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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

AMERIND RISK MANAGEMENT CORPORATION, a federally chartered Section 17 Tribal Corporation, Plaintiff, v. BLACKFEET HOUSING, Defendants.	Case No. 1:16-cv-1093-JAP-KK **RESPONSE IN OPPOSITION TO MOTION TO DISMISS**

Plaintiff AMERIND Risk Management Corporation ("AMERIND") hereby responds in opposition to Blackfeet Housing's Motion to Dismiss. Blackfeet Housing has moved to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, under Rule 12(b)(2) for lack of personal jurisdiction, and on grounds of comity under the doctrine of tribal exhaustion. For the reasons shown below, the motion should be denied.

First, this Court has subject matter jurisdiction. Both claims in the complaint raise federal questions because both seek relief to halt tribal court litigation against AMERIND in excess of the tribal court's jurisdiction, and the proper scope of a tribal court's jurisdiction over a non-member such as AMERIND is a federal question. In any event, the Court has diversity jurisdiction because under 28 U.S.C. § 1332(c), Blackfeet Housing is a "citizen" of Montana,

AMERIND is a "citizen" of New Mexico, and the baseless litigation AMERIND seeks to enjoin here concerns well over the jurisdictional amount of $75,000. In an attempt to defeat jurisdiction, Blackfeet Housing bases its entire argument on the false and unexamined premise that the complaint here is "essentially identical" to prior litigation in this Court where AMERIND sought to compel arbitration. *See* Doc. 12 at 9. The prior case had entirely different claims, and *none* of the jurisdictional issues in this case were previously adjudicated. The prior case sought only to compel arbitration, and the Court held only that there was no federal question jurisdiction over a complaint to compel arbitration. This case, by contrast, seeks declaratory and injunctive relief against tribal court litigation that exceeds the tribal court's jurisdiction under federal law, which is clearly a federal question under controlling Supreme Court authority. This case also pleads diversity, which was neither pleaded nor adjudicated previously.

Second, the Court has personal jurisdiction because Blackfeet Housing consented to jurisdiction in this Court, and because it has an extensive, longstanding contractual relationship with AMERIND conditioned on Blackfeet Housing being subject to suit in New Mexico.

Finally, because AMERIND has tribal sovereign immunity, tribal exhaustion is not appropriate under Tenth Circuit precedent. Blackfeet Housing has expressly waived exhaustion in any event. And the highest Blackfeet court, the Blackfeet Court of Appeals, has already had the opportunity to rule on its own jurisdiction, so there is nothing further to exhaust.

BACKGROUND

AMERIND is a uniquely tribal entity whose purpose is "[t]o promote the social welfare of Native Americans and Alaskan Natives" by providing insurance to American Indian and Alaska Native tribal governments, tribal housing authorities, and tribal businesses. AMERIND Charter §§ 7.1, 7.2, 7.3, 7.4 (filed by Blackfeet Housing as Doc. 12-2). Historically, its role has

been to provide insurance on affordable terms that would not otherwise have been available in Indian Country, the self-governing American Indian and Alaska Native communities across the United States. Declaration of Derek C. Valdo ("Decl.") ¶ 4 (attached as Exhibit 1). It is a non-stock tribal corporation chartered under federal law by three federally recognized Indian 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 at 1 (heading); Charter § 5.1.

The Secretary of the Interior issued AMERIND's corporate charter pursuant to Secretarial authority granted by Section 17 of the Indian Reorganization Act, 25 U.S.C. § 477. *See* Charter § 3.1. Section 17 gives tribes the statutory means to charter tribal businesses that preserve tribal tax immunity, sovereignty, and assets, through federally chartered tribal corporations with "the power to purchase, manage, operate, and dispose of" property. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 134 n.3 (1982). Under federal law and pursuant to express provisions of its charter, AMERIND has the same tribal sovereign immunity possessed by its three charter tribes. Specifically, Section 16.1 of its charter states that it "is an instrumentality of the Charter Tribes and is entitled to all of the privileges and immunities of the Charter Tribes, individually and jointly."

AMERIND provides insurance to federally recognized tribes, tribal housing authorities, and tribal businesses who become members of AMERIND. *See* Charter § 11.1. Only tribes and tribal entities are eligible to become members. *Id.* Under the contractual agreements by which they become members, these tribes and tribal entities are required to contribute capital to the risk pools in which they participate, and from which AMERIND pays all covered claims in those respective groups. Cmplt. ¶ 13. AMERIND is not permitted to "accumulate earnings and profits beyond the Corporation's reasonable business needs," Charter § 5.2, and thus, when appropriate

and possible, on an annual potential basis, AMERIND returns to its members excess reserves from its tribal housing risk pool. Cmplt. ¶ 13. AMERIND's business model, which depends on AMERIND's status as a federally chartered and tribally owned corporate entity under 25 U.S.C. § 477, makes available and affordable insurance that, until AMERIND was formed, tribes and tribal entities could not obtain or could not afford in the private market. Decl. ¶ 4. AMERIND does this by pooling the capital contributions of its members, and by ensuring that only covered claims are paid through established and predictable claims and dispute resolution processes. *Id.* All members contributing to the pool agree contractually to these processes. *Id.* All members of an AMERIND risk pool share a stake in having these stable processes adhered to by all other members. *Id.*

