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IN THE UNITED DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

AMERIND RISK MANAGEMENT CORPORATION, a Section 17 federally chartered corporation,	)	
Plaintiff,	)	
v.	)	**CASE NO. 1:16-cv-1093-LF-KK**
BLACKFEET HOUSING,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION AND SUMMARY OF PROCEDURAL HISTORY

Amerind filed the instant lawsuit against Blackfeet Housing on October 4, 2016 (Doc. 1) asserting jurisdiction in this court under the following theories: (1) federal question citing 28 U.S.C. 1331, 2) diversity citing 28 U.S.C. 1332, (3) supplemental jurisdiction citing 28 U.S.C. 1367, and (4) the Declaratory Judgment Act citing 28 U.S.C. 2201-02. Previously, Amerind filed essentially the identical lawsuit against Blackfeet Housing in this very court on January 28, 2015,

(Doc. 1 in Case no. 1:15-cv-00072-WJ-KBM) asserting federal question as the basis of jurisdiction citing 28 U.S.C. 1331 and 1362 and 9 U.S.C. 4 as authority to provide relief to compel arbitration. (*Id.* at p. 4.) The Honorable Judge William P. Johnson, upon Blackfeet Housing's Motion to Dismiss for lack of jurisdiction and briefing of all issues by the parties, entered an Opinion and Order granting Blackfeet Housing's Motion to Dismiss for Lack of Subject Matter Jurisdiction on the theory of federal question jurisdiction and Denying [Defendant's] Motion with Regard to Other Grounds for Dismissal. (*Id.* Doc. 36, Order and Memorandum Opinion entered on May 11, 2015)[1].

Amerind filed its Notice of Appeal from Judge Johnson's Memorandum Opinion and Order on June 4, 2015, (*Id.* Doc. 38) appealing the case to the United States Court of Appeals for the Tenth Circuit. (Appellate case no.15-2089, Appellate docket). In that appeal Amerind argued, *inter alia,* that the District Court erred on the basis of that court's determination that Amerind's Complaint did not raise any question arising under federal law as required for the court to assert subject matter jurisdiction pursuant to 28 U.S.C. 1331. Astoundingly, Amerind also argued, but did not plead nor seek leave to amend its complaint, that the District Court erred in ruling that it did not have jurisdiction under principles of diversity. (See Doc. 10019489119, pp. 11 -17 of Amerind's Opening Appellate Brief before the Tenth Circuit Court of Appeals). Furthermore, Amerind argued in its Opening Appellate Brief that even on appeal it ought to be allowed to amend its Complaint to Allege Diversity to Avoid Injustice and citing 28 U.S.C. 1653 as authority for amending its complaint even on appeal. (*Id* at 13-17).

[1] Plaintiffs reference the district and appellate court docket numbers from the prior case filed by Amerind in 2015. This was done as these documents collectively exceed the page limitation of the local rule. Upon being advised and with court's permission Defendant will promptly provide the relevant documents.

Although Amerind made arguments not supported in the record regarding the error supposedly committed in the District Court that, in fact, never occurred, and even though it also argued vigorously for its right to amend its Complaint to allege diversity as a basis for jurisdiction, it *never sought leave to amend its complaint to allege diversity as a basis of the district court's jurisdiction.*

Futhermore, after all briefing was done by Amerind and Blackfeet Housing in Amerind's Appeal, Amerind dismissed its appeal offering no explanation and after causing Blackfeet Housing to incur a significant expense in responding to Amerind's apparently groundless appeal. (See Appellate Case 15-2089 Doc. 01019579968 Order of the Tenth Circuit Court of Appeals entered on March 2, 2016, dismissing the case upon Amerind's "Motion for Voluntary Dismissal of Appeal".

The Blackfeet Appellate Court taking jurisdiction over the matter in the Blackfeet Tribal Court system issued its ruling and opinion on November 7, 2016, received by undersigned counsel on November 10, 2016, ruling that Amerind waived sovereign immunity by agreeing to arbitrate and ordering the parties to arbitrate under its authority and providing that Amerind is obligated to pay all of the costs, including those of Blackfeet Housing. Undersigned counsel has been instructed by Blackfeet Housing to file a Motion for Reconsideration and if necessary an appeal to the Blackfeet Supreme Court seeking review of the Blackfeet Appellate Court determination. Hence, this matter is still within the appellate process of the Blackfeet judicial system.

