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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

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Plaintiff AMERIND Risk Management Corporation ("AMERIND") submits this memorandum in support of its motion for summary judgment on both claims in the complaint and all defenses thereto. This case seeks declaratory and injunctive relief against Blackfeet Housing's pursuit of tribal court litigation that violates the parties' contract, exceeds the tribal court's jurisdiction under federal law, and contravenes AMERIND's tribal sovereign immunity as a federal corporation chartered under 25 U.S.C. § 477. For the reasons below, the Court should issue an order granting the declaratory judgment and injunction sought in the motion.

STATEMENT OF MATERIAL FACTS

The following are material facts as to which AMERIND contends no genuine issue exists.

AMERIND's Charter, Tribal Sovereign Immunity, and Business Model

1. AMERIND is a tribal corporation formed 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); it is validly chartered pursuant to Section 17 of the Indian Reorganization Act, 25 U.S.C. § 477. Answer (Doc. 22) ¶ 11; CK 30(b)(6) (Ex. 12)[1] at 12:9-11, 24:2-21 (admission by Blackfeet Housing); AMERIND Charter (Exh. 1) at 1 (heading); Charter (Exh. 1) § 5.1.

2. AMERIND's federal charter provides that it possesses the same tribal sovereign immunity as its Charter Tribes, and "the federal government had the authority" to include this provision in the Charter. Charter (Exh. 1) § 16.1; CK 30(b)(6) (Exh. 11) at 14:4-15, 15:7-16:4 (admission by Blackfeet Housing).

[1] Blackfeet Housing designated two persons to testify at its 30(b)(6) deposition: Chancy Kittson and Margie St. Goddard (each of whom was also deposed individually). The reporter produced separate transcripts for each portion of the deposition. References are abbreviated "CK 30(b)(6)" or "MSG 30(b)(6)," depending on which witness was testifying.

3. Paragraphs 12 and 13 of the complaint are true. Answer ¶¶ 12 and 13 (admitting).

4. 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. 2016 Valdo Decl. (Exh. A) ¶ 4. AMERIND does this by ensuring that only covered claims are paid through established and predictable claims and dispute resolution processes. *Id*. All participants in a particular risk pool agree contractually to these processes. *Id*. All participants in an AMERIND risk pool share a stake in having these stable processes adhered to by all other participants. *Id*. 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*. ¶ 5. 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*.

Participation Agreement

5. Paragraph 4 of the complaint is true. Answer ¶ 4 (admitting).

6. Paragraph 16 of the complaint is true. Answer ¶ 16 (admitting); *see* Participation Agreement ("PA") (Exh. A to 2016 Valdo. Decl. (Exh. A)).

Dispute with Blackfeet Housing

7. The process for making a claim under the TOPP with AMERIND is to contact AMERIND's claims department by phone and provide detailed information about the claim, including policy number, coverage document, and unit numbers. Valdo Tr. (Exh. 15) at 50:8-19, 75:2-18. Thus, the process Blackfeet Housing regularly followed for making claims under the

TOPP was for Ms. St. Goddard to make a phone call to AMERIND's Claims Department. MSG 30(b)(6) (Exh. 12) at 7:3-11; St. Goddard Tr. (Exh. 14) at 10:1-18.

8. On April 25, 2013, Terryl Matt sent a letter to AMERIND CEO Derek Valdo, stating that she was an attorney for Blackfeet Housing and asking Mr. Valdo to address "two issues that they believe are covered by Amerind's insurance" with respect to "all of the 28 units" of housing in "the Tax Credit 2, Country Estates units" at Blackfeet Housing. Exh. 2.

9. In Mr. Valdo's experience, it was "a big red flag" that a letter from a lawyer to AMERIND's CEO was the first contact to request an opinion on coverage, rather than a phone call from Blackfeet Housing's claims person (Margie St. Goddard) to make a claim with AMERIND's claims department. Valdo Tr. (Exh. 15) at 52:12-19.

10. Mr. Valdo did not know whether Ms. Matt was in fact authorized to represent Blackfeet Housing. Valdo Tr. (Exh. 15) at 50:20-51:11. The day after he received the letter from Ms. Matt, he called Chancy Kittson, Executive Director of Blackfeet Housing, and asked him to follow the normal protocol by having Blackfeet Housing's claims person, Margie St. Goddard, call AMERIND's claims department to make a claim. Valdo Tr. (Exh. 15) at 50:20-52:25.

11. On August 16, 2013, Ms. Matt sent another letter to Mr. Valdo. This letter for the first time expanded the number of units from the 28 referred to in the April 25, 2013 letter to "all [130] of [Blackfeet Housing's] tax credit units." Exh. 3. The letter stated that Ms. Matt "will be providing the insurer with a report regarding the full damages as soon as we receive this report," and requested a copy of the "policy and policy limits of coverage." *Id.*

12. In August 2013, Mr. Kittson asked Ms. St. Goddard to call AMERIND's claims department per AMERIND's request, and she did so on August 19 and August 30, making four claims for a total of 130 housing units. MSG 30(b)(6) (Exh. 12) at 13:1-7; 15:8-16:4; St.

Goddard Tr. (Exh. 14) at 10:19-12:1, 23:22-24:7, 44:23-45:12.

13. Ms. St. Goddard is unaware of any other instance where Mr. Kittson had a letter sent to AMERIND first, without her knowledge, rather than immediately having her call AMERIND's claims department. St. Goddard Tr. (Exh. 14) at 46:5-11.

14. Ms. St. Goddard made the claims even though she knew there was mold in the dwelling and that mold is excluded by the TOPP policies. MSG 30(b)(6) (Exh. 12) at 15:8-16:4.

