NO.

IN THE

Supreme Court of the United States

MYRNA MALATERRE, CAROL BELGARDE, AND LONNIE THOMPSON,

Petitioners,

v.

AMERIND RISK MANAGEMENT CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a tribal business corporation formed pursuant to 25 U.S.C. § 477 with the aim of insuring Indian Housing Authorities may properly invoke tribal sovereign immunity as a ground for avoiding its contractual obligation to provide insurance coverage for liability claims arising from injuries sustained by tribal-member tenants in Indian housing units.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties to this proceeding. *See* Sup. Ct. R. 14(1)(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

PETITION FOR WRIT OF CERTIORARI

Petitioners Myrna Malaterre, Carol Belgarde, and Lonnie Thompson respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-32a) is published at 633 F. 3d 680 (8th Cir. 2011). The opinion of the District Court (App. 35a-54a) is published at 585 F. Supp. 2d 1121 (D.N.D. 2008). The opinion of the Turtle Mountain Tribal Court of Appeals (App. 55a-69a), issued in a separate but related proceeding, is unpublished.

JURISDICTION

The Court of Appeals issued its decision on February 15, 2011 (App. 1a), and denied a timely petition for rehearing and rehearing en banc on June 7, 2011. App. 33-34a. On August 5, 2011, Justice Alito extended the time within which to file a petition for a writ of certiorari, to and including October 6, 2011. No. 11A155. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent statutory provisions and regulations are reprinted at App. 70a-79a.

INTRODUCTION

A divided Court of Appeals held that a tribal business corporation formed pursuant to 25 U.S.C.

§ 477 with the aim of insuring Indian Housing Authorities may properly invoke tribal sovereign immunity as a ground for avoiding its contractual obligation to provide insurance coverage for liability claims arising from injuries sustained by tribal-member tenants in Indian housing units. That decision implicates a conflict concerning whether the very existence of a "sue and be sued" clause in a Corporate Charter constitutes a waiver of sovereign immunity. It also raises a critically important question of national significance regarding whether courts should even presume that a § 477 corporation formed with the aim of providing federally mandated insurance for third-party losses enjoys tribal sovereign immunity absent a Congressional abrogation of immunity, when § 477 was enacted before, rather than against the background of, this Court's decisions recognizing tribal sovereign immunity; and when § 477's text, legislative history, and purpose together suggest that Congress did not intend for such federally chartered tribal corporations to be immune from suit.

STATEMENT OF CASE

1. Statutory and Regulatory Framework.

The passage of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461 *et seq.*, marked a shift in Congress's approach to American Indian affairs, from one of federal compulsion (*see* Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388) to one of American Indian self-determination. Under the IRA, "tribes were encouraged to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and

economic affairs of the tribe." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973). Specifically, § 16 of the IRA (codified at 25 U.S.C. § 476) provided for the organization of tribal governments; and § 17 (codified at 25 U.S.C. § 477) provided for the organization of tribal business corporations.

Section 477 enables tribes "to conduct business through th[e] modern device" of corporations. Dep't of Interior, Office of Solicitor, *Request for Interpretive Opinion on the Separability of Tribal Organizations Organized Under Sections 16 and 17 of the Indian Reorganization Act*, Op. No. M-36515, 65 Interior Dec. 483, 484 (1958). Although tribes also may, pursuant to § 476, engage in economic activities, § 477 "was added because of congressional concern that non-Indians would not do business with tribal governments that are immune from suit." William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 175 & n.35 (1994) (citing Hearings on H.R. 7902, 73d Cong., 2d Sess. 90-100 (1934), and S. Rep. No. 1080, 73d Cong., 2d. Sess. (1934) (hereinafter "Vetter"); *see also* 65 Interior Dec. at 484. The model § 477 corporate charter, drafted by the Interior Department, thus includes a "sue and be sued" clause providing a general waiver of immunity with respect to suits against the corporation; at the same time, however, the model charter limits the tribal property subject to execution on judgments against the corporation. Vetter, *supra*, at 176, 179-80 & n.58.

Tribes establish business corporations and subordinate economic enterprises to facilitate participation in federal programs. These federal

programs often require the tribal business corporation or subordinate enterprise to consent to suit or possess surety bonding or insurance. Vetter, *supra*, at 180. One such important federal program—the subject of this petition—is the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. §§ 4101-4243. Federal Department of Housing and Urban Development (HUD) regulations require that tribes create a distinct entity known as an Indian Housing Authority as a precondition to receiving block grants under NAHASDA. Tribes give their "irrevocable consent to allowing the [Housing] Authority to sue and be sued in its corporate name"; but these regulations also disclaim tribal liability for debts or obligations of the Housing Authority. Vetter, *supra*, at 180 (quoting 24 C.F.R. Part 905, App. I to Part A, Art. V. ¶ 2 (1993)). In addition, Indian Housing Authorities that receive federal aid pursuant to NAHASDA must "maintain adequate insurance coverage for housing units that are owned or operated or assisted with grant amounts provided under this Act." 25 U.S.C. § 4133. The federally mandated insurance must include adequate amounts to "indemnify the recipient against loss from fire, weather, and liability claims for all housing units owned or operated by each recipient." 24 C.F.R. § 1000.136. Tribes may establish a § 477 business corporation in order to administer a tribal self-insurance risk pool for properties funded under NAHASDA. *See* 24 C.F.R. § 1000.138.

2. Proceedings Below.

On October 19, 2002, a fire spread through the Turtle Mountain Indian Reservation, destroying a house being leased from the Turtle Mountain

Housing Authority (TMHA), an entity of the Turtle Mountain Band of Chippewa Indians (Tribe). The fire killed two house guests and seriously injured a third. Three enrolled members of the Tribe—Myrna Malaterre and Carol Belgrade, mothers of the deceased house guests, and Lonnie Thompson, the injured house guest (here, petitioners)—brought a wrongful death and personal injury action against TMHA in Tribal Court.[1] The complaint was subsequently amended to include Amerind Risk Management Corporation (ARMC), a tribally chartered insurance risk pool for TMHA. ARMC challenged the Tribal Court's jurisdiction on tribal sovereign immunity grounds in a motion to dismiss.

While the case was pending in Tribal Court, the Department of Interior issued a federal corporate charter pursuant to 25 U.S.C. § 477 incorporating Amerind Risk Management Corporation (Amerind). Amerind's purpose is to administer a tribal self-insurance risk pool for a consortium of Indian Housing Authorities, in accordance with federal law mandating insurance coverage for Indian housing units. *See* 25 U.S.C. § 4133; 24 C.F.R. § 1000.136. The charter became effective on April 15, 2004, upon ratification by three Charter Tribes—the Red Lake Band of Chippewa Indians, the Confederated Salish and Kootani Tribes of the Flathead Reservation, and the Pueblo of Santa Ana. Although Amerind is jointly owned by these Charter Tribes, not the Turtle Mountain Band of Chippewa Indians, TMHA is among those Indian Housing Authorities insured by Amerind. In fact, Amerind's charter expressly

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[1] Lonnie Thompson became a party to the suit after the complaint was filed.

authorizes it to assume the rights and obligations of its tribally chartered, and identically named, predecessor, ARMC. App. 2a.

On July 1, 2004, petitioners filed suit for declaratory judgment in federal District Court seeking a determination that the ARMC insurance policy covered their tort claims. Amerind moved to dismiss the suit on the grounds that petitioners had failed to exhaust their tribal remedies and that Amerind was entitled to tribal sovereign immunity as a § 477 corporation. The District Court dismissed the suit without prejudice, finding that the tribal exhaustion doctrine required that the Tribal Court first entertain the dispute, including the issue of tribal sovereign immunity. *Malaterre v. Amerind Risk Mgmt. Corp.*, 373 F. Supp. 2d 980, 982 n.2, 985-86 (D.N.D. 2005).

Back in Tribal Court, petitioners filed a stipulation to dismiss TMHA with prejudice, which the Tribal Court granted. The sole remaining defendant, Amerind (here, respondent), moved to dismiss, asserting in part that it was entitled to tribal sovereign immunity as a § 477 corporation, and that petitioners' suit could not lie directly against it because petitioners were not a party to ARMC's contract with TMHA. The Tribal Court denied the motion to dismiss. It concluded that Amerind was not entitled to tribal sovereign immunity. It also concluded that, under Turtle Mountain tribal law, petitioners could proceed directly against Amerind, the insurer, because TMHA, the insured, was required by federal law to obtain, and did obtain, insurance designed to protect the public against losses.

Amerind appealed to the Turtle Mountain Tribal Court of Appeals, which affirmed. The Tribal Court of Appeals concluded that Amerind was not entitled to share in TMHA's sovereign immunity. "Federal or tribal law mandating insurance to protect the public," the court reasoned, "constitutes a limited waiver of the sovereign immunity defense that may be available to the party responsible for indemnifying the immune entity." App. 65a. The waiver would be limited in accordance with the coverage and limits of TMHA's insurance policy, which the court concluded required Amerind to cover any liability claim for personal injury or property damage up to $1,000,000. App. 67a. Established tribal law, the Tribal Court of Appeals further found, permitted a direct action against an insurer where, as here, federal law mandated insurance to protect against third-party losses and not merely to indemnify the insured.

On September 4, 2007, Amerind sought a declaration in federal District Court that, in view of *Montana v. United States*, 450 U.S. 544 (1981), the Tribal Court had exceeded its jurisdiction by exercising authority over it, a non-member of the Tribe. Amerind also sought an injunction barring petitioners from proceeding with their tort action in Tribal Court. It then filed a motion for summary judgment based on *Montana*. Amerind did not, however, raise in its complaint or motion for summary judgment the issue of tribal sovereign immunity. The District Court denied Amerind's summary judgment motion, finding that, consistent with Montana's "consensual relationship" exception, the Tribal Court has jurisdiction over Amerind because ARMC had entered into a consensual contractual relationship with TMHA to insure

TMHA against personal injury and property loss. App. 53a. The District Court, in addition, incorporated the Tribal Court of Appeals' decision by reference and *sua sponte* granted summary judgment in favor of petitioners, thereby ordering the parties to return to Tribal Court.

Amerind appealed, and a divided Court of Appeals reversed, issuing an injunction barring the proceedings in Tribal Court. Writing for himself and Judge Shepherd, Judge Beam concluded that Amerind was entitled to tribal sovereign immunity. Although not a tribe itself, the majority concluded that Amerind, as a § 477 corporation, was not a mere business but was an arm of the tribe, created with the purpose of administering a self-insurance risk pool for Indian Housing Authorities, and thus was entitled to tribal sovereign immunity. App. 9a.

Next, the majority considered whether Amerind's immunity had been waived. It concluded that petitioners could not establish a clear waiver, even though Amerind's charter contained a "sue and be sued" clause. That clause, according to the majority, was by its terms inoperative unless and until Amerind's Board of Directors adopted a resolution waiving its immunity. No such resolution was evident in the record, the majority found. The majority also rejected petitioners' arguments that Amerind's failure to raise tribal sovereign immunity as a defense in the District Court constituted waiver, and that Amerind, by assuming ARMC's obligations, had waived immunity. App. 10a-15a. Because the majority concluded that Amerind was entitled to tribal sovereign immunity, it did not decide whether ARMC was amenable to petitioners' suit in Tribal Court. App. 15a.

Judge Beam, in addition to writing for the majority, concurred specially, explaining that he would also reverse based on *Montana*, which limits tribal court jurisdiction over non-members. No exception to this rule applied in this case, according to Judge Beam, including the "consensual relationship" exception, which provides that a tribal court retains jurisdiction over the activities of non-members who enter consensual relationships with the tribe or its members through commercial dealings or contracts.

Judge Bye dissented from the majority's finding of tribal sovereign immunity. Judge Bye believed that Amerind had waived its sovereign immunity, and that waiver was evident in the contract between itself and TMHA. Assuming no waiver on this record, Judge Bye would have remanded to allow petitioners discovery limited to whether Amerind had adopted a corporate charter waiving immunity, or whether it had waived its immunity by its conduct. Lastly, Judge Bye dissented from the majority's extension of tribal sovereign immunity to a § 477 corporation whose very purpose was to insure TMHA from losses sustained by third parties. Calling the result in this case "perverse," Judge Bye wrote:

> As a condition of receiving federal funds, Congress mandated tribes and tribal housing authorities be required to purchase insurance. As a practical matter, requiring the purchase of insurance is perhaps the consummate indication Congress intended tribes and tribal housing authorities would be subject to suit. The fact that we now

> recognize Amerind—the commercial entity created for the very purpose of fulfilling such Congressional mandate—to itself be immune from suit, may require the Supreme Court to re-examine the "wisdom of perpetuating the doctrine [of tribal immunity]." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998).

App. 22a (alterations in original).