Because AMERIND provides risk-pooling insurance for over 400 tribes and tribal entities across hundreds of tribal jurisdictions, its members could not obtain insurance from AMERIND on the same affordable and reliable terms if it were subject to suit in every tribal jurisdiction where it insures property. Decl. ¶ 5. Instead AMERIND provides limited waivers of sovereign immunity to its members for specified dispute resolution procedures and for specified litigation in certain tribal, state, and federal courts of competent jurisdiction. *Id.* When members obtain insurance from AMERIND, they agree to specified, limited legal claims and dispute resolution processes, and they receive direct benefits through the availability of lower-cost insurance and predictable and reliable business operations and processes. *Id.*

Blackfeet Housing is a member of AMERIND by contractual agreement, and has been for approximately 30 years. Cmplt. ¶ 24. As relevant here, Blackfeet Housing joined AMERIND's "Tribal Operations Protection Plan" by entering into a "Participation Agreement" with AMERIND pursuant to which Blackfeet Housing obtained coverage for its housing units. (The

Participation Agreement ("PA") is attached to the Declaration of Derek C. Valdo as Exhibit A.) Section 8 of the Participation Agreement provides that disputes over coverage must be resolved through informal mediation if possible, and then through binding arbitration in Albuquerque, New Mexico. PA §§ 8(a), 8(a)(4). The arbitrator's award is enforceable in three "Courts of Competent Jurisdiction": this Court, the Second Judicial District Court of the State of New Mexico, and the Pueblo of Santa Ana Tribal Court. PA § 8(a)(5). In the Agreement, Blackfeet Housing agrees that it "waives the exhaustion of tribal remedies." PA § 8(a)(9). The Participation Agreement also states that suit may be brought by either party in any of the three Courts of Competent Jurisdiction "to: (1) compel arbitration, (ii) determine the validity of this agreement or this section 8, (iii) determine the authority of the signatories to this agreement, or (iv) determine whether sovereign immunity or tribal remedies [have] been waived." *Id.*

In light of AMERIND's tribal sovereign immunity, as well as the Participation Agreement and other similar agreements by which AMERIND's members freely agree to follow specified dispute resolution procedures to keep their own cost of insurance low, the tribal litigation brought against AMERIND in Blackfeet courts is an aberration. AMERIND issues thousands of policies to over 400+ members across all Indian country and has done so for many years. Decl. ¶ 7. Like any insurer, it handles many disputed claims. *Id.* ¶ 8. It is highly unusual for AMERIND to be sued by a member in the member's own tribal court, in open and blatant violation of contractual membership commitments, as Blackfeet Housing has done here. *Id.* ¶ 9. The only comparable case is *Amerind Risk Management v. Malaterre*, 633 F.3d 680 (2011), where AMERIND was sued not by a member policyholder but by three individuals enrolled in the Turtle Mountain Band of Chippewa Indians. The individuals brought suit in that tribe's courts, attempting to recover under a policy held by the tribal housing authority. The Eighth

Circuit held that the tribal court lacked jurisdiction "because Amerind is entitled to tribal immunity" and ordered that the plaintiffs be "enjoin[ed] . . . from proceeding against Amerind in Tribal Court." *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 682 (8th Cir. 2011).

As detailed more fully in the complaint, a coverage dispute arose between Blackfeet Housing and AMERIND in 2014 after AMERIND denied certain claims. Cmplt. ¶¶ 23-28. Blackfeet Housing disputed the denial of its claims, but instead of invoking the arbitration remedies required by the Participation Agreement it signed, Blackfeet Housing filed a complaint against AMERIND in Blackfeet Tribal Court in Browning, Montana, on April 18, 2014. Cmplt. ¶ 28. Blackfeet Housing did not notify AMERIND that it had filed suit in tribal court for months; it first purported to serve the complaint over five months later on September 29, 2014. Cmplt. ¶ 29.

AMERIND made a special appearance in Blackfeet Tribal Court and filed a motion to dismiss for lack of jurisdiction and on other grounds on October 17, 2014. Cmplt. ¶ 30. *Almost a year later*, on October 1, 2015, the court issued a six-page order denying the motion. *Blackfeet Housing v. AMERIND Risk Management Corp.*, Case NO. 2014 CA60, Order dated Oct. 1, 2015 (attached as Exhibit 2). The court held that it had jurisdiction over AMERIND, rejecting AMERIND's assertion of sovereign immunity and reliance on the Participation Agreement. *Id.*

