

MATT LAW OFFICE

Terryl T. Matt, Esq.
310 East Main
Cut Bank, MT 59427
Telephone: (406) 873-4833
Fax No.: (406) 873-4944
terrylm@mattlawoffice.com

McGinn, Carpenter, Montoya & Love, PA
Randi McGinn, Bar No. 1753
Heidi Todacheene, Bar No. 149548
201 Broadway Blvd SE
Albuquerque, NM 87102
Telephone:(505) 843-6161
Facsimile (505) 242-8227
Randi@mcginnlaw.com
Heidi@mcginnlaw.com

Attorneys for Defendant Blackfeet Housing

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

AMERIND RISK MANAGEMENT)
CORPORATION, a federally chartered Section 17)
Tribal Corporation,)
)
Plaintiff,)
)
)
BLACKFEET HOUSING,)
Defendant.)
_____)

Case No. 1:16-cv-1093-JAP-KK

**DEFENDANT’S MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR
SUMMARY JUDGMENT AND RESPONSE TO AMERIND’S MOTION FOR
SUMMARY JUDGMENT**

TABLE OF CONTENTS

STANDARD OF REVIEW14

 INTRODUCTION1

 STATEMENT OF FACTS1

 ARGUMENT.....13

I. AMERIND CONSENTED TO JURISDICTION IN BLACKFEET TRIBAL COURT AND WAIVED ANY SOVEREIGN IMMUNITY CLAIM IN THE TOPP INSURANCE CONTRACT, WHICH CONTROLS THE DISPUTES IN THIS CASE 14

A. Insurance Coverage Disputes must be Interpreted Based on the Contract of Insurance and the TOPP Insurance Contract, Not the Participation Agreement, Governs this Case.16

B. Under the “Laws Relating to Contractual Relations,” This Court Must Select the Contract Most Favorable to the Insured, Blackfeet Housing, and Construe any Ambiguous Policy Language in favor of Blackfeet Housing 18

C. Any Ambiguity in the Term “Courts of Competent Jurisdiction” in the TOPP Insurance Contract Must be Construed in Favor of the Insured, Blackfeet Housing and Against Amerind20

D. Amerind waived jurisdiction and consented to be sued in Blackfeet Tribal Court when it entered into the TOPP Insurance Contract and it is Irrelevant Whether it has Sovereign Immunity or Not23

II. BLACKFEET TRIBAL COURT HAS JURISDICTION OVER AMERIND UNDER BOTH *MONTANA* EXCEPTIONS BECAUSE THE TOPP INSURANCE CONTRACT CREATES A CONSENSUAL RELATIONSHIP WITH THE BLACKFEET TRIBE AND INTRUDES ON ITS SELF-GOVERNANCE IN A WAY THAT AFFECTS THE HEALTH AND WELFARE OF TRIBAL MEMBERS......25

A. The Blackfeet Tribal Court has Jurisdiction Over Amerind under *Montana’s* First Exception because a Nexus Exists between Amerind’s Consensual Contractual Relationship and Blackfeet’s Tribal Authority.....25

B. *Montana’s* Second Exception Applies Because Amerind’s Refusal to Provide Insurance Coverage Intrudes on Blackfeet Tribe’s Self-Governance and Adversely Impacts the Health and Welfare of the Tribe.28

III. BLACKFEET HOUSING SHOULD BE GRANTED SUMMARY JUDGMENT AND THIS COURT SHOULD ENFORCE THE BLACKFEET TRIBAL COURT OF APPEALS ORDER REQUIRING THE PARTIES TO MEDIATE, THEN ARBITITRATE THIS COVERAGE DISPUTE.....30

A. Amerind has not and will not Suffer any Irreparable Harm by Litigating in a Tribal Court where it has Consented to Suit.....31

B. Blackfeet Housing has and will Suffer Irreparable Harm if the Decision of the Blackfeet Court of Appeals is Voided by this Court.....33

CONCLUSION35

TABLE OF AUTHORITIES

Cases

<i>AMERIND Risk Mgmt. Corp. v. Blackfeet Hous.</i> , 2016 U.S. Dist. LEXIS 180039 (D.N.M. Dec. 29, 2016)	32
<i>AMERIND Risk Mgmt. Corp. v. Blackfeet Hous.</i> , 2016 U.S. Dist. LEXIS 180039 at *16 (D.N.M. Dec. 29, 2016)	15
<i>AMERIND Risk Mgmt. Corp. v. Blackfeet Hous.</i> , No. 15-2089 (10 th Cir. Mar. 2, 2016).	11
<i>AMERIND Risk Mgmt. Corp. v. Blackfeet Hous.</i> , No. 15-cv-00072 WJ/KBM (DNM filed January 28, 2015).....	11
<i>Awad v. ZiriAx</i> , 670 F.3d 1111, 1131 (10th Cir. 2012) (quoting <i>Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.</i> , 269 F.3d 1149, 1156 (10th Cir. 2001)).....	31
<i>Blackfeet Hous. V. AMERIND Rick Mgmt Corp.</i> , Cause No. 2015-AP-09 (Order filed Nov. 7, 2016)	10
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462, 472, note 14, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).....	23
<i>Dolgenercorp, Inc. v. Mississippi Band of Choctaw Indians</i> , 746 F.3d 167 (5 th Cir. 2014)	27
<i>Dollar General. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians</i> , 136 S. Ct. 2159, 195 L. Ed. 2d 637 (2016).....	27
<i>Dudnikov v. Chalk & Vermillion Fine Arts, Inc.</i> , 514 F.3d 1063, 1081 (10 th Cir. 2008)..	32
<i>Hartford Fire Ins. Co. v. Gandy Dancer, LLC</i> , 981 F. Supp. 2d 981, 1008, 2013 U.S. Dist. LEXIS 156735, 2013 WL 5934489 (D.N.M. 2013) (citing <i>United Nuclear Corp. v. Allstate Ins. Co.</i> , 2012-NMSC-032, ¶ 10, 285 P.3d 644).....	19, 20, 22
<i>Helvering v. LeGierse</i> , 312 U.S. 531, 85 L. Ed. 996, 61 S. Ct. 646 (1941)	31
<i>Lightfoot v. Cendant Mortg. Corp.</i> , 137 S. Ct. 553, 561, 196 L. Ed. 2d 493 (U.S. 2017)	22
<i>MacArthur v. San Juan Cnty.</i> , 309 F.3d 1216, 1223 (10th Cir. 2002)	26
<i>Merrion v. Jicarilla Apache Tribe</i> , 617 F.2d 537, 540 (10th Cir. 1980) (en banc), <i>aff'd</i> , 455 U.S. 130, 71 L. Ed. 2d 21, 102 S. Ct. 894 (1982).....	24
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	1

Niemi v. Lasshofer, 770 F.3d 1331, 1351 (10th Cir. 2014).....24

Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc., 569 F.3d 932, 941-942 (9th Cir. 2009).....26

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008).....28

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 340 (2008)...27

Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1243 (10th Cir. 2010) 14

Smith v. Salish, 434 F. 3d 1127, 1133-1134 (9th Cir. 2006).....26

Stearns-Roger Corp. v. United States, 774 F.2d 414, 415 (10th Cir.1985).....32

Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997).....26

Truck Ins. Exch. v. Gagnon, 33 P.3d 901, 903 (N.M. Ct. App. 2001) 19

Valdez v. Metro. Prop. & Cas. Ins. Co., 2012 U.S. Dist. LEXIS 47275 *80-81 (D.N.M. Mar. 31, 2012).....32

Williams v. Life Sav. & Loan, 802 F.2d 1200, 1202 (10th Cir.1986).....23

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) 31

Yaffe Cos. v. Great Am. Ins. Co., 499 F.3d 1182, 1185, 2007 U.S. App. LEXIS 20464 (10th Cir. 2007)..... 16, 19

Statutes

25 U.S.C. § 477.....29

Fed.R.Civ.P. 56(c) 14

Other Authorities

Black's Law Dictionary (abridged 6th ed.1991)22

Rules

Federal Practice and Procedure § 1351 (3d ed., Apr. 2016 update).....23

LIST OF EXHIBITS

Amerind Charter (Doc 12-2, Filed 11/10/16)