15. On or about August 29, 2013, to September 3, 2013, AMERIND sent an adjuster to the Blackfeet Reservation to inspect Blackfeet Housing's property. MSG 30(b)(6) (Exh. 12) at 15:18-16:4; Romero Decl. (Exh. C) at ¶ 4.

16. On February 18, 2014, Ms. Matt submitted to AMERIND a letter labeled "Damages Brochure" seeking $1,413,980, and stating that the letter was an "offer of settlement . . . made **FOR PURPOSES OF COMPROMISE ONLY**." Exh. 6. The letter further admitted that the units contained mold and that its policy contained a "mold exclusion provision," but argued anticipatorily that the exclusion "is not applicable to these facts." *Id.*

17. On March 14, 2014, AMERIND denied all four claims, citing multiple independent grounds: (1) failure to timely report the claim within five days of loss as required by the policies; (2) policy exclusion for water seepage caused by faulty planning, construction or maintenance; (3) policy exclusion for water damage caused by water that backs up from a drain, or seeps through foundations, basements or crawl spaces; and (4) policy exclusion for mold. In addition, AMERIND denied one claim because it sought compensation for damage to crawlspaces, and the units in question did not have crawlspaces. It also denied one other claim because the crawlspaces for the units in question did not have any damage or had been repaired. Romero Decl. (Exh. C) at ¶ 6; Exh. 7.

18. Pursuant to the dispute resolution provisions of the Participation Agreement, Blackfeet Housing and AMERIND met for an informal mediation of their dispute on September 15, 2014. Exh. 4; Kittson Tr. (Exh. 13) at 45:23-46:25.

19. After the mediation meeting failed to resolve the dispute, Blackfeet Housing determined not to go to binding arbitration under the Participation Agreement due to the advice of its outside counsel, Terryl Matt. Kittson Tr. (Exh. 13) at 47:2-9.

20. Instead of invoking the arbitration remedy required by the Participation Agreement, on September 29, 2014, Blackfeet Housing purported to serve on AMERIND a complaint it had previously filed in Blackfeet Tribal Court in Browning, Montana (on April 18, 2014). Valdo 2017 Decl. (Exh. B) at ¶ 7.

21. On October 14, 2014, Ms. Matt sent a letter to AMERIND's outside counsel stating that "[w]e understood the meeting in Portland, Oregon, was the informal mediation" under the Participation Agreement, and rejecting an offer by AMERIND of further mediation because Blackfeet Housing "doubts further mediation will be effective." Exh. 4.

Litigation in Blackfeet tribal courts

22. The complaint filed by Blackfeet Housing in Blackfeet tribal court contained six counts against AMERIND arising out of Blackfeet Housing's participation in the TOPP. Exh. 5.

23. The complaint alleged various statutory, misrepresentation, bad faith, and breach of contract claims: (1) "Violation of the Blackfeet Consumer Protection Act," (2) "Violation of the Blackfeet Commercial Code," (3) "Breach of Fiduciary Duty," (4) "Insurer Breach of Contract," (5) "Breach of Insurer's Duty of Good Faith," and (6) "Punitive Damages." Exh. 5.

24. "AMERIND made a special appearance and filed a motion to dismiss for lack of jurisdiction and on other grounds on October 17, 2014." Answer ¶ 30. Almost a year later, on

October 1, 2015, the Blackfeet Tribal Court issued a six-page order denying the motion. *Id.*; Order, *Blackfeet Hous. v. AMERIND Risk Mgmt. Corp.*, Case No. 2014 CA-60, (Blackfeet Tribal Court Oct. 1, 2015) (Exh. 8). The Blackfeet Tribal Court held that it had jurisdiction over AMERIND, rejecting AMERIND's assertion of sovereign immunity and its reliance on the Participation Agreement. Exh. 8; Answer ¶ 30.

25. AMERIND appealed the decision of the Blackfeet Tribal Court to the Blackfeet Court of Appeals, and after briefing the court held oral argument on March 22, 2016. Exh. 10. By statute, the court was required to issue a ruling within 15 days. *See* Blackfeet Tribal Law & Order Code, Ch. 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. Doc. 1. After 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 of the extension, three days before Blackfeet Housing filed its answer in this Court. *See* Order, *Blackfeet Hous. v. ARMC Risk Mgmt. Corp.*, Case No. 2016-AP-09 (Blackfeet Court of Appeals Nov. 7, 2016) (Exh. 9).

Irreparable Harm

26. AMERIND issues thousands of policies across all Indian country and has done so for many years. 2016 Valdo Decl. (Exh. A) ¶ 7. Like any insurer, it handles many disputed claims. *Id.* ¶ 8. It is unprecedented for AMERIND to be sued by a Member in the Member's own tribal court as Blackfeet Housing has done here. *Id.* ¶ 9. No member of AMERIND has ever challenged AMERIND's federally granted Section 17 tribal sovereign immunity. Joiner Decl. (Exh. E) at ¶ 8; Bush Decl. (Exh. F) at ¶ 8.

27. Historically, all members have benefited from AMERIND's tribal sovereign immunity because it has allowed AMERIND to offer coverage more affordably than non-

sovereign entities. Joiner Decl. (Exh. E) at ¶ 6; Bush Decl. (Exh. F) at ¶ 6.

28. AMERIND's business status as a Tribal governmental entity risk pool is based on its abilities as a Section 17 corporation, with the protections and expectations of tribal sovereign responsibility and immunity. This status establishes and bolsters confidence in the legal protections, financial stability, and financial predictability and reliability of the company. Joiner Decl. (Exh. E) at ¶ 4; Bush Decl. (Exh. F) at ¶ 4.