REASONS FOR GRANTING THE PETITION

I. COURTS ARE DIVIDED AS TO WHETHER THE VERY EXISTENCE OF A "SUE AND BE SUED" CLAUSE WAIVES TRIBAL SOVEREIGN IMMUNITY

In this case, the Eighth Circuit concluded that a "sue and be sued" clause[2] did not effectuate waiver, but that additional evidence of waiver was

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[2] Charter § 8.18 states: "To sue and be sued in the Corporation's name in courts of competent jurisdiction within the United States, but only to the extent provided in and subject to the limitations stated in Article 16 of this Charter." Section 16.2 specifies that the Corporation may waive "any defense of sovereign immunity the Corporation . . . may otherwise enjoy" under federal, state, or tribal law. App. 108a (Charter § 16.2). But it does not indicate what immunity the Corporation may otherwise enjoy. It is necessary to resort back to the "sue and be sued" clause and ask whether it, standing alone, is an effective waiver of sovereign immunity under federal or tribal law, or whether more is needed. Courts are divided on that question.

needed.[3] App. 13a. In other jurisdictions, however, the very existence of a "sue and be sued" clause waives tribal sovereign immunity. This direct and pressing conflict is one the Court should resolve in this case. *See* Sup. Ct. R. 10.

The Eighth Circuit's conclusion, that the "sue and be sued" clause does not constitute waiver, is consistent with its prior decision in *Dillon v. Yankton Sioux Housing Authority*, 144 F.3d 581 (8th Cir. 1998). There, the court considered whether a tribal housing authority waived sovereign immunity as to former employee's federal civil rights claim. The tribal resolution at issue in *Dillon* contained a clause allowing the Housing Authority to sue and be sued; it also authorized the Housing Authority to agree by contract to waive any immunity from suit. The court in *Dillon* held that a "sue and be sued" clause was not an automatic waiver of immunity. For it to be operative, the Housing Authority had to agree by contract to waive any immunity from suit. Because the Housing Authority did not separately waive its immunity through a written or implied contract with employee, the court did not find a waiver.

On similar facts, the Second Circuit concluded that a "sue and be sued" clause in a tribal agency's enabling housing ordinance was only operative in

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[3] In support of this position, the Court stated that § 16.4 required further action by the Board of Directors for there to be an effective waiver of immunity. But § 16.4, by its terms, simply provides the *procedures* by which "[a]ny waiver by the Corporation authorized by Section 16.2" shall be made. App. 109a. No further action would be necessary if the very existence of a "sue and be sued" clause waived the Amerind's immunity.

tribal courts, and did not confer any right on the federal courts to hear the case. *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76 (2d Cir. 2001). The *Garcia* court reasoned that a waiver of sovereign immunity by a foreign sovereign or a state sovereign waives immunity only in the courts of that sovereign; accordingly, a waiver in a tribal ordinance waived immunity only in tribal courts. *Id.* at 86-87.

Other courts hold that the very existence of a "sue and be sued" clause waives tribal immunity.[4] *Duluth Lumber & Plywood Co. v. Delta Dev., Inc.*, 281 N.W.2d 377, 383-84 (Minn. 1979) (collecting authorities); *see R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979 (9th Cir. 1983); *Parker Drilling Co. v. Metlakatla Indian Cmty.*, 451 F. Supp. 1127 (D. Alaska 1978). These courts reason that it would be "grossly unfair" to extend tribal sovereign immunity to a Housing Authority with a "sue and be sued" clause in its ordinance, where the tribe had "purported to create an independent corporation which would be legally responsible for its promises . . . [and] invited outsiders to do business with it on a contractual basis." *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 395 F. Supp. 23, 29 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975). *See also Atkinson v. Haldane*, 569 P.2d 151, 175 (Alaska 1977) (implying that a "sue and be sued" clause has effect of waiving immunity if suit is

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[4] The Ninth Circuit criticized the holdings in *Dillon* and *Garcia*, discussed above, in *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974, 979-81 (9th Cir. 2006). Although that opinion was adopted in part, modified in part on other grounds on rehearing, 519 F.3d 838 (9th Cir. 2008), the Ninth Circuit's discussion of these cases may still aid the Court.

against a corporate entity distinct from the governing body of the tribe).

Had the Court of Appeals in this case concluded, consistent with the authorities above, that the "sue and be sued" clause in Amerind's Charter was itself an automatic waiver of tribal sovereign immunity, then it would not have extended immunity to a corporation created with the express purpose of providing insurance against tort liability.

II. THE COURT OF APPEALS' UNWARRANTED EXTENSION OF TRIBAL SOVEREIGN IMMUNITY EFFECTIVELY INVALIDATES CONGRESSIONALLY MANDATED INSURANCE

The ruling below also raises a critically important question of national significance: whether the framework established in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), for assessing whether Congress intended to abrogate tribal sovereign immunity should apply where, as here, the federal act in question was enacted *before* this Court explicitly held that tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers. Consideration of this question is especially warranted because the Eighth Circuit's holding in this case—that Congress intended for tribal sovereign immunity to extend to a § 477 tribal business corporation formed with the aim of providing insurance coverage for liability claims against Indian Housing Authorities—renders illusory the Congressional mandate that Indian

Housing Authorities obtain insurance as a condition of receiving federal funds.

In *Kiowa Tribe*, this Court ceded to Congress the lead role in drawing the bounds of tribal sovereign immunity. *Id.* at 759-60. Whether immunity promotes federal policies of tribal self-determination, economic development, and cultural autonomy is now primarily a question for Congress. Courts thus presume that a tribe is not subject to suit unless Congress (or the tribe) has expressly waived its sovereign immunity. *Id.* at 754.

The Court should reconsider this framework.[5] It makes no sense to demand or even expect to find an express waiver from Congress if the Congressional act in question was enacted before this Court explicitly held that tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers. Here, § 477 was enacted in 1934, before this Court explicitly recognized tribal sovereign immunity. *See United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940) (*USF&G*). Congress therefore was not "act[ing] against the background of [this Court's tribal immunity] decisions" (*Kiowa Tribe*, 523 U.S. at

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[5] The dissent itself urged this Court to reconsider *Kiowa Tribe*, arguing that "[w]here, as here, the already infirm concept of tribal immunity is extended so far as to shield a corporate entity whose very existence is at odds with the concept of immunity, it seems perhaps the time is now upon us to abrogate the doctrine." App. 32a (Bye, J., dissenting). While Petitioners do not ask this Court to repudiate the doctrine outright, it should not be extended to a § 477 business corporations formed with the aim of providing insurance against tort liability.

758) when it enacted § 477. Under these circumstances, deference to Congress's role in deciding the bounds of tribal sovereign immunity requires consideration of whether Congress intended for § 477 corporations to be immune from suit.

Here, there is no indication that Congress intended for a § 477 corporation to be immune from suit. Section 477's text says nothing of tribal sovereign immunity. *See* 25 U.S.C. § 477. Its language simply suggests that § 477 tribal corporations share some but not all attributes of tribes organized under § 476. Specifically, § 477 describes the holding and disposition of real and personal property as among a federally chartered tribal corporation's chief attributes. *See* § 477. Although § 477 refers to a chartered business as an "incorporated tribe," § 477 attributes are plainly limited in scope compared to the tribal functions contemplated under § 476. *See Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) (finding a tribe's § 476 and § 477 entities to be separate and distinct); *S. Unique Ltd. v. Gila River Pima-Maricopa Indian Cmty*, 674 P.2d 1376 (Ariz. Ct. App. 1984) (entity entitled to tribal sovereign immunity because organized under § 476 rather than § 477). The Court of Appeals' conclusion that an entity incorporated under § 477 automatically shares in the tribe's sovereign immunity because it is referred to by statute as an "incorporated tribe" requires reading into that phrase far more than the text of the statute as a whole would permit.

In addition, § 477's legislative history and purpose strongly indicate that Congress did not intend to extend sovereign immunity to federally chartered tribal businesses. The Interior

Department, in an opinion published in 1958, summarized that legislative history as follows: "The original bills . . . introduced in 1934 to terminate the allotment system and to reestablish tribal autonomy," the opinion explains, "provided for the issuance of a single charter by the Secretary of the Interior to defined communities of Indians." 65 Interior Dec. at 484 (citations omitted). This single charter would have granted powers of government *and* privileges of corporate organization. *Id.* But "[t]he committee objected to the proposed legislation, suggesting that no one would give credit to such an organization *because of its immunities*, ..." The bill was redrafted to "permit[] the organization by the tribe of a separate business corporation in which any part, or all, of the tribe's property and business interests may be vested." *Id.* Congress thus enacted § 477 in addition to § 476 "because of congressional concern that non-Indians would not do business with tribal governments that are immune from suit." Vetter, *supra*, at 175 & n.35 (citing Hearings on H.R. 7902, 73d Cong., 2d Sess. 90-100 (1934), and S. Rep. No. 1080, 73d Cong., 2d. Sess. (1934)).

Not only would extending tribal sovereign immunity to § 477 corporations be contrary to Congressional intent, this extension would impede rather than advance federal policies of tribal self-determination, economic development, and cultural autonomy. The Charter Tribes in this case "pooled their resources in order to fulfill their obligations under NAHASDA to ensure that each individual Indian Housing Authority remains viable after losses are sustained." App. 63a. This insurance protects the TMHA's assets and also protects the public against losses. App. 67a. Extending tribal sovereign immunity to the insurer, a §477 corporation, which

does not perform governmental functions, is not necessary to protect the Tribe. *Cf. Smith Plumbing v. Aetna Casualty Ins. Co.*, 720 P.2d 499, 502 (Ariz. 1986) (holding that although tribe was immune from suit, surety could not invoke tribal immunity because "the compensated surety of a sovereign does not perform the governmental functions that require protection"). The extension, if anything, would be grossly unfair, as it would defeat an established cause of action under tribal law against an insurer that was formed in part to provide coverage for third-party losses.[6] TMHA was required to possess, and did possess, insurance coverage against third-part losses.[7] Consistent with Congressional intent, that coverage should be available to petitioners.

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[6] As the Tribal Court of Appeals recognized, a federal mandate to purchase insurance is a waiver of immunity to liability, up to the limits of the mandated insurance; and under such circumstances a direct action lies against the insurer. App. 61a; *see also Boyles v. Farmers Mut. Hail Ins. Co. of Iowa*, 78 F. Supp. 706, 708-09 (D. Kan. 1948). Even so, there should be no immunity for a § 477 corporation such as Amerind, given that Congress did not intend for § 477 corporations to be immune from suit.

[7] The Court of Appeals noted that Amerind administered a self-insurance risk pool (App. 9a), but as the Tribal Court of Appeals explained, "The actual certificate of coverage . . . provides that Amerind will cover any liability claim for personal injury or property damage up to $1 million. The Court has reviewed the policy and finds nothing therein excluding liability claims arising from losses sustained by tenants or guests in Housing units." App. 67a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Date: October 6, 2011 Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

APPENDIX A

Opinion of The United States Court of Appeals For The Eighth Circuit (February 15, 2011)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 08-3949

AMERIND RISK MANAGEMENT CORPORATION,
Appellant,

v.

MYRNA MALATERRE; CAROL BELGARDE;
LONNIE THOMPSON,
Appellees.

Appeal from the United States District Court for the District of North Dakota

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Submitted: October 22, 2009
Filed: February 15, 2011

Before BYE, BEAM, and SHEPHERD,
Circuit Judges.

BEAM, Circuit Judge.

Amerind Risk Management Corporation (Amerind) is a federally chartered corporation that

assumed the rights and obligations of its tribally chartered predecessor, also named Amerind Risk Management Corporation (ARMC). Amerind appeals the federal district court's adverse grant of summary judgment in this declaratory judgment action. Amerind sought a determination in federal district court that the Turtle Mountain Tribal Court (Tribal Court) lacked jurisdiction over tort litigation between Amerind and three enrolled members of the Turtle Mountain Band of Chippewa Indians (Tribe), and requested an order enjoining the plaintiffs from proceeding in the Tribal Court. The district court held that, although Amerind was a nonmember of the Tribe, the Tribal Court had jurisdiction over the tort litigation based on ARMC's contractual relationship with the Turtle Mountain Housing Authority (TMHA), an entity of the Tribe.

We hold that the Tribal Court does not have jurisdiction over the plaintiffs' direct suit against Amerind because Amerind is entitled to tribal immunity and the plaintiffs have failed to meet their burden of showing that Amerind waived such immunity. Accordingly, we reverse the district court and remand with directions to enjoin the plaintiffs from proceeding against Amerind in Tribal Court.

I. BACKGROUND

In 1986, at the encouragement of the United States Department of Housing and Urban Development, ARMC was incorporated under the laws of the Red Lake Band of Chippewa Indians as a self-insurance risk pool for Indian Housing Authorities and Indian tribes. TMHA joined the ARMC risk pool and, on December 28, 2001, ARMC issued TMHA a "Certificate of Coverage" and a

"Scope of Coverage" document outlining TMHA's property damage and personal injury coverage from January 1, 2002, through December 31, 2002.

On October 19, 2002, a fire destroyed a house on the Turtle Mountain Indian Reservation being leased from TMHA, killing two houseguests and seriously injuring a third. Three enrolled members of the Tribe–Myrna Malaterre and Carol Belgarde, mothers of the deceased houseguests; and Lonnie Thompson, the injured houseguest (plaintiffs)[1]–brought a wrongful death and personal injury action against TMHA in the Tribal Court. The complaint was amended on September 5, 2003, to include ARMC as a defendant. ARMC filed a motion to dismiss, challenging the Tribal Court's jurisdiction on the basis of tribal sovereign immunity. While the case was pending in Tribal Court, the Department of the Interior issued a federal corporate charter incorporating Amerind pursuant to 25 U.S.C. § 477.[2]

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[1] Lonnie Thompson was added as a plaintiff after the lawsuit was filed.