District Judge William Johnson, Memorandum of Opinion, 2015 LEXIS 183974 (D.N.M. May 11, 2015)

Complaint Amerind v. Blackfeet Housing (Doc 1)

Blackfeet Housing v. Amerind Risk Management, Cause No. 2015-AP-09 (Doc 17-3, Filed

Participation Agreement (Doc 12-3, Dep. Ex. 3)

1. TOPP- Pgs. i-ii and 1-5 (Dep. Ex. 7 & 20)
2. Indian Country Today (Dep. Ex. 21)
3. Indian Gaming Article (Dep. Ex. 22)
4. Tribal Land Certificate (Dep. Ex. 25)
5. Tribal Land Certificate (Dep. Ex. 26)
6. Evidence of Insurance Coverage (Dep. Ex. 27)
7. Evidence of Insurance Coverage (Dep. Ex. 28)
8. Evidence of Insurance Coverage (Dep. Ex. 29)
9. Evidence of Insurance Coverage (Dep. Ex. 30)
10. 2014 Financial pg. 7 (Dep. Ex. 35)
11. 2015 Financial pg. 6 (Dep. Ex. 36)
12. Kittson, Chancy - Deposition Excerpts
13. Black , Ken – Deposition Excerpts
14. Valdo, Derek - Deposition Excerpts
15. Gauthier, Robert - Deposition Excerpts
16. St. Goddard, Margie - Deposition Excerpts
17. Chancy Kittson Affidavit

INTRODUCTION

Insurance risk management company AMERIND represented to its insureds, including Blackfeet Housing, that it would be subject to the jurisdiction of tribal courts. This consent to suit in tribal court and waiver of any claim of sovereign immunity was confirmed by AMERIND in the Tribal Operations Protection Program (TOPP), the binding contract of insurance it entered into with Blackfeet Housing. In this dispute over insurance coverage, it is the TOPP insurance contract which determines jurisdiction and controls the issues in this case. Under the TOPP insurance contract, AMERIND consented to jurisdiction in Blackfeet tribal court and waived any argument of sovereign immunity.

The Blackfeet Tribal Courts not only have jurisdiction based on AMERIND's consent and waiver in the TOPP insurance contract, but based on both of the exceptions established by the United States Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981). AMERIND was subject to tribal jurisdiction because it entered into a contract involving tribal land with Blackfeet Housing. *Id.* The Blackfeet tribal courts also have jurisdiction because AMERIND's refusal to provide insurance coverage to repair the flooding damage and resultant mold directly affects the health and welfare of Blackfeet tribal members. *Id.*

As a risk management insurance company, AMERIND cannot credibly argue that it will be irreparably harmed by the order of the Blackfeet tribal courts to do what is contemplated under AMERIND's own TOPP contract of insurance, i.e., participate in mediation/arbitration and pay the property damage claims it agreed to cover. Instead, it is Blackfeet Housing that would be irreparably harmed by a decision of this Court applying

the Participation Agreement rather than the TOPP insurance contract and finding no jurisdiction in the Blackfeet tribal courts. Such a determination would not only set aside the Blackfeet Court of Appeals' order requiring the parties to attend a mediation and, if necessary, an arbitration in this four-year-old claim, but might allow AMERIND to try and deny this claim completely based on the statute of limitations in the Participation Agreement, which provides there is "an absolute bar" and a "waiver of the dispute" if an arbitration is not brought within one year after the dispute arose. Participation Agreement at ¶8(a)(7) [Doc. 12-3, filed 11/10/16].

Based on the TOPP insurance contract, the Montana decision and irreparable harm which would be cause to Blackfeet Housing, this Court should deny the Plaintiffs Motion for Summary Judgment and grant this Cross Motion for Summary Judgment by Defendant Blackfeet Housing.

STATEMENT OF FACTS

1. Plaintiff insurance company, AMERIND, is a risk management company initially formed under the Federal Liability Risk Retention Act of 1986. (Ex. 15 Gauthier Dep. at 14: 22-25; 15:1-18).
2. AMERIND provides insurance coverage to Indian housing authorities across the nation. Ex. 17, Aff. of Chancy Kittso ¶5. AMERIND only insures property that is on trust land. (Ex. 13, Black Dep. at 29:22-25; 30:1-25; 31:1-3). The land that AMERIND insured in this case sits on land owned by the Blackfeet Tribe and is in trust. (Ex. 4-9).

AMERIND Represented to Blackfeet Housing it Would Come to Tribal Court

3. When AMERIND was created, it was expected that AMERIND would go into any tribal court. Ex. 15, Gauthier Dep. at 104:19-23.

4. AMERIND markets to the public that it is the only insurance company willing to go into tribal court. (Ex. 2 & 3)

5. AMERIND represented in its marketing that it insists on adjudicating disputes in tribal courts. (Ex. 2). AMERIND's COO stated: "We enjoy the sovereignty of our chartering tribes...Commercial insurers will agree to arbitration but in state courts. We, as a sovereign entity, agree to arbitration, but we insist on tribal courts." AMERIND's chief legal counsel also said: "Additionally, the insurer should be adjudicating claims based on tribal laws and policies. When tribal courts or arbitrators are utilized, it can cut down on what can be lengthy litigation as seen by state courts. Both parties may also feel more comfortable with the tribal adjudication process." (Ex. 3).

6. AMERIND repeatedly told tribal members it would go into tribal court, Ex. 12, Kittson Dep. at 77:6- 19, and its website promotes the company as Indian friendly, with the slogans, "Tribes protecting Tribes" and "Keeping Money in Indian Country." Ex. 17, Aff. of Kittson, ¶21.

7. Defendant Blackfeet Housing, is a tribal entity created by the Blackfeet Tribal Business Council to provide decent, sanitary, and safe housing to low-income persons residing on the Blackfeet Indian Reservation. (Blackfeet Housing Charter, p. 3 [Doc 12-1, filed 11/10/16]. Currently, 9,572 of the 17,138 enrolled members of the Blackfeet tribe live on the reservation in Montana. Ex. 17, Aff. of Kittson, ¶19. Of these

9,572 tribal members, Blackfeet Housing provides about 2,700 tribal members, or approximately 50% of those on the reservation, with tribally owned housing. *Id.* at ¶20. There is a waiting list of tribal members who would like to live in this low income housing. *Id.* at ¶20.

8. ***Based on the representations made by AMERIND that it would submit to tribal jurisdiction***, Blackfeet Housing purchased four insurance policies to protect the homes of tribal members on trust land at the Blackfeet Indian Reservation. Ex. 1, 6-9.

9. BH trusted that AMERIND would litigate in tribal court based upon what AMERIND told BH. *Id.*, Ex. 12, Kittson Dep. at 74:13-18; 75:11-17.

The TOPP Contract of Insurance, not the Participation Agreement Controls Here

10. The expectation that AMERIND would submit to tribal jurisdiction was confirmed in the written Tribal Operations Protection Program (TOPP), the “binding contract” which controls the obligations between the insurance company, AMERIND, and its insured, Blackfeet Housing. Ex. 1, TOPP General Coverage Conditions at p. 1.

11. The TOPP insurance contract waives jurisdiction and allows AMERIND to be hailed into Blackfeet tribal court by allowing that, “Any judgment upon the award rendered by the arbitrators may be entered to **your tribal** or any federal court of competent jurisdiction.” *Id.* at paragraph 15 (emphasis added). Arbitration is not mandatory, but “may” be requested by either side if there is a coverage dispute. *Id.* The TOPP insurance contract contemplates an arbitration by three arbitrators to be conducted in accordance with the CPR Institute for Dispute Resolution Rules. *Id.*

12. The TOPP contract requires the insured to “bring any action against us within one year after a loss occurs...”, but only after “...the amount of our obligation to

pay has been finally determined...by a non-appealable final judgment in a **court of competent jurisdiction...**” Ex. 1 at paragraph 12 (emphasis added). The insurance contract does not exclude tribal courts from the definition of a “court of competent jurisdiction” and contains no limitation preventing the insured’s underlying legal action to determine damages or enforce the contract (including arbitration) from being filed and pursued in tribal court. *Id.*

13. Although the TOPP contract warns that as a sovereign tribal program, it is not subject to any State insurance laws, regulations or backed by any state insurance insolvency guaranty funds (Ex. 1, p. i), the contract does not specify which tribal, state or federal law will apply to this contract. It leaves open the use of the tribal law of the insured by stating: “Issues regarding interpretation or application of the document shall be decided by the application of laws relating to contractual relationships.” *Id.*, Preamble, p. ii.

