T. Matt_____
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___/s/_Alan Taradash_____
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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the Reply Brief complies with Rule 7.5 in that the brief is not more than 12 pages double-spaced.

/s/ Terryl T. Matt
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was served this 27th day of April 2015, via the Court's ECF system upon:

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