[2] 25 U.S.C. § 477 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 therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no

The charter was effective upon ratification by the 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. By April 15, 2004, all three Charter Tribes passed resolutions ratifying Amerind's federal charter. Notably, the federal charter gave Amerind the power "[t]o acquire the rights and assets and assume the obligations and liabilities of [ARMC]."

On July 1, 2004, the plaintiffs filed a declaratory judgment action in federal district court seeking a determination that the ARMC self-insurance policy covered their claims. Amerind filed a motion to dismiss, asserting that the plaintiffs failed to exhaust their tribal remedies and, alternatively, that Amerind was entitled to tribal sovereign immunity as a § 477 corporation. The federal district court dismissed the case without prejudice, holding that pursuant to the tribal exhaustion doctrine, the Tribal Court should be given the first opportunity to address the factual and legal issues presented in the case, including the tribal sovereign immunity issue. *Malaterre v. Amerind Risk Mgmt.*, 373 F. Supp. 2d 980, 982 n.3, 985-86 (D. N.D. 2005) (*Amerind I*). The court noted that "[i]f needed, the parties can return to this forum for any further litigation." *Id.* at 986. Thus, the parties returned to the Tribal Court.

> 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.

On October 20, 2005, the plaintiffs filed a stipulation to dismiss TMHA with prejudice in the Tribal Court. The Tribal Court granted the motion, leaving Amerind as the sole defendant in the case. Amerind then filed a motion to dismiss, asserting *inter alia* that it was entitled to tribal sovereign immunity as a § 477 corporation, and that the plaintiffs' action could not proceed directly against Amerind because they were not parties to ARMC's contract with TMHA. The Tribal Court denied Amerind's motion to dismiss, holding that Amerind was not entitled to sovereign immunity because it "does not stand in the same position as TMHA or the [Tribe]." The court also held that the plaintiffs could proceed directly against Amerind because, under Turtle Mountain tribal law, claimants may proceed directly against an insurer if the insured was required by federal law to obtain insurance designed to protect the public against losses. The Tribal Court's decision did not address Amerind's specific contention that it was entitled to sovereign immunity in its own right as a § 477 corporation. Amerind appealed to the Turtle Mountain Tribal Court of Appeals (Tribal Court of Appeals).

Before the Tribal Court of Appeals, Amerind again asserted that it was entitled to sovereign immunity as a § 477 corporation, and that the plaintiffs were prohibited from maintaining a direct suit against Amerind. The Tribal Court of Appeals affirmed the Tribal Court's denial of Amerind's motion to dismiss, reasoning that Amerind was not entitled to share in TMHA's sovereign immunity, and that tribal law permitted the plaintiffs' direct suit. Like the Tribal Court, the Tribal Court of Appeals failed to specifically discuss Amerind's

status as a § 477 corporation and whether Amerind was entitled to sovereign immunity in its own right.

On September 4, 2007, Amerind commenced a declaratory judgment action in federal district court, seeking a determination that the Tribal Court exceeded its jurisdiction by exercising authority over Amerind, a nonmember of the Tribe, under *Montana v. United States*, 450 U.S. 544, 565 (1981). Amerind also sought to enjoin the plaintiffs[3] from pursuing their tort action directly against Amerind in Tribal Court. Amerind filed a motion for summary judgment on June 24, 2008. Inexplicably, Amerind failed to raise the tribal immunity issue in either its complaint or in its motion for summary judgment. Nevertheless, the plaintiffs' response to Amerind's motion for summary judgment outlined provisions in the Scope of Coverage agreement that allegedly waived ARMC's, and by extension Amerind's, sovereign immunity. The plaintiffs' response also rhetorically inquired, "Why does AMERIND argue that it is entitled to sovereign immunity when the policy clearly states otherwise?" and asserted that "neither AMERIND nor TMHA is entitled to raise sovereign immunity as a defense to the [plaintiffs'] claims."

The district court denied Amerind's motion for summary judgment, concluding that under *Montana*, the Tribal Court had jurisdiction over Amerind because ARMC entered into a consensual contractual

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[3] In this declaratory judgment action, Malaterre, Belgarde, and Thompson are technically "defendants," but they are "plaintiffs" in the underlying Tribal Court action, and we refer to them as "plaintiffs" here to avoid confusion.

relationship with TMHA to insure TMHA against personal injury and property loss. *Amerind Risk Mgmt. Corp. v. Malaterre*, 585 F. Supp. 2d 1121, 1130 (D. N.D. 2008) (*Amerind II*). The court also incorporated the Tribal Court of Appeals' decision by reference and *sua sponte* granted summary judgment in favor of the plaintiffs, directing the parties to litigate the plaintiffs' suit in the Tribal Court. *Id.* The district court did not address whether the doctrine of tribal sovereign immunity affected the Tribal Court's jurisdiction–an issue raised in *Amerind I*, discussed in the Tribal Court of Appeals' incorporated decision, and addressed in the plaintiffs' response to Amerind's motion for summary judgment.

Amerind appeals, asserting in part that the Tribal Court lacked jurisdiction over Amerind under *Montana*. Amerind did not raise the tribal immunity issue in its appellate brief, and we directed the parties to address whether tribal immunity barred the plaintiffs' action against Amerind in the Tribal Court. *See Taylor v. Alabama Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1034 (11th Cir. 2001) (per curiam) (We may "*sua sponte* conduct an inquiry into whether a party enjoys Indian sovereign immunity, as this consideration determines whether a court has jurisdiction to hear an action.").

II. DISCUSSION

We have held that tribal sovereign immunity is a threshold jurisdictional question.[4] *Hagen v.*

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[4] Amerind concedes it voluntarily waived its tribal immunity in federal court by filing this declaratory judgment action, so our jurisdiction is not in dispute. *See Rupp v. Omaha*

Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040, 1044 (8th Cir. 2000). "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."[5] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Thus, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). "A waiver of sovereign immunity may not be implied, but must be unequivocally expressed by either the Tribe or Congress." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995).

To determine whether Amerind is immune from the plaintiffs' suit in Tribal Court, we must first determine whether Amerind is entitled to sovereign immunity. While Amerind is not itself a tribe, "[i]t is . . . undisputed that a tribe's sovereign immunity may extend to tribal agencies." *Hagen*, 205 F.3d at 1043. As discussed above, Amerind was incorporated by three Charter Tribes and issued a federal charter under 25 U.S.C. § 477. Several courts have recently recognized that § 477 corporations are entitled to tribal sovereign immunity. *See Memphis Biofuels,*

Indian Tribe, 45 F.3d 1241, 1244-45 (8th Cir. 1995). Therefore, our question on appeal is whether tribal sovereign immunity precludes the Tribal Court from exercising jurisdiction over the plaintiffs' underlying tort action.

[5] Amerind is a § 477 corporation that is jointly owned by the Charter Tribes, not the Turtle Mountain Band of Chippewa Indians. "The power to subject other sovereigns to suit in tribal court [is] . . . not a part of the tribes' inherent sovereignty." *Montana v. Gilham*, 133 F.3d 1133, 1138 (9th Cir. 1998.

LLC v. Chickasaw Nation Indus., Inc., 585 F.3d 917, 920-21 (6th Cir. 2009); *Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299, 1304 (D. N.M. 2009); *Sanchez v. Santa Ana Golf Club, Inc.*, 104 P.3d 548, 551 (N.M. Ct. App. 2004). As the Sixth Circuit emphasized in *Memphis Biofuels*, "the language of [§ 477] itself–by calling the entity an 'incorporated tribe'–suggests that the entity is an arm of the tribe." 585 F.3d at 921.

We also note that Amerind is not an ordinary insurance company. Indeed, Amerind's purpose is to administer a *self-insurance* risk pool for Indian Housing Authorities and Indian tribes. *See* Self-Insurance Plans Under the Indian Housing Block Grant Program, 71 Fed. Reg. 11464, 11464 (proposed Mar. 7, 2006) ("AMERIND continues to administer the approved self-insurance plan for properties funded under NAHASDA, pursuant to 24 CFR 1000.138."). Because Amerind is a § 477 corporation that administers a tribal self-insurance risk pool, we hold that Amerind "serves as an arm of the [Charter Tribes] and not as a mere business and is thus entitled to tribal sovereign immunity." *Hagen*, 205 F.3d at 1043.

Given that Amerind is entitled to tribal immunity, our next question is whether Amerind's immunity has been waived.[6] The plaintiffs bear the

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[6] The plaintiffs assert that we may not consider Amerind's federal corporate charter because it was not introduced into the record in *Amerind II*. We note that citations to and quotations from Amerind's federal charter appear in the exhibits attached to the plaintiffs' response to Amerind's motion for summary judgment in *Amerind II*. Moreover, the charter, which was issued by the Department of the Interior, was introduced into evidence in *Amerind I* and in the Tribal Court.

burden of proving that either Congress or Amerind has expressly and unequivocally waived tribal sovereign immunity. *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001); *Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005). The plaintiffs do not argue that Congress waived Amerind's sovereign immunity, so our focus is solely on whether Amerind waived its sovereign immunity.

The plaintiffs assert that Amerind waived its sovereign immunity by failing to raise the issue before the district court in *Amerind II*. However, our court has held that sovereign immunity is a "threshold jurisdictional matter" and a "jurisdictional prerequisite." *Hagen*, 205 F.3d at 1044 (quotations omitted). Therefore, tribal sovereign immunity may be raised for the first time on appeal, *id.*, or raised *sua sponte* by the court. *Taylor*, 261 F.3d at 1034. We also note that the tribal sovereign immunity issue is not a newcomer to the litigation

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Therefore, our consideration of the charter is appropriate. *See Omaha Tribe of Neb. v. Miller*, 311 F. Supp. 2d 816, 819 n.3 (S.D. Iowa 2004) (taking judicial notice of tribe's corporate charter as a public record); *Biomedical Patent Mgmt. Corp. v. Cal., Dep't of Health Servs.*, 505 F.3d 1328, 1331 n.1 (Fed. Cir. 2007) (taking judicial notice of court filings from previous litigation between the parties as public records); *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. In Iowa*, 609 F.3d 927, 937 (8th Cir. 2010) ("In analyzing the jurisdictional issue we rely on the record developed in the tribal courts . . . ."), *cert. denied*, 2011 WL 134297 (U.S. Jan. 18, 2011). Because it is undisputed that Amerind is a § 477 corporation that administers a self-insurance risk pool, we only consider the charter's specific provisions to determine whether Amerind waived its sovereign immunity. Given that the plaintiffs bear the burden of proving waiver, their attempt to exclude the charter from our discussion is counterintuitive.

between these parties. Indeed, the issue was raised in *Amerind I*, in the Tribal Court, in the Tribal Court of Appeals, and it was discussed in the plaintiffs' response to Amerind's motion for summary judgment in *Amerind II*. Accordingly, we hold that Amerind did not waive its tribal immunity by failing to raise the issue in *Amerind II*, and we properly raised the issue *sua sponte*.

The plaintiffs' second waiver argument is more complex. The plaintiffs begin their argument by pointing out that Amerind's federal charter authorizes Amerind to "assume the obligations and liabilities of [ARMC]." The plaintiffs then assume, without citing any supporting authority, that this provision constitutes an express waiver of Amerind's sovereign immunity so long as ARMC was amenable to the plaintiffs' pending suit in Tribal Court. Finally, the plaintiffs point to provisions in the contract between ARMC and TMHA that purportedly waive ARMC's, and by extension Amerind's, tribal immunity. Because we hold that the general assumption of ARMC's obligations and liabilities in Amerind's federal charter does not constitute an express waiver of Amerind's sovereign immunity, we need not address the plaintiffs' arguments regarding ARMC's purported waiver of its sovereign immunity.[7]

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[7] A sovereign entity does not automatically waive its sovereign immunity through the mere act of succeeding a corporation that is either not entitled to sovereign immunity or that has waived such immunity. *See Asociacion De Empleados Del Area Canalera v. Panama Canal Comm'n*, 453 F.3d 1309, 1315-16 (11th Cir. 2006); *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 49-50 (1st Cir. 2003); *Kroll v. Bd. of Trs. of the Univ. of Ill.*, 934 F.2d 904, 909 (7th Cir. 1991). In other words, a predecessor

To determine whether Amerind waived its sovereign immunity when it expressly assumed ARMC's "obligations and liabilities," we find the eleventh Circuit's decision in *Asociacion De Empleados Del Area Canalera v. Panama Canal Commission*, 453 F.3d 1309, 1316 (11th Cir. 2006) instructive. There, plaintiffs sued the Panama Canal Commission (PCC), a wholly-owned United States corporation, for unpaid work benefits. *Id.* at 1311-12. While the suit was pending, Congress terminated the PCC and, through 22 U.S.C. § 3712(e)(2), directed the General Service Administration (GSA) to "make payments of any outstanding liabilities of the PCC." *Id.* at 1312 (internal quotation omitted). The plaintiffs argued that by directing the GSA to pay the PCC's "outstanding liabilities," Congress unequivocally waived the GSA's sovereign immunity as to the pending suit. The Eleventh Circuit disagreed, holding that "to accept [plaintiffs'] position would be to imply a waiver of immunity, which we will not do." *Id.* at 1315.