14. Defendant disputes any implication by AMERIND in paragraphs 5 and 6 of its Material Facts, that it is the Participation Agreement, rather than the TOPP insurance contract that controls the jurisdictional and underlying coverage issues in this case. The Participation Agreement does not control the obligations or jurisdictional issues involved in this dispute over insurance coverage, but merely sets out the financial obligations of Blackfeet Housing as a participant in funding the risk management pool administered by AMERIND. (Participation Agreement, [Doc. No. 12-3, filed 11/10/16]

15. Blackfeet Housing signed its first Participation Agreement in 2012. *Id.* & Ex. 12, Kittson Dep. at 74:1-4. The Participation Agreement sets out the obligations of Blackfeet Housing to make contributions to the risk management pool, provide accurate

reports on its loss history and pay administrative fees associated with managing ARMC.

Participation Agreement, [Doc. No. 12-3, filed 11/10/16]

16. AMERIND never once went over or discussed the Participation Agreement with its insured, BH. Ex. 12. at 73:1-3. Created in 2009, the Participation Agreement was first signed by Gabe Grant, Assistant Director to BH, in 2012.

Participation Agreement, [Doc. No. 12-3, filed 11/10/16]. Margie Goddard, the woman who administered insurance for the tribe and was the contact person for AMERIND, never saw the Participation Agreement until May of 2017 and had never been told by AMERIND that it should be used to administer claims. Ex. 16, St. Goddard, Margie, Dep. at 37:5-21.

17. The dispute resolution provisions for issues arising “out of or relating to” the Participation Agreement are markedly different than those for coverage and arbitration issues arising under the TOPP insurance contract as exhibited by the chart below. Compare, Ex. 1, preamble, p. i; General Coverage Conditions ¶12 and ¶15 to the Participation Agreement, Arbitration, ¶8. [Doc. No. 12-3, filed 11/10/16]

Differences in Jurisdiction and Issue Resolution		
	TOPP Ins. Contract	Participation Agreement
Suit may be filed in any court of competent jurisdiction (including Blackfeet tribal court)	Yes	No
Arbitration Required	No	Yes
Arbitration Process	No Mediation 3 Arbitrators CPR Inst. Rules Apply No exclusion punitive dams	Mediation First 1 Arbitrator AAA Rules Apply Punitive dams excluded

	<u>Location:</u> Santa Ana Pueblo or another agreed site	<u>Location:</u> Albuquerque only
Arbitration Award filed in Blackfeet Tribal Court	Yes	No
Designation of Substantive Law to be Used	No	Yes
SOL	Lawsuit must be filed within one year after loss occurs.	Arbitration must occur within 1 year of dispute or “absolute bar” and “waiver of dispute”

18. Unlike disputes over coverage and arbitration in the TOPP insurance contract, in disputes arising “out of or relating to” the Participation Agreement, the parties are not allowed to file in any court of competent jurisdiction, but are required to engage informal mediation, then a formal arbitration. Participation Agreement at ¶8, [Doc. No. 12-3, filed 11/10/16]. The form and rules of the arbitration are markedly different than the arbitration process in the TOPP. *Id.* Once an arbitration award is issued under the Participation Agreement, it may not be filed or enforced in Blackfeet Tribal Court, but must be filed and litigated in only one of three locations – the United States District Court for New Mexico, the Second Judicial District Court or the Santa Ana Pueblo Tribal Court. *Id.* The statute of limitations in the Participation Agreement provides that there is “an absolute bar” and a “waiver of the dispute” if an arbitration is not brought within one year after the dispute arose. *Id.*, ¶8(a)(7).

19. The underlying dispute in this case arises out of a denial of coverage under the TOPP insurance contract, not any issue involving the Participation Agreement.

AMERIND’s Refusal to Pay the Property Damage Claim

20. In April, 2013, Blackfeet Housing began receiving complaints about damages from flooding in the tax credit homes provided to tribal members. Aff. Chancy Kittson, ¶7, [Doc 12-6, filed 11/10/16]

21. On April 23, 2013, staff of Blackfeet Housing inspected some of the homes in which damage was claimed and found flooding and water beneath the houses, along with mold caused by the flooding. *Id.*, ¶8.

22. Two days after the inspection, on April 25, 2013, Blackfeet Housing filed a written notice of claim with AMERIND through its attorney, Terryl Matt. *Id.*, ¶9.

23. The next day, April 26, 2013, Chancy Kittson, the Executive Director of Blackfeet Housing, was contacted by AMERIND CEO Derek Valdo. After discussing the claim, CEO Valdo promised to send someone out to assess the damage. . *Id.*, ¶9.

24. A few weeks later, when no one had come to inspect the homes, Director Kittson spoke in person with AMERIND Chief Financial Officer Dennis McCann about the written claim. CFO McCann again assured Director Kittson that someone would be coming out to assess the damage. *Id.*, ¶10.

25. When no one from AMERIND arrived by the end of May, 2013, Blackfeet Housing hired its own engineer to assess the damage and come up with an estimate for repairs. This estimate was completed in August, 2013. *Id.*, ¶11.

26. In August, 2013, BH filed a written notice of the claim again, this time outlining what the engineer it hired had discovered about the flooding, water damage and the mold it caused in 130 of the BH housing units. *Id.*, ¶12.

27. It was not until the first week of September, 2013 that AMERIND did as it had promised on several occasions and finally sent out an adjuster. *Id.*, ¶12

28. When there was no follow up by the adjuster, on February 14, 2014, BH sent a demand letter to AMERIND with the standard language indicating it was an offer to settle the insurance coverage claims. *Id.*, ¶13, and see Plaintiff's Ex. 6, Offer of Compromise. [Declaration of Romero, Doc. No. 28-2, Pgs 18-21, filed 06/20/17]. The letter again outlined BH's claims for flooding, explained why the mold exception did not apply and requested \$1,413,980 in damages. *Id.*

29. AMERIND denied the claims on March 14, 2014 for the reasons stated in Plaintiff's Statement of Facts at ¶17.

30. On April 18, 2014, before the one year statute of limitations in the TOPP expired, BH filed suit in Blackfeet Tribal Court, a court of competent jurisdiction in Browning, Montana, against AMERIND to enforce AMERIND's obligations to provide insurance for this loss. Kittson Aff., ¶14, Doc 12-6, filed 11/10/16.

31. At the request of AMERIND's attorneys, BH delayed serving the Complaint filed in Tribal Court. *Id.*, ¶14.

32. In May, 2015, AMERIND's attorney and CFO Valdo proposed a mediation to resolve the insurance coverage claims. The mediation was set to coincide with AMERIND's Board of Directors meeting in Portland, Oregon on September 15, 2014. *Id.*, ¶15.

33. On the Friday before the Monday mediation, AMERIND's attorney called Mr. Chancy and informed him there was a problem fitting the mediation into the Board meeting schedule. *Id.*, ¶16. When Blackfeet Housing representatives arrived in Portland on Monday, they found the mediation had not been scheduled, but were told

they could make a brief presentation over the lunch hour. *Id.*, ¶17. Of course, in an hour, the case was not resolved.

Litigation in Blackfeet Tribal Courts

34. After AMERIND violated its agreement to hold an informal mediation, Blackfeet Housing served the Complaint it had previously filed in Blackfeet Tribal Court, alleging six claims all arising out of AMERIND's failure to provide coverage under the TOPP contract of insurance, including (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. See Plaintiff's Exh. 5 and Plaintiff's Ex. B, Valdo Declaration at ¶7 [Doc. No. 28-2, filed 06/20/11].