FACTUAL BACKGROUND

A. Relevant Facts

Blackfeet Housing is a non-profit entity wholly owned and chartered by the Blackfeet Tribe. (Exhibit A, pg. 2) Blackfeet Housing is a member of Amerind Risk Management Corporation. (Doc. #1, p. 4 & Exh. A, p. 2.) Blackfeet Housing has no established minimum contacts with the state of New Mexico. Blackfeet Housing has no bank accounts in New Mexico, has no office or property in New Mexico, is not licensed to do business in New Mexico, has no employees in New Mexico, does not advertise or solicit business in New Mexico, and does not pay taxes in New Mexico. (Chancy Kittson Affidavit, pgs 1-2)

Amerind Risk Management Corporation ("Amerind Risk") is a member-owned organization of Tribes and Indian Housing Authorities. Blackfeet Housing is one of the member-owners. (Exhibit C) This document provides:

> AMERIND RISK MANAGEMENT CORPORATION ("ARMC"), acting as administrator of the TRIBAL OPERATIONS PROTECTION PLAN, an ARMC Cell ("TOPP"), and _____, located at _____ (the "Participant"). TOPP is a self-insurance risk-sharing cell created under the rules of the ARMC Cell Regulation adopted by ARMC on January 29, 2009, to protect participants from financial loss arising out of certain liability and property risks and under which the participants in TOPP agree to jointly share in the costs of protecting against financial loss and in the monetary claims that may arise from financial loss. (Exhibit E)

This language establishes several relevant facts: (1) Blackfeet Housing and Amerind do not meet the diversity requirement of 28 U.S.C. 1332; (2) Blackfeet Housing shares in any Amerind financial loss; (3) and, Blackfeet Housing is a part owner of Amerind, in addition to, and separate from, Amerind insuring Blackfeet Housing property.

In April of 2013, Blackfeet Housing provided notice to Amerind that some of its Amerind insured homes had been damaged and requested Amerind to determine coverage. (Exhibit D). Amerind denied coverage in March of 2014. (*Id.* at 3).

In April of 2014, Blackfeet Housing filed a complaint against Amerind in the Blackfeet Tribal Court. In early May of 2013 the parties held a conference call and agreed to informal mediation to be conducted in September 2014 in Portland, Oregon but mediation did not occur. (*Id.*). The parties did meet briefly in September during Amerind's general meeting over lunch and this meeting with the board failed to resolve the dispute. (Exhibit E) On September 29, 2014 Blackfeet Housing served Amerind's chairman, Phil Bush with the Blackfeet Tribal Court complaint which had been filed in tribal court. (Exhibit F)

B. Prior Federal District Court Litigation

In the first case, *Amerind Risk Management Corporation v. Blackfeet Housing, et al.*, (Doc. 1 in Case no. 1:15-cv-00072-WJ-KBM) filed in this court, Amerind asked for Specific Performance to Compel Arbitration and for Declaratory Relief pursuant to 28 U.S.C §§ 1331 and 1362 and 9 U.S.C § 4. In this the second case, Amerind asked for Declaratory Relief and an Injunction pursuant to 29 U.S.C. 1331 and 1332; 28 U.S.C. § 1367, and 28 U.S.C §§ 2201-2202. (Doc. 1) In the first case, Amerind, while it did not specifically plead the Declaratory Judgment Act as an independent basis for jurisdiction, did ask for declaratory relief in its claim for relief. (Doc. 1 in Case no. 1:15-cv-00072-WJ-KBM, pgs 10-11) As a result, in the first case Blackfeet Housing presented in its brief to the court that an action brought pursuant to the Declaratory Judgment Act, 28 U.S.C. 2201, does not confer jurisdiction and is not an independent source of subject matter jurisdiction, either. 10 Federal Procedure, L. Ed Declaratory Judgments § 23:39 (2007). Judge William P. Johnson of this court in his Order of dismissal reiterated this axiomatic status of the law. (*Id.* Doc 36, pg. 7).