Precedent from our circuit also supports the conclusion that Amerind's general assumption of ARMC's "obligations and liabilities" was, at most, an implied waiver of sovereign immunity. In *American Indian Agricultural Credit Consortium, Inc. v.*

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corporation's amenability to a pending suit is irrelevant unless the sovereign successor's immunity has been expressly and unequivocally waived. *Asociacion De Empleados*, 453 F.3d at 1316; *Maysonet-Robles*, 323 F.3d at 50; *Kroll*, 934 F.2d at 909. Thus, if Amerind did not expressly waive its sovereign immunity, we need not determine whether ARMC was immune from suit.

Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985), a creditor sued the Standing Rock Sioux Tribe after the tribe defaulted on a promissory note. The promissory note stated that, upon the tribe's default, the creditor was entitled to (1) "rights and remedies provided by law," and (2) reimbursement of attorney fees incurred in collection efforts. *Id.* at 1376. The note also stated that such rights and obligations would be subject to the law of the District of Columbia. *Id.* We rejected the creditor's argument that the promissory note constituted an express waiver of the Tribe's sovereign immunity. Specifically, we emphasized that through the note, the Tribe did not "explicitly consent to submit any dispute over repayment on the note to a particular forum, or to be bound by its judgment." *Id.* at 1380. Accordingly, we held that "[t]o derive an express waiver of sovereign immunity" from the promissory note "simply asks too much." *Id.* at 1380-81.

Like the promissory note in *Standing Rock*, and like the federal statute in *Asociacion De Empleados*, Amerind's federal charter does not state that Amerind, in assuming ARMC's obligations and liabilities, consents to submit to a particular forum, or consents to be bound by its judgment. *Cf. Rosebud Sioux Tribe v. Val-U Const. Co. of S.D.*, Inc., 50 F.3d 560, 563 (8th Cir. 1995) (holding that tribe waived its immunity as to contract claims by expressly designating an arbitral forum to settle contract disputes and agreeing to arbitration rules that explicitly provided for judicial enforcement of arbitration awards). In fact, Article 8, Section 8.18 of Amerind's charter provides that Amerind may "sue and be sued in the Corporation's name in courts of competent jurisdiction within the United States, *but only to the extent provided in and subject to the*

limitations stated in Article 16 of this Charter." (emphasis added). Article 16.4 provides:

> *Any waiver* [of tribal immunity] by the Corporation . . . *shall be in the form of a resolution duly adopted by the Board of Directors,* which resolution shall not require the approval of the Charter Tribes or the Secretary of the Interior. *The resolution shall* identify the party or parties for whose benefit the waiver is granted, the transaction or transactions and the claims or classes of claim for which the waiver is granted, the property of the Corporation which may be subject to execution to satisfy any judgment which may be entered in the claim, and shall identify the court or courts in which suit against the Corporation may be brought. Any waiver shall be limited to claims arising from the acts or omissions of the Corporation, its Directors, officers, employees or agents, and shall be construed only to effect the property and Income of the Corporation.

(emphasis added). The plaintiffs have provided no evidence that Amerind's Board of Directors ever adopted a resolution waiving Amerind's immunity as to the plaintiffs' pending suit, and absent such a resolution, we cannot say that Amerind unequivocally waived its sovereign immunity when it generally assumed ARMC's "obligations and

liabilities."[8] *See Memphis Biofuels*, 585 F.3d at 921-22 (where federal charter required board resolution to waive tribal immunity, immunity was not waived without such a resolution even though the corporation's contract with the plaintiff expressly waived all immunities).

Thus, we hold that Amerind is entitled to sovereign immunity and that the plaintiffs have failed to show that Amerind expressly waived such immunity as to the underlying personal injury/wrongful death action in this case. Given that Amerind did not waive its sovereign immunity, we need not decide whether ARMC was amenable to the plaintiffs' suit.[9] Accordingly, the Tribal Court does

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[8] We disagree with the dissent's contention that we should remand to the district court for the plaintiffs to conduct further discovery. In *Amerind I*, Amerind's motion to dismiss asserted that Amerind's Board of Directors had not adopted a resolution to waive Amerind's tribal immunity and the plaintiffs were permitted discovery. Later, the parties litigated the tribal immunity issue in both the Tribal Court and the Tribal Court of Appeals. Now, more than six years after Amerind raised the tribal immunity issue in *Amerind I*, the plaintiffs can point to no evidence that Amerind's Board of Directors ever passed a resolution to waive Amerind's sovereign immunity as to the plaintiffs' claims. Under these circumstances, we find that remanding this case for another round of discovery is neither appropriate nor necessary.

[9] Although we need not decide whether ARMC was amenable to suit, we disagree with the dissent's assertion that ARMC waived its immunity through the Scope of Coverage agreement's arbitration provision. The provision in question is housed under the heading "Non-Binding Arbitration" and provides: "If [TMHA] and [ARMC] do not agree whether coverage is provided by the Scope of Coverage document, then either party *may* make a written demand for arbitration." (emphasis added). This provision is readily distinguishable

not have jurisdiction over the plaintiffs' direct suit against Amerind.

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from the arbitration provisions that operated as express waivers of tribal immunity in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), and *Rosebud*, 50 F.3d 560 (8th Cir. 1995). Unlike the provision in the present case, the arbitration provisions in those cases expressly required *binding* arbitration and *judicial enforcement* of arbitration awards. *C & L*, 532 U.S. at 414-15; *Rosebud*, 50 F.3d at 562-63. Also, unlike the plaintiffs in the present case, the plaintiffs in both *C & L* and *Rosebud* were parties to the contracts containing the arbitration provisions at issue. *C & L*, 532 U.S. at 414; *Rosebud*, 50 F.3d at 563. And finally, the *Rosebud* court held that the binding arbitration provision in that case waived tribal immunity as to contract claims, but not as to tort claims. *Rosebud*, 50 F.3d at 563. It is a mystery, then, how the non-binding arbitration provision in the agreement between ARMC and TMHA waived ARMC's tribal immunity as to the plaintiffs' underlying tort action.

The dissent also places undue emphasis on the Scope of Coverage document's conformity provision, which provides that "[i]f any provision of this policy conflicts with the tribal laws of [the Tribe], this policy is amended to conform to those laws." In order to drum up a conflict between the policy and Turtle Mountain tribal law, which permits direct suits against insurers under certain circumstances, the dissent relies on a remote provision housed in the policy's "Tribal Housing Officials Liability Coverage" section. The provision provides: "No action shall be taken against the Insurer unless, as a condition precedent thereto, . . . the Insureds' obligation to pay shall have been fully and finally determined either by judgment against them or by written agreement between them, the claimant, and the Insurer." While this provision of the policy arguably conflicts with Turtle Mountain tribal law, a closer reading of the policy reveals that this section defines "Insurer" as "United States Fire Insurance Company." It is not clear how this provision, which applies to an entirely different insurer, could possibly operate as an express waiver of ARMC's immunity.

III. CONCLUSION

We reverse the district court and remand with instructions to enjoin the plaintiffs from proceeding against Amerind in the Tribal Court.

BEAM, Circuit Judge, concurring specially.

In *Nevada v. Hicks*, 533 U.S. 353, 373-74 (2001), the Court rejected the notion that qualified immunity claims should be considered in reviewing tribal court jurisdiction because such immunity defenses are not jurisdictional. Although *Hicks* did not specifically discuss sovereign immunity, which has been frequently described as a threshold jurisdictional issue in our circuit, the Tenth Circuit concluded that Hicks stands for the proposition that courts should consider tribal court jurisdiction under *Montana* "before reaching the sovereign immunity question." *MacArthur v. San Juan County*, 309 F.3d 1216, 1227 (10th Cir. 2002). In the event that the Tenth Circuit's sequencing of these issues is correct, I would also reverse the district court's conclusion that the Tribal Court had jurisdiction over the plaintiffs' underlying tort action under *Montana*.

"We review a district court's grant of summary judgment de novo, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party." *Copeland v. Locke*, 613 F.3d 875, 879 (8th Cir. 2010) (quotation omitted). "The extent of tribal court subject matter jurisdiction over claims against nonmembers of the Tribe is a question of federal law which we review de novo." *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 934 (8th Cir.

2010), *cert. denied*, 2011 WL 134297 (U.S. Jan. 18, 2011).

Under *Montana* and its progeny, a tribal court's civil jurisdiction generally does not extend to the activities of nonmembers of the tribe. *Montana*, 450 U.S. at 565; *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997); *see Attorney's Process*, 609 F.3d at 936 ("*Montana*'s analytic framework now sets the outer limits of tribal civil jurisdiction–both regulatory and adjudicatory–over nonmember activities on tribal and nonmember land."). The plaintiffs concede that Amerind is a nonmember of the Tribe,[10] but they contend that ARMC, and by extension Amerind, is subject to the Tribal Court's jurisdiction because ARMC entered into a consensual agreement with TMHA, an entity of the Tribe. This argument is premised on *Montana*'s "consensual relationship" exception, which provides that a tribal court retains jurisdiction over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565; *Strate*, 520 U.S. at 456-57. This is a limited exception, however. The tribe retains jurisdiction only over suits which "have a nexus to the consensual relationship itself." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). In other words, "[a] nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another–it is not in for a penny, in for a Pound." *Id.* (internal quotation omitted).

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[10] Amerind is jointly owned by three Charter Tribes, none of which is the Turtle Mountain Band of Chippewa Indians (Tribe).

Here, the district court agreed with the plaintiffs and found that their direct suit against Amerind fell under *Montana's* consensual relationship exception. The court emphasized that the dispute between Amerind and the plaintiffs was "distinctively tribal in nature," *Amerind II*, 585 F. Supp. 2d at 1129, and that the contract between ARMC and TMHA was "directly at the heart of this dispute." *Id.* I disagree.

While the scope of tribal courts' jurisdiction over nonmembers is admittedly "ill-defined," *Hicks*, 533 U.S. at 376 (Souter, J., concurring), the following cases are instructive in applying *Montana* to the facts presented here. In *Strate*, Gisela Fredericks was seriously injured when her automobile collided with a gravel truck driven by Lyle Stockert and owned by A-1 Contractors (A-1), Stockert's employer. 520 U.S. at 443. The accident occurred on a North Dakota state highway that ran through the Fort Berthold Indian Reservation, home of the Three Affiliated Tribes. *Id.* at 442-43. Although Fredericks, Stockert, and A-1 were all nonmembers of the Tribes, Fredericks filed suit in tribal court under *Montana*'s consensual relationship exception. *Id.* at 443. Fredericks argued that the tribal court had jurisdiction over the suit because A-1 was working on the reservation pursuant to a subcontract with a corporation wholly owned by the Tribes. The Supreme Court rejected this argument, reasoning that "[a]lthough A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a 'consensual relationship' with the Tribes, Gisela Fredericks was not a party to the subcontract, and the [T]ribes were strangers to the accident." *Id.* at 457 (second alteration in original) (internal quotation omitted) .

In *Nord v. Kelly*, 520 F.3d 848 (8th Cir. 2008), we considered a case factually similar to *Strate*. There, Chad Nord, a non-Indian, was driving a semi-truck owned by Nord Trucking when he collided with an automobile driven by Donald Kelly, a member of the Red Lake Band of Chippewa Indians. *Id.* at 851. The accident occurred on a Minnesota state highway that ran through the Red Lake Indian Reservation. *Id.* Kelly sued Nord in tribal court under Montana's consensual relationship exception, emphasizing that Nord Trucking had a consensual commercial relationship with the Red Lake Band to haul and remove timber from the reservation. We disagreed, concluding that "the accident gave rise to a simple tort claim between strangers, *not a dispute arising out of the commercial relationship.*" *Id.* at 856-16 (emphasis added). Importantly, we also determined that whether Nord was driving in connection with Nord Trucking's contract with the Red Lake Band at the time of the accident was immaterial because "the dispute merely involves the tortious conduct of a run-of-the-mill highway accident between strangers, and no amount of discovery can alter the nature of that claim." *Id.* (internal quotation omitted). Note that in *Nord*, unlike in *Strate*, the plaintiff was a member of the tribe whose court was attempting to assert jurisdiction.

In the present case, the plaintiffs initially filed suit against TMHA in the Tribal Court, asserting that the TMHA negligently maintained a house it leased to individuals on the Turtle Mountain Indian Reservation. The plaintiffs amended their complaint to include ARMC as a defendant because ARMC was TMHA's insurer. Then, they dismissed TMHA with prejudice, leaving Amerind, ARMC's successor, as the sole defendant in the suit. Thus, what began as

a distinctively tribal personal injury/wrongful death suit between the plaintiffs and TMHA became a suit between the plaintiffs and Amerind–i.e., a suit between "strangers." As in *Strate* and *Nord*, the plaintiffs are not parties to ARMC's contract with TMHA. Indeed, the Scope of Coverage agreement expressly states that "[t]his . . . document is a contract between you and us," defining "you" as TMHA and "us" as ARMC. The agreement also expressly excludes "[t]enants and participants of mutual help home ownership programs" from the definition of "Covered Person."

I disagree with the district court's determination that "[t]he contract between [ARMC] and [TMHA] is directly at the heart of this dispute." *Amerind II*, 585 F. Supp. 2d at 1129. In reality, it is TMHA's alleged negligence that is "directly at the heart" of the plaintiffs' underlying personal injury and wrongful death claims. The district court itself recognized that, even under Turtle Mountain tribal law, the secondary question of whether the ARMC policy covers the plaintiffs' losses does not arise unless and until "the plaintiffs . . . can establish that [TMHA] was negligent and that such negligence was the proximate cause of the injuries sustained by the plaintiffs." *Id.* at 1130.