35. On October 17, 2014, AMERIND made a special appearance in tribal court to file a motion to dismiss for lack of jurisdiction. This motion was denied on October 1, 2015, with the tribal court finding it had jurisdiction over AMERIND, rejecting AMERIND's assertion of sovereign immunity and its reliance on the Participation Agreement rather than the TOPP contract of insurance. Plaintiff's Ex. 8, [Doc. No. 17-2, filed 06/20/17]; Answer ¶30 [Doc. No. 22, filed 1/17].

36. AMERIND appealed that decision to the Blackfeet Court of Appeals, which issued a decision on November 7, 2016, finding that, while AMERIND had tribal sovereign immunity as a Section 17 tribal corporation, it had waived that immunity by including an arbitration clause in the TOPP contract of insurance and concluded it had jurisdiction. *Blackfeet Hous. V. AMERIND Rick Mgmt Corp.*, Cause No. 2015-AP-09 (Order filed Nov. 7, 2016). The Blackfeet Court of Appeals ordered AMERIND to

“proceed to mediation as contemplated by the Participation Agreement and thereafter to arbitration if needed” and ordered that, because of the illusory mediation, AMERIND would be responsible for the entire expense of the future mediation.” See, *id.* at 18, ¶25.

AMERIND’s Attempts to Avoid Tribal Jurisdiction and Litigation in Federal Court

37. In December 2014, while its motion to dismiss was pending in Blackfeet Tribal Court, AMERIND filed for Arbitration before the American Arbitration Association and filed a federal court action to compel arbitration. *AMERIND Risk Mgmt. Corp. v. Blackfeet Hous.*, No. 15-cv-00072 WJ/KBM (DNM filed January 28, 2015).

38. District Judge William Johnson dismissed the suit for lack of jurisdiction after concluding that the claim to compel arbitration of a contractual dispute did not raise an issue of federal law. *Id.*, Memorandum Opinion, 2015 LEXIS 183794 (D.N.M. May 11, 2015).

39. Plaintiff filed, then voluntarily dismissed its appeal to the Tenth Circuit of Judge Johnson’s Order and the arbitration file was closed and is no longer pending. See Compl. ¶32, 33, *AMERIND Risk Mgmt. Corp. v. Blackfeet Hous.*, No. 15-2089 (10th Cir. Mar. 2, 2016).

40. Rather than proceed to mediation and arbitration at its own expense, as ordered by the Blackfeet Court of Appeals, AMERIND filed a second lawsuit in the United States District Court for the District of New Mexico, which is the case now before the court.

Statute of Limitations and Irreparable Harm

41. The TOPP contract of insurance requires the insured to bring a lawsuit against AMERIND in a “court of competent jurisdiction” within one year after a loss occurs. Ex. 1, ¶12.

42. The Participation Agreement states:

Any arbitration proceeding under this regulation must be brought no later than one year after the dispute arose. The failure to timely bring an arbitration proceeding is (i) an absolute bar to the commencement of the arbitration proceeding concerning the dispute and (ii) a waiver of the dispute. Participation Agreement at ¶8(a) (7), [Doc. No. 12-3, filed 11/10/16].

43. Because of AMERIND’s refusal to pay for the damage caused by the flooding, Blackfeet Housing has only been able to do patchwork repairs to keep the tribal members in the 130 damaged homes, but has been unable to completely repair all the damage, which endangers the health and welfare of those living there. Ex. 17, Aff. of Chancy Kittson, ¶21

DISPUTED MATERIAL FACTS ALLEGED BY AMERIND

A. Blackfeet Housing does not dispute that AMERIND is a federally-chartered tribal corporation under Sec. 17 of the Indian Reorganization Act, 25 USC 477. However, Blackfeet Housing disputes AMERIND’s claim that AMERIND is owned by the three charter tribes, and disputes that AMERIND is entitled to sovereign immunity.

B. In 2004, AMERIND had three 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) request the federal government for a charter. (Ex. 14 Valdo Dep, P. 19, L. 13-25.) The federal government issued a charter to AMERIND, not the three tribes. AMERIND 2012 Charter, [Doc 12-2, p. 21, filed 11/10/16].

C. The three tribes are distinct and separate from AMERIND. *Id.* at p. 2, Section 4.1. AMERIND's charter states that the following are NOT those of the charter tribes: 1) the activities; 2) the transactions; 3) the obligations; 4) the liabilities, and 5) the property. *Id.* at Article 4.1. AMERIND does not give ANY income to the charter tribes. *Id.*

D. None of the three (3) charter tribes has a tribal council leader on the AMERIND board. Ex. 14, Valdo Dep. at 40:10-25; 41:4-14. The three (3) tribes do not select AMERIND's board. *Id.* at 41:15-17. AMERIND's board is made up of the policyholders from nine (9) regions. *Id.* at 41:14-18. The board's executive committee controls the day-to-day activities of AMERIND. *Id.* Of the four (4) executive members, only one is Native American. *Id.* at 17:10-21. Despite language in the Charter that the Board manages AMERIND's day-to-day affairs, no one from the board manages AMERIND's day-to-day affairs. Ex. 13, Black Dep. at 66:11-13.

E. Defendant Blackfeet Housing disputes the facts in paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21 of AMERIND's Memorandum in Support of its Motion for Summary Judgment and submits its own material facts in paragraphs 18-34 above.

F. Blackfeet Housing disputes the irreparable harm claimed in the Plaintiff's Statement of Material Facts, paragraphs 26-30. AMERIND has not suffered irreparable

harm and has had increased financial profits, lost none of its members, and boasts about record breaking years. AMERIND has told the risk management owners that financially it has done very well. 9Ex. 10, p. 7). In 2015, AMERIND claimed in its annual report to the members: “In 2015, we reached \$55 million in Net Assets marking another successful year in AMERIND’s history” and “In the past few years, despite growing competition, we have retained over 92 percent of all our tribal clients.” Ex. 11, p. 6.

G. Blackfeet Housing also disputes Paragraphs 27 and 28 because they call for a legal conclusion, and specifically disputes AMERIND’s claim that it shares in the three chartering tribes’ sovereign immunity.

STANDARD OF REVIEW

A district court's grant of summary is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). When applying this standard, the district court is to view the evidence and draw reasonable inferences there from in the light most favorable to the nonmoving party." *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1243 (10th Cir. 2010) (internal quotation marks omitted). The standard does not alter when the parties file cross motions for summary judgment. Each motion is treated separately and "the denial of one does not require the grant of another." *Phila. Indem. Ins. Co. v. Lexington Ins. Co.*, 845 F.3d 1330, 1337 (10th Cir. Okla. Jan. 19, 2017).

ARGUMENT

I. AMERIND CONSENTED TO JURISDICTION IN BLACKFEET TRIBAL COURT AND WAIVED ANY SOVEREIGN IMMUNITY CLAIM IN THE

**TOPP INSURANCE CONTRACT, WHICH CONTROLS THE DISPUTES
IN THIS CASE**

In the underlying insurance coverage case between an Insured (Blackfeet Housing) and its Risk Management Insurance Company (AMERIND), it is the TOPP Insurance Contract and not the Participation Agreement which controls. AMERIND agreed to suit in Blackfeet Tribal Court and waived any claim of sovereign immunity when it entered into the TOPP Insurance Contract, and the Blackfeet Tribal Courts had jurisdiction in this case.

Whether it is a non-tribal member or a sovereign entity, a corporation may agree to waive jurisdiction and be brought into tribal court. *AMERIND Risk Mgmt. Corp. v. Blackfeet Hous.*, 2016 U.S. Dist. LEXIS 180039 at *16 (D.N.M. Dec. 29, 2016).

AMERIND agreed to tribal jurisdiction not only through its repeated representations to Blackfeet Housing, (Ex. 15, Gauthier Dep. at 104:19-23; Ex. 2 & 3; Ex. 12, Kittson Dep. at 74:13-18; 75:11-17; 77:6- 19,) but in the TOPP Insurance Contract provisions which:

--allows suit to be filed on the underlying claims in any “court of competent jurisdiction,” which would include tribal courts. Ex. 1, TOPP General Coverage Conditions, paragraph 12.