In the first case, Amerind asked this court for an order to compel arbitration declaring that the parties "Participation Agreement" governs the arbitration process. Amerind's first case was dismissed based on lack of federal question jurisdiction. The court issued a final judgment on May 11, 2015 based on its Memorandum of Opinion and Order. The j*udgment* states: "…thus *disposing of this case on its merits and in its entirety*." (Id. Doc. 37, emphasis added)

In the first case, Amerind did not plead diversity, supplemental, or declaratory judgment as a basis for jurisdiction but did plead federal question jurisdiction. After this court dismissed the case on its merits on the May 5, 2016, Amerind filed an appeal with the Tenth Circuit. The Tenth Circuit court clerk issued an order scheduling the due date for Amerind's brief for August 28, 2015. (Doc. 01019462208) On August 3, 2015, the appellate court clerk issued to Amerind a deficiency notice for failing to file its brief in a timely manner. (Doc. 010194891193365) On September 10, 2015, Amerind filed its brief out-of-time brief without leave of court. In this brief Amerind argued to the Tenth Circuit that the lower court erred both by not taking jurisdiction based on diversity even though it was not pleaded nor did that court rule on it but also by not allowing Amerind to amend its complaint to allege diversity jurisdiction, which it never asked leave to do. (Doc. 0101948119336) Amerind also argued that the district court erred by not considering that Blackfeet Housing's raising of the doctrine of exhaustion of tribal remedies in the court below was, somehow, thereby seeking to abrogate Amerind's sovereign immunity. Amerind argued this was also a federal question. (*Id.*) Blackfeet Housing then spent considerable time and money preparing and filing a Response brief. This matter was set on the Tenth Circuit calendar for oral argument. Two weeks before oral argument, Amerind filed a motion to dismiss its appeal. (Doc. 01019578365)

In the Second case, now before this court, Amerind asks for the same relief as in the first case at both the district court and appellate court levels. An appeal Amerind voluntarily dismissed after causing a significant expense to be incurred by Blackfeet Housing.

SUMMARY OF ARGUMENT

Dismissal of this case is mandated for several reasons. First, Amerind litigated, and lost, in its earlier case in this court because the District Court correctly ruled that Amerind's claims did not give rise to federal question jurisdiction under 28 U.S.C. 1331. Moreover, 28 U.S.C.1505 which recognizes the right of Tribes to sue in federal court does not create a separate basis of federal question jurisdiction. It is axiomatic that there still must be a federal question of law underlying a plaintiff tribe's claim.

Similarly, 9 U.S.C. 4 like 28 U.S.C. 2201-02 only provides authority for a federal district court *which otherwise has jurisdiction* to provide specific remedies with the former providing the court with authority to order a party to arbitrate and the latter providing the court with authority to declare rights and to issue appropriate injunctive relief relative to declared rights. *In each instance, there must be an independent basis for jurisdiction of the court.*

As stated hereinabove, Amerind vigorously argued in its Opening Brief before the Tenth Circuit in its appeal from its prior case, which had been dismissed in this court, that the District Court Judge committed reversible error in not ruling that the court had diversity jurisdiction as well as federal question jurisdiction *nothwithstanding the fact that it never pleaded diversity as a basis of the district court's jurisdiction.* Leaving aside Amerind's apparent violation of the Tenth Circuit's Local Rule 46.5(3) which requires that "the factual contentions or denials must be supported in the record," (*Id*.) Amerind still did not move for leave to amend to plead diversity as

a basis of jurisdiction in the district or the appellate court. However, it argued the issue of its asserted right to do so. It contended the commission of reversible error by the District Court Judge on the issue of diversity jurisdiction, *even though it never, never pleaded the issue and even though there was no ruling by the district court judge. Issue Preclusion* requires dismissal of the instant case as both of Amerind's asserted jurisdictional predicates were argued by Amerind in both the district court and the appellate court.

Pursuant to Rule 12(h) this court lacks personal jurisdiction over Blackfeet Housing as Defendant has no contacts with New Mexico giving rise to *in personam* jurisdiction. Finally, Amerind has failed to exhaust its tribal court remedies as required by the United States Supreme Court jurisprudential doctrine as articulated in *National Farmers Union Cos. v. Crow Tribe*, 471 U.S. 845(1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). The Supreme Court has established the doctrine of deference to tribal courts in the first instance to determine their own jurisdiction in cases like the instant one. Here, the tribal court's appellate process is still underway.