While ARMC had a consensual relationship with TMHA, it was TMHA's alleged negligence, not ARMC's contractual relationship with TMHA, that gave rise to the plaintiffs' personal injury/wrongful death suit. The Supreme Court has cautioned against broadly applying *Montana*'s exceptions and made it clear that when it comes to a nonmember's consensual relationship with a tribe or its members, it is not "in for a penny, in for a Pound." *Atkinson*,

532 U.S. at 656 (quotation omitted). Accordingly, I would find that the Tribal Court does not have jurisdiction over the plaintiffs' direct suit against Amerind under *Montana*.

BYE, Circuit Judge, dissenting.

I respectfully dissent from the holding as to the Tribal Court lacking jurisdiction over the three tribal members' direct suit against Amerind, a holding the majority justifies on the grounds Amerind is entitled to tribal immunity.

First, I believe Amerind waived its immunity in the contract between itself and the Turtle Mountain Housing Authority (TMHA). Second, even assuming Amerind did not waive its immunity, the procedural posture of this case demands us to allow the three tribal members an opportunity to conduct discovery to determine whether Amerind adopted a corporate resolution waiving its immunity, or otherwise waived its immunity with the requisite clarity by means of its conduct. Finally, I believe the result in this case is perverse. As a condition of receiving federal funds, Congress mandated tribes and tribal housing authorities be required to purchase insurance. As a practical matter, requiring the purchase of insurance is perhaps the consummate indication Congress intended tribes and tribal housing authorities would be subject to suit. The fact that we now recognize Amerind–the commercial entity created for the very purpose of fulfilling such Congressional mandate–to itself be immune from suit, may require the Supreme Court to re-examine the "wisdom of perpetuating the doctrine [of tribal immunity]." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998).

While I recognize a waiver of tribal immunity must either be "unequivocally expressed" by Congress, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), or "waived, with the requisite clarity" by the tribe itself, *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001), I believe the unique circumstances encountered in this case do indicate Amerind waived any tribal immunity it may have enjoyed.

The arbitration clause in the relevant insurance policy expressly states coverage disputes between Amerind and the TMHA were arbitrable "in the tribal jurisdiction in which the address shown in the Certificate of Coverage is located." The arbitration clause further provided local tribal laws were applicable, and an arbitrator's decision could be "appealed to a tribal court of competent jurisdiction." In *C & L Enterprises*, the Supreme Court held a tribe clearly waived its tribal immunity by entering into a contract containing an arbitration clause in which the tribe expressly agreed to arbitrate disputes arising under the contract and to allow an arbitration award to be enforced "in any court having jurisdiction thereof." 532 U.S. at 414. The Court explained it was resolving a conflict between "several state and federal courts [which] held that an arbitration clause, kin to the one now before us, expressly waives tribal immunity from *a suit arising out of the contract*" and some courts which held a tribe had not waived its immunity despite the presence of such a clause. *Id.* at 417-18 (emphasis added). In resolving the conflict, the Court cited with approval the following reasoning from the Supreme Court of Alaska:

> [W]e believe it is clear that *any dispute arising from a contract* cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. . .. The arbitration clause . . . would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed.

Id. at 422 (quoting *Native Vill. of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alaska 1983)) (emphasis added).

The Eighth Circuit had addressed this same issue prior to *C & L Enterprises*, also deciding a tribe clearly waived its immunity "with respect to claims under the contract" by entering into an agreement containing an arbitration clause, concluding "[b]y definition such disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense. . . . The parties clearly manifested their intent to resolve disputes by arbitration, and the Tribe waived its immunity *with respect to any disputes under the contract.*" *Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D., Inc.*, 50 F.3d 560, 562-63 (8th Cir. 1995) (emphasis added).

Under *Rosebud Sioux Tribe* and *C & L Enterprises*, the arbitration clause in the insurance policy issued by Amerind clearly manifests Amerind's intent to waive immunity with respect to any disputes arising under the contract (i.e., coverage disputes) between itself and the TMHA.

The tribal court lawsuit did not, however, begin as a coverage dispute between Amerind and

the TMHA; it was commenced as a wrongful death action filed by the three tribal members against the TMHA. Amerind was later added to the suit and, pursuant to tribal law, the suit became a direct action between Amerind and the three tribal members seeking insurance coverage up to the amount purchased by the TMHA. It was at that point Amerind sought to assert a sovereign immunity defense, which defense was rejected by the tribal court. Because the tribal lawsuit did not start as a coverage dispute between Amerind and the TMHA, but is now a coverage dispute, the question remains whether Amerind's clear waiver of immunity with respect to coverage disputes should apply. I believe, under the unique facts encountered in this case, such waiver still applies.

In addition to the arbitration clause, the policy also contained a clause stating the policy would conform to tribal law whenever the policy conflicted with such tribal law. As noted above, tribal law provides insurers of a tribal entity to be subject to direct actions when the tribal entity purchases the insurance pursuant to a mandate of federal law, and the federal law reflects an intent to provide remedies to third parties injured by the tribe. The policy's prohibition on direct actions against an insurer (before the insured's obligation to pay is finally determined) conflicts with this principle of tribal law. Thus, the conforming clause applies. Amerind agreed the policy would conform to tribal law.

The result is this coverage dispute is being litigated directly between the tribal members and Amerind rather than between the TMHA and Amerind (or as a personal injury suit between the tribal members and the TMHA). In other words,

Amerind's own contract operates in a manner in which coverage disputes may be resolved directly between itself and third party claimants, rather than between itself and the TMHA. This fact, coupled with Amerind's waiver of immunity "with respect to any disputes under the contract," *Rosebud Sioux Tribe*, 50 F.3d at 563, indicates Amerind waived its tribal immunity under the unique circumstances involved in this case.

II

Even assuming the arbitration clause does not operate as a clear waiver of immunity, I believe the procedural posture of this case requires us to remand it to allow the three tribal members to conduct jurisdictional discovery in the district court.

Amerind initiated this federal declaratory judgment action against the three tribal members and, as the majority acknowledges, voluntarily waived its tribal immunity in federal court by doing so. *See Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244-45 (8th Cir. 1995) (concluding a tribe waived its sovereign immunity by filing an action in federal court asking for something more than injunctive relief). Significantly absent from Amerind's complaint for declaratory relief is any claim whatsoever as to the tribal court lacking jurisdiction over Amerind because of tribal immunity. Such was not a ground upon which Amerind claimed a right to declaratory relief in federal court. In fact, Amerind *never* raised the issue of tribal immunity in the district court at any time between the filing of its complaint on September 4, 2007, and its notice of appeal to the Eighth Circuit on December 9, 2008.

The issue of tribal immunity was not raised in this federal action until October 13, 2009, when this court itself asked the parties to be prepared to address certain questions at the oral argument scheduled and held nine days later on October 22, 2009. Included among those questions were some pertaining to the issue of Amerind's immunity in tribal court. While some of our questions asked about the absence in the record of a corporate resolution waiving Amerind's immunity as to the three tribal members' suit, we never directly asked Amerind whether such a resolution had, in fact, ever been adopted.

In addressing our questions, Amerind renewed the unsuccessful argument it had pursued in tribal court, which was based on its current corporate charter's requirement that it must pass a resolution waiving immunity with respect to any particular lawsuit. The three tribal members responded by explaining the absence of a resolution under Amerind's current charter was irrelevant, because the current charter did not become effective until April 15, 2004, well after the operative events involved in this dispute.[11] The tribal members further argued, to the extent the *applicable* charter may be relevant, it was not part of this court's record, the district court's record, or the tribal court record. The tribal members argued Amerind should be deemed to have waived its immunity by

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[11] The fire giving rise to the tribal court lawsuit occurred on October 19, 2002. The applicable insurance policy was in effect from January 1, 2002, through December 31, 2002. The three tribal members filed suit on January 23, 2003. Amerind was added to the lawsuit on September 5, 2003.

abandoning the defense in the district court proceedings, thereby depriving the tribal members of the opportunity to conduct discovery and develop the factual predicate necessary to determine whether Amerind waived its immunity.

While I would decline the tribal members' request to find Amerind waived its immunity by failing to raise the issue in the district court, *see, e.g., In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304 (8th Cir. 1994) (recognizing the jurisdictional nature of tribal immunity); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1044 (8th Cir. 2000) (allowing parties to raise tribal immunity for the first time on appeal), I nonetheless believe a remand is both necessary and appropriate.

As part of the grounds for concluding the tribal court lacked jurisdiction over Amerind in the tribal court, the majority relies upon the lack of evidence in the federal court record showing that Amerind's Board of Directors ever adopted a resolution waiving Amerind's immunity. However, the three tribal members never had a reason to look for that evidence (which may actually exist), because Amerind never raised the issue of immunity in the district court. Since Amerind was the party which failed to raise the issue in district court, it should not benefit from an incomplete factual record on the issue. Under these circumstances, the appropriate remedy should be to send this case back to the district court and allow the tribal members to conduct discovery. *See Miller v. First Serv. Corp.*, 84 F.2d 680, 683 (8th Cir. 1936) ("If . . . a grave doubt of jurisdiction arises, we may remand to the District Court for hearing and determination upon the question of jurisdiction."); *see also United States ex*

rel. Miss. Rd. Supply Co. v. H. R. Morgan, Inc., 528 F.2d 986, 987 (5th Cir. 1976) (indicating "it is vital to a proper determination of [a] jurisdictional issue for the record to be properly developed" and a remand is appropriate where the record is not properly developed).

III

Finally, I am compelled to comment on what I view as a perverse result. Amerind, a commercial entity created for the very purpose of insuring tribal entities, is permitted to rely upon tribal immunity as a ground for avoiding its contractual obligation to provide insurance coverage. Indian housing authorities are required by federal law to carry liability insurance in order to receive grant money under the Native American Housing Assistance and Self-Determination Act (NAHASDA), 25 U.S.C. §§ 4101-4243.

Amerind is an insurance risk pool initially created by a collection of tribes at the encouragement of the United States Department of Housing and Urban Development (HUD) and subsequently issued a federal corporate charter pursuant to 25 U.S.C. § 477. Thus, Amerind's very creation and existence arises from the Congressional mandate which directs Indian tribes and tribal housing authorities protect themselves from tort liability (i.e., lawsuits) as a condition of their receipt of federal funds. It seems to me, therefore, that Congress necessarily envisioned the tribes and tribal housing authorities would be subject to suit, and by logical extension their insurer would likewise be subject to suit. If the insuring entity must itself consent to be sued before the insurance is operative, the condition Congress placed

on the receipt of NAHASDA grant money seems tenuous at best, if not entirely illusory.

Prior to the Supreme Court's decision in *Kiowa Tribe*, some courts distinguished between the governmental functions of tribes and the commercial activities of tribal corporations when determining whether a particular tribal corporation was immune from suit. *See, e.g., Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1109-11 (Ariz. 1989) (rejecting a tribal construction corporation's claim of immunity in part because the corporation did not aid the tribe in carrying out tribal governmental functions), *abrogated by Kiowa Tribe, as recognized in Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1110 n.12 (Colo. 2010). One of the relevant factors in determining whether a commercial tribal corporation might enjoy the tribe's governmental immunity was whether the tribal corporation had purchased insurance coverage. *See Dixon*, 772 P.2d at 1110 ("The purchase of liability insurance is some evidence that the [Tribe] expected its corporation to be liable for its torts."). Here, the argument against extending tribal immunity to shield Amerind seems even stronger given the fact Amerind is actually an insurer and not just an insured.

While I acknowledge *Kiowa Tribe* renders irrelevant the distinction between governmental functions and commercial activities when determining whether a particular tribal entity enjoys immunity, I find it very significant the Supreme Court did not address the distinction between tribal business corporations formed under 25 U.S.C. § 477 and tribal governments organized under 25 U.S.C. § 476. In this case, Amerind's corporate charter was issued pursuant to § 477, not § 476. There is some

support for the argument that when Congress adopted the Indian Reorganization Act (IRA) in 1934, it did not intend tribal business corporations formed under § 477 to have the same immunity that tribal governments formed under § 476 would have. *See Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) (recognizing the distinction between a tribe's governmental entity created under § 476 and a tribal business corporation formed under § 477); *Veeder v. Omaha Tribe of Neb.*, 864 F. Supp. 889, 900 (N.D. Iowa 1994) (pre-Kiowa Tribe case noting decisions wherein courts held tribal corporations formed under § 477, as opposed to tribal governments organized under § 476, waived sovereign immunity); *see also* William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 175 & n.35 (1994) (distinguishing between tribal governments formed under § 476 and tribal business corporations formed under § 477, and noting Congress added the latter section to the IRA "because of congressional concern that non-Indians would not do business with tribal governments that are immune from suit.") (citing Hearings on H.R. 7902, 73d Cong., 2d Sess. 90-100 (1934) and S. Rep. No. 1080, 73d Cong., 2d. Sess. (1934)). The argument against extending tribal immunity to a § 477 corporation seems particularly compelling when the commercial activity in which the corporation is engaged is providing insurance against tort liability, a purpose utterly at odds with the concept of immunity from suit.