--specifically allows Blackfeet Housing to file and pursue an arbitration award (or defendant submits, seek enforcement of AMERIND’s refusal to arbitrate), in any tribal court. *Id.*, paragraph 15.

As the first order of business in deciding these motions, the Court must determine whether it is the TOPP Contract or the Participation Agreement which controls the coverage dispute in this case. Because the TOPP Contract and the Participation Agreement contain completely different terms – they permit litigation in different jurisdictions, require the application of different substantive law and mandate different

procedures for arbitration—it cannot be both. See, chart of differences, Defendants Material Facts, ¶15.

If the Court concludes, as a matter of law, that it is the TOPP Contract rather than the Participation Agreement, which controls the underlying coverage issues in this case, all of Plaintiff AMERIND’s arguments in its Motion for Summary Judgment fail and Summary Judgment must be granted to Blackfeet Housing.

A. Insurance Coverage Disputes must be Interpreted Based on the Contract of Insurance and the TOPP Insurance Contract, Not the Participation Agreement, Governs this Case.

The Tenth Circuit has found “the foremost principle of insurance policy interpretation is that an insurance policy is a contract. Parties are at liberty to contract for insurance to cover such risks as they see fit and they are bound by the terms of the contract.” *Yaffe Cos. v. Great Am. Ins. Co.*, 499 F.3d 1182, 1185, 2007 U.S. App. LEXIS 20464 (10th Cir. 2007). Courts cannot rewrite the terms of an insurance “contract and the interpretation of the policy is a legal question, “unless the facts necessary to apply the decided law question are in dispute.” *Id.*

The underlying lawsuit in this case was brought as a result of AMERIND’s denial of coverage to Blackfeet Housing under the TOPP Insurance Contract. The TOPP specifically states: “This document is a binding contract between you and us.” and “...it explains your coverage and all other conditions of (*sic*) you and we are responsible for in fulfilling the terms of this document.” Ex. 1, TOPP Insurance Contract, p. i.

Because it is the TOPP Insurance Contract which specifies the procedures for resolution of the disputes that may arise between AMERIND and Blackfeet Housing

related to *insurance coverage*, it is the TOPP and not the Participation Agreement which governs this case. The TOPP Insurance Contract provides:

Any judgment upon the award rendered by the arbitrators may be entered to **your tribal** or any federal court of competent jurisdiction. *Id.*, ¶15 (emphasis added).

It also provides that AMERIND's obligation to pay can be finally determined "...by a judgment after a trial in a court of competent jurisdiction...", which includes tribal courts. *Id.*, at ¶12.

A separate contractual agreement, the Participation Agreement does not govern insurance coverage issues, but is a risk pool agreement that addresses only Blackfeet Housing's obligations to make financial contributions to the risk management pool, provide reports on its loss history, and pay administrative fees associated with managing AMERIND. Participation Agreement, [Doc. No. 12-3, filed 11/10/16]. When it comes to dispute resolution of administrative issues under the Participation Agreement, the three designated courts are not allowed to decide coverage issues, but may only act to: (i) compel arbitration [for contribution issues arising under the Participation Agreement], (ii) determine the validity of [the Participation Agreement], (iii) determine the authority of the signatories to [the Participation Agreement], or (iv) determine whether tribal sovereign immunity or tribal remedies has been waived [under the Participation Agreement]." Participation Agreement at ¶8 (a)(9) [Doc. No. 12-3, filed 11/10/16].

The dispute resolution provisions arising out of "or relating to" the Participation Agreement are separate and distinct from the insurance coverage and arbitration issues arising under the TOPP Insurance Contract, and this Court must use only the TOPP in deciding the jurisdictional issues in this case.

Because the two contracts contain markedly different provisions on jurisdiction, law and the proscribed procedures for issue resolution, they cannot be read together or in combination. The two contracts require the use of different substantive law, different locations for arbitration, different courts and different procedures for arbitration. If the Court is unable to determine which contract applies to this case based on the specific language of the contracts themselves, then it must decide which contract to apply and how to interpret the language of the contract based on the principal of contractual interpretation that favors the insured rather than the drafter of the contracts.

B. Under the “Laws Relating to Contractual Relations,” This Court Must Select the Contract Most Favorable to the Insured, Blackfeet Housing, and Construe any Ambiguous Policy Language in favor of Blackfeet Housing

Because the contract provisions between the TOPP Insurance Contract and the Participation Agreement are so dramatically different, they cannot both apply to the insurance disputes in this case. See, Chart of Differences, Def.’s Material Facts, ¶15.

The TOPP provides that:

Issues regarding interpretation or application of the **document** shall be decided by the application of laws relating to contractual relationships. Ex. 1, Preamble, p. ii.

In choosing which of the two contracts and the interpretation of contract provisions which apply to this case, this Court should rely upon the law of contracts, particularly insurance contracts, which construes disputed terms against the drafter of the contract (AMERIND) and in favor of the insured (Blackfeet Housing).

When deciding whether it is the TOPP Insurance Contract or the Participation Agreement which should apply to this case and in interpreting the contract language relating to jurisdiction, under the law of contractual relations, this Court “...must

construe the policy to give a reasonable effect to all of its provisions, construing liberally words of inclusion in favor of the insured and construing strictly words of exclusion against the insurer.” *Yaffe Cos. v. Great Am. Ins. Co.*, 499 F.3d 1182, 1185, 2007 U.S. App. LEXIS 20464 (10th Cir. 2007). Policies are construed in favor of the insured because “[i]nsurance policies almost always are contracts of adhesion, meaning that ‘the insurance company controls the language’ and ‘the insured has no bargaining power.’” *Hartford Fire Ins. Co. v. Gandy Dancer, LLC*, 981 F. Supp. 2d 981, 1008, 2013 U.S. Dist. LEXIS 156735, 2013 WL 5934489 (D.N.M. 2013) (citing *United Nuclear Corp. v. Allstate Ins. Co.*, 2012-NMSC-032, ¶ 10, 285 P.3d 644).

The principal of construing insurance contracts in favor of the insured should apply to the court’s choice between applying the TOPP Insurance Contract, which allows Blackfeet Housing’s choice of jurisdiction in tribal court and the Participation Agreement, which limits the choice of jurisdiction. Under this principal, the choice is obvious – it is the TOPP Insurance Contract which applies here. The principal of construction favoring the insured also applies if the court finds any ambiguity in the contract language about whether AMERIND has consented to jurisdiction in tribal court.

In determining a dispute regarding the language of an insurance policy, the court must first determine, as a matter of law, “whether the policy language at issue is ambiguous. A term is not ambiguous merely because it is not defined; however, “we accept the language in its plain, ordinary and popular sense...and may be ascertained from a dictionary” *Hartford Fire Ins. Co. v. Gandy Dancer, LLC*, 981 F. Supp. 2d 981, 1008, 2013 U.S. Dist. LEXIS 156735, 2013 WL 5934489 (D.N.M. 2013); *see also Truck Ins. Exch. v. Gagnon*, 33 P.3d 901, 903 (N.M. Ct. App. 2001).

In *Hartford Fire Ins. Co.*, this Court found the insurance policy terms “premises,” “person,” and “occupy” were ambiguous and construed those terms against the insurer as the drafter of the policies. *Hartford Fire Ins. Co.*, 981 F. Supp. 2d 981. Citing the Supreme Court of New Mexico, it reasoned that because insurance companies draft the individual terms in its policies, and the insured only makes broad choices regarding general concepts of coverage, risk, and costs, then there is an imbalance of power and “as a matter of public policy, courts generally construe ambiguities in favor of the insured and against the insurer.” *Id.* at 1004. It found that the court’s construction of the policy “will be guided by the reasonable expectations of the insured” and “unnecessary to show that a construction against the insurer is more logical than a construction against the insured, so long as both constructions are reasonable.” *Id.*

Through its marketing materials, AMERIND promised Blackfeet Housing it would come to litigate disputes in “your” tribal court. Defs. Material Facts, ¶5. AMERIND confirmed that promise in the TOPP, agreeing to allow suit to be filed in “any competent jurisdiction” and for an arbitration award to be filed in “your tribal court.” Defs. Material Facts, ¶10 & ¶11. Blackfeet Housing had the reasonable expectation that AMERIND consented to jurisdiction in Blackfeet Tribal Court. To the extent there is any ambiguity in the TOPP Insurance Contract, that expectation must be enforced.

