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

AMERIND RISK MANAGEMENT)	
CORPORATION, a federally chartered Section 17)	
Tribal Corporation,)	
)	Case No. 1:16-cv-1093-JAP-KK
)	
Plaintiff,)	
)	
)	
BLACKFEET HOUSING,)	
Defendant.)	

**DEFENDANT'S REPLY IN SUPPORT OF ITS
CROSS-MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Why are we here in federal court?

AMERIND received from the Blackfeet Court of Appeals the very ruling it now seeks from this court, i.e. that AMERIND has sovereign immunity. If, after receiving that favorable ruling on November 7, 2016, AMERIND had done as the court ordered and gone to mediation/arbitration, the underlying insurance claims from April 2013 would already be resolved.

One explanation for AMERIND's continued litigation on an issue it has already won, is to have this Court set aside the Blackfeet Appellate Court order sending the parties to mediation/arbitration. Such a result would allow AMERIND to avoid entirely its contractual obligations based on the contract provision requiring that arbitration occur within one year of the insurable event or be forever barred.

This Court need not re-litigate or re-determine the issue of sovereign immunity if it finds, as did the Blackfeet Court of Appeals, that AMERIND has waived sovereign immunity through its contract of insurance, or if AMERIND's business relationship with the tribe falls under the civil adjudication exceptions in *Montana v. United States*, 450 U.S. 544 (1981).

The language of the TOPP insurance contract, when interpreted in the light most favorable to the insured, establishes that AMERIND has waived sovereign immunity and consented to suit in Blackfeet Tribal Court. AMERIND's dealings with the tribe also fall within the *Montana* exceptions to confer tribal jurisdiction in Blackfeet Courts.

This Court should grant the Defendant's cross-motion for summary judgment, finding AMERIND waived its sovereign immunity and send this case back to Blackfeet Tribal Court. Such a decision would allow the Blackfeet Court of Appeals Order to

stand and send the parties to mediation/arbitration four and a half years after the Blackfeet reservation homes were originally flooded.

ARGUMENT

I. THE TOPP INSURANCE COVERAGE CONTRACT, INTERPRETED IN THE LIGHT MOST FAVORABLE TO THE INSURED, WAIVES SOVEREIGN IMMUNITY FOR AMERIND AND PERMITS SUIT IN BLACKFEET TRIBAL COURT

A. It is the TOPP Insurance Contract, rather than the Participation Agreement Which Controls this Case.

Contrary to AMERIND’s argument, the TOPP and the Participation Agreement (PA) cannot be read together – even if the definition of “document” includes both contracts -- because the key contract provisions on jurisdiction, applicable law and arbitration procedures in the two documents are diametrically opposed (see chart below).

Contract 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 <u>Location:</u> Santa Ana Pueblo or another agreed site	Mediation First 1 Arbitrator AAA Rules Apply Punitive dams excluded <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 1 year after loss occurs.	Arbitration must occur within 1 year of dispute or “absolute bar” and “waiver of dispute”

Since this case involves two contracts with contradictory provisions on the key issues raised with the Court, the first order of business for this Court is to decide which contract controls the insurance coverage issues for the underlying flooding claims.

The first clue as to which contract controls this dispute comes in the very nature of the contracts themselves. The two contracts regulate different relationships and obligations. The Participation Agreement controls the obligations of the participating tribes to report and contribute to the risk pool. The TOPP Insurance Contract controls the coverage afforded, including whether the April 2013 flooding of the Blackfeet Housing homes is an insurable event.

The second, conclusive piece of evidence is found in two places in the specific language of the TOPP:

This is **your** Tribal Operations Protection Program (hereinafter referred to as **TOPP**) Scope of Coverage **document** (hereinafter referred to as the **document**). Together with your Certificate of Coverage (COC) it explains your coverage and all other conditions of you and we are responsible for in fulfilling the terms of this document.” Scope of Coverage, p. 1.