In *Kiowa Tribe*, the Supreme Court questioned the "wisdom of perpetuating the doctrine [of tribal immunity]" noting it developed "almost by accident" and "with little analysis." 523 U.S. at 756-58. The

Supreme Court suggested the continued recognition of tribal immunity may no longer be "necessary to protect nascent tribal governments from encroachments by States" and may "extend[] beyond what is needed to safeguard tribal self-governance" in our current commerce, where "[t]ribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians." *Id.* at 758. The Court acknowledged that "[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* Ultimately, however, the Court "decline[d] to revisit [its] case law" and instead chose to "defer to the role Congress may wish to exercise in this important judgment [to abrogate the doctrine of tribal immunity]." *Id.* at 758, 760.

Where, as here, the already infirm concept of tribal immunity is extended so far as to shield a corporate entity whose very existence is at odds with the concept of immunity, it seems perhaps the time is now upon us to abrogate the doctrine.

IV

For the reasons expressed above, I respectfully dissent.

APPENDIX B

Order of the United States Court of Appeals for the Eighth Circuit Denying Petition for Rehearing

(June 7, 2011)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 08-3949

AMERIND RISK MANAGEMENT CORPORATION,

Appellant,

v.

MYRNA MALATERRE; CAROL BELGARDE; AND LONNIE THOMPSON,

Appellees.

Appeal from U.S. District Court for the District of North Dakota – Bismarck (4:07-cv-00059-DLH)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye would grant the petition for rehearing en banc.

June 07, 2011

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

Order of the United States District Court Denying Plaintiff's Motion For Summary Judgment

(November 14, 2008)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION
CASE NO. 4:07-CV-059

AMERIND RISK MANAGEMENT CORPORATION,

Plaintiff,

v.

MYRNA MALATERRE, CAROL BELGARDE, AND LONNIE THOMPSON,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before the Court is the Plaintiff's motion for summary judgment filed on June 24, 2008. *See* Docket No. 17. The Defendants filed a response in opposition to the motion on August 29, 2008. *See* Docket No. 25. The Plaintiff filed a reply brief on September 11, 2008. *See* Docket No. 29. For the

reasons set forth below, the Plaintiff's motion for summary judgment is denied and summary

Judgment is granted in favor of the Defendants.

I. BACKGROUND

The plaintiff, Amerind Risk Management Corporation (Amerind), administers a federally regulated Insurance risk pool. *See* Docket No. 20. Amerind is chartered under federal law for the purpose of providing insurance coverage for federally subsidized Indian housing owned and operated by Indian tribes and their housing authorities. *See* Docket No. 20. On December 28, 2001, the Turtle Mountain Housing Authority entered into a "Certificate of Coverage" contractual agreement with Amerind to provide insurance coverage to the Turtle Mountain Housing Authority for property damage and personal injury. *See* Docket No. 20-4. The defendants, Myrna Malaterre, Carol Belgarde, and Lonnie Thompson are enrolled members of the Turtle Mountain Band of Chippewa Indians. *See* Docket No. 1.

On October 19, 2002, Stacey Bruce, Ruth Poitra, and Lonnie Thompson were guests in a House located on the Turtle Mountain Indian Reservation that was leased from the Turtle Mountain Housing Authority. *See* Docket Nos. 1 and 25. On that date, a fire destroyed the house, killed Stacey Bruce and Ruth Poitra, and seriously injured Lonnie Thompson. *See* Docket No. 25. At the time of the fire, the Turtle Mountain Housing Authority was insured by Amerind under the "Certificate of Coverage" agreement and a "Membership Subscription Agreement." *See* Docket Nos. 20-3 and 20-4.

On January 23, 2003, Myrna Malaterre, the mother of decedent Stacey Bruce; Carol Belgarde, the mother of decedent Ruth Poitra; and Lonnie Thompson filed a wrongful death and Personal injury action against the Turtle Mountain Housing Authority in Turtle Mountain Tribal Court (Tribal Court).[12] *See* Docket Nos. 25 and 25-2. On September 5, 2003, the complaint was Amended to include Amerind as a defendant. *See* Docket No. 25-10. On July 1, 2004, Malaterre, Belgarde, and Thompson filed a declaratory judgment action against Amerind in federal court, Seeking a determination that the insurance policy issued by Amerind provided coverage for the Claims. *See* Docket No. 25-18. On December 8, 2004, Amerind filed a motion to dismiss the action in federal court contending that dismissal was appropriate under the tribal exhaustion doctrine and on the basis of sovereign immunity. On June 20, 2005, this Court granted the motion to dismiss without prejudice, finding that tribal court remedies had to be exhausted before the Court could become involved in the dispute. *See Malaterre v. Amerind Risk Management*, 373 F. Supp. 2d 980 (D.N.D. 2005).

On October 20, 2005, the Tribal Court dismissed the Turtle Mountain Housing Authority Pursuant to a stipulation. *See* Docket Nos. 25-27 and 25-28. On November 10, 2005, Amerind filed A motion to dismiss the action in Tribal Court contending that the Turtle Mountain Housing Authority was an indispensable party and, therefore,

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[12] Stacey Bruce and Ruth Poitra were enrolled members of the Turtle Mountain Indian Reservation. *See* Docket No. 25-10.

a direct action could not be maintained against Amerind. *See* Docket No. 25-29. On December 15, 2005, the Tribal Court denied Amerind's motion to dismiss and found that "[b]y contract and by its actions, Amerind has assumed control over the defense of this matter." *See* Docket Nos. 25-31. Amerind appealed the Tribal Court's decision to the Turtle Mountain Tribal Court of Appeals. *See* Docket No. 25-32. On July 5, 2007, the Tribal Court of Appeals affirmed the lower court's ruling. *See* Docket No. 25-36.

Amerind then commenced a declaratory judgment action in federal court on September 4, 2007. *See* Docket No. 1. Amerind seeks "a determination that an Indian tribe exceeds its regulatory and adjudicatory jurisdiction when it exercises authority over a non-member that is a federal corporation comprehensively regulated by federal law." *See* Docket No. 1. Amerind requests that this Court declare that Amerind is not subject to a direct action and further requests that the Court enjoin the Defendants from proceeding with a civil action in tribal court against Amerind. *See* Docket No. 1. On June 24, 2008, Amerind filed a motion for summary judgment. *See* Docket No. 17.

II. LEGAL DISCUSSION

A. DECLARATORY JUDGMENT ACT

The Plaintiff seeks declaratory relief under the Declaratory Judgment Act codified at 28 U.S.C. § 2201. "Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v.*

Seven Falls Co., 515 U.S. 277, 286 (1995). To that end, the Act specifically provides that a court "may declare the rights and other legal relations of any interested party seeking such declaration . . . ." 28 U.S.C. § 2201(a) (emphasis added). The Act has been "repeatedly characterized" by the United States Supreme Court as "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Wilton*, 515 U.S. at 287 (citations omitted). As stated by the United States Supreme Court, "[b]y the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants." *Id.* At 288. Ultimately, "the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power." *Id.* at 287. Any willingness to entertain such relief in this case would yield to the applicability of the tribal exhaustion doctrine. *See Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8th Cir. 2003) ("The issue of tribal exhaustion is a threshold one because it determines the appropriate forum.").[13]

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[13] It has been established in the Eighth Circuit that tribal exhaustion precedes the tribal immunity inquiry. *See Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 992 (8th Cir. 1999). As one court explained, "The Eighth Circuit has held that a district court should begin this phase of its inquiry by addressing exhaustion and, If it determines that tribal remedies must be exhausted, give the tribal court the first crack at considering the bona Fides of the sovereign immunity defense." Ninigret *Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 28 (1st Cir. 2000).

B. TRIBAL COURT JURISDICTION

Pursuant to 28 U.S.C. § 1331, this Court is empowered to determine whether a tribal court has exceeded the lawful limits of its jurisdiction. *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985). "The question of whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331." *Id.* at 852.

For nearly two centuries, courts of the United States "have recognized Indian tribes as 'distinct, independent political communities,' qualified to exercise many of the powers and prerogatives of self-government." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, 2718 (2008) (citing *Worchester v. Georgia*, 6 Pet. 515, 559 (1832); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)). Indian tribes possess attributes of sovereignty to govern their members and their territory. *United States v. Mazurie*, 419 U.S. 544, 557 (1975). "[T]hey are 'a separate people' possessing 'the power of regulating their internal and social relations . . . .'" *Id.* (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *Mcclanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973)). An essential attribute of that sovereignty is the power to hear and adjudicate disputes arising on reservation land. *Weeks Constr., Inc. v Oglala Sioux Hous. Auth.*, 797 F.2d 668, 673 (8th Cir. 1986). Civil jurisdiction over activities arising on reservation lands "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. 'Because [a tribe] retains all

inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from [Congressional] silence . . is that the sovereign power . . . remains intact.'" *Iowa Mut. Ins. Co. v. Laplante*, 480 U.S. 9, 18 (1987) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982)). An analysis of the Tribal Court's jurisdiction starts with the United States Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), a "pathmarking case concerning tribal civil authority over nonmembers." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). The Supreme Court in Montana specifically addressed the reach of tribal jurisdiction over non-Indian Parties. In Montana, the Supreme Court announced the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe. However, Indian tribes retain sovereignty over non-members in two specific instances:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the Activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct

> threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. 450 U.S. 544, 565-66 (internal citations omitted). The burden rests on the tribe to establish that one of the two Montana exceptions is satisfied. *Plains Commerce Bank*, 128 S. Ct. At 2720.

The Supreme Court further explained the *Montana* rule in *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997):

> *Montana* thus described the general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non- Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political Integrity, economic security, health or welfare.

Even though *Montana* addressed the authority of tribes to exercise civil jurisdiction on the reservation and on non-Indian fee lands, the Supreme Court has since clarified that *Montana*'s analysis is not limited to fee land disputes. *See Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 426-27 (1989).

The rulings of the United States Supreme Court in *Montana* and i make clear that tribal jurisdiction over non-members of the tribe or non-

Indians is limited. Numerous Supreme Court cases analyzing civil jurisdiction over a non-Indian have cited to or relied upon *Montana*. *See Plains Commerce Bank*, 128 S. Ct. 2709 (2008) (following Montana's principles and finding no tribal interest in the sale of non-Indian fee land); *Nevada v. Hicks*, 533 U.S. 353 (2001) (following Montana's principles and finding no tribal interest to regulate the ability of state officials to investigate off-reservation violations of state law); *Brendale*, 492 U.S. 408 (1989) (following *Montana*'s principles and finding no tribal interest in zoning lands held in fee by non-Indians); *South Dakota v. Bourland*, 508 U.S. 679, 694-95 (1993) (citing *Montana* for the proposition that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (citing Montana for the proposition that "A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established.").

In this case, the Turtle Mountain Tribal Court does not have civil jurisdiction over the conduct of Amerind on Indian land unless one of the two recognized *Montana* exceptions is found to apply. Neither party has argued that the second exception, which concerns activity that affects the tribe's political integrity, economic security, health, or welfare, applies to this action.

With respect to the first *Montana* exception, the Turtle Mountain Tribal Court retains jurisdiction over the conduct of Amerind if Amerind entered into

"consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Amerind contends that this exception does not apply because Amerind entered into a contractual agreement solely with the Turtle Mountain Housing Authority and, therefore, there is no consensual relationship between the Defendants and Amerind. Amerind further argues that because there was no consensual relationship between the Defendants and Amerind, a direct action cannot be pursued against Amerind without the Turtle Mountain Housing Authority being named a party to the lawsuit. The defendants contend that Amerind's interpretation of *Montana* is misplaced because the subject matter giving rise to this lawsuit involves an insurance contract and Amerind providing coverage for tribal property located on tribal land for the benefit of the tribe and its members.

As support for its claim that a consensual relationship is lacking, Amerind relies on *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001). Amerind contends that both *Strate* and *Atkinson Trading* establish that a consensual relationship with the Turtle Mountain Housing Authority is insufficient to establish a consensual relationship with the Defendants.

In *Atkinson Trading*, the Supreme Court considered whether the tribe had the authority to impose a hotel occupancy tax on a hotel located on non-Indian fee land and owned by a nonmember. At issue was whether the consensual relationship between the non-member hotel owner and the tribe was sufficient under *Montana* for the tribe to tax the

hotel. The tribal tax commissioner argued that the relationship was sufficient because the hotel and its occupants benefited from tribal emergency services, such as tribal police and tribal emergency medical services, which would respond to an emergency call from the hotel. *Atkinson Trading*, 532 U.S. at 654-55. The Supreme Court disagreed with the tax commissioner and noted that the mere benefit of tribal emergency services was insufficient to create a consensual relationship. *Id.* at 655.

> The consensual relationship must stem from 'commercial dealing, contracts, leases, or other arrangements,' and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection. If it did, The exception would swallow the rule: All non-Indian fee lands within a reservation Benefit, to some extent, from the advantages of a civilized society' offered by the Indian tribe.

Id. (internal citations omitted). The Supreme Court found that the relationship between the hotel owner and tribe was too tenuous to create a consensual relationship. As a result, the Supreme Court struck down the tax. *Id.* at 656-57.