29. AMERIND's members indirectly bear the cost for litigation such as the Blackfeet tribal court litigation, by being required to pay higher contributions than they would otherwise have to pay absent such litigation. Joiner Decl. (Exh. E) at ¶ 9; Bush Decl. (Exh. F) at ¶ 9. If Blackfeet Housing is allowed to continue its suit in Blackfeet tribal courts, this will create greater prospective liability for AMERIND in similar situations in the future, and AMERIND will have to pass on the cost of that uncertainty to those who purchase insurance from it, raising the cost of such insurance and thus impairing the benefits granted by AMERIND's Section 17 Charter. Joiner Decl. (Exh. E) at ¶ 11; Bush Decl. (Exh. F) at ¶ 11. It would mean the interests of each of the Tribal sovereigns who are Members would potentially be subject to the jurisdictions of every other in an irrational and very unpredictable way. Joiner Decl. (Exh. E) at ¶ 12; Bush Decl. (Exh. F) at ¶ 12.

30. AMERIND's ability to provide insurance coverage at the rates it does depends upon it not being involuntarily subject to liability in potentially hundreds of tribal jurisdictions when disputes arise between it and a member. Joiner Decl. (Exh. E) at ¶ 7; Bush Decl. (Exh. F) at ¶ 7.

Exhibits

31. The exhibit attached to the 2016 declaration of Derek C. Valdo (Exh. A) is a true

and correct copy of the Participation Agreement, as described in that declaration.

32. The exhibits referenced in or attached to the 2017 declaration of Derek C. Valdo (Exh. B., Exhs. 1-5) are true and correct copies of the documents described in that declaration.

33. The exhibits attached to the declaration of Alan Romero (Exh. C., Exhs. 6-7) are true and correct copies of the documents described in that declaration.

34. The exhibits referenced in or attached to the declaration of Merrill C. Godfrey (Exh. D., Exhs. 8-16) are true and correct copies of the documents described in that declaration.

STANDARD OF REVIEW

A district court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). Disputes are genuine only if "a reasonable jury could return a verdict for the nonmoving party" based on the evidence. *Id*. "[I]t is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.'" *Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992) (quoting *Liberty Lobby*, 477 U.S. at 249-50). And "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Liberty Lobby, Inc*., 477 U.S. at 247-48.

SUMMARY OF ARGUMENT

AMERIND, which is a non-member as to the Blackfeet Tribe and thus is not generally

subject to the Blackfeet Tribe's jurisdiction, has not engaged in any activity that would render it subject to the jurisdiction of Blackfeet tribal courts. When AMERIND agreed to enter into a contractual relationship with Blackfeet Housing with respect to the TOPP, 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. It retained its tribal sovereign immunity as to suit in those courts.

AMERIND is entitled to declaratory relief and an injunction against Blackfeet Housing preventing it from continuing with litigation in the Blackfeet tribal courts or attempting to enforce those courts' orders.

ARGUMENT

I. THIS COURT SHOULD DECLARE THAT BLACKFEET TRIBAL COURTS LACK JURISDICTION BECAUSE AMERIND HAS NOT CONSENTED TO JURISDICTION OR WAIVED ITS SOVEREIGN IMMUNITY TO SUIT

"[A] federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985); *accord id.* at 857 ("whether a tribal court has exceeded the lawful limits of its jurisdiction" is a "federal question"). "[T]he 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). This Court has held that AMERIND already exhausted tribal remedies, so the merits of the tribal court's assertion of jurisdiction are now subject to this Court's review.

Shortly before Blackfeet Housing's answer was filed in this case, the Blackfeet Court of Appeals reversed the Blackfeet Tribal Court's erroneous ruling that AMERIND lacked tribal sovereign immunity. It held that AMERIND (which it referred to as "ARMC") has tribal sovereign immunity by virtue of its Section 17 (25 U.S.C. § 477) charter of incorporation:

> As argued by ARMC, the benefit conferred to tribes by Section 17 incorporation is that it allows tribes to conduct their business affairs outside of their governmental functions and still maintain immunity from suit. We agree with that interpretation of the purpose and intent of Section 17 incorporation. It is also clear to this Court that ARMC was issued a Section 17 Charter by the Secretary of the Interior, and that is [sic] was properly ratified by each of the three chartering tribes by resolutions passed by each of the respective federally recognized tribes. We therefore find that ARMC enjoys the protections of congressionally conferred immunity from suit as a Section 17 Corporation.

Exh. 9 at 13 ¶¶13-14. In so holding, the Court concluded that the "arm of the tribe" analysis advanced by Blackfeet Housing and adopted by the lower court did not apply to a Section 17 corporation such as AMERIND, which possesses tribal sovereign immunity by virtue of its federally granted charter:

> In the instant case, we find that the Blackfeet Tribal Court erred in finding that it had jurisdiction in this matter under the arm of the tribe analysis it applied. The Arm of the Tribe analysis applied by the Blackfeet Tribal Court was misplaced. As a Section 17 Charter, the analysis is whether the Charter was properly granted and ratified. We further find that ARMC does in fact enjoy a congressional grant of sovereign immunity under 25 U.S.C. 477.

