Allison C. Binney
Merrill C. Godfrey (No. 16-208)
Akin Gump Strauss Hauer & Feld, LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036-1564
(202) 887-4000
abinney@akingump.com
mgodfrey@akingump.com

Attorneys for AMERIND Risk Management Corporation, Plaintiff

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

AMERIND'S COMBINED RESPONSE TO BLACKFEET HOUSING'S MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF AMERIND'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

LIST OF ADDITIONAL EXHIBITS

Exhibit 17: Tribal Operations Protection Plan Scope of Coverage Document (Dep. Exh. 7)

Exhibit 18: Additional Robert Gauthier deposition excerpts

Exhibit 19: EFI Global Building Assessment Report excerpt (Dep. Exh. 6)

Exhibit 20: Additional Chancy Kittson deposition excerpts

Exhibit 21: Additional Derek Valdo deposition excerpts

FACTS SET FORTH BY BLACKFEET HOUSING AS MATERIAL THAT AMERIND DISPUTES OR OBJECTS TO (RESPONSE BRIEF)

1. Blackfeet Housing ("BH") fact 1 is wrong because AMERIND was not initially formed under the Federal Liability Risk Retention Act of 1986. Nothing in the deposition excerpt Blackfeet Housing cites supports such an assertion. To the contrary, AMERIND was originally chartered by "Red Lake" (*i.e.*, the Red Lake Band of Chippewa Indians) in Red Lake, Minnesota. Gauthier Tr. (Exh. 18) at 18:23-19:10.

2. BH 3 is wrong to the extent it might suggest that "to go into any tribal court" means anything other than providing a defense to members[1] for third-party claims under the terms of coverage. Nothing in the deposition excerpt Blackfeet Housing cites supports any assertion that AMERIND agreed to be sued by its own members in their own tribal courts. To the contrary, in the first 18 years of AMERIND's existence there had never been a situation where a member of AMERIND had a dispute with AMERIND, and there had not been any thought given to how such disputes might be resolved between sovereign entities. Gauthier Tr. (Exh. 18) at 105:9-106:2.

3. BH 4 and BH 5 are wrong to the extent they might suggest that "to go into tribal court" means anything other than providing a defense for members for third-party claims under the terms of coverage. Blackfeet Housing Exhibits 2 and 3 on their face are both articles about workers' compensation coverage and the statements about tribal court therein by their terms relate only to AMERIND's willingness to defend its members in tribal court against third-party workers' compensation claims.

4. As to BH 7, 2,700 is not "approximately 50%" of 9,572; it is 28% of 9,572.

[1] Use of the term "member" in this brief refers to a member of an AMERIND risk pool. When tribal membership is referenced, the terms "tribal member" and "non-member" are used.

5. In BH 8, the statement "Based on the representations made by AMERIND that it would submit to tribal jurisdiction" is not supported by any evidence showing that AMERIND made any representations that it would "submit" to tribal jurisdiction or that Blackfeet Housing relied on such representations in purchasing its policies. The record shows to the contrary that AMERIND does not market to its potential customers how or where they can sue AMERIND. Valdo Tr. (Exh. 21) at 79:18 ("We don't market how to sue Amerind.").

6. BH 9 is also wrong because the passages cited in Kittson's deposition do not address reliance and do not support this assertion. (Blackfeet Housing does not cite to or rely on 75:18-21, a question and answer that were subject to an objection for leading the witness.)

7. BH 10 is a legal argument about the meaning of the Tribal Operations Protection Program Scope of Coverage Document, not a factual assertion, and is wrong because the "binding contract" referred to is the boldface defined term "**document**," a term that is defined in the TOPP Scope of Coverage as follows: "**Document** means your entire TOPP Scope of Coverage, including the Certificate of Coverage, endorsements, your new or renewal questionnaire *and your written Affiliate agreement to participate in the **TOPP** risk pool*" (emphasis added). Thus, it includes the Participation Agreement. The entire TOPP Scope of Coverage Document is attached as Exhibit 17, and an excerpt from the deposition of Chancy Kittson, at 75:25-76:7, identifying the document as such, appears in BH Exh. 12 (Doc. 33-12 at 2) (AMERIND waives its objection to the leading question in this excerpt).

8. BH 11, 12, and 13 are not factual assertions but legal arguments about the meaning of the Scope of Coverage Document, which AMERIND disputes in the argument section of this brief. *See infra* III.C.

9. BH 11, BH 12, BH 13, BH 17, BH 18, BH 19, BH 30 and BH 41 wrongly refer to

the Scope of Coverage Document as "the TOPP insurance contract," "the TOPP contract," the "TOPP," or "the insurance contract"; this nomenclature is wrong for the reasons stated in response to BH 10, *supra* ¶ 7; the Scope of Coverage Document is on its face called "Tribal Operations Protection Program Scope of Coverage Document" and is not a standalone contract. *See* Exh. 17; BH Exh. 12 (Doc. 33-12 at 2) (Kittson Tr. at 75:25-76:7).

10. BH 17 is not a factual assertion but a legal argument about the relationship between the Participation Agreement and the Scope of Coverage Document, which Blackfeet Housing wrongly labels "the TOPP insurance contract." BH has misinterpreted that relationship and these documents, and its chart is inaccurate in several respects for the reasons stated in the argument section of this brief, including that the documents must be read together. Contrary to BH 17, arbitration is required under the Scope of Coverage Document Condition 15. *See* Exh. 17 at BH0184. Contrary to BH 17, the Scope of Coverage Document does exclude punitive damages from coverage: "Covered loss" is defined to exclude "[a]ny punitive or exemplary damages or the multiplied portion of any multiplied damages." *Id*. at BH0188.

11. BH 19 is a legal argument rather than a factual assertion. It is wrong because it does not account for the six causes of action in Blackfeet Housing's complaint filed in Blackfeet tribal court, which arise under the Participation Agreement for the reasons stated in the argument section of this brief and AMERIND's opening brief.

12. The references to "flooding" or damages being caused by "flooding" in BH 20, BH 21, BH 26, BH 28, and BH 43 are all wrong because the water damage complained about was not from flooding. Rather, it was from faulty construction and landscaping, as described by an analysis and inspection done by Blackfeet Housing's own expert and submitted by Blackfeet Housing to AMERIND as part of its claim:

- [T]he water intrusion into Tax Credit residences [is] due to improper landscape finish grading, landscape materials that slow runoff or that do not drain well, gutter downspouts that do not direct water away from the house and/or seasonal high ground water seeping into the crawlspace.

- [C]rawlspace moisture accumulation is due to water intrusion, ineffective vapor barrier and ineffective crawlspace ventilation.

- [M]oisture accumulation from tenant living is from incomplete kitchen and ineffective bathroom venting to the exterior.

Exh. 19 (EFI Global Building Assessment Report excerpt) at BH0140; Kittson Tr. (Exh. 20) at 54:7-24. Blackfeet Housing's complaint described this damage as coming from "water leaks" and made no claim of any flooding. Exh. 5 (Doc. 28-2 at 7-8). Also, AMERIND denied the claims for the specific exclusion of mold, for construction defects, for failure to maintain the dwellings properly, and for failure to report damage on a timely basis. Romero decl. (Exh. C) at ¶ 6; Exh. 7. Blackfeet Housing knew there was mold in the dwellings and that mold damage is excluded from coverage. St. Goddard 30(b)(6) (Exh. 12) at 15:8-16:4.

13. BH 22 is wrong because the letter referred to is not a notice of claim. It requests a coverage opinion from AMERIND about 28 housing units, but does not make a claim.

14. BH 23 is wrong because it gives a selective account of the interaction; Mr. Valdo requested that Mr. Kittson initiate a claim using the usual procedure, by having Blackfeet Housing's claims contact call AMERIND's claims department, and said that once he did so, AMERIND would send out someone to assess the damage. Valdo Tr. (Exh. 15) at 50:8-52:25; *id.* at 52:22-25 (Doc. 28-2 at 67) ("We asked him to file a claim so we could set up a file, identify units, send out an adjust[er] and adjudicate the claim."); *id.* at 75:3-18 (Doc. 28-2 at 68).