Amerind contends that the tenuous relationship between the hotel owner and the tribe in *Atkinson Trading* is akin to Amerind's relationship with the Defendants. Specifically, Amerind states:

> As in *Strate* and *Atkinson Trading,* there is no nexus here between Malaterre's direct-action claim and

> AMERIND's consensual relationship with the Housing Authority because (a) her direct-action claim is based on the Tribal Court's Misinterpretation of 24 C.F.R. § 1000.136(a)—a federal regulation independent of That relationship, and (b) the Housing Authority is a stranger to Malaterre's claim Against AMERIND.
>
> Additionally, here, even if a nexus somehow existed under the Scope of Coverage Agreement, Malaterre voluntarily severed that nexus when she dismissed The Housing Authority from the suit with prejudice.

See Docket No. 20, pp. 9-10.

The present case is not similar to the situation that existed in Atkinson Trading where the only benefit to the non-member was the availability of tribal emergency services. The Turtle Mountain Housing Authority is located on the Turtle Mountain Indian Reservation and it provides federally subsidized housing to its members. Amerind entered into a consensual relationship with "the tribe or its members" when it agreed to insure the Turtle Mountain Housing Authority against personal injury and property loss. *See* Docket No. 20-4. For receipt of this broad coverage, the

Turtle Mountain Housing Authority made significant annual payments to Amerind: $314,160 in 2000; $324,704 in 2001; $370,380 in 2002; $453,109 in 2003; and $418,489 in 2004. *See* Docket No. 25-41, pp. 57-59, 62, 63, 65. The Turtle Mountain Housing Authority paid the annual insurance

premiums from federal grants which were provided to the Housing Authority to maintain Indian Housing on the reservation. *See* Docket No. 5-41, pp 33-35. Even though Amerind contracted directly with the Turtle Mountain Housing Authority, Amerind had a consensual relationship with "the tribe or its members" to protect life and property on the Turtle Mountain Indian Reservation in accordance with the terms and conditions of the "Certificate of Coverage" and the "Membership Subscription Agreement." A review of the liability policy reveals that it provides broad coverage for third party claims for personal injury or "bodily injury" as defined within the policy. *See* Docket No. 20-4. None of the exclusions or defenses asserted under the policy appear to have been triggered.

The Court's finding of the existence of a consensual relationship with "the tribe or its Members" is not inconsistent with *Strate*. In *Strate v. A-1 Contractors*, the Supreme Court considered whether a tribal court had jurisdiction over a civil action arising out of a motor vehicle accident that occurred on a portion of a public highway maintained by the state under a federally granted right-of-way over Indian reservation land. An overview of the factual and procedural history of *Strate* is necessary in understanding the Supreme Court's ruling.

Gisela Fredericks and Lyle Stockert, an employee of A-1 Contractors, were involved in a motor vehicle accident that occurred on a state highway that was maintained by the state under a right-of-way granted by the United States to the highway department. *Strate*, 520 U.S. at 442-43. A-1 Contractors were under a subcontract with the tribe to complete work within the boundaries of the

reservation. Neither Fredericks nor Stockert were members of the tribe. Nonetheless, Fredericks brought a tort claim against Stockert and A-1 Contractors in tribal court which determined that it had jurisdiction over the dispute. Before the tribal court resolved the matter, Stockert and A-1 contractors filed an action in federal district court to enjoin the proceedings in tribal court. The federal district court determined that the tribal court had jurisdiction over the matter and dismissed the federal action. Stockert and A-1 Contractors then appealed the decision to the Eighth Circuit Court of Appeals, where a divided panel affirmed the decision of the federal district court. *See A-1 Contractors v. Strate*, 1994 WL 666051 (8th Cir. Nov. 29, 1994). The Eighth Circuit granted a Rehearing en banc and, on rehearing, reversed the district court's judgment. *See A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996). On rehearing, the Eighth Circuit determined that the tribal court lacked subject matter jurisdiction over the dispute pursuant to Montana.

On appeal, the United States Supreme Court considered whether the Eighth Circuit properly applied the *Montana* framework to the facts of the case. The Supreme Court noted that the accident occurred on a portion of a North Dakota state highway that ran through the reservation but was not under the dominion or control of the tribe.

> Forming part of the State's highway, the right-of-way is open to the public, and Traffic on it is subject to the State's control. The Tribes have consented to, and received payment for, the State's use of the 6.59-mile stretch for a public highway. They have retained no

> gatekeeping right. So long as the stretch is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude. *Cf. Bourland*, 508 U.S. at 689 (regarding reservation land acquired by the United States for operation of a dam and a reservoir, Tribe's loss of "right of absolute and exclusive use and occupation . . . Implies the loss of regulatory jurisdiction over the use of the land by others").

Strate, 520 U.S. at 455-56.

To determine whether a consensual relationship existed, the Supreme Court examined *Williams v. Lee*, 358 U.S. 217, 223 (1959) (finding tribal jurisdiction over a lawsuit arising out of an on-reservation sales transaction between a non-member plaintiff and member defendants); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (upholding tribal taxation on a non-member who owned livestock within tribal land); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (upholding tribal taxation of non-members who conducted business within tribal land); and *Washington v. Confederated Tribes of Coville Indian Reservation*, 447 U.S. 134, 152-54 (1980) (upholding tribal taxation of on reservation cigarette sales to non-members). Applying these cases, the Supreme Court in *Strate* concluded that the highway accident did not constitute a consensual relationship: "The tortuous conduct alleged in Fredericks' complaint does not fit [the first exception]. The dispute, as the Court of Appeals said, is 'distinctly non-tribal in nature.' It 'arose between two non-Indians involved in [a] run-of-the-mill [highway]

accident.'" *Strate*, 520 U.S. at 457 (quoting *A-1 Contractors v. Strate*, 76 F.3d 930, 940 (8th Cir. 1996)).

Relying on the Eighth Circuit's findings, the Supreme Court stated, "Although A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a 'consensual relationship' with the Tribes, 'Gisela Fredericks was not a party to the subcontract, and the [T]ribes were strangers to the accident.'" *Id.* (quoting *A-1 Contractors*, 76 F.3d at 940). The Supreme Court also concluded that the complaint did not fit within the second *Montana* exception. *Id.* At 459. In affirming the ruling of the Eighth Circuit Court of Appeals, the Supreme Court held that "tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty" granting the tribe such authority. *Id.* at 442. Therefore, the Supreme Court's holding was specific to factual situations involving motor vehicle accidents on a state highway by non-members.

The Court finds that this dispute is distinctively tribal in nature. Amerind administers a self insurance Risk pool that insures federally subsidized Indian housing owned and operated by Indian tribes. On December 28, 2001, Amerind entered into a "Certificate of Coverage" agreement with The Turtle Mountain Housing Authority to insure the Housing Authority against claims of personal Injury, property damage, business liability, employee dishonesty, and tribal housing officials'

Liability.[14] *See* Docket No. 20-4. On October 19, 2002, a fire started in a house located on the Turtle Mountain Indian Reservation which was owned by the Turtle Mountain Housing Authority. *See* Docket No. 25. The parties do not dispute that the Turtle Mountain Housing Authority was insured Under the terms and conditions of the insurance agreement at the time of the fire. Stacey Bruce and Ruth Poitra died as a result of the fire and Lonnie Thompson was seriously injured. *See* Docket No. 25.

The Defendants initiated a wrongful death and personal injury action against Amerind in Turtle Mountain Tribal Court for the damages sustained as a direct result of the fire. *See* Docket No. 25-10. The Defendants are members of the Turtle Mountain Indian Reservation. *See* Docket No. 25. The contract between Amerind and the Turtle Mountain Housing Authority is directly at the heart of this dispute. Amerind is a party to this action because it entered into a consensual Relationship with "the tribe or its members" and it contracted with the Turtle Mountain Housing Authority to provide insurance coverage for claims that arose out of the fire of October 19, 2002.

The Court finds the holding of the Turtle Mountain Tribal Court of Appeals, as set forth in its

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[14] The "Certificate of Coverage" agreement provides in pertinent part, "**We** [Amerind] cover damages a covered person is legally obligated to pay for **advertising injury, personal injury**, or **property damage** which takes place anytime during the term of coverage and are caused by an occurrence, unless stated otherwise or an exclusion applies. Exclusions to this coverage are described in the Cause of Loss Exclusions Section." *See* Docket No. 20-4, p. 23 (emphasis in original).

Memorandum Decision of July 5, 2007, to be persuasive and the holding is incorporated by reference in this decision. *See* Docket No. 20-8. In that decision, the Turtle Mountain Tribal Court of Appeals held that a direct action lies against Amerind if the plaintiffs (*Malaterre et al.*) Can establish that the Turtle Mountain Housing Authority was negligent and that such negligence was the proximate cause of the injuries sustained by the plaintiffs. *See* Docket No. 20-8. Amerind contends that the Turtle Mountain Tribal Court of Appeals decision is misguided and contrary to federal law. However, the Court notes that Amerind specifically agreed in the insurance contract that if any provisions of the policy conflict with tribal laws, then the terms and conditions of the policy are amended to conform to those laws. *See* Docket No. 20-4, pp. 93, 135. In other words, Amerind contractually agreed that a direct action lies against the insurer (Amerind) by a third party when tribal laws on the Turtle Mountain Indian Reservation so dictate.

The Court finds, as a matter of law, that the first *Montana* exception applies and that the Turtle Mountain Tribal Court has not exceeded its jurisdiction by exercising authority over Amerind Risk Management Corporation under the circumstances. The Court declines to enjoin the defendants from proceeding with a civil action in tribal court against Amerind. This case has been lingering in the tribal and federal courts for nearly six years. Justice requires that the case proceed to trial in tribal court and that the defendants be afforded a forum to litigate their claims.

III. CONCLUSION

The Court finds, as a matter of law, that this case satisfies the first exception of *Montana v. United States*, 450 U.S. 544, 565-66 (1981). A consensual relationship exists between Amerind Risk Management Corporation and the Turtle Mountain tribe or its members. Amerind voluntarily Entered into a contractual relationship with the tribe and the Turtle Mountain Housing Authority Through the "Certificate of Coverage" agreement and "Membership Subscription Agreement." The Contractual agreements were executed for the benefit of the Turtle Mountain Indian Reservation, the Turtle Mountain Housing Authority, and members of the tribe. Amerind agreed to be bound by the Laws of the tribe, the Turtle Mountain Tribal Court, and the Turtle Mountain Tribal Court of Appeals If any such laws are in conflict with the terms of the insurance policy. In essence, Amerind agreed To be bound by the decision of the Turtle Mountain Tribal Court of Appeals rendered on July 5, 2007, which expressly held that a direct action lies against Amerind.

For the reasons stated above, the motion for summary judgment (Docket No. 17) is DENIED, and the Court, *sua sponte*,[15] grants summary judgment in favor of the Defendants.

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[15] The prevailing view is that summary judgment may be granted in favor of a non-moving party or *sua sponte* by the court. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986); *Boyle v. Anderson*, 849 F. Supp. 1307, 1309 (D. Minn. 1994); *see generally* 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure Civil § 2720 (3d ed. 1998).

IT IS SO ORDERED.

Dated this 14th day of November, 2008.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court

APPENDIX D

Turtle Mountain Tribal Court of Appeals Notice of Entry of Appellate Order

(July 9, 2007)

TURTLE MOUNTAIN TRIBAL COURT OF APPEALS
TURTLE MOUNTAIN INDIAN RESERVATION
IN THE COURT OF APPEALS
BELCOURT, NORTH DAKOTA
TMAC-06-003

AMERIND RISK MANAGEMENT CORP.

Appellant,

v.

MALATERRE, ET AL,

Appellees,

NOTICE OF ENTRY OF APPELLATE ORDER

YOU WILL PLEASE TAKE NOTICE, that the APPELLATE MEMORANDUM DECISION, in the above-entitled action was entered and docketed in the office of the Turtle Mountain Appellate Court in Belcourt, North Dakota, on the 9th day of July, 2007, a copy of which response so entered is hereto attached and herewith served upon you.

Dated this 9th day of July, 2007.

Jolene A. House
Chief Clerk of Court

SEAL

APPENDIX E

Memorandum Decision of the Turtle Mountain Court of Appeals

(July 5, 2007)

TURTLE MOUNTAIN TRIBAL COURT OF APPEALS
TURTLE MOUNTAIN INDIAN RESERVATION
IN THE COURT OF APPEALS
BELCOURT, NORTH DAKOTA
TMAC-06-003

AMERIND RISK MANAGEMENT CORP.

Appellant,

V.

MALATERRE, ET AL,

Appellees,

MEMORANDUM DECISION

Before Chief Justice Jones, Justices Azure And Vondallrieke

CHIEF JUSTICE JONES FOR THE COURT:

Amerind Risk Management Corp. appeals from a decision of the lower court sustaining a direct action against it for the alleged negligence of the Turtle Mountain Housing Authority resulting in a

house fire in Unit #1221 killed two Turtle Mountain members and seriously injured another. The administrators of the estates of the decedents and the injured party then commenced this action against the Turtle Mountain Housing Authority and its "insurer", Amerind Risk Management Corp. The Housing Authority was voluntarily dismissed, but the Tribal Judge, the Honorable Beverly May, denied the motion of Amerind to dismiss the direct action against it finding that the cause of action is permitted under this Court's decision in *St. Claire v. Turtle Mountain Casino*, No TMAC 97-013 (May 11, 1998). Amerind then sought permission to file an interlocutory appeal from that decision and this Court granted the petition for permission to hear the matter on an interlocutory basis.[16] For the reasons stated herein this Court affirms the ruling of the Court below that the Appellees may bring a direct action against Amerind because federal law mandates that Indian Housing Authorities procure insurance to indemnify them against their liabilities arising from acts of negligence. The Appellees should have the opportunity to demonstrate that the Housing and employees were negligent and that negligence resulted in a liability subject to indemnification.