Id. at 17-18 ¶ 24. The Court nonetheless went on to exercise jurisdiction over AMERIND, holding that AMERIND had waived its tribal sovereign immunity to suit in Blackfeet tribal courts "by the inclusion of an arbitration clause in the Participation Agreement." *Id.* at 18 ¶ 24. The Court acknowledged that any waiver of tribal sovereign immunity must be clear. Yet the Court did not acknowledge that in the Participation Agreement, there is no waiver of immunity for suit in Blackfeet tribal courts. Blackfeet tribal courts are not among the "Courts of Competent Jurisdiction" under the Agreement where the arbitration clause can be challenged. Instead of acknowledging this limitation and dismissing the case because it lacked jurisdiction, *cf. Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514-15 (1868), it ordered both parties to mediation and arbitration "as contemplated by the Participation Agreement." Exh. 9 at 18 ¶ 25. In so doing, it ruled erroneously, in the last paragraph of the decision—without any factual record, and

after acknowledging that Blackfeet Housing had first raised the issue only at oral argument, *see id.* at 16-17—that Blackfeet Housing and AMERIND had not yet mediated the dispute, that AMERIND has conceded that it was solely at fault and had "failed to properly mediate this dispute,"[2] and that AMERIND "will responsible [*sic*] for the entire expense of the future mediation." *Id.* at 18. Thus, AMERIND has been ordered to pay for and participate in mediation under the Participation Agreement, despite Blackfeet Housing's admission that such mediation has already occurred and failed (*see supra* ¶¶ 20, 23, 26).

There are two reasons that, as a matter of law, Blackfeet tribal courts lack jurisdiction over Blackfeet Housing's suit against AMERIND, and the orders of the Blackfeet courts were issued without jurisdiction. First, the Blackfeet Court of Appeals, relying solely on the Participation Agreement as the basis for its jurisdiction, erroneously ignored the provisions in that Agreement expressly placing jurisdiction over the dispute elsewhere. Although tribes retain civil jurisdiction over consenting non-members under certain circumstances under *Montana v. United States*, 450 U.S. 544, 565 (1981), that does not include the power to exercise jurisdiction over a dispute the parties prospectively agreed would only be brought elsewhere.

Second, and more important, even if the Blackfeet Court of Appeals otherwise would have had jurisdiction here, AMERIND has not waived its tribal sovereign immunity to Blackfeet Housing's suit in Blackfeet tribal courts. The Blackfeet Court of Appeals itself held that AMERIND has tribal sovereign immunity, but erroneously concluded that the arbitration provision of the Participation Agreement waived that immunity for suit in Blackfeet tribal courts.

[2] The Court's contrived assertion that AMERIND conceded this issue does not find any support in the record. It based its conclusion solely on the following statement by counsel for AMERIND at oral argument: "I think I can say that if Blackfeet Housing wants to have another mediation, is willing to go to mediation and go to arbitration, we can talk about that. Our understanding was it was very clear that mediation had been accomplished and that both parties agreed that mediation had been unsuccessful. So that shouldn't be a concern." Exh. 10 at 47.

AMERIND's tribal sovereign immunity is a federally recognized and federally protected right, and AMERIND is entitled to relief against further violation of that right.

A. Blackfeet Tribal Courts Lack Jurisdiction over AMERIND under the Participation Agreement

The existence of the Participation Agreement is the only fact on which the Blackfeet Court of Appeals rested its assertion of jurisdiction; it held that AMERIND is subject to suit solely due to "the inclusion of an arbitration clause in the Participation Agreement." Exh. 9 at 18 ¶ 24. Likewise, at Blackfeet Housing's 30(b)(6) deposition, it admitted that it relies on only one fact for its assertion that Blackfeet tribal courts have jurisdiction over AMERIND: "[t]he Participation Agreement." CK 30(b)(6) at 21:7-22:21 (Exh. 12). Blackfeet Housing asserts that by entering into the Participation Agreement, AMERIND entered into a consensual contractual relationship with Blackfeet Housing that thereby subjects AMERIND to Blackfeet jurisdiction. *Id.* Yet far from supporting such jurisdiction, the Participation Agreement expressly precludes it.

Section 8 of the Agreement provides that "[t]he parties shall resolve any dispute arising out of or relating to this agreement by informal mediation and, if the parties do not resolve the dispute within 90 days of the initiation of informal mediation, then by binding arbitration" in Albuquerque, New Mexico. PA §§ 8(a), 8(a)(4). The arbitrator is required to apply the substantive law of the Pueblo of Santa Ana, and the Agreement is to be interpreted in accordance with that law. PA §§ 8(a)(6), 9(m). The arbitrator's award is enforceable only 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). The 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." PA § 8(a)(9). Thus, under the Participation Agreement, the parties have agreed to resolve their dispute through mediation and arbitration, and that any challenge to the Agreement must be filed in one of the three specified Courts of Competent Jurisdiction. The Agreement precludes any jurisdiction in Blackfeet tribal courts.

Blackfeet Housing admits that AMERIND is not a member of the Blackfeet Tribe. CK 30(b)(6) at 32:8-12 (Exh. 11). As a general matter, under *Montana v. United States*, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," unless the nonmembers' conduct fits within one of two narrow exceptions to this rule. *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1234 (10th Cir. 2014) (citing *Montana*. 450 U.S. at 565). Under the first exception, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. As for the second exception, a tribe may retain civil authority over nonmember conduct "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. Under both exceptions, tribal court "adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997); *accord Nevada v. Hicks*, 533 U.S. 353, 357-58 (2001). Neither exception applies here.

1. Blackfeet Housing's Suit Does Not Satisfy the First Montana *Exception*

Under the consensual relationship exception, a non-member is not subject to tribal jurisdiction outside the scope of the non-member's express or implied consent. Jurisdiction exists only when there is "commensurate consent" from the non-member. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008). The consensual relationship exception "is not 'in for a penny, in for a Pound,'" *Plains*, 554 U.S. at 338 (quoting *Atkinson*

Trading Co. v. Shirley, 532 U.S. 645, 656 (2001)), but rather is limited by the scope of the non-member's consent—what the non-member "may reasonably have anticipated" would be the extent of the Tribe's jurisdiction over it, in light of the circumstances. *Plains*, 554 U.S. at 338. Here, although AMERIND has a consensual contractual relationship with Blackfeet Housing, the scope of the consent, and the scope of the relationship, plainly do not include AMERIND being subject to suit in Blackfeet tribal court under the Participation Agreement. AMERIND could not reasonably have anticipated that it would be subject to adjudicative jurisdiction that the Blackfeet Tribe's own housing authority expressly disclaimed by contract.