ARGUMENT

I. THE PRIOR RULINGS OF THIS COURT DIVISTS THE COURT JURISDICTION OVER THIS CASE.

A. This Court's Prior Ruling is Binding on Jurisdictional Grounds

Although the dismissal of a complaint for lack of jurisdiction does not adjudicate the merits so as to make the case *res judicata* on the substance of the asserted claim, it does adjudicate the court's jurisdiction. A second complaint cannot command a second consideration of the same jurisdictional claims. *Mulcahy v. United States*, 388 F.2d 300 (5th Cir. 1968); *Shaw v. Merritt-Chapman & Scott Corp.*, 554 F.2d 786 (6th Cir.), cert. denied, 434 U.S. 852 (1977);

Sanchez v. Caribbean Carriers Ltd., 552 F.2d 70 (2d Cir.), cert. denied, 434 U.S. 853 (1977); see *Durfee v. Duke*, 375 U.S. 106 (1963).

Amerind has already litigated the question of federal jurisdiction in this very district court and diversity jurisdiction and sovereign immunity at the appellate level. The district court concluded that there was no federal question jurisdiction for the claims. Amerind appealed and contended diversity jurisdiction was applicable and that Amerind was immune from suit. Before the Tenth Circuit Court could rule Amerind, by its voluntary dismissal of its appeal, conceded that the lower court decision was legally correct. Therefore, the issue has been decided, and Amerind is precluded from asserting it again.

B. Issue Preclusion Bars Plaintiff's Claims From Its Prior Litigation

The doctrine of issue preclusion prevents a party from "relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim." *Park Lake Res. Ltd. Liab. v. U.S. Dep't of Agr., 378 F.3d 1132, 1136 (10th Cir. 2004)*; *see also Burrell v. Armijo, 456 F.3d 1159, 1172 (10th Cir. 2006)*. Issue preclusion bars reconsideration of an issue that has been previously decided in an earlier action when the following elements are met:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *Park Lake Res. Ltd. Liab., 378 F.3d at 1136*; *Dodge v. Cotter Corp., 203 F.3d 1190, 1198 (10th Cir. 2000)*.

A review of the prior filings will show that all four elements are satisfied, barring Amerind's claims. Amerind's second complaint filed herein is essentially identical to the

claims Amerind asserted and this district court dismissed in Amerind's first case against Blackfeet Housing. All operative facts known to Amerind at the time of filing the first complaint regarding jurisdiction are the same herein. This case thus must be dismissed. To permit otherwise would result in endless litigation if all of the facts, as is the case here, were known by the plaintiff prior to the filing of the first case.[2] "[I]t does not make sense to allow a plaintiff to begin the same suit over and over again in the same court, each time alleging additional facts that the plaintiff was aware of from the beginning of the suit, until it finally satisfies the jurisdictional requirements." *Magnus Electronics, Inc. v. La Republica Argentina*, 830 F.2d 1396, 1401 (7th Cir. 1987).

Repetitive litigation between the same parties raising the same claims based upon the same facts are not favored in the courts. Such litigation amount to vexatious litigation which is something not favored by the courts for obvious reasons. The federal rules of civil procedure are designed and intended *". . . to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, and to provide repose by preventing a person from being harassed by vexatious litigation."* See, *Wanamaker v. Albrecht*, 99 F.3d 1151 (10th Cir. Oct 10, 1996), citing, *People v. Santamaria*, 8 Cal. 4th 903, 884 P.2d 81, 87, 35 Cal. Rptr. 2d 624(Cal. 1994), aff'd, 99 F.3d 1151 (10th Cir. 1996); see also, *Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah*, 114 F.3d 1513, 1524 (10th Cir. 1997), cert. denied, 522 U.S. 1107 (1998).

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[2] See 1B James W. Moore, Moore's Federal Practice P 0.405[5] (2d ed. 1993) (stating that a dismissal for want of jurisdiction does not preclude a subsequent action where in the interim facts have occurred which now establish jurisdiction). *Dozier v. Ford Motor Co.,* 227 U.S. App. D.C. 1, 702 F.2d 1189, 1192 (D.C. Cir. 1983*)* (limiting "curable defects" exception to post-transactional incidents of jurisdiction and finding diversity jurisdiction deficiency must be remedied by occurrences subsequent to original dismissal).