Meanwhile, AMERIND filed for arbitration before the American Arbitration Association in December 2014, but Blackfeet Housing refused to proceed. So the arbitration was stayed and AMERIND filed suit in this Court to compel arbitration, invoking only federal question jurisdiction. Cmplt. ¶ 32; *AMERIND Risk Mgmt. Corp. v. Blackfeet Housing*, Civil. No. 15-00072-WJ-KBM, Doc. 1. This Court held only that it lacked federal question jurisdiction over a contractual claim to compel arbitration, because it did not involve federal law. No. 15-00072-

WJ-KBM, Doc. 36 at 12-14 (Order dated May 11, 2015). In so holding, the Court noted regarding that prior complaint, "Amerind is not alleging in its Complaint that the Blackfeet Tribe has exceeded its jurisdictional authority over it, nor does it seek a determination as to whether Defendants have jurisdiction over the complaint that was filed by Defendants in Tribal court." *Id.* at 13. Also, AMERIND did not plead and this Court did not address any issue regarding diversity jurisdiction. AMERIND's appeal from this Court's dismissal order was voluntarily dismissed on March 2, 2016, before oral argument. *AMERIND Risk Mgmt. Corp. v. Blackfeet Housing*, No. 15-2089 (10th Cir. Mar. 2, 2016). Thus, nothing was adjudicated by the Tenth Circuit on appeal, and the only issue adjudicated by this Court was the absence of federal question jurisdiction over the prior complaint as pleaded.

In the meantime, AMERIND had appealed the decision of the Blackfeet Tribal Court to the Blackfeet Court of Appeals, the highest court of the Blackfeet Tribe, *see* Blackfeet Law and Order Code Ch. 11, § 1 (*available at* http://www.narf.org/nill/codes/blackfeetcode/blkftcode11appeal.html). That court held oral argument on March 22, 2016. Cmplt. ¶ 31. By statute, the court was required to issue a ruling within 15 days. *See* Blackfeet Tribal Law and Order Code, Chapter 11, § 46. More than six months later, it had failed to issue any ruling, and AMERIND filed the complaint in this case on October 4, 2016. After counsel for Blackfeet Housing was granted a six-day extension of time to answer the complaint, the Blackfeet Court of Appeals issued its order on the third day, three days before Blackfeet Housing filed its answer in this Court. *See* Exhibit 3, *Blackfeet Housing v. ARMC Risk Management Corporation*, Blackfeet Court of Appeals No. 2016-AP-09, Order dated November 7, 2016. It ruled that the Blackfeet Tribal Court had erred in concluding that AMERIND lacked tribal sovereign immunity, but it nonetheless went on to exercise jurisdiction over AMERIND, holding that AMERIND had

waived its tribal sovereign immunity to suit in Blackfeet courts "by the inclusion of an arbitration clause in the Participation Agreement," without acknowledging that there is no waiver of immunity for suit in Blackfeet courts. *Id.* at 18. It did not acknowledge any of the limitations in the Participation Agreement on AMERIND's amenability to arbitration or suit; in particular, it did not acknowledge that it is not among the "Courts of Competent Jurisdiction" under the Agreement. Instead of acknowledging this limitation and dismissing the case because it lacked jurisdiction, *cf. Ex parte McCardle*, 7 Wall. 506, 514 (1868), it ignored its own lack of jurisdiction and ordered both parties to mediation and arbitration "as contemplated by the Participation Agreement." *Id.* In so doing, it ruled erroneously, in the last paragraph of the decision—without any factual record, and after acknowledging that neither party had raised the issue, *see id.* at 17—that Blackfeet Housing and AMERIND had not yet mediated the dispute, that AMERIND was solely at fault and had "failed to properly mediate this dispute," and that AMERIND "will responsible [*sic*] for the entire expense of the future mediation." *Id.* at 18.

STANDARD OF REVIEW

When ruling on a motion to dismiss for lack of subject matter jurisdiction, to the extent that "the movant merely challenges the sufficiency of the complaint," the court must "accept the allegations in the complaint as true." *Paper, Allied-Indus., Chem. And Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005). When "the movant goes beyond the allegations in the complaint and challenges the facts upon which subject matter jurisdiction depends," "the court must look beyond the complaint and has wide discretion" to consider factual materials. *Id.*

"Prior to trial, . . . when a motion to dismiss for lack of [personal] jurisdiction is decided on the basis of affidavits and other written materials, plaintiff need only make a prima facie

showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party." *Behagen v. Amateur Basketball Ass'n of U.S.A.*, 744 F.2d 731, 733 (10th Cir. 1984) (citations omitted).

SUMMARY OF ARGUMENT

The motion to dismiss should be denied because this Court has subject matter jurisdiction over the complaint, because personal jurisdiction over Blackfeet Housing satisfies due process, and because tribal exhaustion is not appropriate or required here.