15. BH 24 is wrong because there was no written claim, see response to BH 22 *supra* ¶ 13.

16. BH 25 is wrong because the estimate was completed in July 2013. *See* Exh. 19 at

BH 0134.

17. BH 26 is wrong because the letter referred to is not a notice of claim. It informs AMERIND of Blackfeet Housing's legal representation and of a report that the lawyer says will be forthcoming. It also requests the "insurance policy and policy limits of coverage." Exh. 3 (Doc. 28-2 at 3). BH 26 is also wrong because of the incorrect reference to flooding, see *supra* ¶ 12.

18. BH 27 is wrong because AMERIND followed its normal process and sent out an adjuster as soon as Blackfeet Housing made a claim by following AMERIND's claims process. *See* AMER. Statement of Material Facts ¶¶ 7-15 (Doc. 28-1 at 2-4).

19. BH 30 contains legal argument and is wrong to the extent it reflects an interpretation of the Scope of Coverage Document, which Blackfeet Housing refers to incorrectly as "the TOPP" (see response to BH 10, *supra* ¶ 7). For the reasons explained more fully in the argument section, the Scope of Coverage Document Coverage Condition 12 referred to in BH 30 does not apply here because this dispute does not involve a third-party claim. *See infra* III.C.

20. BH 33 is wrong to state that "[t]he mediation had not been scheduled." *See* AMER. Statement of Material Facts ¶¶ 18, 21 (Doc. 28-1 at 5).

21. BH 34 is wrong because AMERIND did not violate the agreement to mediate; Blackfeet Housing repeatedly admitted that the September 15, 2014 meeting satisfied the Participation Agreement's requirement to mediate. *See* AMER. Statement of Material Facts ¶¶ 18, 21 (Doc. 28-1 at 5). BH 34 is also wrong because Blackfeet Housing's claims go well beyond coverage issues, as is apparent on the face of its complaint. *See* Exh. 5 (Doc. 28-2 at 5-14); *see infra* at 20.

22. BH 35 is wrong because the Blackfeet tribal court's decision did not reject AMERIND's "reliance on the Participation Agreement rather than" the TOPP Scope of Coverage Document (which Blackfeet Housing wrongly refers to as "the TOPP contract of insurance," see response to BH 10, *supra* ¶ 7). The decision says and holds nothing about either the Participation Agreement or the Scope of Coverage Document. Rather, the decision addresses only AMERIND's claim of tribal sovereign immunity based on its Section 17 Charter, rejecting AMERIND's argument without any reference to or reliance on either the Participation Agreement or the Scope of Coverage Document. *See* Exh. 8 (Doc. 17-2).

23. BH 36 is wrong because the Blackfeet Court of Appeals held that AMERIND had waived sovereign immunity by including an arbitration clause in Section 8 of the Participation Agreement, not in the Scope of Coverage Document (which Blackfeet Housing wrongly refers to as "the TOPP contract of insurance," see response to BH 10, *supra* ¶ 7). *See* Exh. 9 (Doc. 17-3).

24. BH 40 is wrong because the Blackfeet Court of Appeals' order does not include any language stating who is to pay for arbitration. *See id*.

25. BH 41 is a legal argument about the meaning of the Scope of Coverage Document rather than a factual assertion. It is wrong to the extent it attempts to tie the language "court of competent jurisdiction" to the member's obligation to bring "any action against us within one year after a loss occurs." As explained more fully in the argument section, the reference to a "trial in a court of competent jurisdiction" is a reference to a lawsuit brought by a third-party "claimant," not the member, and does not waive sovereign immunity. *See infra* III.C.

ADDITIONAL FACTS SET FORTH BY BLACKFEET HOUSING IN RESPONSE THAT AMERIND DISPUTES OR OBJECTS TO (REPLY BRIEF)

A. BH Fact B is wrong because the Charter Tribes requested and were issued AMERIND's Charter. The Charter states plainly in the heading on the first page that it is "Issued

to the following Charter Tribes: The Red Lake Band of Chippewa Indians," "The Confederated Salish and Kootenai Tribes of the Flathead Reservation," and "The Pueblo of Santa Ana." Exh. 1 (Doc. 12-2 at 1). The Certificate of Approval at the end of the Charter further states that the Charter is "approve[d] . . . for" these three tribes. *Id.* at 21.

B. The last sentence of BH Fact C is wrong; Charter § 5.1 provides that the income of AMERIND "shall not inure . . . to the benefit of the Charter Tribes in their capacity as Charter Tribes," but that the Charter Tribes may receive distributions of income as "Members of the Corporation." *Id.* at 2.

C. BH Fact F is wrong to the extent that it suggests that AMERIND will not suffer irreparable harm absent an injunction, for the reasons stated in the argument section of this brief. *See infra* VI.

ARGUMENT

AMERIND is entitled to summary judgment, and Blackfeet Housing must be denied summary judgment, because the Blackfeet courts lacked jurisdiction as a matter of law. AMERIND has tribal sovereign immunity and did not waive it for purposes of the case the Blackfeet Court of Appeals adjudicated. The Blackfeet Court of Appeals recognized that AMERIND has tribal sovereign immunity. It nevertheless erroneously held that it had jurisdiction to enforce the mediation and arbitration provisions in Section 8 of the TOPP Participation Agreement. Section 8 contains no waiver of tribal sovereign immunity for Blackfeet tribal court jurisdiction and specifies that any suit to enforce that section must be brought elsewhere.

In its response brief, Blackfeet Housing admits that the Participation Agreement cannot be enforced in Blackfeet tribal courts. Instead of attempting to defend the Blackfeet Court of Appeals' reasoning, Blackfeet Housing completely ignores the specific language of the decision

that relies on Section 8 of the Participation Agreement. Instead, it attempts to recharacterize the decision as having been based on the TOPP Scope of Coverage Document. It then purports to find waivers of sovereign immunity in that document and in marketing materials and statements by AMERIND. None of these new waiver arguments were made to or accepted by the Blackfeet tribal courts, and as a matter of law, none of them meet the high standard under federal law requiring that a waiver of tribal sovereign immunity be express, clear, and unequivocal.[2]

II. THE BLACKFEET COURT OF APPEALS LACKED JURISDICTION TO ENFORCE THE PARTICIPATION AGREEMENT

The Blackfeet Court of Appeals held that Blackfeet tribal courts lacked jurisdiction to grant the relief requested by Blackfeet Housing's complaint, but then it purported to enforce the mediation and arbitration provisions in Section 8 of the Participation Agreement. Even this limited order was without jurisdiction, because Section 8 specifies only three courts where it can be enforced, and does not include Blackfeet courts.

"[W]hen reviewing tribal court decisions on jurisdictional issues, district courts should review tribal courts' findings of fact for clear error and conclusions of law de novo." *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996). In applying these standards on review of a tribal court decision asserting jurisdiction over a non-member, the question is whether the tribal court had jurisdiction to enter the order that it actually entered. "While the Supreme Court has held that the breadth of tribal court jurisdiction is a federal question, it is for

[2] AMERIND's position is that in light of the briefing to date, its motion for summary judgment can be granted without reference to facts 7 through 21 inclusive in AMERIND's Statement of Material Facts. AMERIND does not concede that any of those facts have been put in genuine dispute by Blackfeet Housing, and still believes that some or all of these facts may be helpful to the Court's consideration of the motion to the extent the Court agrees that they are not genuinely disputed. Moreover, some of these facts create disputes with respect to facts Blackfeet Housing contends are material to its cross-motion, as noted *supra*.

the tribal court to determine . . . the scope of its own jurisdiction. On review in the federal courts, the only question is whether the tribal court had the authority to adjudicate the case." 1-7 *Cohen's Handbook of Federal Indian Law* § 7.04 (2017); *cf. Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa, Inc.*, 923 F. Supp. 2d 1186, 1199 (D. Ariz. 2013) ("[T]he Hualapai Tribal Court has already ruled that [it] lacks jurisdiction concerning arbitrations under the 2003 Agreement . . . .") (citing to the tribal court's order).