Blackfeet Housing is now faced with having to argue again to this court that federal question jurisdiction does not exist. In its first case as discussed above, Amerind did not plead diversity as a basis of the court's jurisdiction but on appeal argued that this very district court committed reversible error by not giving Amerind the opportunity to amend its complaint or by not finding jurisdiction based on diversity -- something it never pleaded. Astoundingly, Amerind did not file a motion seeking to amend either in the district court or the appellate court. *Amerind misrepresented to the Tenth Circuit that the lower court erred in not finding diversity as a basis for jurisdiction*. *Amerind never pleaded diversity jurisdiction nor sought leave to amend its complaint to plead it.* It is difficult to avoid the conclusion that Amerind's litigation in these cases is the epitome of vexatious litigation.

The doctrine of issue preclusion bars attacks on a judgment when the issue in question has been fully and fairly litigated in the prior proceeding. *Bell v. Dillard Dep't Stores, Inc., 85 F.3d 1451, 1454 (10th Cir. 1996)* (citations omitted); *Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation, 975 F.2d 683, 689 (10th Cir. 1992)*. Amerind argued federal questions jurisdiction in the district court and lost. Amerind then appealed and argued the court erred because the court should have found federal question jurisdiction existed, that diversity jurisdiction existed, and that Amerind was immune from suit. Two weeks before scheduled oral argument and before the court decided the merits, Amerind voluntarily asked the court to dismiss its appeal. Amerind has had a full and fair opportunity to litigate its jurisdictional claims. See, *Salguero v. City of Clovis,* 366 F.3d 1168, 1174 (10th Cir. 2004*)* (citations omitted) Amerind's voluntary choice to abandon its appeal does not entitle Amerind to evade issue preclusion. See, *Hartsel Springs Ranch of Colo., Inc. v. Bluegreen Corp.,* 296 F.3d 982, 989 (10th Cir. 2002)

(quoting *Sutcliffe Storage & Whse. Co. v. United States,* 162 F.2d 849, 851 (1st Cir. 1947)). Amerind has had its chance to establish whether this court has jurisdiciton. Therefore, Blackfeet Housing respectfully submits that this court should not address the merits of Amerind's lawsuit because its claims are barred by the doctrine of issue preclusion.

II. Diversity Jurisdiction Pursuant to 28 U.S.C. § 1332(a) is Lacking

Section 1332 of Title 28, United States Code confers district courts with subject matter jurisdiction over actions between "citizens of different States." 28 U.S.C. § 1332(a)(1). The party seeking to invoke diversity jurisdiction must allege facts demonstrating that complete diversity of citizenship exists between all parties to the action. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L. Ed. 435 (1806). "[W]hether federal diversity jurisdiction exists is determined by examining the citizenship of the parties at the time the action is commenced." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 179 (1936); (See also 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3608, at 448-49 (2d ed. 1984)); 15 J. Moore, Moore's Federal Practice § 102.32, at 102-61-62 (3d ed. 1998); *Grupo Dataflux v. Atlas Global Group*, L.P., 541 U.S. 567, 570-71 (2004).

Amerind is a member-owned organization of Tribes and Indian Housing Authorities. Blackfeet Housing is just such a part owner. Amerind provides insurance coverage for Blackfeet Housing's houses. Amerind and Blackfeet Housing are, for diversity of citizenship purposes, one and the same. Amerind, thus, has failed to plead complete diversity. In addition, when the underlying claim is brought by an insured against an insurer, there cannot be a finding of diversity.

III. SUPPLEMENTAL JURISDICTION IS LACKING

Amerind alleges in the instant case in essentially its second complaint raising the same issues that this court has supplemental jurisdiction. (Doc. #1, p. 2) Blackfeet Housing disputes this jurisdictional assertion on the grounds that (1) supplemental jurisdiction is not applicable to this case and (2) the Court's original jurisdiction was determined and fixed as of the time this court rendered judgment in the Amerind's first case against this same defendant. This district court's earlier ruling bars the refilling of essentially the same claims for relief. Thus any subsequently filed essentially identical complaint is irrelevant to the question of original jurisdiction as that issue has already been decided.

Section 1367(c) of Title 28 provides, *inter alia,* that a district court may decline to exercise supplemental jurisdiction over a claim if the claim involves "novel or complex" state law issues, the claim "substantially predominates over the claim or claims over which it has original jurisdiction," the "district court has dismissed all claims over which it has original jurisdiction," or "there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c). Section 1367 of Title 28 provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a) (emphasis added). The bases for supplemental jurisdiction are simply not present here and this court should decline to accept jurisdiction on that basis.