First, the Court has both federal question and diversity jurisdiction. It has federal question jurisdiction because this case seeks a determination that the Blackfeet tribal courts have exceeded the limits of their jurisdiction under federal law. It is settled law that such a suit presents a federal question. In any event, the Court has diversity jurisdiction, because both parties are corporations, and applying the plain terms of 28 U.S.C. § 1332, Blackfeet Housing is considered a "citizen" of Montana and AMERIND is considered a "citizen" of New Mexico for purposes of diversity. The jurisdictional amount is satisfied because the object of the injunctive and declaratory relief here is a tribal court suit seeking over $1.4 million. Blackfeet Housing attempts to defeat jurisdiction by invoking claim and issue preclusion even though no claims or issues in this case were previously adjudicated. It falsely states that this case is "identical" to prior litigation, but never attempts to support that false premise. It does not acknowledge that the prior case in this Court brought only a claim to compel arbitration, while by contrast this case seeks relief to enjoin litigation in Blackfeet tribal courts. The previous complaint was dismissed not on the merits but rather solely for lack of federal question jurisdiction, so there is no claim

preclusion. And none of the jurisdictional issues present in this case were previously adjudicated, so there is no issue preclusion.

Second, the Court has personal jurisdiction because Blackfeet Housing consented to this Court's jurisdiction in the Participation Agreement. In any event, Blackfeet Housing is subject to specific jurisdiction for claims arising out of its longstanding, voluntary, purposeful contractual relationship with AMERIND, on terms that specify and make entirely foreseeable that disputes will be resolved in three specified "Courts of Competent Jurisdiction" (including this Court), all of which are located in New Mexico.

Third, tribal exhaustion is not required because AMERIND has tribal sovereign immunity from suit in Blackfeet tribal courts; because Blackfeet Housing has expressly waived the exhaustion of tribal remedies in the Participation Agreement; and because the highest court of the Blackfeet Tribe under the Blackfeet Tribal Law and Order Code, the Blackfeet Court of Appeals, has already ruled on its own jurisdiction, so there is nothing more to exhaust.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION

A. The Court Has Federal Question Jurisdiction

Under controlling Supreme Court law, this Court has federal question jurisdiction over both claims brought in this case, because both claims seek relief for the Blackfeet courts having exceeded the lawful limits of their jurisdiction. "[A] federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985); *accord id.* at 857 ("§ 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction . . .").

Count One of the complaint seeks a declaration that Blackfeet tribal courts lack

jurisdiction over AMERIND as a matter of federal law. Cmplt. ¶ 38. The complaint alleges that AMERIND, which is not a member of the Blackfeet Tribe and is not generally subject to its jurisdiction, has not engaged in any activity that would render it subject to the jurisdiction of Blackfeet tribal courts. Cmplt. ¶ 39. When AMERIND agreed to enter into a contractual relationship with Blackfeet Housing, it did so only on terms that expressly provide that no aspect of the contractual relationship is subject to the jurisdiction of Blackfeet tribal courts. *Id.* It retained its tribal sovereign immunity as to suit in those courts. Under *National Farmers*, Count One raises a federal question because to decide it, the Court must determine whether Blackfeet tribal courts have exceeded the lawful limits of their jurisdiction.

Count Two is similar to Count One and seeks an injunction against Blackfeet Housing preventing it from continuing with litigation in the Blackfeet tribal courts. "[A] tribal court defendant may bring a federal cause of action for an injunction where the basis of the claim is assertion of a right to be protected against an unlawful exercise of Tribal Court judicial power . . . ." *MacArthur v. San Juan Cty.*, 309 F.3d 1216, 1224 (10th Cir. 2002) (citation, internal quotation marks, and emphasis omitted).

B. The Court Has Diversity Jurisdiction

This Court has diversity jurisdiction over this case under 28 U.S.C. § 1332(a)(1) because it is a "civil action[] where the matter in controversy exceeds the sum or value of $75,000 . . . and is between . . . citizens of different States."

The amount in controversy is determined as of the time of filing of the complaint. *See St. Paul Mercury Indem. Co. v. Red Cab. Co.*, 303 U.S. 283, 289-90 (1938). "The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed in good faith." *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 353 (1961). The complaint controls unless

it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." *Id.* Blackfeet Housing has not disputed that the amount in controversy was pleaded in good faith and is met here. "In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 347 (1977); *accord Horton*, 367 U.S. at 349-50, 353-54 (jurisdictional amount of $10,000 met in an action to set aside a state administrative decision that awarded only $1,045, where plaintiff in state proceedings sought $14,035). Here, as pleaded in the complaint, the object of the litigation is the tribal court suit in which Blackfeet Housing seeks over $1.4 million plus unspecified punitive damages. Cmplt. ¶ 9-10.

Diversity is met here. For purposes of evaluating diversity, Blackfeet Housing is a "citizen" solely of Montana, and AMERIND, as a corporation chartered under 25 U.S.C. § 477, is "considered a citizen of the state of its principal place of business [New Mexico] for diversity jurisdiction purposes." *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993). The citizenship of corporations for diversity purposes is governed by 28 U.S.C. § 1332(c)(1), and it is undisputed that both parties are corporations. For purposes of evaluating whether an action is between "citizens of different States," "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . ." Blackfeet Housing does not dispute that "is a state-law corporation organized under the laws of the state of Montana with its principal place of business in Browning, Montana." Cmplt. ¶ 5; *see* Exhibit 4 (Blackfeet Housing Business Entity Registration from the Montana Secretary of State's website). It is also undisputed that AMERIND is incorporated under federal law and has its principal place of business in New Mexico. *See* Cmplt. ¶ 4. Accordingly, under the plain terms of § 1332, diversity is present.