In *Plains Commerce*, starting from the principle that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," the Court analyzed the scope of regulatory jurisdiction to determine the outer bounds of possible adjudicative jurisdiction. *Id.* at 330 (quoting *Strate*, 520 U.S. at 453). The Court reasoned that the non-member's consent to jurisdiction could not be inferred, despite the existence of a consensual relationship. First, the Court explained that there is no jurisdiction without "commensurate consent":

> Not only is regulation of fee land sale beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. . . . [N]onmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions.

Id. at 337. The Court then explained that the scope of consent is no broader than the extent to which the non-member "may reasonably have anticipated" being subjected to the tribe's jurisdiction:

> The Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions—a question we need not and do not decide. But there is no reason the Bank should have anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank's sale of land it owned in fee simple.

> . . . [W]hatever the Bank anticipated, whatever "consensual relationship" may have been established through the Bank's dealing with the Longs, the jurisdictional consequences of that relationship cannot extend to the Bank's subsequent sale of its fee land.

Id. at 338. Here, whatever else might reasonably be inferred from the consensual relationship between AMERIND and Blackfeet Housing, "the jurisdictional consequences of that relationship cannot extend to" a lawsuit that is expressly prohibited by the parties' contract.

This point is strengthened further in light of AMERIND's sovereign immunity, discussed in Section I.B. below. Because any waiver of sovereign immunity must be clear, express, and unequivocal, and because AMERIND did nothing to effectuate such a waiver, it is impossible to infer that AMERIND could reasonably have anticipated any jurisdiction by Blackfeet tribal courts. But even putting aside AMERIND's sovereign immunity, the Participation Agreement that the Blackfeet tribal court relied on for jurisdiction plainly does not allow such jurisdiction.

2. Blackfeet Housing's suit does not meet the second Montana *exception*

To meet the second *Montana* exception, the conduct at issue must "imperil the subsistence of the tribal community." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1153 (10th Cir. 2011) (citing *Plains*, 544 U.S. at 341). Further, the exception does not recognize tribal authority "beyond what is necessary to protect tribal self-government or to control internal relations." *MacArthur v. San Juan County*, 309 F.3d 1216, 1224 (2002); *Atkinson*, 532 U.S. at 658-59 (quotations omitted). Here, the conduct at issue does not meet the second exception because enforcing contractual limitations on the forum in which Blackfeet Housing may bring its claims will not imperil the subsistence of the Blackfeet tribal community or hinder the Blackfeet Tribe's ability to self-govern and control its internal relations. Rather, refusal to enforce such contractual limitations assented to by Blackfeet Housing would denigrate Blackfeet Housing's capacity to contract.

B. AMERIND has Tribal Sovereign Immunity and Thus Is Not Subject to Blackfeet Housing's Suit in Blackfeet Tribal Court

Under the federal principles governing tribal jurisdiction, Blackfeet tribal courts lack jurisdiction over Blackfeet Housing's suit against AMERIND, because AMERIND has tribal sovereign immunity and has not waived it for the suit Blackfeet Housing brought.

"The power to subject other sovereigns to suit in tribal court [is] ... not a part of the tribes' inherent sovereignty." *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 n.5 (8th Cir. 2011) (quoting *Montana v. Gilham*, 133 F.3d 1133, 1138 (9th Cir. 1998)). In *Gilham*, the court held that the Blackfeet Tribe did not possess any retained sovereignty that would allow its tribal courts to exercise jurisdiction over an entity with sovereign immunity. Because AMERIND has such immunity, Blackfeet tribal courts lack jurisdiction over AMERIND as a matter of law.

Sovereign immunity to suit in tribal court is of course sufficient to defeat any claim of jurisdiction, under *Montana v. United States* or otherwise. "Sovereign immunity is a jurisdictional question," and thus "suit . . . is barred where" an entity with tribal sovereign immunity "[has] refused to waive [its] sovereign immunity." *Seneca-Cayuga Tribe of Oklahoma v. State of Okl. ex rel. Thompson*, 874 F.2d 709, 714 (10th Cir. 1989) (citations omitted); *accord Ramey Const. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982) ("The issue of sovereign immunity is jurisdictional.").

Thus, in *Thlopthlocco Tribal Town v. Stidham*, the Tenth Circuit held that it had jurisdiction over a claim by the plaintiff Tribal Town that the Town's tribal sovereign immunity entitled it to an order enjoining litigation against it in another tribe's court. The court held that the Tribal Town had articulated a federal claim that tribal jurisdiction was lacking under *Montana v. United States*: "The federal government has recognized the Tribal Town as a sovereign tribe and, accordingly, the government has recognized the rights that accompany the

Tribal Town's sovereignty. The Tribal Town now alleges that the Muscogee courts are attempting to trample on those federally recognized rights." *Thlopthlocco*, 762 F.3d at 1234.

In sum, AMERIND is not subject to Blackfeet Housing's suit against it in Blackfeet tribal courts because, as shown below, AMERIND has tribal sovereign immunity and has not waived its sovereign immunity to Blackfeet Housing's suit against it.

1. AMERIND has sovereign immunity

"[T]ribal [sovereign] immunity is a matter of federal law . . . ." *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1988). The federal government has affirmatively recognized that AMERIND has such immunity, in AMERIND's federal charter of incorporation. 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).