6. Changes to the Document

This **document** and its coverage parts contain all the agreements between you and us concerning the coverage afforded. The **document's** terms can be amended or waived only by Enforcement insured by **us** as part of this **document**, in accordance with the principles of contract law, by amendment to this **document**.
TOPP General Conditions Pg. 2, §6. (underlining added).

Based on the language of the two contracts, the TOPP provisions on jurisdiction, law and mediation are controlling here. Even if the Court decides the two different contracts should be read together, in choosing between the contradictory provisions, it must select those terms that favor the position of the insured, Blackfeet Housing.

B. Applying the Law of Contractual Relationships, the TOPP Waives Sovereign Immunity for Amerind and Allows Jurisdiction in the

Blackfeet Tribal Courts.

The TOPP does not designate what jurisdiction’s law will apply to coverage issues, but specifically provides:

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

As discussed in more detail on pp. 18-23 of the Defendant’s Memorandum in Support of Cross-Motion for Summary Judgment, any ambiguity between the two contracts or within the TOPP contract of insurance, must be resolved in favor of the insured, Blackfeet Housing. *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); *Max True Plastering Co. v. US. Fid & Guar. Co.* 1996 OK 28. 912 P.2d 861, 869 (Okla. 1996)(“[A]mbiguities are construed most strongly against the insurer.”)

In ruling on these motions for summary judgment, the Court must find in favor of the insured on any ambiguous contract language. *Id.* For example, there are two places in the TOPP contract that use the language “court of competent jurisdiction.” One section allows the insured to file and pursue an arbitrator’s award “to **your tribal** or any federal **court of competent jurisdiction.**” TOPP General Coverage Conditions, ¶ 15. This provision clearly waives sovereign immunity and allows BH to bring suit against AMERIND in Blackfeet Tribal Court to enforce an arbitration award. It should also apply to its converse—AMERIND’s refusal to submit to arbitration to obtain such an award.

The second provision allows BH to bring an action against AMERIND once “the amount of our obligation to pay has been finally determined...by a non-appealable final judgment after a trial in a **court of competent jurisdiction...**” *Id.* at ¶12. AMERIND urges the Court to interpret the language “court of competent jurisdiction” not to exclude tribal

court, but to mean that a third person must first sue the insured and get a judgment before a claim can be made against AMERIND. However, that interpretation does not work under the facts of our case.

Because Blackfeet Housing (BH) was responsible for providing safe housing to tribal members, BH was the claimant/insured rather than the 130 members whose homes were flooded. Because BH owned the homes, none of those homeowners would have standing to sue BH or AMERIND. The only way to obtain a monetary judgment under this provision was for BH to sue AMERIND in a court of competent jurisdiction within the TOPP's one-year time statute of limitations to bring suit against the company. Given the inclusion of "your tribal court" with a "court of competent jurisdiction" in paragraph 15, this ambiguity must be resolved in favor of Blackfeet Housing.

The evidence supporting BH's interpretation is stronger when the Court looks outside of the contract to interpret the ambiguity based on the reasonable expectations of the insured. When a contract is ambiguous, extrinsic evidence may be necessary to resolve the ambiguity. *See Campbell v. Indep. Sch. Dist. No. 1*, 77 P.3d 1034, 1039 (Okla. 2003). AMERIND repeatedly made representations orally and in its marketing materials that it would go into any tribal court and was Indian friendly. Defendant's Undisputed Facts, ¶¶3-9. Based on these representations made by AMERIND, BH decided to purchase the four insurance policies meant to protect tribal members' homes on the Blackfeet reservation. *Id.* at ¶8.

This Court should grant summary judgment finding that the TOPP insurance contract provisions waived sovereign immunity for AMERIND and allowed BH to bring a claim against its insurer, AMERIND, in Blackfeet Tribal Courts.

II. BOTH OF THE *MONTANA* EXCEPTIONS APPLY IN THIS CASE AND THE COURT MAY FIND JURISDICTION IN THE BLACKFEET TRIBAL COURT WITHOUT REACHING THE ISSUE OF SOVEREIGN IMMUNITY.