Blackfeet Housing's argument against diversity addresses none of this authority. Blackfeet Housing argues only, without citation to any authority, that it is a "part owner" of AMERIND and that this gives it the same citizenship as AMERIND for diversity purposes. Doc. 12 at 12. As an initial matter, Blackfeet's claim to be a "part owner" is incorrect; Blackfeet Housing is a member, not a part-owner, as AMERIND's charter makes clear. AMERIND is "jointly owned by the Charter Tribes," Charter § 4.1, not by the members. But in any event, Blackfeet Housing cannot overcome the plain language of § 1332(c)(1), under which Blackfeet Housing is considered a "citizen" of Montana and AMERIND is considered a "citizen" of New Mexico. Thus, diversity jurisdiction is present.

C. The Court Has Supplemental Jurisdiction to the Extent Necessary

In light of the presence of both federal question and diversity jurisdiction over all claims in the complaint, there should be no need to analyze supplemental jurisdiction, but AMERIND has pleaded supplemental jurisdiction in the alternative. Supplemental jurisdiction would be present here if the Court were to find original jurisdiction over part but not all of the complaint. The complaint describes a single "case or controversy" for purposes of Article III and 28 U.S.C. § 1367(a). None of the exclusions in 28 U.S.C. § 1367(b) are applicable; the case is brought against only the named defendant Blackfeet Housing, does not involve any claims against the additional parties described by that rule. And none of the permissible grounds for declining jurisdiction in § 1367(c) are present.

D. Neither Claim Preclusion Nor Issue Preclusion Defeats Subject-Matter Jurisdiction Here

Claim preclusion has no application here because it does not apply to dismissals for lack of subject matter jurisdiction. And issue preclusion does not apply here because the jurisdictional issues in this case are all different from the jurisdictional issue in the prior case in

this Court, which sought only to compel arbitration.

To begin with, Blackfeet Housing's totally unexplained premise that the complaint here is "essentially identical" to the complaint to compel arbitration, Doc. 12 at 9, is flat wrong. In the arbitration case, the complaint sought only two things: an injunction compelling arbitration, and a declaration that the Participation Agreement (rather than certain other "Scope of Coverage" documents between the parties) "govern[s] the parties' arbitration process." No. 15-00072-WJ-KBM, Doc. 1 at 11. In dismissing the complaint, this Court held only that it lacked federal question jurisdiction over a complaint to compel arbitration, and limited its order to dismissal under Rule 12(b)(1). The Court refused to reach any other arguments because "the Court has no jurisdiction to hear these other arguments, having found that this Court lacks subject matter jurisdiction over the case." No. 15-00072-WJ-KBM, Doc. 36 at 14. This refusal to go beyond the threshold jurisdictional issue was required because "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514 (1868); *accord Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). The court of appeals did not issue any substantive orders before the case was dismissed on appeal, leaving intact this Court's ruling. Therefore, the only issue adjudicated in the prior case was the issue of federal question jurisdiction over a complaint to compel arbitration, a claim not raised in this case.

Claim preclusion does not apply to a ruling regarding subject matter jurisdiction, because it is not a decision on the merits. "A dismissal under Rule 12(b)(1) is not on the merits, and therefore cannot have a res judicata [claim preclusion] effect." *Home Builders Ass'n of Mississippi, Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1013 (5th Cir. 1998) (footnote

omitted). "[B]ecause a dismissal pursuant to Rule 12(b)(1) is not on the merits, it can have no *res judicata* effect." *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1188 (2d Cir. 1996) (citation omitted). In a case that is dismissed for lack of subject matter jurisdiction, "the resulting judgment of dismissal is not a determination of the claim, but rather a refusal to hear it . . . ." 18 *Moore's Federal Practice* § 131.30[3][b] at 131-104 (3d ed.).

The Tenth Circuit has explained that the only possible preclusive effect of a dismissal for lack of subject matter jurisdiction is *issue preclusion* for the precise jurisdictional issue actually decided on the facts presented. When a complaint is dismissed for lack of jurisdiction, "[t]he preclusive effect . . . is one of *issue preclusion* (collateral estoppel) rather than *claim preclusion* (res judicata)." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218–19 (10th Cir. 2006) (emphasis in original). A dismissal for lack of jurisdiction "precludes [a party] from relitigating the [jurisdictional] *issue* on the facts presented, but does not preclude his *claim*." *Id.*

Issue preclusion also does not apply here. Issue preclusion "is only applicable when an issue *identical* to that presented in the second suit has been raised and *fully adjudicated* under *identical and inseparable* relevant facts." *Jones v. United States*, 466 F.2d 131, 133 (10th Cir. 1972) (emphasis added). There is no such issue here. The previously adjudicated issue of whether the court has federal question jurisdiction over a complaint to compel arbitration is not presented by the complaint here. It is almost as though Blackfeet Housing has not read both complaints. The federal question in *this* case is whether the court has jurisdiction to "determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." *Nat'l Farmers Union*, 471 U.S. at 853.