Section 16.1 of AMERIND's 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's tribal sovereign immunity can be waived only by a resolution of AMERIND's Board of Directors. Charter § 16.4. The charter has a "sue and be sued" clause, Section 8.18, but this clause expressly provides that the power to sue and be sued is limited by the Article 16 provisions preserving sovereign immunity unless it is waived by board resolution. Thus, the Blackfeet Court of Appeals correctly held that AMERIND possesses tribal sovereign immunity by virtue of its Section 17 charter.

Blackfeet Housing argued in the Blackfeet trial court, and apparently continues to contend, that despite AMERIND's Section 17 charter, its sovereign immunity must be analyzed under the "arm of the tribe" test that is sometimes applied to identify tribal entities that share in a

tribe's sovereign immunity. But the Blackfeet Court of Appeals correctly recognized that such analysis is irrelevant and unnecessary in light of the clear grant of sovereign immunity in AMERIND's charter. Exh. 9 at 17. The "arm of the tribe" analysis allows a court to determine whether a corporation incorporated (chartered) *under tribal or state law* possesses tribal sovereign immunity. The Secretary of the Interior has already determined that AMERIND is an "instrumentality of the Charter Tribes" in issuing Amerind a federal charter under Section 17.

In *Amerind*, three members of the Turtle Mountain Band of Chippewa Indians sued AMERIND in tribal court, attempting to recover under a policy held by the tribal housing authority. The tribal court found jurisdiction over AMERIND under *Montana v. United States* because of AMERIND's contractual relationship with the Turtle Mountain Housing Authority. *Amerind*, 633 F.3d at 682. The Eighth Circuit disagreed, holding that AMERIND inherently possesses tribal sovereign immunity and had not waived it. *Id.* at 688. It held that the tribal court lacked jurisdiction "because Amerind is entitled to tribal immunity" and ordered that the plaintiffs should be "enjoin[ed] . . . from proceeding against Amerind in Tribal Court." *Id*. at 682, 689.

AMERIND is an arm of the Chartered Tribes due to its Section 17 charter: "[b]ecause Amerind is a [25 U.S.C.] §477 [*i.e.*, Section 17] corporation that administers a tribal self-insurance risk pool, we hold that Amerind serves as an arm of the Charter Tribes and not as a mere business and is thus entitled to tribal sovereign immunity." *Id.* at 685 (citation and citation marks omitted). "[Section 17] corporations are entitled to tribal sovereign immunity." *Id*. Indeed, every court that has addressed this question has held that Section 17 corporations inherently possess tribal sovereign immunity. *See Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009) (Section 17 corporations "do not automatically

forfeit tribal-sovereign immunity"); *Amerind*, 633 at 685 (AMERIND, a Section 17 corporation, is "entitled to tribal sovereign immunity"); *Am. Vantage Cos. v. Table Mt. Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002) ("A tribe that elects to incorporate [under Section 17] does not automatically waive its tribal sovereign immunity by doing so" (citations omitted)).

2. AMERIND has not waived its sovereign immunity to Blackfeet Housing's suit in Blackfeet tribal courts

AMERIND has not waived its sovereign immunity to Blackfeet Housing's suit in Blackfeet tribal court. As the Blackfeet Court of Appeals itself recognized, any such waiver must be clear, express, and unequivocal. "It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)); *accord Ramey*, 673 F.2d at 319. A tribe's waiver of immunity must be expressed "clearly and unequivocally." *Nanomantube v. Kickapoo Tribe,* 631 F.3d 1150, 1152 (10th Cir. 2011)."

Moreover, "the requirement that a waiver of tribal immunity be 'clear' and 'unequivocally expressed' is not a requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved. In the absence of a clearly expressed waiver by either the tribe or Congress, the Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998) (citations omitted).

In *Ramey,* the Tenth Circuit rejected "attempts . . . to imply a waiver when no express waiver exists." 673 F.2d at 319. It cited *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir.), *aff'd*, 455 U.S. 130 (1982), as an example of an express waiver, where a "tribal council passed a formal resolution expressly waiving sovereign immunity." Similarly, Section

16.4 of AMERIND's Section 17 charter prohibits any waiver except by resolution of the Board of Directors. In *Amerind*, the Eighth Circuit held that absent such a resolution, there was no waiver. 633 F.3d at 687–88 (citing *Memphis Biofuels*, 585 F.3d at 921–22 as holding, "where federal charter required board resolution to waive tribal immunity, immunity was not waived without such a resolution even though the corporation's contract with the plaintiff expressly waived all immunities").

Here, the Blackfeet Court of Appeals was mistaken in holding that the arbitration clause in the Participation Agreement was a waiver to suit in Blackfeet tribal court; there is no clear, express, unequivocal waiver to such a suit. Although the court's reasoning is not clear, it apparently believed that *any* waiver of sovereign immunity is all-or-nothing. Thus, it appears to have concluded that the limited consent in the Participation Agreement to certain procedures, courts (this Court, New Mexico court, and the courts of the Pueblo of Santa Ana), and causes of action could be treated as a waiver of immunity to suit in Blackfeet tribal courts for any cause of action. This is incorrect as a matter of federal law, and the cases it cited say no such thing. The arbitration clauses in those cases expressly included language that broadly permitted enforcement of arbitration awards among any courts having jurisdiction, including the tribal courts at issue. See *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 419 (2001); *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 562 (8th Cir. 1995). Here, by contrast, the Participation Agreement's arbitration clause explicitly limits jurisdiction in a manner that precludes suit in Blackfeet tribal court.