IV. PERSONAL JURISDICTION OVER DEFENDANT IS LACKING

To obtain personal jurisdiction over a nonresident defendant in a diversity action, a plaintiff must show that jurisdiction is proper under the laws of the forum state and that the

exercise of jurisdiction does not offend the due process clause of the Fourteenth Amendment." *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1295 (10th Cir. 1999). New Mexico's long-arm statute provides, in relevant part, that its courts may exercise personal jurisdiction over:

> Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this subsection thereby submits himself or his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from:
> (1) the transaction of any business within this state . . . ." N.M. Stat. Ann. § 38-1-16 C. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction is based upon this section. NMSA 1978, § 38-1-16.

The New Mexico long-arm statute is coextensive with constitutional limitations that the due process clause imposes. See *Tercero v. Roman Catholic Diocese*, 132 N.M. 312, 316, 48 P.3d 50, 54 (2002). "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). Therefore, a "court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum state." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). The requisite minimum contacts are absent here.

In determining whether a defendant has established minimum contacts with the forum state, a court examines whether the defendant "purposefully availed itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235 (1958). A defendant's contacts are sufficient if "the defendant purposefully directed its activities at residents of the forum, and . . . the plaintiff's claim arises out of or results from 'actions by the defendant *himself* that create a substantial connection with the forum state.'" *OMI*, 149 F.3d at 1091 (quoting *Asahi*,

480 U.S. at 109) (internal citations omitted).

New Mexico may have jurisdiction over a defendant who "transacts business" in New Mexico within the meaning of § 38-1-16(A)(1)N.M.S.A. (1978). *In Monks Own, Ltd. v. Monastery of Christ In Desert,* 142 N.M. 549, 168 P.3d 121 (2007), the Supreme Court of New Mexico explained that "[t]ransaction of any business . . . is defined as doing a series of similar acts for the purpose of thereby realizing pecuniary benefit, or otherwise accomplishing an object, or doing a single act for such purpose with the intention of thereby initiating a series of such acts." 142 N.M. at 556, 168 P.3d at 128 (internal quotations omitted). The court must look to the facts of each case to determine if the transaction of business category is met. See *Monks Own, Ltd. v. Monastery of Christy In Desert,* 142 N.M. at 556, 168 P.3d at 128.

1. Minimum Contacts

Blackfeet Housing has not established minimum contacts with the state of New Mexico. Blackfeet Housing has no bank accounts in New Mexico, has no office or property in New Mexico, is not licensed to do business in New Mexico, has no employees in New Mexico, does not advertise or solicit business in New Mexico, and does not pay taxes in New Mexico. Blackfeet Housing is an Indian Housing entity chartered by the Blackfeet Tribe. Blackfeet Housing owns homes on the Blackfeet Indian Reservation that it insures as part owner of Amerind. The relevant documents the property Amerind insures are homes located on the Blackfeet Indian Reservation. Thus, the performance of its insurance contract obligations are to be performed on the Blackfeet Reservation in Montana. The alleged bad faith refusal of Amerind to provide paid for insurance coverage, a partial basis of the tribal court action against Amerind by Blackfeet Housing, occurred on the Blackfeet Indian Reservation within Montana.

The question of "whether a non-resident defendant has the requisite minimum contacts with the forum state to establish in personam jurisdiction must be decided on the particular facts of each case." *Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 456 (10th Cir. 1996) (internal quotation marks omitted). The facts of this case, a contract between an out-of-state party and a resident of the forum state *cannot*, standing alone, establish sufficient minimum contacts with the forum. *Burger King*, 471 U.S. at 473. However, "with respect to interstate contractual obligations . . . parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King*, 471 U.S. at 473.