As this Court has already noted, the Blackfeet Court of Appeals, "without pointing to any reason for an exception to the limited waiver" in the Participation Agreement specifying only three courts of competent jurisdiction, "appears to have concluded that it had jurisdiction" to enforce the Participation Agreement. Order dated Dec. 29, 2016 (Doc. 20) at 5. In its response brief here, Blackfeet Housing abandons any attempt to defend the jurisdictional analysis of its own Court of Appeals. Instead, it focuses on making new arguments. In light of Blackfeet Housing's attempt to shift the focus away from the specifics of the jurisdictional ruling under review here, those specifics bear re-emphasis. The Blackfeet Court of Appeals' only assertion of jurisdiction was to enforce Section 8 of the Participation Agreement. It reversed the Blackfeet tribal court's general assertion of jurisdiction over the merits of Blackfeet Housing's six-count complaint against AMERIND. *Id.* at 17. It held:

> As a Section 17 Charter, the analysis is whether the Charter was properly granted and ratified. We . . . find that [AMERIND] does in fact enjoy a congressional grant of sovereign immunity under 25 U.S.C. 477. We further find that [AMERIND]'s sovereign immunity defense was waived by the inclusion of an arbitration clause *in the Participation Agreement*.
>
> It is hereby ORDERED that the parties are to proceed to mediation *as contemplated by the Participation Agreement* and thereafter to arbitration if needed. Because [AMERIND] previously failed to properly mediate this dispute, and caused Blackfeet Housing to incur costs for an illusory mediation at great expense, it will [be] responsible for the entire expense of the future mediation.

Exh. 9 (Doc. 17-3) at 18 (emphasis added). In sum, the Blackfeet Court of Appeals held that Blackfeet tribal courts lacked jurisdiction to do anything other than to enforce the mediation and arbitration provisions of Section 8 of the Participation Agreement. *Id.* The only question for this Court is whether the Blackfeet Court of Appeals had jurisdiction to enforce Section 8.[3]

As shown below, as the Blackfeet Court of Appeals correctly held that AMERIND has tribal sovereign immunity, and, as Blackfeet Housing itself admits, there is no consent in Section 8 of the Participation Agreement for suit in Blackfeet courts. BH Resp. (Doc. 33) at 6-7. Thus, the Blackfeet Court of Appeals erred in finding a waiver of sovereign immunity in Section 8 of the Participation Agreement and lacked jurisdiction to enforce Section 8.

A. The Blackfeet Court of Appeals Correctly Held that AMERIND Has Tribal Sovereign Immunity

As the Blackfeet Court of Appeals correctly held, AMERIND has tribal sovereign immunity recognized in its Charter issued by the Secretary of the Interior under 25 U.S.C. § 477.[4] Blackfeet Housing states that it "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.

[3] The Blackfeet Court of Appeals found that AMERIND had violated its duty to participate in informal mediation under Section 8 of the Participation Agreement. Blackfeet Housing admitted in correspondence and again at its deposition in this case that the mediation conducted in September 2014 was the mediation required by the Participation Agreement. *See* AMER. Statement of Material Facts ¶¶ 18, 21; *supra* ¶ 21. The Blackfeet Court of Appeals raised this issue *sua sponte* and manufactured this ruling on appeal without any record. It based its holding solely on a statement by AMERIND counsel at oral argument that actually stated the opposite: that although AMERIND would be willing to "talk" about "*another* mediation," AMERIND's "understanding was it was very clear that mediation had been accomplished and that both parties agreed that mediation had been unsuccessful." Exh. 10 at 47 (emphasis added); *see* AMER. Mem. at 11 & n.2. Therefore this holding is clearly erroneous in addition to having been rendered without jurisdiction.

[4] Effective September 1, 2016, the United States House of Representatives – Office of Law Revision Counsel (OLRC) renumbered 25 U.S.C. § 477 as 25 U.S.C. § 5124.

§ 477," BH Resp. at 24, but it fails to address the Blackfeet Court of Appeals' reasoning. Its primary response is to argue that this Court does not need to reach the jurisdictional question of sovereign immunity. It argues, without citation to authority, that the Court can instead apply contract interpretation principles, construe any ambiguities against AMERIND, and hold that AMERIND has contractually consented to Blackfeet jurisdiction over the complaint Blackfeet Housing filed. BH Resp. at 18-23.

Blackfeet Housing ignores entirely the jurisdictional nature of sovereign immunity. *See, e.g.*, *Seneca-Cayuga Tribe of Okla. v. State of Okla. ex rel. Thompson*, 874 F.2d 709, 714 (10th Cir. 1989) ("Sovereign immunity is a jurisdictional question . . ."); *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982) ("The issue of sovereign immunity is jurisdictional."). Blackfeet Housing ignores that sovereign immunity cannot be waived by ambiguous language; any waiver must be clear, express, and unequivocal. *See* AMER. Mem. (Doc. 28-1) at 19-21 (citing cases). Blackfeet Housing does not acknowledge this strict standard for waiver, much less argue that it has been met here. Contract interpretation rules to resolve ambiguities have no application to the question of whether there is a clear, express, and unequivocal waiver of sovereign immunity.

Blackfeet Housing's argument is foreclosed by *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1171 (10th Cir. 1992), where the Tenth Circuit held that contract clauses that are "at best ambiguous" "do not reach the high threshold required by *Santa Clara* [*Pueblo v. Martinez*, 436 U.S. 49 (1978)] for clear expression of . . . waiver of sovereign immunity." "Tribal sovereign immunity can be waived only if a tribe unequivocally waives its tribal sovereign immunity or Congress unequivocally abrogates tribal sovereign immunity." *Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299, 1301-02 (D.N.M. 2009) (Parker, J.). "[A]

waiver of sovereign immunity is to be strictly construed," and thus the scope of any consent must be strictly construed. *Ramey*, 673 F.2d at 320.

Blackfeet Housing offers no authority for the proposition that a court can bypass sovereign immunity analysis, ignore the standard requiring that a waiver of sovereign immunity be clear, express, and unequivocal, and instead elevate maxims of contract interpretation above the analysis of jurisdiction. "Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (unanimous decision by panel including Parker, D.J.) (citation omitted). If there is any ambiguity as to whether AMERIND has waived sovereign immunity to Blackfeet's suit in Blackfeet tribal courts, this Court must hold that there is no clear, express, unequivocal waiver of sovereign immunity. *See Bank of Okla.*, 972 F.2d at 1171.

After attempting to persuade this Court to ignore the jurisdictional issue of sovereign immunity, Blackfeet Housing devotes only a footnote to the substance of the issue. BH Resp. at 24. It does not directly address the Blackfeet Court of Appeals' reasoning upholding AMERIND's tribal sovereign immunity, much less identify anything that is incorrect as a matter of law or clearly erroneous as a matter of fact. Rather, Blackfeet Housing argues that under *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104 (Ariz. 1989), AMERIND "operates independently" of its three charter tribes, and that as a result AMERIND lacks tribal sovereign immunity. BH Resp. at 24. Blackfeet fails to note that this Court thoroughly distinguished *Dixon* in *Bales*, 606 F. Supp. 2d at 1306, on the ground that *Dixon* involved a corporation formed under tribal law and not 25 U.S.C. § 477. In *Bales*, this Court held that the "subordinate economic organization test"

(also called the "arm of the tribe" test[5]) relied on in *Dixon* does not apply to corporations formed under 25 U.S.C. § 477 or 25 U.S.C. § 503 (which is the analogue of Section 477 for tribes in Oklahoma, *see id.*). This Court explained that, unlike corporations formed under tribal law, corporations chartered under 25 U.S.C. § 477 (and, by analogy, under 25 U.S.C. § 503) are entitled to sovereign immunity by virtue of their charters under federal law:

> Both *Dixon* and *Johnson* are distinguishable from this case in one very important way: in both cases, the business entities were . . . not chartered under either § 503 or § 477. . . . With respect to a tribal entity incorporated under tribal law, like in *Dixon*, the "principal legal difference" between tribal entities incorporated under their own tribal law or state law and § 477 tribal corporations "is that, while section [477] corporations retain their tribal status—and, accordingly, sovereign immunity in the absence of a 'sue and be sued' waiver—the other species of corporations are not imbued automatically with such status" and so a subordinate economic organization test should be applied to determine the tribal status of those other kinds of corporations. Clay Smith, *Tribal Sovereign Immunity: A Primer*, 50–MAY Advocate (Idaho) 19, 20–21 (2007). Consequently, a subordinate economic organization test is not relevant to an entity already incorporated under § 477 and by analogy under § 503.