Blackfeet Housing appears to confuse or conflate issue preclusion and claim preclusion. It argues that the issue of diversity jurisdiction in this case is subject to issue preclusion, even

though that issue was never adjudicated in the prior case brought in this Court. That issue was not pleaded in the prior case, was only argued for the first time on appeal in the Tenth Circuit, and was never decided. It is not enough for issue preclusion that the issue was argued on appeal previously; it must have been "raised and fully adjudicated." *Jones v. United States*, 466 F.2d at 133. There was no adjudication of diversity jurisdiction in the arbitration case. Similarly, it is not enough for issue preclusion that an issue *could have* been adjudicated. "A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action." *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1093–94 (10th Cir. 2003) (quoting *Restatement (Second) of Judgments* § 27 cmt. e).

In sum, Blackfeet Housing does not address the differences between the issue actually adjudicated in the Court's prior jurisdictional ruling and the issues in the complaint here. No issue previously adjudicated is raised in this case, so issue preclusion has no bearing here.

II. THE COURT HAS PERSONAL JURISDICTION DUE TO BLACKFEET HOUSING'S CONSENT AND ITS LONGSTANDING BUSINESS RELATIONSHIP WITH AMERIND

Blackfeet Housing has consented to personal jurisdiction in this Court, and thus its motion to dismiss for lack of personal jurisdiction should be denied. In addition, specific personal jurisdiction is proper under well-established precedents regarding extensive and longstanding interstate contractual relationships such as that between Blackfeet Housing and AMERIND.

Personal jurisdiction in this case is bounded only by the Due Process Clause. As Blackfeet Housing correctly notes, "[t]he New Mexico long-arm statute is coextensive with" the Due Process Clause. Doc. 12 at 14 (citing *Tercero v. Roman Catholic Diocese*, 132 N.M. 312, 316, 48 P.3d 50, 54 (2002)).

A. Blackfeet Housing Has Consented to Personal Jurisdiction

"Due process is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause." *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 726 (8th Cir. 2001) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n. 14 (1985); *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 15 (1972)).

> [B]ecause the personal jurisdiction requirement is a waivable right, there are a variety of legal arrangements by which a litigant may give express or implied consent to the personal jurisdiction of the court. For example, particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction. Where such forum-selection provisions have been obtained through freely negotiated agreements and are not unreasonable and unjust, their enforcement does not offend due process.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.14 (1985) (citations omitted).

The Participation Agreement contains such a clause, specifying this Court as a "Court of Competent Jurisdiction." PA § 8(a)(5), (9). The Courts of Competent Jurisdiction are the only allowable courts specified by the parties for litigation under the Agreement. Blackfeet Housing does not dispute that the complaint here is within the parties' forum selection clause, nor could it; the complaint asks, among other things, for this Court to "uphold the validity of this agreement [and] this section 8" as a bar to Blackfeet jurisdiction, and to "determine whether tribal sovereign immunity or tribal remedies has been waived." PA § 8(a)(9). Nor does Blackfeet Housing argue that the forum selection clause is invalid. Indeed, it does not even acknowledge the forum selection clause. Blackfeet Housing's ignoring the clause does not defeat its consent to jurisdiction in this Court.

B. The Court Has Specific Jurisdiction in Any Event

Specific personal jurisdiction here is constitutional in any event, given the scope of the parties' relationship and interstate contract. Once a plaintiff shows that the defendant has purposefully established "minimum contacts" with the forum state, the defendant then has to show that jurisdiction would "offend traditional notions of fair play and substantial justice," and

"bears the burden . . . to present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Marcus Food Co. v. DiPanfilo*, 671 F.3d 1159, 1167 (10th Cir. 2011) (citations and internal quotation marks omitted); *accord Burger King*, 471 U.S. at 477 ("[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.")

1. Blackfeet Housing's Membership in and Ongoing Contractual Relationship with AMERIND Show Minimum Contacts

Blackfeet Housing admits that "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, *accord* Doc. 12 at 16. It also admits the relevance of "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing." *Burger King*, 471 U.S. at 479; *accord* Doc. 12 at 16; *Equifax Servs., Inc. v. Hitz*, 905 F.2d 1355, 1357–58 (10th Cir. 1990).