Before reaching the issue of sovereign immunity, the Tenth Circuit Court first analyzes whether any of the exceptions in *Montana vs. United State* apply to the case.

MacArthur v. San Juan County, 309 F.3d 1216, 1226 (10th Cir. 2002) states:

The threshold question in our review of the Navajo court judgment is whether the Navajo Nation's decision to exercise adjudicative power over County and Health District defendants passes muster under *Montana*. If, and only if, appellants overcome the heavy presumption *Montana* establishes against the existence of tribal jurisdiction will a federal court have occasion to address the sovereign immunity issue at all.

Should this Court find that one or both of the *Montana* exceptions apply to this case to confer tribal jurisdiction, it need not reach and re-litigate the issue of sovereign immunity.

As discussed in Defendant's Memorandum Brief in Support of Cross-Motion for Summary Judgment, pp. 25-30, the existence of a contractual relationship between BH and AMERIND involving the protection of property and tribal members on tribal land are at the very heart of the two exceptions that allow tribal jurisdiction over non-members. *Montana v. United States*, 450 U.S. 544, 563-67 (1981).

A. Blackfeet Tribal Court Has Jurisdiction Under the First *Montana* Exception Because of the Consensual Contractual Relationship Under Which AMERIND Waived Sovereign Immunity and Consented to Suit in Tribal Court.

The first *Montana* exception gives a tribe jurisdiction over non-members or companies who have consensual dealings, including "commercial dealings, contracts leases or other arrangements" with "tribes or its members." *Montana v. United States*, 450 U.S. at 565. The basis for tribal jurisdiction is even stronger if the contract or consensual relationship involves property on tribal land. *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1244-45 (10th Cir. 2017).

Where, as here, the TOPP contract of insurance not only involved insuring tribal property, but contained two express provisions (the applicable “forum selection clauses”) where AMERIND waived any claim of sovereign immunity by consenting to suit in courts of competent jurisdiction, including tribal court, there is jurisdiction in the Blackfeet Tribal Court and the cross motion for summary judgment should be granted.

B. The Blackfeet Tribal Court Has Jurisdiction Under the Second *Montana* Exception Because AMERIND’s Failure to Fix the Flooded Reservation Homes Adversely Effects the Health and Welfare of the Tribe and Its Members.

The second *Montana* exception authorizes tribal jurisdiction where non-member conduct affects either the political integrity, economic security or the health or welfare of the tribe. *Montana v. United States*, 450 U.S. at 566. The Tenth Circuit has recently recognized the second *Montana* exception may be used when the challenged conduct can "fairly be called catastrophic for tribal self- government." *Norton v. Ute Indian Tribe*, 862 F.3d at 1246.

In the wake of the televised devastation by Hurricane Harvey, it should be beyond dispute that one of the greatest and highest callings of a government – whether the United States or a tribal government – is protecting and rebuilding of community homes after a flood. Because of the delay and denial of insurance coverage by AMERIND, the Blackfeet Tribe has been unable to protect the health and welfare of its citizens by fully repairing these tribal homes.

This second exception gives the tribal court jurisdiction over AMERIND. The two “forum selection” clauses in the TOPP waive any claim of sovereign immunity by AMERIND and allows suit in the Blackfeet Tribal Courts. This Court should grant Defendant’s cross-motion for summary judgment, dismiss and send this case back to the tribal court due to the important "economic security" or "health or welfare"-based governmental interests in

protecting tribal members under the second *Montana* exception.

III. ONLY A GENUINE TRIBAL ENTITY IS ENTITLED TO SOVEREIGN IMMUNITY. AMERIND SHOULD NOT HAVE SOVEREIGN IMMUNITY BECAUSE IT DOES NOT MEET THE ARM OF A TRIBE TEST.

Should this Court reach the issue of sovereign immunity, there are disputed issues of material fact concerning whether AMERIND actually qualifies for sovereign immunity which preclude summary judgment on this issue and requires a trial or evidentiary hearing. Blackfeet Housing disputes the decision of the Blackfeet Court of Appeals finding that AMERIND has sovereign immunity because it conflicts with federal law and the facts in this case.