Id. at 1306 (footnote omitted).[6] Subsequently, in a case that cites to *Bales* on a related issue, the Tenth Circuit noted this same point.

> Section 17 is not the exclusive means for tribes to incorporate for business or other purposes—*i.e.*, tribes can create corporate entities under their own laws or those of other sovereigns. The principal legal difference is that, *while section 17 corporations retain their tribal status—and, accordingly, sovereign immunity* in the absence of a "sue and be sued" waiver—the other species of corporations are not imbued *automatically* with such status.

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[5] *See, e.g., Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1185 n.9 (10th Cir. 2010) (noting this variation in terminology).

[6] The footnote to this passage in *Bales* notes that a "sue and be sued" clause in a 25 U.S.C. § 477 charter can waive sovereign immunity. As explained in AMERIND's opening brief, although AMERIND's Charter has a limited "sue and be sued" clause in Section 8.18, that clause contains an express limitation providing that it is subject to other provisions in Article 16 "preserving sovereign immunity unless it is waived by board resolution." AMER. Mem. (Doc. 28-1) at 17.

Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1184 n.8 (10th Cir. 2010) (emphasis added) (quoting from the same article relied on in *Bales*, Clay Smith, *Tribal Sovereign Immunity: A Primer,* 50 Advoc. 19, 20–21 (May 2007)).[7] Section 17 corporations "automatically" are tribal corporations that have tribal sovereign immunity. The Blackfeet Court of Appeals' conclusion that AMERIND has tribal sovereign immunity by virtue of its Section 17 Charter is correct and completely consistent with *Bales* and *Breakthrough Management*. These precedents and the other precedents cited in AMERIND's opening brief (at 17-19) are fatal to Blackfeet Housing's arguments. None of the facts proffered by Blackfeet Housing are material under *Bales* and *Breakthrough Management*; Blackfeet Housing does not dispute the validity of AMERIND's Section 17 Charter, *see* BH Resp. at 12 ¶ A. As a matter of law, AMERIND has tribal sovereign immunity "automatically" by virtue of its Section 17 Charter.

B. As Blackfeet Housing Admits, the Participation Agreement Has No Waiver of Immunity for Blackfeet Court Jurisdiction, and thus the Blackfeet Court of Appeals Lacked Jurisdiction to Enforce It

In support of its motion for summary judgment, AMERIND showed that the Blackfeet Court of Appeals acted without jurisdiction in enforcing the Participation Agreement because (1) the Participation Agreement contains a forum selection clause that excludes Blackfeet tribal courts from the list of courts that can enforce Section 8 of the Agreement, and (2) AMERIND did not waive its tribal sovereign immunity to suit in Blackfeet tribal courts under the Participation Agreement. In its responding brief, Blackfeet Housing does not even attempt to defend the reasoning of the Blackfeet Court of Appeals finding a waiver of sovereign immunity for suit in

[7] In *Breakthrough Management*, the Tenth Circuit stated this principle in contextualizing an argument that it ultimately did not decide—whether the *failure* to incorporate under Section 17 is an indication that an entity *lacks* tribal sovereign immunity.

Blackfeet tribal courts in Section 8 of the Participation Agreement. Blackfeet Housing instead admits that under the Participation Agreement, suit may not be filed in Blackfeet tribal courts. BH Resp. at 6 (chart, "Suit may be filed in . . . Blackfeet tribal court[:] Participation Agreement: No."); *Id*. at 7 ("[I]n 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 [in] informal mediation, then a formal arbitration.") (citing PA § 8). These admissions are the end of the analysis; this Court need go no further. Blackfeet Housing has admitted that the only assertion of jurisdiction by the Blackfeet Court of Appeals is contrary to the language of the Agreement it was interpreting.

To attempt to deal with this problem with its position, Blackfeet Housing looks elsewhere for a source of Blackfeet tribal court jurisdiction for its dispute with AMERIND. It relies on the TOPP Scope of Coverage Document, a risk-pool coverage document issued pursuant to the Participation Agreement, which it misleadingly calls "the TOPP Insurance Contract." (As AMERIND explains further below, this newly devised label is misleading; the Scope of Coverage Document is not a standalone contract.) Yet, despite Blackfeet Housing's extensive effort to expound an (incorrect) interpretation of that document, it never asserts, nor could it, that the Scope of Coverage Document gives the Blackfeet court jurisdiction to enforce *Section 8 of the Participation Agreement.* Instead, using its own misleading nomenclature (the terms "TOPP" and "TOPP contract of insurance") to refer to the Scope of Coverage Document, Blackfeet asserts that the Blackfeet Court of Appeals actually based its holding on the Scope of Coverage Document rather than the Participation Agreement. *See* BH Resp. at 10 ¶ 36 ("the Blackfeet Court of Appeals . . . issued a decision . . . 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*") (emphasis added); *Id*. at 24 ("the Blackfeet Court of Appeals found [that] AMERIND has consented to tribal court jurisdiction *in the TOPP* . . . .") (emphasis added).

Blackfeet Housing's attempt to recharacterize the Blackfeet Court of Appeals' decision as based on the Scope of Coverage Document is plainly wrong. Not only did the Blackfeet Court of Appeals expressly state that it was relying on the Participation Agreement, but only Section 8 of the Participation Agreement requires "informal mediation" as a precursor to arbitration, as ordered by the Blackfeet Court of Appeals. Blackfeet Housing admits as much. *See* BH Resp. at 6 ¶ 17 ("No Mediation" under Scope of Coverage Document, "Mediation First" under Participation Agreement). As discussed below, Blackfeet Housing is wrong as a matter of law about the significance and meaning of the Scope of Coverage document, but the Court need not look that far because Blackfeet Housing does not articulate any argument as to how the Scope of Coverage document could possibly give any jurisdiction to enforce the dispute resolution process *in the Participation Agreement.* AMERIND is entitled to summary judgment that the Blackfeet tribal courts lack jurisdiction over this dispute.

III. THE SCOPE OF COVERAGE DOCUMENT IS NOT A SEPARATE CONTRACT AND DOES NOT WAIVE AMERIND'S SOVEREIGN IMMUNITY FOR THE SUIT BLACKFEET HOUSING FILED

In its attempt to escape the Participation Agreement, Blackfeet Housing sets up a related document, the Tribal Operations Protection Plan Scope of Coverage Document ("TOPP Scope of Coverage Document" or "Scope of Coverage Document"), as a sort of competing contract. In so doing, Blackfeet Housing goes out of its way to rename the Scope of Coverage Document the "TOPP Insurance Contract." But as shown below, by its very terms, the Scope of Coverage Document is *not* a separate contract or agreement. As explained below, it must be read jointly

with the Participation Agreement and several other documents. *See* Exh. 17 at BH0185, BH0190; PA §§ 1(a), 4(b)(1), 4(i)(a), 5(a), 7(c)(1).

Blackfeet Housing argues that the Scope of Coverage Document supports Blackfeet jurisdiction here. This argument is not within the scope of the Blackfeet Court of Appeals' circumscribed assertion of jurisdiction based on the Participation Agreement. So it is not within this Court's review of the Blackfeet Court of Appeals' order. In any event, there is no waiver of sovereign immunity or consent to jurisdiction of any kind in the Scope of Coverage Document for the suit Blackfeet Housing filed in the Blackfeet tribal court.

A. The Scope of Coverage Document Is Not a Free-Standing Contract and Cannot, by Its Express Terms, Be Read in Isolation from the Participation Agreement

Blackfeet Housing adopts new terminology to attempt to obscure and complicate the relationship between the TOPP Participation Agreement (which governs all aspects of participation in the TOPP risk pool) and the Scope of Coverage Document (which lists the specific coverages Blackfeet Housing receives as a participant in the TOPP risk pool). In so doing it ignores the specific provisions that govern the issue.