C. Any Ambiguity in the Term “Courts of Competent Jurisdiction” in the TOPP Insurance Contract Must be Construed in Favor of the Insured, Blackfeet Housing and Against AMERIND

The TOPP states that, before suing AMERIND, the insured, Blackfeet Housing, must first obtain a non-appealable final judgment on AMERIND’s obligations after a trial

in a “court of competent jurisdiction.” Ex. 1, TOPP General Coverage Conditions. ¶12. In a case involving claims against AMERIND for flooding damage to tribal property, how can Blackfeet Housing obtain a final judgment on the amount of the damages for the flooding without filing a lawsuit in a court of competent jurisdiction? Since the flooding was caused by nature and not a third party bad actor, the only entity which could be named to bring such a lawsuit is AMERIND itself. Complicating this scenario is the requirement that, in order to perfect the claim, the lawsuit on the loss must be filed against AMERIND within one year of the loss. *Id.*

Insofar as this section of the TOPP contract is ambiguous, it must be construed against the drafter of the contract, AMERIND, and in favor of the insured, Blackfeet Housing. That construction favors jurisdiction in the Blackfeet Tribal Court and the actions Blackfeet Housing took to try and get the coverage matter resolved.

Given the delays caused by AMERIND in this case, starting with its refusal to respond to repeated requests by Blackfeet Housing to come out and assess the damage, then to pay the claim and finally, setting up a the sham Portland mediation [Defs. Mat. Facts, ¶¶18-31], the one year deadline to sue AMERIND under the TOPP was about to expire at the time Blackfeet Housing finally filed a case in Blackfeet Tribal Court.

The only remaining question is whether Blackfeet Tribal Court qualified as a “court of competent jurisdiction” under the TOPP Insurance Contract. The contract has no language that would exclude tribal courts from the definition of a “court of competent jurisdiction.” In addition, the TOPP specifically allows the insured to use “...your tribal or any federal court of competent jurisdiction” to file and enforce “Any judgment upon the award rendered by the arbitrators.” Ex. 1, TOPP General Coverage Conditions, ¶15.

Black's Law Dictionary defines "jurisdiction" as Black's Law Dictionary defines "jurisdiction" as the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties. Black's Law Dictionary (abridged 6th ed.1991). A "court of competent jurisdiction" is defined as a court with the power to adjudicate the case before it and "[a] court that has the power and authority to do a particular act; one recognized by law as possessing the right to adjudicate a controversy". Black's Law Dictionary 431 (10th Ed. 2014), *see also*, *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 561, 196 L. Ed. 2d 493 (U.S. 2017).

As the judicial system established by a sovereign nation, tribal courts squarely fall within the definition of "courts of competent jurisdiction." If the Court finds the TOPP is ambiguous about whether tribal courts are included in the contract definition, it must construe the insurance contract in favor of the insured, Blackfeet Housing to find jurisdiction in tribal court.

Further support for this interpretation comes from AMERIND's own representations and marketing to the public that is the only insurance company willing to go into tribal court. (Ex. 2 & 3). "The Court's focus in interpreting the language of an insurance policy must be upon the objective expectations the language of the policy would create in the mind of a hypothetical reasonable insured who, we assume, will have limited knowledge of insurance law." *Hartford Fire Ins. Co.*, at 1009. AMERIND's COO stated: "We enjoy the sovereignty of our chartering tribes....Commercial insurers will agree to arbitration but in state courts. We, as a sovereign entity, agree to arbitration, but we insist on tribal courts." AMERIND's chief legal counsel also said: "Additionally, the

insurer should be adjudicating claims based on tribal laws and policies. When tribal courts or arbitrators are utilized, it can cut down on what can be lengthy litigation as seen by state courts. Both parties may also feel more comfortable with the tribal adjudication process.” (Ex. 3.)

If the Court finds there is ambiguity, the insured, Blackfeet Housing’s reasonable expectations must be enforced and this Court should find there is jurisdiction in Blackfeet Tribal Court.

D. AMERIND waived jurisdiction and consented to be sued in Blackfeet Tribal Court when it entered into the TOPP Insurance Contract and it is Irrelevant Whether it has Sovereign Immunity or Not

In its decision on the motion to dismiss in this case, this Court ruled, "jurisdiction over a party may be conferred upon a court by contractual agreement of the parties." *AMERIND Risk Mgmt. Corp.*, 2016 U.S. Dist. LEXIS 180039 (D.N.M. 2016) at *16 (citing *Williams v. Life Sav. & Loan*, 802 F.2d 1200, 1202 (10th Cir.1986)). Your Honor concluded, “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.” *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, note 14, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). “[A] valid consent or a stipulation that the court has jurisdiction prevents the successful assertion of a Rule 12(b)(2) defense.” *Id.* (citing 5B Charles Alan Wright et al., *Federal Practice and Procedure* § 1351 (3d ed., Apr. 2016 update)). Similarly, this Court found that signing a contract giving written consent to suit in a particular jurisdiction waived any claim of sovereign immunity. *Id.* at *18 (citing *Niemi v. Lasshofer*, 770 F.3d 1331, 1351 (10th Cir. 2014)).

Although Blackfeet Housing respectfully disagrees with the decision of the Blackfeet Court of Appeals that AMERIND has sovereign immunity because it is a federally-chartered tribal corporation formed under Section 17 of the Indian Reorganization Act, 25 U.S.C. §477¹, if, as the Blackfeet Court of Appeals found, AMERIND has consented to tribal court jurisdiction in the TOPP, this court need not reach the issue of whether AMERIND has sovereign immunity. Based on its previous ruling in this case, this Court has already determined that tribal entities who have sovereign immunity may waive that immunity and consent to personal and subject matter jurisdiction in a written contract. *AMERIND Risk Mgmt. Corp.*, 2016 U.S. Dist. LEXIS 180039 (D.N.M. 2016). This court's decision on waiver is consistent with Tenth Circuit law, which holds that tribes (or corporations asserting sovereign immunity like a tribe) can expressly consent to suits against the Tribe in the United States District Court or in a Tribal Court. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980) (en banc), *aff'd*, 455 U.S. 130, 71 L. Ed. 2d 21, 102 S. Ct. 894 (1982).

AMERIND has consented to jurisdiction in Blackfeet Tribal Court and waived any claim of sovereign immunity through the TOPP Insurance Contract. This Court should deny AMERIND's motion for summary judgment and grant Blackfeet Housing's cross-motion for summary judgment.

¹ Should the Court reach the issue of sovereign immunity, it cannot grant summary judgment for Amerind as a matter of law, because Defendant disputes the facts underlying its charger. "If a tribally chartered corporation operates independently of the tribal government and does not engage in governmental function...it may not qualify for immunity...because it is not an arm of the tribe." *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104 (Ariz. 1989). Based on Defendant's Disputed Material Facts in ¶¶A-D, above, Blackfeet Housing asserts that this Section 17 federally chartered corporation operates independently of the three tribal governments in its charter and does not qualify for sovereign immunity. However, *Cf. Amerind Risk Mgmt. Corp., v. Malaterre*, 585 F. Supp. 2d 1121 (D.N.D. 2008).