In *Ramey*, the Tenth Circuit held, "When consent to be sued is given, the terms of the consent establish the bounds of a court's jurisdiction." 673 F.2d at 319–20 (citing *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Sherwood*, 312 U.S. 584, 586 (1941);

Reynolds v. United States, 643 F.2d 707, 713 (10th Cir. 1981)). The Court further held that because "a waiver of sovereign immunity is to be strictly construed," the scope of any consent must be strictly construed. *Ramey*, 673 F.2d at 320 (citing *Reynolds*, 643 F.2d at 713). The Participation Agreement, strictly construed, shows that AMERIND did not effectuate a clear, express, and unequivocal waiver to the suit Blackfeet Housing brought in Blackfeet tribal court. AMERIND is entitled to judgment as a matter of law.

II. AMERIND IS ENTITLED TO AN ORDER ENJOINING BLACKFEET HOUSING FROM FURTHER LITIGATION AGAINST AMERIND IN BLACKFEET TRIBAL COURTS OR ENFORCING THOSE COURTS' ORDERS

AMERIND is entitled to injunctive relief against further litigation by Blackfeet Housing in Blackfeet tribal courts or enforcing those courts' orders. To obtain a permanent injunction, a plaintiff must show "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Sw. Stainless, LP v. Sappington*, 582 F.3d 1176, 1191 (10th Cir. 2009). AMERIND meets this test.

A. Actual Success on the Merits

For the reasons stated above in section I, Blackfeet tribal courts lack jurisdiction over Blackfeet Housing's suit against AMERIND, and thus AMERIND has shown actual success on the merits.

B. Irreparable Harm

Where, as here, a party seeks injunctive relief against an exercise of jurisdiction that violates the party's tribal sovereign immunity, irreparable injury is evidenced by the fact that without an injunction the party would be "forced to expend time and effort on litigation in a court that does not have jurisdiction." *Seneca-Cayuga Tribe of Oklahoma*, 874 F.2d at 716; *accord Chiwewe v. Burlington N. & Santa Fe Ry. Co.*, No. 02-0397 JP/LFG-ACE, 2002 WL

31924768, at *2 (D.N.M. Aug. 15, 2002) (Parker, J.); *Crowe & Dunlevy, P.C. v. Stidham*, 609 F. Supp. 2d 1211, 1222–23 (N.D. Okla. 2009), *aff'd on other grounds*, 640 F.3d 1140 (10th Cir. 2011). That is the situation AMERIND faces here, where Blackfeet tribal courts have wrongly asserted jurisdiction over Blackfeet Housing's complaint and have, without jurisdiction, ordered AMERIND to pay for and attend mediation under its supervision. Sovereign immunity is not merely a defense to liability, but is the "privilege not to be sued," a dignity and privilege that is effectively lost if suit is allowed to continue. *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139, 146 n.5 (1993). AMERIND will effectively suffer the loss of its tribal sovereign immunity to Blackfeet Housing's suit unless this Court enters an injunction.

Further, for the reasons set out at *supra* ¶¶ 28-32 and Exhibits A, E, and F, AMERIND's business operations will be irreparably harmed by a continuation of Blackfeet jurisdiction over it.

Finally, Blackfeet Housing seeks remedies against AMERIND in Blackfeet tribal court under Blackfeet tribal law that are not available under the Participation Agreement, such as unspecified punitive damages to be determined at trial, potentially subjecting AMERIND to limitless liability. *See* Exh. 5 at 8-9. The mere possibility of such liability in a court without jurisdiction will, if not foreclosed by an order from this court, severely undermine AMERIND's business operations and viability.

C. Balance of Harms

Where, as here, a plaintiff seeks to enjoin an unlawful exercise of jurisdiction, a showing of success on the merits necessarily means that the defendant will suffer no legally cognizable harm. This follows because the defendant is being enjoined from doing "something they have no legal entitlement to do in the first place. In this light, the defendants' claims to injury should an injunction issue shrink to all but 'the vanishing point.'" *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F. 3d 1000, 1007 (10th Cir. 2015) (quoting *Seneca-Cayuga*, 874

F.2d at 716). Plainly, the harm to AMERIND in being subjected to suit in a court lacking jurisdiction outweighs any interest Blackfeet Housing might claim in suing AMERIND in a court that lacks jurisdiction.

D. Public Interest

An injunction will not adversely affect the public interest; rather, it will serve the public interest, because entities such as AMERIND should not be involuntarily subjected to Blackfeet tribal jurisdiction in violation of sovereign immunity and where the parties to a contract have agreed that it does not exist. *See Ute Indian Tribe*, 790 F. 3d at 1007. There is a strong public interest in not allowing proceedings to go forward in a court that is clearly without jurisdiction.

III. AMERIND IS ENTITLED TO SUMMARY JUDGMENT ON ALL AFFIRMATIVE DEFENSES

AMERIND is also entitled as a matter of law to summary judgment on all defenses to the complaint. In its answer, Blackfeet Housing pleaded a grab-bag of eight arguments it termed affirmative defenses, but each fails as a matter of law.

Blackfeet Housing's "First Affirmative Defense" is that the complaint fails to state a claim. For the reasons in other sections of this motion, each claim in the complaint does state a claim, and AMERIND is entitled as a matter of law to the injunction and declaration it seeks.

Blackfeet Housing's second and third "affirmative defenses" repeat arguments raised in its motion to dismiss the complaint and rejected by the Court: lack of subject matter jurisdiction and lack of personal jurisdiction. AMERIND has shown jurisdiction for the reasons stated in the Court's opinion denying the motion to dismiss.