As an initial matter, the "Tribal Operations Protection Plan" or "TOPP" is not itself a document, but rather the name of the risk pool or "cell" within AMERIND that Blackfeet Housing joined when it signed the "Tribal Operations Protection Plan Participation Agreement." PA at 1 ("TOPP is a self-insurance risk-sharing cell . . ."); Exh. 17 at BH0180, BH0195. The TOPP Participation Agreement (which both parties have referred to as simply the "Participation Agreement") provides that "[a]s a condition precedent to participating in TOPP, the Participant has entered into this agreement . . . ." PA § 1(a). Pursuant to that Agreement, AMERIND issued "coverage documents," namely, the Scope of Coverage Document. *See* PA §§ 4(b)(1), 4(i)(a), 5(a), 7(c)(1). Blackfeet Housing confuses this simple relationship by referring to the Scope of

Coverage Document variously as "the TOPP insurance contract," or "the TOPP contract of insurance," or as simply "the Tribal Operations Protection Program" or "TOPP." Blackfeet Housing's use of new names for the Scope of Coverage Document is contrary to that document's own terminology and to the Participation Agreement.

Moreover, the Scope of Coverage Document is not a standalone contract; rather, it provides that it cannot be read in isolation from the Participation Agreement. "**Document**" is defined in the Scope of Coverage as follows: "**Document** means your entire TOPP Scope of Coverage, including the Certificate of Coverage, endorsements, your new or renewal questionnaire *and your written Affiliate agreement to participate in the **TOPP** risk pool.*" Exh. 17 at BH0190 (boldface in original; italics added). When Blackfeet Housing quotes the Scope of Coverage Document as saying that "This **document** is a binding contract between **you** and **us**," it omits the boldface that designates "**document**" as a defined term. BH Resp. at 16; Exh. 17 at BH0180. Under that definition, the Scope of Coverage Document specifically prohibits reading it in isolation from the Participation Agreement.

Blackfeet Housing signed the Participation Agreement "[a]s a condition precedent to participating in TOPP," PA § 1(a), and only by entering into the Participation Agreement and becoming a Participant in TOPP did Blackfeet Housing obtain the coverage specified in the TOPP Scope of Coverage Document. The Scope of Coverage thus requires Blackfeet Housing to "adher[e] to the terms of this document, *your risk pool Affiliate Agreement*, and any risk management recommendations made by us." Exh. 17 at BH0185 (emphasis added).

The coverage specified in the Scope of Coverage Document is issued pursuant to the Participation Agreement. The Participation Agreement states, "TOPP shall indemnify the Participant in accordance with any *coverage documents issued to the Participant and this*

agreement, but only from the assets of TOPP." PA § 4(i)(a) (emphasis added). Thus, indemnification is an obligation imposed by and subject to the terms of the Participation Agreement. Similarly, the Participation Agreement specifies that termination of the Participation Agreement also "automatically terminates any indemnification or financial protection provided to the Participant by the TOPP under any coverage documents as of the date of termination of this agreement." PA § 2(a). And the Participation Agreement provides that Blackfeet Housing "shall comply with and perform all of the obligations imposed by *this agreement, any coverage documents issued by TOPP* to the Participant, and any rules and regulations." PA § 7(c)(1) (emphasis added).

Therefore, everything in the Scope of Coverage Document is subject to the Participation Agreement pursuant to which coverage is granted. Blackfeet Housing's attempt to characterize the Participation Agreement as narrowly confined to "administrative issues" unrelated to coverage, BH Resp. at 17, is contradicted by the language of both the Participation Agreement and the Scope of Coverage Document. The Participation Agreement governs indemnification, under terms further specified by the TOPP Scope of Coverage Document. It is of course true that the dispute resolution provisions in the Participation Agreement differ from those cited by Blackfeet Housing in the Coverage Conditions of the Scope of Coverage Document, but as described further below, those in the Scope of Coverage Document must be read in the context of the Participation Agreement pursuant to which the Scope of Coverage Document was issued.

B. Blackfeet Housing Filed a Suit That Is Governed By Section 8 of the Participation Agreement.

Blackfeet Housing testified at its Rule 30(b)(6) deposition on May 5, 2017, that the contract on which it is relying for its claim of Blackfeet tribal court jurisdiction is the Participation Agreement:

Q: So Blackfeet Housing asserts that its contract with AMERIND means that Blackfeet Tribal Court has jurisdiction over AMERIND; is that right?

A: Yes.

Q: And what contract is that?

A: The Participation Agreement.

Kittson 30(b)(6) Tr. (Exh. 11) at 21:24-22:4. Blackfeet Housing now argues that the Participation Agreement is completely irrelevant to and entirely unrelated to this dispute: "this Court must use only the [Scope of Coverage Document] in deciding the jurisdictional issues in this case." BH Resp. at 17. It claims that although the Participation Agreement governs "Blackfeet Housing's obligations to make financial contributions to the risk management pool," the Participation Agreement does not cover or even relate to AMERIND's obligation to indemnify Blackfeet Housing out of that same risk pool. BH Resp. at 17. Blackfeet Housing makes this jarring distinction without any basis in the actual language of the Agreement. Blackfeet Housing is wrong.

Section 8 of the Participation Agreement governs a very broad category of potential disputes: "any dispute arising out of or relating to this agreement." PA § 8(a). The dispute Blackfeet Housing raised in Blackfeet tribal courts both arises out of and relates to the Participation Agreement. In the Participation Agreement, Blackfeet Housing agreed to participate in TOPP, and AMERIND agreed to indemnify Blackfeet Housing, so the Agreement encompasses (but is not limited to) coverage issues. Counts I, II, III, V, and VI of Blackfeet Housing's complaint all allege non-coverage issues, including bad faith, deception, misrepresentation, breach of a fiduciary duty that allegedly arises from AMERIND's course of dealing with Blackfeet Housing, and punitive damages. Count IV alleges a breach of the Participation Agreement: "By accepting Plaintiff's premium, Defendant agreed to provide

insurance policy benefits," and "has failed and refused to provide the agreed-upon coverage for which Plaintiff paid a premium." Exh. 5 at 7 (Doc 28-2 at 11). This alleges a breach of the obligation in section 4(i)(a) to "indemnify the Participant in accordance with coverage documents issued to the Participant and this agreement," in exchange for the payments by Blackfeet Housing specified in the Participation Agreement in Section 1 and elsewhere. Blackfeet Housing's failure to cite to the Participation Agreement does not change the fact that its complaint arises under and relates to the Participation Agreement.

In its statement of disputed facts, Blackfeet Housing does not specifically dispute AMERIND's fact 22, which states that "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*" (emphasis added). Elsewhere in its brief it argues without elaboration that its six claims in Blackfeet Tribal Court "all aris[e] out of AMERIND's failure to provide coverage," BH Resp. at 10 ¶ 34, and out of "a denial of coverage," *id*. at 7 ¶ 19, but these unsupported characterizations ignore that the Participation Agreement includes an obligation to provide coverage. Indeed, Blackfeet Housing is inconsistent in its attempt to pivot away from the Participation Agreement and distance itself from its previous reliance on the Agreement. In its statement of material facts, ¶ 34, Blackfeet Housing argues that "AMERIND violated its agreement to hold an informal mediation" with respect to this very dispute—a frank admission that the Participation Agreement applies to this dispute, because the only "agreement to hold an informal mediation" is section 8(a) of the Participation Agreement: "The parties shall resolve any dispute arising out of or relating to this agreement by informal mediation . . . ." PA § 8(a). Blackfeet Housing's opportunistic attempt to sideline the Participation Agreement is contrary to its own statements.