II. BLACKFEET TRIBAL COURT HAS JURISDICTION OVER AMERIND UNDER BOTH *MONTANA* EXCEPTIONS BECAUSE THE TOPP INSURANCE CONTRACT CREATES A CONSENSUAL RELATIONSHIP WITH THE BLACKFEET TRIBE AND INTRUDES ON ITS SELF-GOVERNANCE IN A WAY THAT AFFECTS THE HEALTH AND WELFARE OF TRIBAL MEMBERS

The rule that determines whether the Blackfeet Tribal Court has jurisdiction over specific civil cases comes from the United States Supreme Court case *Montana v. United States*, 450 U.S. 544 (1981). *Montana* sets forth the scope of an Indian tribe's power to regulate non-Indian conduct within the boundaries of the reservation on fee lands owned by non-Indians. *Id.* Generally, tribal courts lack civil authority over the conduct of non-Indians on land within the reservation unless one of the two *Montana* exceptions applies. The two exceptions which permit tribal jurisdiction are:

1. When nonmembers enter consensual relationships with the tribe or its members through commercial dealings, contracts, leases, and other arrangements; or
2. When a nonmembers' activity severely effects the political integrity, economic security, health, or welfare of the tribe. *Montana v. United States*, 450 U.S. 544, 565 (1981).

While only one of the exceptions must apply, the Blackfeet Tribal Court has adjudicative jurisdiction over AMERIND in this case because it satisfies both *Montana* exceptions.

A. The Blackfeet Tribal Court has Jurisdiction Over AMERIND under *Montana*'s First Exception because a Nexus Exists between AMERIND's Consensual Contractual Relationship and Blackfeet's Tribal Authority

The first *Montana* exception which allows tribal jurisdiction over nonmembers in civil cases provides,

[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. 544, 566 (1981).

The consensual relationship need not be in writing and can be with a tribal member, the tribe itself, or a tribal entity. *Id.* A “tribal entity” is defined as a non-governmental entity that is owned and operated by the tribe. *Smith v. Salish*, 434 F. 3d 1127, 1133-1134 (9th Cir. 2006). Blackfeet Housing is a tribal entity. Once a nonmember enters into a consensual relationship on tribal lands, in order to have jurisdiction in tribal courts, the tribe must establish a nexus between the relationship and the lawsuit sufficient to justify the use of the first exception. *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997).

Strate set forth two requirements to establish a nexus under the first *Montana* exception: 1) the cause of action must arise from the consensual relationship; and 2) the action in question must be the kind that is reasonably entailed by the consensual relationship. *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997); *see also Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 941-942 (9th Cir. 2009). In *Strate*, the Supreme Court found a consensual relationship existed between A-1 Contractors (a non-Indian owned enterprise) and the tribe existed because the Contractors entered into a sub-contract with LCM Corporation (a tribally owned enterprise). 520 U.S. 457.² However, because the action in question in the lawsuit was not reasonably entailed by the contract, the dispute did not arise from the consensual relationship.

The Supreme Court’s most recent decision affirming tribal courts’ jurisdiction to adjudicate civil tort claims against nonmembers is *Dollar General. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159, 195 L. Ed. 2d 637 (2016); *see also*

² Following *Strate*, the Tenth Circuit has also found there must be a nexus between the consensual relationship and the attendant “exertion of tribal authority” for a tribe to assert civil jurisdiction over a nonmember. *MacArthur v. San Juan Cnty.*, 309 F.3d 1216, 1223 (10th Cir. 2002); *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001).

Dolgenercorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014). There, the Supreme Court affirmed the Fifth Circuit's decision giving the tribal court civil jurisdiction to hear a case between a nonmember operator of Dolgenercorp that allegedly molested a tribal member involved in the tribal youth internship program through the store. *Id.* It reasoned that absent the contractual relationship, the harm inflicted would have never occurred.

AMERIND concedes it had a "consensual contractual relationship with Blackfeet Housing" (Mot. for SJ at 13-15), but tries to argue that there is no connection between its TOPP Insurance Contract and a lawsuit to enforce coverage under the TOPP contract for flood damage to the homes on tribal land it was supposed to cover. Stating that position out loud highlights its ludicrousness. AMERIND's position is not helped by the Supreme Court's 5-4 decision in *Plains Commerce Bank*, which limited the holding in that decision "specifically to the sale of the fee land" -- something which is not involved in this case. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 340 (2008).

The facts of this case meet Supreme Court's requirements in *Strate*, and *Dollar General*. AMERIND, a nonmember, entered into a consensual relationship with Blackfeet Housing, a tribal entity, through the TOPP Insurance Contract which insured property on reservation land. In compliance with the two-part test in *Strate*, Blackfeet Housing's cause of action both: 1) arises from the TOPP Contract for AMERIND's refusal to provide insurance coverage to Blackfeet Housing; and 2) insurance coverage for Blackfeet Housing is the primary purpose of the contractual relationship. There is more than a sufficient nexus between the consensual TOPP insurance contract and a

cause of action to enforce coverage under that contract to establish jurisdiction in the Blackfeet Tribal Court.

B. *Montana*'s Second Exception Applies Because AMERIND's Refusal to Provide Insurance Coverage Intrudes on Blackfeet Tribe's Self-Governance and Adversely Impacts the Health and Welfare of the Tribe.

The second *Montana* exception provides:

[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or health or welfare of the tribe." *Montana v U.S.*, 450 U.S. at 566.

The *Montana* exceptions are rooted in the tribes' inherent power to protect certain sovereign interests. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). The nonmember conduct must do more than injure the tribe: "it must imperil the subsistence of the tribal community." *Id.* at 341.

Unlike cases which involve an individual negligence claim against a nonmember (like the car accident in *Strafe*), which only tangentially endanger the tribe, the matters raised by this insurance coverage dispute directly and powerfully impact the Blackfeet community and the 130 tribal members whose homes were flooded and developed mold. Blackfeet Housing purchased insurance under the TOPP contract specifically to provide coverage for this kind of damage to tribal property and protect the tribal members who make their homes on the reservation. AMERIND's refusal to keep its promise and pay for repairs to these homes has directly endangered the health and safety of the tribal members who live there.

In addition, the underlying coverage lawsuit in Blackfeet Tribal Court did not involve the typical "nonmember." Although AMERIND is a technically a "nonmember"

insurance company, it markets itself as “the only 100%, tribally owned and operated insurance provider that is committed to Indian Country” and uses slogans like, “Tribes protecting Tribes” and “Keeping Money in Indian Country.” AMERIND’s entire business model and stated purpose is “to create affordable and sustainable insurance products and services for Indian Country.” Contrary to AMERIND’s claims that it has an interest in protecting tribes and creating affordable insurance coverage for Indians, when faced with a \$1.4 million insurance claim to fix the damaged homes of Blackfeet tribal members, it seeks to wrap itself in the same non-Indian *Montana* arguments used to chip away at tribal civil adjudication. AMERIND’s contradictory actions are more offensive than that of a nonmember, non-Indian because it claims protect tribes yet preys on Indian Country while ciphering money from impoverished communities under the guise of a section 17 tribal corporation that enjoys sovereign immunity, obtains financing without exposing their tribes’ governmental assets, and receives tax-exempt financing. *See* 25 U.S.C. § 477.

The Tenth Circuit has recently recognized that the second *Montana* exception may be used when the challenged conduct is “fairly be called catastrophic for tribal self-government.” *Plains* at 342. Currently, 9,572 of the 17,138 enrolled members of the Blackfeet tribe live on the reservation in Montana. *Ex. 17, Aff. of Kittson*, ¶19. Of these 9,572 tribal members, Blackfeet Housing provides about 4,775 tribal members with tribally owned housing. *Id.* Blackfeet Housing provides housing for 50% of the tribal members that live on the reservation and have a waiting list of tribal members trying to obtain housing. *Id.* at ¶20

AMERIND made the intentional decision to deny insurance coverage and withhold from Blackfeet Housing \$1.4 million dollars to fix 130 low-income tribal housing units. For the last four years, this refusal of coverage has prevent Blackfeet Housing from fully repairing the homes which suffered flooding damage and the resultant mold. Ex. 17, Aff. of Kittson, ¶21. AMERIND clearly meets *Plains Commerce Bank* definition of ‘imperiling the subsistence’ of the tribal. This is a clear encroachment of Blackfeet’s tribal sovereignty to protect the health and welfare of its members and adjudicate claims that arose on their reservation.