None of the U.S. Supreme Court cases on tribal immunity¹ address the question of immunity as it relates to an arm of a tribe or entity of tribe. The Tenth Circuit has recognized that tribal immunity extends to entities that are arms of the tribes and has established a test for determining when an entity merits this designation. *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010); *see also White v. University of California*, 765 F.3d 1010, 1025 (9th Cir. 2014) (adopting the *Breakthrough Management* test). AMERIND does not meet the factors in the Tenth Circuit test which are required for sovereign immunity.

Breakthrough Management adopted a six-factor test that includes "(1) the method of the [entities'] creation; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the Tribe has over the entities; (4)

¹ *See Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, (1998) (Indian tribes are immune from suit and immunity is not subject to diminution by the States); *Michigan v. Bay Mills Indian Cmty.* 134 S. Ct 2024, 2032 (2014); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, (1978) (Immunity can be abrogated by Congress, but congressional intent to abrogate tribal immunity must be unequivocally expressed.)

whether the Tribe intended for them to have tribal sovereign immunity: (5) the financial relationship between the Tribe and the [entities]: and (6) whether the purposes of tribal sovereign immunity are served by granting them immunity." *Id.* at 1191. Although *Breakthrough* recognized that the financial relationship between a tribe and its economic entities is a relevant measure of the closeness of their relationship, it rejected the notion that financial relationship or any other single factor is a dispositive inquiry. *Id.* at 1187.²

The first factor to be considered in the sovereign immunity analysis is the method of creation of the economic entity. *Breakthrough Management*, 629 F.3d at 1187. Courts have focused on the law under which the entity was formed. Formation under tribal law weighs in favor of immunity. *Id.* at 1191. Formation under state law has been held to weigh against immunity. *American Property Management Corp. v. Superior Court*, 206 Cal.App.4th 491, 503 (2012) or to constitute a waiver of immunity. *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1280, 2006 Wash. LEXIS 892 (Wash. 2006); *Runyon ex rel. B.R. v. Assn. of Village Council Presidents*, 84 P.3d 437, 441 (Alaska 2004). AMERIND was created pursuant to federal law, not tribal or state law, and argues this fact alone entitles it to sovereign immunity. Its position is not supported by the law. The statute itself 25 U.S.C. 477, Section 17 provides:

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, that such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefore interests in corporate property, and such further powers as may be

² AMERIND's citation to *AMERIND v. Malaterre*, 633 F.3d 680 (8th Cir. 2011) for the proposition that it is immune from suit. Doc 28-1, p. 16. A review of *Malaterre* reveals that none of the six relevant factors in *Breakthrough Management* were properly analyzed in that decision, making it inapplicable in this case.

incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

This statute does not have any language that grants sovereign immunity to AMERIND.

The Tenth Circuit stated that when a tribal entity is incorporated under law that is not tribal and incorporates under the authority of another sovereign, it voluntarily subjects itself to the authority of another sovereign which allows them to be sued. *Somerlott v. Cherokee Nation Distribs.*, 686 F.3d 1144, 1149 (10th Cir. 2012). Federal law provides risk management groups are subject to the Liability Risk Retention Act, 15 U.S.C. §§3901 *et seq.*

AMERIND argued it was not created pursuant to this statute but even if it is not and it is created pursuant to 25 U.S.C. §477 by forming under the laws of another sovereign it subjects itself to that sovereign laws. This statute provides a risk management group is required to comply with state law as it relates to unfair claims practices of that State. 15 USCS 3902 (a)(1)(A). Thus, according to the Tenth Circuit, Amerind subjected itself voluntarily to the laws of the federal government and that means AMERIND as a risk management group is subject to state law through this statute for claims related to unfair practice settlement actions.