C. The Coverage Conditions in the Scope of Coverage Document Do Not Provide Jurisdiction for Blackfeet Tribal Courts over Blackfeet Housing's Complaint

Blackfeet Housing argues that two provisions in the Scope of Coverage Document, General Coverage Conditions 12 and 15, are the only operative provisions here. But these two provisions do not revoke the general applicability of Section 8 of the Participation Agreement to the suit brought by Blackfeet Housing, and certainly do not waive immunity clearly, expressly, or unequivocally. Rather, they work in concert with Section 8 and apply only in specific circumstances not present here.

The Coverage Conditions relied on by Blackfeet Housing do not apply to its dispute with AMERIND here. Rather, Section 8 of the Participation Agreement governs dispute resolution for disputes between AMERIND and Blackfeet Housing, including suits by Blackfeet Housing against AMERIND arising out of AMERIND's duty to indemnify—so-called "first-party claims." By contrast, the two Coverage Conditions cited by Blackfeet Housing relate to Blackfeet Housing's right, when Blackfeet Housing is sued by a third party in its own courts for covered damages, to have AMERIND defend Blackfeet Housing against the "third-party claim" (including in Blackfeet's own tribal courts). *See, e.g., TPLC, Inc. v. United Nat'l Ins. Co.*, 44 F.3d 1484, 1496 (10th Cir. 1995) (citing *Farmers Grp., Inc. v. Williams*, 805 P.2d 419 (Colo. 1991) (en banc)) (describing the distinction between first-party claims and third-party claims in the context of Colorado law). For example, the TOPP Scope of Coverage Document specifies "Legal Defense Coverage" for business liability. Exh. 17 at BH0219. AMERIND at its own expense provides "outside legal counsel" to provide Blackfeet Housing "with a legal defense against a claim, demand, or summons and complaint seeking monetary damages" for certain covered losses. *Id.*

Reading the Scope of Coverage Document as a whole, this duty to defend against third-party claims in the TOPP Scope of Coverage Document is important context for the two "General Coverage Conditions," numbers 12 and 15, that Blackfeet Housing cites. The list of Coverage Conditions appears at the front of the first part of the TOPP Scope of Coverage Document, listed in mostly alphabetical order.[8] Condition 12 restricts the member's ability to bring AMERIND itself as a party into a third-party dispute involuntarily. Although AMERIND agrees in other provisions to go into court by providing *counsel* to defend the risk pool member against certain covered claims in actions by a third-party claimant (such as the "Legal Defense Coverage" cited above), Condition 12 prohibits the member from suing AMERIND *directly* (as a party) until after the amount that AMERIND will pay (if the third-party claim is within coverage) been determined in litigation or a settlement agreement.

> **You** agree not to bring legal action against **us** unless you have first complied with all conditions of this **document**, and the amount of **our** obligation to pay has been finally determined either by [1] a non-appealable final judgment after a trial in a court of competent jurisdiction or [2] a **Settlement Agreement** *between **you**, the claimant, and **us***.

Exh. 17 at BH0183 (boldface in original, italics added). This serves the important purpose of not allowing indemnity issues into the case prematurely or unnecessarily, when defense of the third-party claim may be compromised by the presence of a collateral dispute over indemnity.

This language in Coverage Condition 12 is by its terms a restriction on "bring[ing] legal action against" AMERIND, not a grant of a right to sue AMERIND, much less an unequivocal and express waiver of sovereign immunity. Moreover, it applies only when a third-party "claimant" is involved, either through a settlement with the "claimant," or when that claimant

[8] The Scope of Coverage Document has four component parts, each of which is paginated separately: "TOPP General Coverage Conditions," "Property Coverage," "Business Liability Coverage," and "Employee Dishonesty Coverage." *See* Exh. 17.

has sued all the way to a "non-appealable final judgment." Blackfeet Housing interprets this provision nonsensically as requiring Blackfeet Housing itself to obtain "a non-appealable final judgment after a trial" against AMERIND before it can "bring a legal action against [AMERIND]." BH Resp. at 20-21; Exh. 17 at BH0183. Condition 12 should not be read as requiring something logically impossible. Rather, it applies only when there is a third-party "claimant" and requires resolution of the claimant's claim as a pre-condition to any legal action against AMERIND by Blackfeet Housing. This reading is supported by the further language in Coverage Condition 12, which goes on to provide a parallel restriction on suits by a third-party claimant against AMERIND, stating, that "[a] person or organization may only sue us to recover on a Settlement Agreement or on a non-appealable final judgment." Exh. 17 at BH0184. *Cf. Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1010 (10th Cir. 2015) ("[T]rying to make sense of the whole document before us without rendering any portion of it a nullity—always our aspiration when interpreting contracts—we cannot say it clearly and unequivocally waives sovereign immunity.").

Finally, even if the language about suit in a "court of competent jurisdiction" were applicable to suits by a member of the risk pool against AMERIND, the Tenth Circuit has held that such language does not constitute an unequivocal waiver of sovereign immunity to suit in a court that would otherwise lack jurisdiction. *Santana v. Muscogee (Creek) Nation, ex rel. River Spirit Casino*, 508 F. App'x 821, 822-23 (10th Cir. 2013). Condition 12 thus does not clearly, expressly, or unequivocally waive sovereign immunity to the suit Blackfeet Housing filed in Blackfeet tribal court.

Nor is Coverage Condition 15 a waiver of sovereign immunity for Blackfeet Housing's suit. That condition provides an additional arbitration remedy for disputes that are limited solely

to the question of "whether coverage is provided": "If **you** and **we** do not agree whether coverage is provided by the **document**, then either party may make a written demand for arbitration" according to a specified procedure. Exh. 17 at BH0184. Only if an award is made by the arbitrators, then "[a]ny judgment upon the award rendered by the arbitrators may be entered to your tribal or any federal court of competent jurisdiction." *Id.* Reading this provision together with the Participation Agreement, Section 8 of the Participation Agreement applies to *all* disputes that arise from or relate to that agreement, and Coverage Condition 15 adds a further arbitration option for *only* the question of "whether coverage is provided," which "either party may" use by making a written demand for arbitration.

Condition 15 is intended to provide a more streamlined arbitration remedy when there is a coverage dispute in the context of a third-party claim. If, for example, AMERIND were to dispute its duty to defend a third-party claim, a member such as Blackfeet Housing could resolve the third-party claim as required by Condition 12, use Condition 15 to resolve the question of coverage between it and AMERIND through arbitration, and then enter any award in, for example, the same court where it was previously sued by the third party. But even if Condition 15 were to be read (incorrectly) as applying to direct claims against AMERIND, it does not waive sovereign immunity for the suit Blackfeet Housing brought here. Only *after* arbitration can an award "be entered to your tribal or any federal court of competent jurisdiction." Blackfeet Housing's tribal court complaint is not a suit to enter an arbitration award. Blackfeet Housing was attempting to *avoid* arbitration by filing its lawsuit in Blackfeet tribal court. It never made any demand for arbitration in or out of court, and it refused and resisted AMERIND's attempts to arbitrate. *See* BH Resp. at 11. And, as noted above, its complaint is not limited to the question of "whether coverage is provided." Therefore, Condition 15 is of no

benefit to Blackfeet Housing, and does not provide jurisdiction for the Blackfeet Court of Appeals' order enforcing the dispute resolution provisions in Section 8 of the Participation Agreement.

D. Marketing Materials and Statements Do Not Change the Parties' Written Contract and Do Not Waive AMERIND's Sovereign Immunity

Blackfeet Housing claims to find support for Blackfeet jurisdiction in written marketing materials and in oral statements by AMERIND personnel. *See* BH Resp. at 20 (citing *id.* at 3 ¶ 5); *id*. at 22-23 (citing marketing materials attached as Exhibits 2 and 3); *id.* at 15.[9] Blackfeet Housing's arguments are limited to the contention that these statements bear on Blackfeet Housing's "reasonable expectations" (*id*. at 23) for purposes of applying rules of contract interpretation. It does not argue, nor could it, that any of these statements constitutes a waiver of AMERIND's sovereign immunity. Section 16.4 of AMERIND's Section 17 Charter prohibits any waiver except by resolution of the Board of Directors; statements made in marketing materials and statements made orally do not satisfy this standard. Blackfeet Housing, itself being a tribal housing authority, cannot claim ignorance with respect to the principles of tribal sovereign immunity. And while the statements in these articles are accurate (as explained below), even "misrepresentations of [a] Tribe's officials or employees cannot affect its immunity from suit." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008).