In a contract case, such as the instant one, relevant factors for assessing minimum contacts include "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing." *Id*. at 479. In this case, the parties entered into a "Participation Agreement" that proposed the terms of insurance coverage for property located all within the exterior boundaries of the Blackfeet Indian Reservation. Blackfeet Housing has no contacts in New Mexico other than to send payment to Amerind or to send letters or have phone calls with Amerind regarding insurance. Courts have said: "phone calls and letters are not necessarily sufficient in themselves to establish minimum contacts," *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1077 (10th Cir. 1995). Blackfeet Housing does not go to Amerind's place of business, but Amerind sends insurance agents and employees to the Blackfeet Indian Reservation in order to maintain and further its insurance coverage with Blackfeet Housing. This shows Amerind purposefully and knowingly avails itself of a business opportunity on the Blackfeet Indian Reservation. By contrast, Blackfeet Housing has no

contacts with New Mexico other that to send letters and payments to Amerind at its office on the Santa Ana Pueblo Reservation. *See World-Wide Volkswagen*, 444 U.S. at 298 (holding that personal jurisdiction over defendant car manufacturer was inappropriate when defendant's only contacts with the forum resulted from plaintiff's unilateral activity of driving defendant's product into another state); *Hanson*, 357 U.S. 235 (holding that personal jurisdiction over defendant trustee was inappropriate when defendant's only contacts with the forum resulted from plaintiff-settlor's unilateral activity of moving to Florida).

The touchstone of a minimum contacts analysis is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297. Blackfeet Housing has not transacted business with Amerind in New Mexico and thus has not had sufficient minimum contacts to support an exercise of personal jurisdiction.

2. Traditional Notions of Fair Play and Substantial Justice

Courts must also "consider whether the exercise of personal jurisdiction over the defendant offends traditional notions of fair play and substantial justice." *OMI*, 149 F.3d at 1091. Therefore, the next question is "whether a district court's exercise of personal jurisdiction over a defendant with minimum contacts is 'reasonable' in light of the circumstances surrounding the case." *Id*.

In assessing whether an exercise of jurisdiction is reasonable, courts consider [a] the burden on the defendant, [b] the forum state's interest in resolving the dispute, [c] the plaintiff's interest in receiving convenient and effective relief, [d] the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and [e] the shared interest of the several

states in furthering fundamental social policies. *Id*. at 1095. The analyses of minimum contacts and reasonableness are complementary, such that "[t]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: an especially strong showing of reasonableness may serve to fortify a borderline showing of [minimum contacts]." *Id*. at 1092 (quoting *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 210 (1st Cir.1994)). Applying this framework, Blackfeet Housing submits that the application of personal jurisdiction over it in this case would be inconsistent with traditional notions of fair play and substantial justice.

"The burden on the defendant of litigating the case in a foreign forum is of primary concern in determining the reasonableness of personal jurisdiction. . . . When the defendant is from another country, this concern is heightened and 'great care and reserve should be exercised' before personal jurisdiction is exercised over the defendant." *Id*. at 1096. In this case, the burden on the defendant is significant. Blackfeet Housing has its principal offices in Montana on the Blackfeet Indian Reservation and it has no office or property in New Mexico, is not licensed to do business in New Mexico, and has no employees in New Mexico. Blackfeet Housing's officers and employees will not only have to travel outside their home country, they will also be forced to litigate the dispute in a foreign forum unfamiliar with the Blackfeet laws governing the dispute were this court to find that the constitutionally required minimum contacts exist here such that long arm jurisdiction is permissible. Therefore, this factor weighs against the exercise of personal jurisdiction over Blackfeet Housing.

"States have an important interest in providing a forum in which their residents can seek

redress for injuries caused by out-of-state actors." *Id*. "The state's interest is also implicated where resolution of the dispute requires a general application of the forum state's laws." *Id*. In this case, the property insured and the place where the injury occurred are on the Blackfeet Indian Reservation. Thus, New Mexico has little interest in adjudicating this dispute.

This factor hinges on whether the Plaintiff may receive convenient and effective relief in another forum. This factor may weigh heavily in cases where a plaintiff's chances of recovery will be greatly diminished by forcing him to litigate in another forum because of that forum's laws or because the burden may be so overwhelming as to practically foreclose pursuit of the lawsuit. *Id*. at 1097. Because the contract is to be performed on the Blackfeet Indian Reservation its laws and the State of Montana's laws govern the tribal court litigation. Amerind has not established that litigating the matter in tribal court would cause undue hardship to it. Therefore, this factor weighs in Blackfeet Housing's favor, against an exercise of this court's jurisdiction.