Blackfeet Housing has affirmatively reached out and created a 30-year, voluntary, interstate contractual relationship with AMERIND in New Mexico, and is therefore subject to specific personal jurisdiction here for causes of action arising out of that relationship. Similar to the relationship between the defendant Burger King franchisee and plaintiff corporation in *Rudzewicz*, Blackfeet Housing is a member of AMERIND and has a long-standing, mutually beneficial insurance relationship with AMERIND. Indeed, Blackfeet Housing itself effectively claims (albeit incorrectly) that its membership in AMERIND makes it a citizen of New Mexico for diversity purposes. Doc. 12 at 12.

As part of this contractual relationship, the Participation Agreement clearly provides that

Blackfeet Housing will have to travel to New Mexico to resolve any disputes. It makes Blackfeet Housing a participating member of AMERIND, whose principal place of business is in New Mexico; it requires that any dispute under the agreement be resolved by an arbitration to be held in Albuquerque, New Mexico, PA § 8(a)(4); it specifies only three Courts of Competent Jurisdiction, all of which are in New Mexico, PA § 8(a)(5); it states that the "agreement shall be construed in accordance with the laws of the Pueblo of Santa Ana," in New Mexico, PA § 9(m); it requires that all notices and reports be sent to New Mexico, PA § 9(d); and it provides that all records pertaining to the coverage will be "available for inspection and examination at the headquarters" of AMERIND, PA § 4(b)(7). Having deliberately obtained the benefits of insurance in exchange for all these promises, Blackfeet Housing has purposefully availed itself of contacts within New Mexico and could reasonably foresee being haled into court here as a consequence of its own actions.

2. Blackfeet Housing Cannot Show that Jurisdiction Is Unfair or Unjust

Blackfeet Housing has failed to make a compelling showing that jurisdiction would offend traditional notions of fair play and substantial justice. Here, the court considers "(1) the burden on the defendant, (2) the forum state's interests in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effectual relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states . . . in furthering fundamental social policies." *Marcus Food Co. v. DiPanfilo*, 671 F.3d 1159, 1166–67 (10th Cir. 2011). These factors all favor AMERIND or are neutral, particularly given the nature of the claims here to halt unlawful out-of-state litigation in a tribal jurisdiction.

First, Blackfeet Housing, a sophisticated corporation, agreed to resolve all disputes in New Mexico, and has shown nothing beyond the ordinary inconvenience of traveling to another state, something present for one party or the other in all interstate disputes. If that inconvenience

were enough to defeat a showing of minimum contacts, the Due Process Clause would be read to deprive a Plaintiff of any choice of forum other than the Defendant's home state. Moreover, Blackfeet Housing is blatantly wrong to claim that Blackfeet law governs; the Participation Agreement specifies that the laws of the Pueblo of Santa Ana govern. PA § 9(m).

Second, New Mexico has an interest in providing businesses headquartered here with a forum to resolve contractual disputes with out-of-state corporations such as Blackfeet Housing, and in preventing the assertion of unlawful jurisdiction over them.

Third, AMERIND has a strong interest in litigating coverage disputes in a single, predictable, contractually specified forum state, to keep the cost of insurance low for members; to ensure the availability of insurance; and to keep claims processes predictable, reliable, and consistently fair to all members of the risk pool who contribute capital.

Fourth, judicial efficiency is a neutral factor because this case involves primarily legal questions about the scope of tribal jurisdiction, and each party's evidence and potential witnesses, if any, are primarily at its own headquarters. Contrary to Blackfeet Housing's suggestion, the underlying dispute over coverage is not at issue in this case, so the location of its housing units is not relevant. In any event, the dispute over coverage is governed by the laws of the Pueblo of Santa Ana in New Mexico. PA §§ 8(a)(6), 9(m).

Fifth, Blackfeet Housing incorrectly argues that the case is "international" (Doc. 12 at 20). Blackfeet Housing and the Blackfeet Tribe are located in Montana—within, not outside, the United States. And if there are social policies at issue here, they relate to the need for predictability in contracting and enforcement of the parties' contractual choice of forum.

In sum, AMERIND has made a prima facie case for specific personal jurisdiction over AMERIND with respect to this contractual relationship, and therefore Blackfeet Housing's

motion to dismiss should be denied.

III. EXHAUSTION OF TRIBAL REMEDIES IS NOT REQUIRED

AMERIND is not required to exhaust tribal remedies because it has tribal sovereign immunity and because Blackfeet Housing waived exhaustion. In any event, AMERIND has already exhausted tribal remedies because the Blackfeet Court of Appeals has already had a chance to rule on its own jurisdiction.

A. Exhaustion Is Not Required Because AMERIND Is Immune from Suit in Blackfeet Courts

Although federal policy sometimes favors deferring to tribal courts in the first instance as a matter of comity, exhaustion is not required here because AMERIND has tribal sovereign immunity. Requiring it to submit to the jurisdiction of Blackfeet courts violates and deprives it of its sovereign immunity, because immunity is from suit, not just from liability.