Moreover, as noted above, any waiver must be clear, express, and unequivocal. Nothing in Blackfeet Housing Exhibits 2 and 3 purports to be a waiver of immunity to suit or represents

[9] Although AMERIND contests some of Blackfeet Housing's assertions for purposes of Blackfeet Housing's motion for summary judgment, AMERIND assumes the truth of these assertions for purposes of its own motion for summary judgment.

anything about members suing AMERIND for TOPP coverage. Rather, both articles are about workers' compensation coverage, which is not part of TOPP coverage (*see generally* Exh. 17). All of the statements are simple marketing explanations of the duty to defend third-party workers' compensation claims, and refer to AMERIND's willingness to defend its members against such claims in tribal courts. (Workers' compensation coverage for an employer is by its nature coverage to indemnify the employer against third party, *i.e.*, workers', claims.)

Blackfeet Housing Exhibits 2 and 3 both explain that even when a tribe wants to adjudicate workers' compensation claims of its members in its own tribal court, if the tribe's insurer is a state-law corporation, the insurer may insist on state court. The articles explain that AMERIND, by contrast, designs its workers' compensation to have the worker's dispute stay in the member's own tribal court. AMERIND agrees to defend suits against members in their tribal courts, including for enforcement of a workers' compensation arbitration. Thus, Exhibit 2 emphasizes, in discussing third-party worker's compensation claims, that (1) AMERIND is a sovereign entity, and (2) AMERIND uses this sovereignty to help its members keep claims against them in tribal courts.

> . . . . [A]s a tribally-owned company, AMERIND can protect and defend tribal sovereignty. AMERIND believes tribal governments and businesses should not be limited to the state statutory workers' compensation provided through corporate insurance companies.
>
> "Unlike commercial insurers, AMERIND Risk is a Section 17, federal corporation. We enjoy the sovereignty of our chartering tribes," [AMERIND Risk COO Dennis] McCann explained. "Commercial insurers will agree to arbitration, but only in state courts. We, as a sovereign entity, agree to arbitration, but we insist on tribal courts."
>
> AMERIND's exceptional Tribal Workers' Compensation program has helped the company grow its client base by 200 percent in the past two years.

BH Exh. 2 (Doc. 33-2). This says nothing (and certainly nothing unequivocal) about waiving AMERIND's sovereign immunity for first-party claims *against AMERIND* by its own members for alleged breaches of its duty to indemnify under the TOPP.

Likewise, Blackfeet Housing Exhibit 3 (Doc. 33-3) is a marketing article that discusses only third-party workers' compensation claims. It begins, "Tribes have many options when looking for workers' compensation insurance." Under the heading "Tribal Worker[s'] Comp Laws," it explains,

> [T]he 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 in state courts. Both parties may also feel more comfortable with the tribal adjudication process, which is slightly less formal, to resolve the issues. Utilizing this process will expedite getting the employee back to work or on light duty. Keeping your employees productive and active is better for morale.

Again, this says nothing about first-party claims against AMERIND. It emphasizes that "both parties," *i.e.*, the tribal employee and the tribal employer, may be more comfortable with "tribal adjudication" and that a tribal process will "get[] the employee back to work." Moreover, this discusses the "insurer . . . adjudicating claims," *i.e.,* defending claims, not being sued itself.

The only other statements Blackfeet Housing relies on are Blackfeet Housing Executive Director Chancy Kittson's "conversations . . . with AMERIND reps," where "[i]t was always . . . reinforced into me that AMERIND is the only insurance company that would go into tribal court." BH Exh. 12 (Doc. 33-12) (Kittson Tr. at 75:11-17). Again, to "go into tribal court" is clearly a reference to defending a member of the risk pool in tribal court; "going into" court denotes voluntary action to litigate, not being involuntarily subject to suit. And even if such a statement could be interpreted as a promise to be subject to suit, such an oral statement by a marketing "rep" would not suffice to modify the Participation Agreement, much less waive sovereign immunity. *See* PA § 9(k) ("No representations or statements of any kind made by

either party that is not expressly stated in this agreement or in any written amendment to this agreement is binding on the party.").

More generally, it should be no surprise that AMERIND does not distribute marketing materials advertising where AMERIND *itself* can be sued for alleged breaches of its duty to indemnify covered costs. *Cf.* Exh. 21 (Valdo Dep.) at 79:18 ("We don't market how to sue Amerind."). Nothing in these documents suggests that breaching its contracts and promising where it can be sued is part of AMERIND's business model or marketing strategy. There is no statement that AMERIND waives sovereign immunity, much less any suggestion in these marketing materials for prospective customers of any intention by AMERIND to contradict or supersede a specific written agreement with AMERIND.

IV. THE *MONTANA v. UNITED STATES* EXCEPTIONS DO NOT ALLOW DISREGARD OF SOVEREIGN IMMUNITY OR FORUM SELECTION CLAUSES

A "bedrock principle" of tribal jurisdiction is that "[t]ribal jurisdiction . . . . generally does not extend to nonmembers." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 340 (2008) (citing *Montana v. United States,* 450 U.S. 544, 565 (1981)). Blackfeet Housing argues that the Blackfeet tribal courts have jurisdiction here under the two exceptions to this rule in *Montana v. United States*. But nowhere does Blackfeet Housing argue or provide any support for the proposition that either *Montana* exception allows a tribal court to exercise jurisdiction in violation of a defendant's sovereign immunity or in violation of a forum selection clause. All authority is to the contrary.

As to sovereign immunity, as noted in AMERIND's opening brief (at 16), "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)) (alteration in original).

Blackfeet Housing does not contend, nor could it, that the Blackfeet Tribe can claim as part of its own inherent sovereignty the right to violate AMERIND's sovereign immunity.

Likewise, a forum selection clause excluding a tribal court deprives that tribal court of jurisdiction as a matter of federal law (although exhaustion may be required before federal enforcement of the clause). *See, e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 35 (1st Cir. 2000) (forum selection clause is a "jurisdictional issue[]" subject to district court review after exhaustion); *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 195-99, 211 (7th Cir. 2015), *as amended* (Dec. 14, 2015) (forum selection clause enforceable in district court without exhaustion).

Neither of the *Montana* exceptions provides tribal court jurisdiction in contravention of a forum selection clause. To hold otherwise would be to undermine tribal sovereignty, as the court explained in *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir. 1993):

> Sioux Manufacturing Corporation explicitly agreed to submit to the venue and jurisdiction of federal and state courts located in Illinois. To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination. . . . If contracting parties cannot trust the validity of choice of law and venue provisions, SMC may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught.

To hold that *Montana* allows Blackfeet Housing to ignore Section 8 of the Participation Agreement would have profound precedential effects for tribes, by depriving them of the power to negotiate their own contracts with contracting partners who are not willing to agree to unlimited and unconditional tribal court jurisdiction. This deprivation of sovereignty is antithetical to the purpose for the *Montana* exceptions.

Consistent with these principles, under the first *Montana* exception, tribal jurisdiction "may be fairly imposed on nonmembers only if the nonmember has consented, either expressly

or by his actions." *Plains Commerce*, 554 U.S. at 337. A tribe may not "subject[] non-members to tribal regulatory authority," or to adjudicative jurisdiction, "without commensurate consent." *Id.* In addition, the exercise of jurisdiction "must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id.* Under *Plains Commerce*, the question is whether there is "commensurate consent" such that the non-member could "reasonably anticipate" being subject to tribal jurisdiction in the specific circumstances in question. Here, the "consensual relationship" is formed and limited by the Participation Agreement.