In its "Fourth Affirmative Defense," Blackfeet Housing asserts improper venue. This defense was waived when Blackfeet Housing failed to raise it in its motion to dismiss the complaint. Under Federal Rule of Federal Procedure 12(h)(1) and 12(g)(2), "[a] party waives"

an objection to improper venue by "omitting it from a motion" to dismiss when that defense "was available to the party." In any event, venue is proper under a forum selection clause such as the one in the Participation Agreement at issue here.

In its fifth and seventh "affirmative defenses," Blackfeet Housing does not actually plead any specific defense but rather purports to "assert[] all affirmative defenses that are or may become available" and asserts the right to amend its answer. Answer at 7. Blackfeet Housing was required to plead all affirmative defenses in the answer. "In responding to a pleading, a party *must* affirmatively state any avoidance or affirmative defense . . . ." Fed. R. Civ. P. 8(c) (emphasis added). "Failure to plead an affirmative defense results in a waiver of that defense." *Bentley v. Cleveland Cty. Bd. of Cty. Comm'rs*, 41 F. 3d 600, 604 (10th Cir. 1994).

Blackfeet Housing's "Sixth Affirmative Defense" is a rote, conclusory recitation that "Plaintiff's claims are barred, in whole or in part, by the doctrines of waiver, unclean hands, estoppel and/or ratification." Answer at 7. AMERIND served an interrogatory on Blackfeet Housing to "Explain fully the basis for each of the affirmative defenses in your answer in this matter, identifying every fact and circumstance that you believe supports each defense." Exh. 16 at 5. Blackfeet Housing's response was silent as to "ratification," *see id.* at 5-6, and thus that defense fails. As to both waiver and estoppel, Blackfeet Housing stated that "Amerind waived the right to compel arbitration as the arbitration policy in the Participation Agreement states that Amerind must file for arbitration within 90 days of mediation." *Id.* at 3. This argument misreads the parties' contract and is incorrect as a matter of law. Section 8(a) of the Participation Agreement states that neither party can seek arbitration until *after* 90 days have passed from "the initiation of informal mediation." Exh. A at 6. It is a condition precedent to any arbitration that "the parties do not resolve the dispute within 90 days of the initiation of informal mediation." *Id.*

Likewise, Blackfeet Housing's defense of "unclean hands" fails. AMERIND's tribal sovereign immunity is not waived by inequitable conduct. *See Ute Distribution Corp.*, 149 F.3d at 1267. Moreover, Blackfeet Housing's allegations are inadequate as a matter of law to support allowing Blackfeet tribal courts to proceed without jurisdiction. It is not enough to prove *some* inequitable conduct; rather, it "must be related to the plaintiff's cause of action," *Worthington v. Anderson*, 386 F.3d 1314, 1320 (10th Cir. 2004), and must be "sufficiently egregious" to preclude a grant of equitable relief to the plaintiff. *McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1052 (D. Colo. 1991). Blackfeet Housing's only allegations are: (1) "Amerind failed to timely respond to BH's notice of the claim," and (2) AMERIND's participation in the mediation on September 15, 2014, was not in good faith. Exh. 16 at 5-6. These allegations, even if true, would not provide an excuse in equity for Blackfeet Housing's efforts to seek redress outside the dispute resolution procedures in the Participation Agreement. Blackfeet Housing never attempted to arbitrate its dispute and never sought redress in a Court of Competent Jurisdiction under the Participation Agreement. If Blackfeet Housing believed that AMERIND was being insufficiently responsive to its claim or its efforts to mediate, its remedy was to seek redress under the further procedures in the Agreement, not to ignore the Agreement, sue in its own courts, and then attempt to invoke equity as a shield for improper assertion of jurisdiction.

In any event, Blackfeet Housing's vague allegations of unclean hands are undermined by Blackfeet Housing's specific admissions showing that there is no genuine dispute over anything sufficiently egregious or inequitable to support a valid unclean hands defense. First, the allegation of failure to timely respond to claims is foreclosed by Ms. Matt's August 16, 2013 letter, which, far from making any complaint about delay, informs AMERIND that full information about the claims is not yet available and asks AMERIND to await further

information in a report that is promised to be forthcoming. Exh. 3. Less than two weeks later, AMERIND had sent an adjuster to inspect the units. *Supra* ¶ 17;MSG 30(b)(6) (Exh. 12) at 15:8-16:4; Romerto Decl. (Exh. C) at ¶ 4. Second, as to the allegation of failure to mediate in September 2014, Blackfeet Housing had already violated the Participation Agreement by filing its complaint in April 2014 in Blackfeet Tribal Court, without first seeking to mediate or arbitrate the dispute. Moreover, correspondence from Blackfeet Housing and Blackfeet Housing's own deposition testimony admits that the September 15, 2014, meeting satisfied the requirement of informal mediation, *see supra* ¶¶ 20, 23;Exh. 4; Kittson Tr. (Exh. 13) at 45:23-46:25, and the October 14, 2014 letter also shows that Blackfeet Housing refused further mediation, Exh. 4.

The "Eighth Affirmative Defense" states that "Plaintiff's request for equitable relief should be denied on grounds that this court lacks jurisdiction as the Blackfeet Tribal Court has jurisdiction under the *Montana v. U.S.* test." For the reasons stated above, *Montana v. United States* does not support an assertion of tribal jurisdiction that overrides contractual restrictions and that violates AMERIND's tribal sovereign immunity. Thus, this defense fails.

CONCLUSION

The Court should grant AMERIND declaratory and injunctive relief against further litigation in the Blackfeet tribal courts and against any attempt to enforce the orders of those courts against AMERIND with respect to the dispute arising out of the claims denied by AMERIND on March 14, 2014.

DATED this 20th day of June 2017.

Allison C. Binney

/s/ Merrill C. Godfrey

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of June 2017, 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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