AMERIND does not meet the second factor in the *Breakthrough Management* test. Although AMERIND'S charter states that it is an instrumentality of the tribes that chartered it, Defendant strongly disputes that claim. *See Disputed Material Facts*, ¶¶ C and D. None of the three tribes are allowed to be involved in the activities, transactions, obligations, liabilities or property of AMERIND. *Id.*; *see also* AMERIND Charter, Art. 16, Sec. 16.1. The three tribes did not charter AMERIND, the federal government did. The truth is that AMERIND is not an instrumentality or arm of the three tribes and,

based on that evidence, should not have sovereign immunity.

The stated purpose of AMERIND is to promote the social welfare of Native Americans and Alaska Natives by providing a means for members to indemnify and financially protect against any risk of loss as may be agreed upon between any of them and the Corporation, including, but not limited to third person, employer liability, directors and officers liability and errors and omission, together with financial services provided by its members. *See* AMERIND Charter, Art. 7, Sec. 7.1. The truth is somewhat different—the sole purpose of AMERIND is to reduce the risk of loss to its members rather than protect them.

As for the factor of control, AMERIND does not have one tribal council member from any of the chartering tribes on its board and the tribes have no control over AMERIND activities. Ex. 14, Valdo Dep. At 40:10-25; 41:4-14; Disputed Material Facts ¶¶ C-D. The charter states AMERIND is owned by the chartering tribes, but the tribes receive no benefits and have no ownership interest and receives no income from the Corporation. See Article 4, section 4.1 & Article 5, section 5.1. The authority of charter tribes is just to ratify the charter. See Article 5, Section 5.3. The Charter provides that the Board shall control day-to-day management of the corporation. Article 12, Section 12.1 & 12.7. Between regularly scheduled meetings, the Executive Committee controls all business. Article 12, Section 12.5.1 The executive committee is made up of four individuals three of whom are non-Indian and only one who is Indian. Absent from the evidence presented is any statement from any of the three charter tribes showing their involvement in any way in this corporation's operation. Some courts have held that if the tribe is a passive owner, exercises little or no control or oversight, this should weigh against a finding of sovereign immunity. *American Property Management Corp. v. Superior Court*, 206 Cal. App. 4th 491, 503 (Cal. App. 4th Dist. 2012). AMERIND does not qualify for

sovereign immunity under the fifth factor requiring a financial relationship and the extent to which the tribe "depends ... on the [entity] for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities." *Breakthrough Management*, 629 F.3d at 1195. In this case, AMERIND' S liabilities or obligations are not those of the charter tribes. Art. 4, Sec. 4.1 & Art. 16, Sec. 16.4 & 16.5. Since the charter tribes receive no financial benefit from AMERIND, the tribes do not depend on revenue from AMERIND to fund their governmental functions.

Finally, AMERIND's purpose to provide insurance does not meet the sixth factor requiring that "the purpose of tribal sovereign immunity be served by granting them immunity." *Id.* In fact, AMERIND's business model engages in activities which are so far removed from tribal interests that it "...no longer can legitimately be seen as an extension of the tribe itself." *See Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 638-39 (Cal. App. 4th Dist. 1999). In such cases, extending immunity to the entity does not "promote the federal policies of tribal self-determination, economic development, and cultural autonomy." *Breakthrough* at 1182.

Arm-of-the-tribe immunity must not become a doctrine of form over substance. The ultimate purpose of the inquiry is to determine "whether the entity *acts* as an arm of the tribe so that its *activities* are properly deemed to be those of the tribe." *Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1046. This important matter is not something that can be determined on a motion for summary judgment on briefs alone.

Analysis of the *Breakthrough Management* factors shows AMERIND is not an arm of the three tribes and thus, not entitled to sovereign immunity. At the very least, because the material facts of how AMERIND really operates are in dispute, if this court reaches the issue of sovereign immunity, summary judgment must be denied and must await a factual finding at

trial or after an evidentiary hearing.

CONCLUSION

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

Dated this 6th day of September 2017.

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CERTIFICATE OF SERVICE

I certify that a copy of the Defendant's Reply in Support of its Cross-Motion for Summary Judgment was served upon all counsel of record on September 6, 2017 via CM/ECF electronic filing system.

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