The factor of judicial efficiency asks "whether the forum state is the most efficient place to litigate the dispute." *Id*. "Key to the inquiry are the location of witnesses, where the wrong underlying the lawsuit occurred, what forum's substantive law governs the case, and whether jurisdiction is necessary to prevent piecemeal litigation." *Id.* (citations omitted). Based on the nature of Blackfeet Housing's claims against Amerind, many of the witnesses in the dispute would be directors, officers, and employees of Blackfeet Housing, tribal reservation residents of the affected homes, all located in Montana on the Blackfeet Indian Reservation. Likewise, the alleged wrong, Amerind's failure to provide coverage, occurred on the Blackfeet Reservation, and Blackfeet law will govern the dispute. Therefore, litigating the dispute in New

Mexico would conclusively be more burdensome and certainly not be more efficient than in Montana on the Blackfeet Reservation.

A fifth factor of the reasonableness inquiry "focuses on whether the exercise of personal jurisdiction by [the forum] affects the substantive social policy interests of other states or foreign nations." *Id.* "The Supreme Court has cautioned that 'great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Id*. at 1097-98. Therefore, a close examination of the extent to which an exercise of personal jurisdiction by Amerind over Blackfeet Housing interferes with Blackfeet Tribal and Blackfeet Housing's sovereignty. Relevant facts include "whether one of the parties is a citizen of the foreign nation, whether the foreign nation's law governs the dispute, and whether the foreign nation's citizen chose to conduct business with a forum resident." *Id.* at 1098 Blackfeet Housing did choose to conduct business with Amerind, a resident of New Mexico. However, Blackfeet Housing is a corporation owned by the Blackfeet Tribe. Choice of law principles dictate that Blackfeet law will govern the dispute. Therefore, deference to the international nature of this case results in a finding that an exercise of personal jurisdiction would affect the Blackfeet Tribe's policy interests.

Blackfeet Housing's contacts with New Mexico are quite limited, barely any, and not satisfying the minimum contacts standard. As a result, Blackfeet Housing need not make a particularly strong showing in order to defeat New Mexico jurisdiction under this reasonableness inquiry. *OMI*, 149 F.3d at 1092. A fair examination of the relevant reasonableness factors weigh in Blackfeet Housing's favor, compelling the conclusion that an exercise of personal jurisdiction over Blackfeet Housing would offend traditional notions of fair play and substantial justice.

V. Amerind Is Required to Exhaust Tribal Court Remedies

Amerind alleges that is has exhausted tribal court remedies as the appellate court had only fifteen days to issue an order and such time has elapsed. (Doc. #1, pg. 8) The Blackfeet Appellate Court issued a decision and undersigned counsel has been instructed by her client to seek reconsideration and if necessary an appeal to the Blackfeet Supreme Court. Thus the case is winding its way appropriately through the Blackfeet Tribal Court system as the Supreme Court of the United States intended when it ruled requiring deference to tribal court. *National Farmers Union Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); and, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). ([R]espect for tribal legal institutions requires that they be given a full opportunity to consider the issues before them and to rectify any errors. The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. (internal quotation marks omitted)). Because the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty [and] the extent to which that sovereignty has been altered, divested, or diminished.. . . that examination should be conducted in the first instance in the Tribal Court itself. *National Farmers Union Insurance Companies v. Crow Tribe of Indians National Farmers*, 471 U.S. 845, 855-56 (1985). That way, federal courts will have the benefit of a full factual record on the relevant issues and the benefit of tribal court expertise. *Id.* at 856-57. Based on review of the above-cited law, Supreme Court jurisprudence, and federal policy this court should find that exhaustion in tribal court is necessary and that Amerind has failed to meet that requirement.

CONCLUSION

Blackfeet Housing respectfully requests that the Court dismiss this action for want of jurisdiction or to "stay its hand" while the matter is resolved through the Blackfeet court system for and based on, the reasons and based on the legal authorities and principles detailed hereinabove. Respectfully submitted this 10th day of November 2016.

/s/ Terryl T. Matt
Terryl T. Matt

/s/ Alan Robert Taradash
Alan Robert Taradash

CERTIFICATE OF COMPLIANCE

I hereby certify that the Memorandum in Support of Motion to Dismiss complies with Rule 7.5 in that the brief is not more than 22 pages double-spaced.

/s/ Terryl T. Matt
Terryl T. Matt
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served this 10th day of November 2016 via the Court's ECF system upon:

/s/Terryl T. Matt
Certifier