If AMERIND’s deceitful conduct of agreeing to insure subsidized tribal housing while advertising their Mission is “Tribes Protecting Tribes,” then shielding themselves from liability by claiming sovereign immunity as a section 17 tribal corporation after they fail to insure one-hundred and thirty tribal housing units costing the tribe \$1.4 million dollars and forcing tribal members out of their homes does not satisfy the second *Montana* exception then what will?

Because the AMERIND’s conduct encroaches on the Blackfeet Tribe’s self-governance and its ability to protect the health and welfare of tribal members, the second *Montana* exception applies. This Court must find jurisdiction in the Blackfeet Tribal Courts, deny AMERIND’s Motion for Summary Judgement and grant Blackfeet Housing’s Motion for Summary Judgment.

III. BLACKFEET HOUSING SHOULD BE GRANTED SUMMARY JUDGMENT AND THIS COURT SHOULD ENFORCE THE BLACKFEET TRIBAL COURT OF APPEALS ORDER REQUIRING THE PARTIES TO MEDIATE, THEN ARBITRATE THIS COVERAGE DISPUTE

Federal Rule of Civil Procedure 65(a) authorizes district courts to issue preliminary injunctions. A plaintiff “seeking a preliminary injunction must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

A. AMERIND has not and will not Suffered any Irreparable Harm by Litigating in a Tribal Court where it has Consented to Suit

“A plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain.” *Awad v. Ziriox*, 670 F.3d 1111, 1131 (10th Cir. 2012) (quoting *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1156 (10th Cir. 2001)).

As a risk management insurance company, AMERIND cannot credibly argue that it will be irreparably harmed by the order of the Blackfeet Court of Appeals to do what is contemplated under AMERIND’s own TOPP contract of insurance -- participate in mediation/arbitration and pay the property damage claims it agreed to cover. The purpose of a risk management company is to pay for the property damage losses of its insured members and spread that risk of loss. In *Helvering v. LeGierse*, 312 U.S. 531, 85 L. Ed. 996, 61 S. Ct. 646 (1941), the Court held that for there to be "insurance" there must be a shifting of the risk of loss or a spreading of the risk. This statement of the elements of insurance has been applied for tax purposes generally.” *Stearns-Roger Corp.*

v. United States, 774 F.2d 414, 415 (10th Cir.1985). Such payment is not an “irreparable harm” to AMERIND, but what it agree to do.

Nor do AMERIND’s arguments of inconvenience, litigation in a Montana tribal court, uncertainty of its participants or expense rise to the level of irreparable harm. See Doc. 1, ¶ 51. These are all merely the natural consequences of denying insurance coverage under an insurance contract where AMERIND agreed to be hailed into tribal court. All of this uncertainty, inconvenience and expense could have been avoided by AMERIND honoring its promise to timely investigate and pay the property damage claims or participate in good faith in an early mediation and/or arbitration.

These same types of monetary or inconvenience claims were rejected by this Court when raised by Defendant Blackfeet Housing in response to the Motion to Dismiss. *AMERIND Risk Mgmt. Corp. v. Blackfeet Hous.*, 2016 U.S. Dist. LEXIS 180039 (D.N.M. Dec. 29, 2016). This Court found that that “Defendant’s lack of presence in New Mexico is no different than any case involving a nonresident defendant, so does not present an unreasonable burden.” *Id.* at *21 (citing *Dudnikov v. Chalk & Vermillion Fine Arts, Inc.*, 514 F.3d 1063, 1081 (10th Cir. 2008)). The same should be true of AMERIND traveling to Blackfeet Tribal Court in Montana.

When seeking injunction relief, irreparable harm cannot generally be established by claims of loss of money or income, which can be rectified by damages or costs at the end of a court proceeding. See, *Valdez v. Metro. Prop. & Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 47275 *80-81 (D.N.M. Mar. 31, 2012). AMERIND’s claims of lost income are not just legally insufficient to establish irreparable harm, but discovery has revealed those claims to to be demonstrably false. In annual financial reports to its members,

AMERIND writes this year has better than the year before. (Ex. 10 & 11) AMERIND's 2015 annual financial report said: "In 2015, we reached \$55 million in Net Assets marking another successful year in AMERIND's history" and "In the past few years, despite growing competition, we have retained over 92 percent of all our tribal clients." (Ex. 36, P. 6.) The evidence reflects no harm, much less irreparable harm and this Court must deny AMERIND's request for injunctive relief.

B. Blackfeet Housing has and will Suffer Irreparable Harm if the Decision of the Blackfeet Court of Appeals is Voided by this Court

Blackfeet Housing is a non-profit entity which purchased insurance from AMERIND to protect the tribal housing for its members. (Ex. 17, Kittson Aff., ¶6 & 20) This property serves low-income tribal members who cannot afford to make repairs to their own property. (*Id.* ¶20). Blackfeet Housing purchased this insurance because of AMERIND's promises that it would cover losses from flooding in tribal homes; it would quickly investigate and resolve property damage issues through lawsuits filed in "courts of competent jurisdiction," including tribal courts or alternatively, through arbitration; and that insurance coverage would make it possible to repair the homes and protect the health and welfare of the tribal members who live in them. Ex. 1, TOPP Insurance Contract.

It has now been over four years since the Blackfeet tribal homes were flooded and the insurance coverage dispute over payment to repair these homes has still not been resolved. AMERIND's refusal to participate and pay for the mediation/arbitration ordered by the Blackfeet Court of Appeals; its continued litigation, including twice filing actions in federal court; and its failure to honor its obligations under the TOPP and pay to

have these flooded homes repaired has caused and continues to cause irreparable harm to the tribal members who rely on Blackfeet Housing to provide a safe home.

However, the most permanent irreparable harm and serious injustice happens if this Court decides to apply the provisions of the Participation Agreement, rather than the TOPP Insurance Contract to this dispute over insurance coverage. Should this Court do as requested by AMERIND -- apply the Participation Agreement, find the Blackfeet tribal courts had no jurisdiction over this case and set aside the Blackfeet Court of Appeals Order to Mediation/Arbitration – it will allow AMERIND to use a technicality in the Participation Agreement contract to try and avoid paying these claims altogether. That technicality is the statute of limitations in the Participation Agreement, which provides that:

Any arbitration proceeding under this regulation must be brought no later than one year after the dispute arose. The failure to timely bring an arbitration proceeding is (i) an absolute bar to the commencement of the arbitration proceeding concerning the dispute and (ii) a waiver of the dispute. Participation Agreement [Doc. No. 12-3, filed 11/10/16] at ¶8(a)(7).

Should this Court choose the Participation Agreement as the controlling contract and use it to set aside the order of the Blackfeet Court of Appeals, it allows AMERIND to claim Blackfeet Housing no longer has any legal remedy because an arbitration has not and can no longer occur within one year after the dispute arose. Such a ruling and the loss any legal remedy for Blackfeet Housing would create irreparable harm to the Defendant and the tribal members who rely upon it for safe housing. This Court should determine that the TOPP Insurance Contract controls this dispute and uphold the jurisdiction of the Blackfeet tribal courts contemplated under that agreement.

CONCLUSION

For the foregoing reasons, Blackfeet Housing asks this Court to deny AMERIND's request for summary judgment and grant Blackfeet Housing's motion for summary judgment.

Dated this 26th day of July 2017.

Respectfully submitted,

MATT LAW OFFICE

Terryl T. Matt, Esq.
310 East Main
Cut Bank, MT 59427
Telephone: (406) 873-4833
Fax No.: (406) 873-4944
terrylm@mattlawoffice.com

-and-

McGinn, Carpenter, Montoya &
Love, PA
Randi McGinn, Bar No. 1753
Heidi Todacheene, Bar No. 149548
201 Broadway Blvd SE
Albuquerque, NM 87102
Telephone:(505) 843-6161
Facsimile (505) 242-8227
Randi@mcginnlaw.com
heidi@mcginnlaw.com

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was served upon all counsel of record on July 26, 2017 via the CM/ECF electronic filing system.

/s/Terryl T. Matt
Terryl T. Matt