Blackfeet Housing also does not address the reasoning of *Plains Commerce*. Instead, after dismissively describing it as a "5-4 decision," Blackfeet Housing attempts to limit it to its facts, to cases involving the sale of fee land. BH Resp. at 27. There is no support for such an arbitrary limitation. In the passage Blackfeet Housing quotes, the Court rejected efforts to sue a non-member bank in tribal court over alleged discrimination in the bank's sale of fee land within the tribal reservation. 554 U.S. at 339. In so doing it rejected the assertion "that the discrimination claim is best read to challenge the Bank's whole course of commercial dealings . . . stretching back over a decade"; instead, the "discrimination claim . . . is tied specifically to the sale of the fee land." *Id.* Thus, the Court held that the bank had not consented to tribal jurisdiction over that transaction even if it were subject to tribal jurisdiction for its other dealings: "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." *Id.* at 338. Similarly, here there is no reason that AMERIND should have anticipated being subject to Blackfeet jurisdiction by entering into a consensual contract that prescribes a specific dispute resolution process and a list of three courts of competent jurisdiction that does

not include Blackfeet tribal courts. It would be absurd to subject AMERIND to Blackfeet court jurisdiction based on consent when it specified that it does *not* consent.

Indeed, even the four dissenters in *Plains Commerce* recognized as much. Justice Ginsburg, in an opinion joined by all four dissenting justices, reasoned that the Bank should be subject to tribal jurisdiction because it could have negotiated a forum selection clause and failed to do so: "Had the Bank wanted to avoid responding in tribal court or the application of tribal law, the means were readily at hand: The Bank could have included forum selection, choice-of-law, or arbitration clauses in its agreements with the Longs, which the Bank drafted." *Id.* at 346 (Ginsburg, J., dissenting). That is precisely what AMERIND did here. Blackfeet Housing cites no authority allowing a tribal court to assert jurisdiction despite contractual restrictions to the contrary, simply because the contractual relationship was consensual. Contractual relationships are by definition consensual, so such a rule would be a *per se* bar on forum selection clauses in contracts with tribal entities, even for contracting parties who have sovereign immunity, like AMERIND.

Nor does the second *Montana* exception overcome sovereign immunity or forum selection clauses. *Montana* does not allow "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations." *Montana v. United States*, 450 U.S. 544, 564 (1981). Blackfeet Housing admits that the second *Montana* exception applies only when "tribal self-government" is "imperil[ed]." BH Resp. at 29 (quoting *Plains Commerce*, 554 U.S. at 341). That is not the case here; enforcing a contractual forum selection clause is not an attack on the Blackfeet Tribe's government or political integrity.

Blackfeet Housing focuses on the wrong question in applying this standard. It argues that AMERIND's "decision to deny insurance coverage" "has directly endangered the health and

safety of the tribal members" who live in the 130 homes subject to the claims. BH Resp. at 30, 28. This misstates the issue, which is the forum selection clause, not coverage. Even if Blackfeet Housing were to prevail here and establish that its own courts have jurisdiction, it would still be subject to the Blackfeet Court of Appeals' order requiring mediation and arbitration under the Participation Agreement and refusing all relief requested by Blackfeet Housing in its complaint. In any event, even if the issue were coverage, the denial of a specific claim for indemnity for housing affecting a subset of tribal members does not "threaten the Tribe as a whole" and "'is not what the second *Montana* exception is intended to capture.'" *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1247 (10th Cir. 2017) (quoting *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 943 (9th Cir. 2009)).

The Blackfeet Tribe's political integrity as a tribal nation does not depend on it being able to adjudicate indemnity disputes with non-member companies in violation of contractual restrictions. Such a rule would imperil not only Blackfeet's ability to protect itself against financial risks but other tribes' as well. Tribes would be viewed as inherently unreliable contracting partners, and would be prevented from contracting to obtain affordable coverage from companies that cannot simultaneously offer such coverage *and* submit to unlimited tribal jurisdiction. *See Altheimer & Gray*, 983 F.2d at 815.

V. AMERIND IS ENTITLED TO SUMMARY JUDGMENT ON ALL AFFIRMATIVE DEFENSES BECAUSE BLACKFEET HOUSING HAS FAILED TO ARGUE THEM

AMERIND showed in its memorandum in support of its motion that it is entitled to summary judgment on all affirmative defenses pleaded by Blackfeet Housing in its answer. Except for its argument about *Montana v. United States*, addressed above, Blackfeet Housing does not contest AMERIND's arguments in favor of summary judgment on the affirmative

defenses, and does not advance any argument at all in support any of its affirmative defenses. Blackfeet Housing bears the burden of proof on its affirmative defenses and is not allowed to "rest upon the mere allegations or denials of [its] pleading[s]" at the summary judgment stage. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 256 (1986). Thus, AMERIND is entitled to summary judgment on all affirmative defenses.

VI. AMERIND IS ENTITLED TO SUMMARY JUDGMENT ON ITS REQUEST FOR INJUNCTIVE RELIEF

The only element of injunctive relief that Blackfeet Housing addresses is irreparable harm. Blackfeet Housing's argument on this point only knocks down straw-man arguments, mischaracterizing AMERIND's position as mere complaints about "inconvenience" and "lost income." BH Resp. at 32. Blackfeet Housing fails entirely to respond to the cases cited by AMERIND showing that being subjected to suit in violation of sovereign immunity constitutes irreparable harm. AMER. Mem. (Doc. 28-1) at 21-22. Moreover, "[t]he Supreme Court has very clearly held that tribal immunity does indeed guarantee immunity from suit, and not merely a defense to liability." *Osage Tribal Council ex rel. Osage Tribe v. U.S. Dep't of Labor*, 187 F.3d 1174, 1179 (10th Cir. 1999) (citing *Kiowa Tribe v. Mfg. Techs., Inc*., 523 U.S. 751, 757-58 (1998)). Because disregard of such immunity is irreparable, a denial of such immunity is immediately appealable, even when most of the benefit of the immunity has already been lost in the previous stages of litigation. *Osage*, 187 F.3d at 1179-80.

Blackfeet Housing also does not provide any evidence to dispute the declarations from AMERIND board members and officers explaining the harm that AMERIND will suffer to its business operations if its Section 17 tribal sovereign immunity is not given effect. *See* Doc. 28-1 at ¶¶ 26-30 and Exhs. A, E, F. For Blackfeet Housing merely to point out that AMERIND has

been profitable in the past, citing AMERIND's 2015 annual financial report as showing "a better year" than 2014, BH Resp. at 32-33, is not responsive to this evidence of future harm.

Blackfeet Housing argues that "this Court should enforce the Blackfeet Tribal Court of Appeals order requiring the parties to mediate, then arbit[rate]," BH Resp. at 30 (heading III) (capitalization altered), and also contends that it "will suffer irreparable harm if the decision of the Blackfeet Court of Appeals is voided by this Court," *id.* at 33 (heading B) (capitalization altered). For all the reasons previously stated, it is not entitled to such relief. Blackfeet Housing argues that the "irreparable harm" it will suffer if the Blackfeet Court of Appeals order "is voided by this Court" is the potential enforcement under the Participation Agreement of a one-year limitation on the filing of a dispute. BH Resp. at 34 (citing PA § 8(a)(7)). But even the "enforce[ment]" of that order that Blackfeet Housing requests would not exempt Blackfeet Housing from § 8(a)(7), because the Blackfeet Court of Appeals' order enforces Section 8. In any event, this is a non-issue, because AMERIND has always been willing to arbitrate and will not invoke PA § 8(a)(7), so long as Blackfeet Housing promptly invokes arbitration once this dispute over jurisdiction is resolved.

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 28th day of August 2017.

Allison C. Binney

/s/ Merrill C. Godfrey

Merrill C. Godfrey (No. 16-208)
Akin Gump Strauss Hauer & Feld, LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036-1564
(202) 887-4000
abinney@akingump.com
mgodfrey@akingump.com

Attorneys for AMERIND Risk Management Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of August 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:

MATT LAW OFFICE, PLLC
Terryl T. Matt, Esq.
310 E. Main
Cut Bank, MT 59427
terrylm@mattlawoffice.com

McGinn, Carpenter, Montoya & Love, PA
Randi McGinn
Heidi Todacheene
201 Broadway Blvd SE
Albuquerque, New Mexico 87102
Randi@mcginnlaw.com

Attorneys for Defendants