There are at least four established exceptions to tribal exhaustion: "(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; . . . (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction"; and "(4) where it is clear that the tribal court lacks jurisdiction and that judicial proceedings would serve no purpose other than delay." *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1238–39 (10th Cir. 2014). The Tenth Circuit has held that sovereign immunity fits within these exceptions to exhaustion in tribal courts: one of the typical situations where "tribal courts are not given the first opportunity to determine their jurisdiction" is "where tribal jurisdiction is foreclosed by sovereign immunity." *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1502 (10th Cir. 1997), citing *United States v. Yakima Tribal Court*, 806 F.2d 853, 860–61 (9th Cir. 1986). In *Yakima*, the case cited with approval by the Tenth Circuit, the court of

appeals held that "exhaustion was pointless because tribal court jurisdiction clearly was foreclosed by the sovereign immunity of the United States." *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986) (citing as "controlling" *United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 n.10 (1986)).

With respect to AMERIND, in *Malaterre*, the Eighth Circuit did not require exhaustion of tribal remedies and instead "enjoin[ed] the plaintiffs from proceeding against Amerind in the Tribal Court" because AMERIND has tribal sovereign immunity from suit in tribal court. *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 689 (8th Cir. 2011). The same is true here; AMERIND possesses tribal sovereign immunity and under federal law cannot be required to submit to Blackfeet tribal courts.

B. Exhaustion Is Not Required Because Blackfeet Housing Has Waived Exhaustion of Tribal Remedies in the Participation Agreement

Tribal exhaustion is a doctrine of "comity" that rests on "the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). That policy is not implicated where, as here, a tribal entity has agreed not to sue in its own tribal courts and has expressly consented to a waiver of tribal court exhaustion in exchange for valuable consideration. Section 8(a)(9) of the Participation Agreement provides that Blackfeet Housing "waives the exhaustion of tribal remedies." All other members of the risk pool will be harmed if Blackfeet Housing is allowed to continue to cause unfair litigation expenses by evading contractual promises that provide uniformity in dispute resolution.

In *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir. 1993), the court enforced just such a waiver of tribal court exhaustion by the defendant, a tribal entity. The "Sioux Manufacturing Corporation explicitly agreed to submit to the venue and jurisdiction of federal and state courts located in Illinois." *Id.* The court held that "[t]o refuse enforcement of

this routine contract provision would be to undercut the Tribe's self-government and self-determination." *Id.* Because "[e]conomic independence is the foundation of a tribe's self-determination," the clause was enforceable. *Id.* "If contracting parties cannot trust the validity of choice of law and venue provisions, SMC may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught." *Id.* Similarly, in *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995), the court of appeals rejected an argument for tribal exhaustion and held that there was "no significant comity reason" to defer to tribal court, because "[t]he 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." Likewise, there is no comity reason here to defer to Blackfeet's courts when Blackfeet's own housing authority has agreed not to sue in that forum in exchange for valuable benefits it receives in the form of lower insurance costs.

Blackfeet Housing should be held to the contract it agreed to. It has not challenged the validity of the forum selection clause or of the provision of the Participation Agreement waiving exhaustion of tribal remedies. To hold otherwise would denigrate the competence of a tribal entity to enter contracts as a commercial enterprise. It would prevent tribal entities such as Blackfeet Housing (a tribal housing authority wholly owned by the Blackfeet Tribe) from *ever* waiving tribal exhaustion. Nothing in Supreme Court jurisprudence, federal law, or federal policy requires such a result.

C. In Any Event, AMERIND Has Already Exhausted Tribal Remedies

AMERIND has already adequately exhausted tribal remedies, the Blackfeet Court of Appeals has ruled. Although Blackfeet Housing claims that the case may yet involve "an appeal to the Blackfeet Supreme Court," Doc. 12 at 21, there is no provision for a "Blackfeet Supreme Court" in the Blackfeet Constitution or the Blackfeet Tribal Law and Order Code. To the

contrary, the Blackfeet Law and Order Code states conclusively that "[t]he highest court of the Blackfeet Tribe shall be known as the Blackfeet Court of Appeals . . . ." Blackfeet Law and Order Code Ch. 11, § 1, *available at* http://www.narf.org/nill/codes/blackfeetcode/blkftcode11appeal.html. AMERIND cannot be required to exhaust remedies in a "Blackfeet Supreme Court" that does not exist under the tribal constitution or code and is not presently constituted.

LaPlante itself involved a dispute in Blackfeet Tribal Court that had not yet reached the Blackfeet Court of Appeals. The Supreme Court held that "the Blackfeet Tribal Courts' determination of tribal jurisdiction is ultimately subject to review. *If the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction*, petitioner may challenge that ruling in the District Court." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) (emphasis added). Here, the Blackfeet Appeals Court has ruled that it has jurisdiction over AMERIND, and AMERIND "may challenge that ruling" in this District Court.[1]

DATED this 2nd day of December 2016.

Allison C. Binney

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[1] If the Court were to determine that something further is required for exhaustion, the Court should stay this case rather than dismiss. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 20 n.14 (1987); *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of December 2016, I filed the foregoing using CM/ECF which caused the following counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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