The Appellant raises several issues on appeal, each of which will be discussed in turn. It first alleges that the presiding Judge should have recused herself from hearing this matter because she is a

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[16] In general, decisions denying an entity the sovereign immunity defense are appealable as a matter of right before resolution of the merits of the claim under the collateral order doctrine.

tenant of the Turtle Mountain Housing Authority and that it should be excused from failing to file a motion to recuse because it was not aware that the matter bad been reassigned to her until the date of hearing. The Court rejects the argument that a Judge who resides in Housing Authority Housing is barred from presiding over an action involving the Housing Authority or its insurer. The Court will address the argument, notwithstanding the failure of the Appellant to file an appropriate motion to recuse below, because it appears that the argument was not waived below because the Chief Judge was presiding over the matter the reassignment came on or near the date of hearing below. No waiver of the alleged disqualification grounds is apparent from the record below.

In order to warrant a reversal of the order below on the ground of judicial bias the Appellant must overcome the presumption that a sitting Judge is impartial and should entertain all suits that come before her. The Appellant's argument is that the presiding Judge resided in a Housing Authority unit and is therefore unable to impartially resolve the issue of the direct suit against it because a ruling against the Appellant could possibly inure in some way to her benefit should be befall some inquiry at the hand of the Housing Authority. This is far too speculative to warrant recusal. In order to recuse for a personal proprietary or pecuniary interest, or one affecting the individual rights of the judge, the challenging party must demonstrate that the presiding Judge possesses an interest that will turn on the outcome of the individual suit before her. It is not sufficient to merely speculate that the Judge may benefit from the ruling in the future. If this were the case, Judges would have to be recused in cases

involving taxpayer suits or other suits involving classes of persons to whom the Judge belongs. Before a Judge is disqualified it must be demonstrated that she possesses a unique quality that distinguishes her from any other citizen or taxpayer and she has a direct pecuniary interest in the case before her. *See Worth v. Benton County Circuit Court.* 89 S.W.3d 391 (Ark. 2002) The Appellant cannot demonstrate that Judge May had a pending lawsuit against the Housing Authority or its insurer, nor does it proffer sufficient proof that the presiding Judge would benefit from a ruling either way in this case. Therefore the Court denies the appeal alleging that Judge May should have been disqualified from hearing the matter below.

The real crux of this appeal centers on the joinder of the Appellant as a party defendant in the lawsuit below. The Appellant contends that no direct cause of action lied against it both because the type of indemnification it provides the Housing Authority hinges on a finding of liability against the Authority, which no such finding was made below, and is not designed to protect the public against losses caused by the Housing Authority. Even if it does, according to the Appellant, Amerind is not a typical "insurance company", but instead is a type of "risk management" self-insurance pool that is not separate and distinct from the Housing Authorities themselves and therefore any suit against it is necessarily one against the sovereign that funds it.

Resolution of this issue necessarily involves a reexamination of this Court's ruling in St. Claire which is relied upon both parties to this appeal. This Court's decision in *St. Claire v. Turtle Mountain Chippewa Casino* has been the subject of numerous

appeals to this Court since its pronouncement in 1998. Many of those suits have addressed the issue of whether insurance is mandated under federal and tribal law, while others have addressed the issue of whether the Tribe has waived immunity from suit by procuring mandated insurance. The *St. Claire* decision recognized that lawsuits involving the allegedly negligent actions of a sovereign should not be dismissed on sovereign immunity grounds if the law underlying the Tribe's procurement of insurance reflects a legislative intent to provide a remedy to those injured by the sovereign, rather than to merely indemnify the sovereign for any losses it sustains in the operation of its lawful duties and responsibilities. This distinction is important because in many circumstances the Tribe is required to obtain indemnity insurance as a condition of receiving federal dollars, for example, and the clear intent of the insurance mandate is to protect the Tribe's assets instead of protecting the public against losses. That type of mandatory insurance is not a clear and unequivocal waiver of the immunity of the Tribe, whereas a congressional act or act of tribal government that clearly mandates that insurance be procured in order to protect third persons from losses is clearly a waiver of the immunity of the Tribe up to the limits of the mandated insurance. *See e.g., Boyles v. Farmers Mut. Hail Ins. Co. of Iowa*, 78 F. Supp. 706, 708-709 (D.C. Kan. 1948).

Therefore, in order for the Appellees to surmount the general obstacle to bringing a direct action against an insurer they must demonstrate: 1) that the insurer is providing coverage pursuant to a mandate of federal or tribal law; and 2) that the type of insurance mandated is specifically designed to protect the public against losses and not merely to

indemnify the insured. The latter inquiry would be self-defeating, however, if the Court merely examined the insurance policy to determine if there is reference to indemnification of public at large because all insurance policies necessarily include coverage for the insured only. If the insurance policy is mandated under the law, and includes language mandating that the carrier indemnify the insured for losses to the public, *St. Claire* suggests that the immunity of the insured entity would be waived to the limits of any insurance coverage. Otherwise, the insurance policy covering indemnification of the insured for losses to third-parties would be rendered superfluous because the insured would never be liable to the public because of its sovereign status.

This case presents an even more difficult public policy issue than that presented by the *St. Claire* case due to the deaths of two tribal members and the serious injuries to another because of the allegedly negligent acts of the Turtle Mountain Housing Authority. The Appellees spend some time in their brief pointing out the amounts of money paid by the Turtle Mountain Housing Authority to Amerind for risk-coverage purposes. The Court finds this information irrelevant. It cannot base its decision in this case on the mere fact that the Housing Authority has contributed substantially to Amerind in its quest to insure various Housing Authorities nationwide. Nor can the Court base a legal determination on the potential impact of permitting direct actions against insurance carriers on the underwriting of insurance policies for tribal programs. The Court can only assume that if an insurance policy requires the carrier to indemnify an insured for losses sustained by third parties those potential liabilities are written into the underwriting

decisions and the decisions made by Amerind regarding the contributions of each Indian Housing Authority to its risk pool.

The crux of the *St. Claire* ruling is that if the law mandates that a tribal entity possess liability insurance that mandates indemnification of losses to the public, merely permitting the tribal entity and its insurer to use the mantra of sovereign immunity to defeat all claims violates the clear intent of federal and/or tribal law that such claims should be covered under the policy of insurance provided.

Amerind also contends that it is not the typical insurance company, but instead is a type of inter-tribal housing risk pool that distinguishes it from general commercial liability insurance carriers and separates it from this Court's decision in *St. Claire* that clearly dealt with a commercial insurance carrier. This argument troubles the Court because this Court finds it laudable that Indian Housing Authorities have come together and pooled their resources in order to fulfill their obligations under NAHASDA to ensure that each individual Indian Housing Authority remains viable after losses are sustained. Federal regulations expressly countenance this type of self-insurance. *See* 24 CFR Part 1000. Those regulations, however, contemplate that this type of self-insurance would be conducted through "nonprofit insurance entities owned and controlled by Indian tribes and tribally-designated housing entities." As such, Amerind contends, it is no different than the Indian Housing Authorities it indemnifies and should therefore share in the immunity of those entities.

The Court first notes that the question of the right of Indian Housing Authorities to be shielded from sovereign immunity is an issue of much contemporary dispute. Recently the United States Court of Appeals for the Ninth Circuit held that the "sue and be sued" provision of an IHA's charter waived its immunity from suit in an action brought to challenge alleged construction defects in tribal housing. *See Marceau v. Blackfeet Housing Authority*, 455 F.3d 974 (9th Cir. 2006). The United States Court of Appeals for the Eighth Circuit has been much more ambivalent about this issue, strongly implying a **tribal** court cause of action against an Indian Housing Authority in *Weeks Construction v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986) but apparently retreating somewhat from that position in *Dillon v. Yankton Sioux Housing Authority*, 104 F.3d 581 (8th Cir. 1998) wherein the Court held that the IHA would have to expressly contract away the immunity defense. The Dillon case, however, did not discuss the availability of the defense in a tribal court setting, whereas the *Weeks* case dealt with the subject matter jurisdiction of the federal court to entertain a lawsuit against the IHA there and the Court held that the matter should be resolved in a tribal court. As the Ninth Circuit noted in *Marceau* the Eighth Circuit's analysis of the issue seems incoherent in light of the conflicting rulings in *Weeks Construction* and *Dillon*. The only way to reconcile the two may be to rule that the waiver of immunity contained in the tribal housing charters permits suits in tribal but not federal court.

This issue is not directly presented by this case, however, because the Plaintiff voluntarily dismissed the Housing Authority from this suit.

Amerind, however, argues that it is no different than the Housing Authorities it insures and is therefore entitled to the sovereign immunity defense. Even assuming that the Turtle Mountain Housing Authority may be immune from suit, the Court finds that its decision in *St. Claire* as well as its recent decision in *Gourneau v. Turtle Mountain Band of Chippewa Indians*, TMAC 02-10247 clearly hold that federal or tribal law mandating insurance to protect the public constitutes a limited waiver of the sovereign immunity defense that may be available to the party responsible for indemnifying the immune entity. As this Court held in *Gourneau*:

> " a congressional act or act of tribal government that clearly mandates that insurance be procured in order to protect third persons from losses is clearly a waiver of the immunity of the Tribe up to the limits of the mandated insurance. *See e.g., Boyles v. Farmers Mut. Hail Ins. Co. of Iowa*, 78 F. Supp. 706, 708 -709 (D.C. Kan. 1948)". Opinion at 3.

It is therefore of no utility for Amerind to argue that it should share in the immunity of the Housing Authorities that it indemnifies. *See also Smith Plumbing v. Aetna Casualty Insurance Co.*, 720 P.2d 499 (Ariz. 1986)(surety of immune Tribe not entitled to defend against its liabilities based upon the Tribe's immunity). If Amerind has a duty to indemnify the losses sustained by the Appellees it cannot avail itself of immunity to avoid its obligations. The Northern Plains Inter-Tribal Court of Appeals decision in *Mountain v. Fort Berthold Housing Authority and Amerind Risk Management*

Corporation. CV-18-18-01 (September 24, 2003) is not to the contrary. In Mountain the Court reversed a decision of the trial court permitting a direct suit against Amerind. In so doing, however, the Court noted that the reasoning of St. Claire did not apply to the case at bar because the Appellee had failed to point to any federal law mandating that the Housing Authority there have insurance to protect the public against losses. The Court did not repudiate the ruling in *St. Claire* but instead found insufficient briefing on the issue.

The Court now turns its attention to the real dispositive issue in this case- what is the nature of the legal obligation of the Turtle Mountain Housing Authority and its insurer to the Appellees in this case? Neither party seems to dispute the fact that federal law mandates that Indian Housing Authorities possess insurance; instead, they contest what type of coverage is mandated. Under the Native American Housing Assistance and Self-Determination Act of 1996 (hereinafter NAHASDA) Indian Housing Authorities receiving monies pursuant to that law from the federal government must abide by NAHASDA and the federal regulations implementing it. One requirement under NAHASDA is that each recipient of NAHASDA monies shall "maintain adequate insurance coverage for housing units that are owned or operated or assisted with grant amounts provided under this Act." 25 USC §4133. This language, in and of itself, does not meet the significant hurdles confronting a party seeking to mount a direct action against an insurance carrier. Further fleshed out, however, federal regulations implementing NAHASDA clearly dictate that recipients of NAHASDA monies must provide insurance to cover

liability claims. 24 CFR §1000.136 dictates that the mandated insurance must include adequate amounts to "indemnify the recipients against loss from fire, weather, **and liability claims** for all housing units owned or operated by the recipient." The actual certificate of coverage, attached to the Appellant's reply brief as Exhibit D, provides that Amerind will cover any liability claim for personal injury or property damage up to $1,000,000. The Court has reviewed the policy and finds nothing therein excluding liability claims arising from losses sustained by tenants or guests in Housing units.

Amerind quite naturally argues that these federal laws and regulations clearly reference the obligation of it to indemnify the Housing Authority for liability claims and not to its direct liability for losses sustained by others not affiliated with the IHA. Amerind is correct in its assertion that this language differs from the language of the mandatory insurance discussed in cases relied upon by this Court in *St. Claire* because the insurance policies therein, especially the policy involved in the *James* case from the North Dakota Supreme Court expressly referenced indemnification of third-party losses (taxi customers). However, some common sense has to be interjected into the analysis of what HUD intended when it mandated insurance coverage for liability claims. Who would the IHA be liable to if it is immune from suit? Liability implies a legal obligation to indemnify the insured for the obligations owed by the IHA to a third party not associated with it for a covered act of negligence. It could not mean the duty to indemnify the IHA against its own losses sustained by its negligent actions because such is already covered in the policy or would be covered by worker's compensation, which

does not seem to be the thrust of this particular risk pool. HUD clearly contemplated that third parties would have potential claims against IHA recipients of NAHASDA monies when the IHA or its employees were negligent. The mandated insurance is therefore designed to cover the losses of tenants occasioned by the negligence of IHA employees.[17]

The Court therefore concludes that the lower court did not err in finding that a direct action could lie against Amerind if the Appellees can demonstrate that the Turtle Mountain Housing Authority was negligent and that said negligence breached a duty of care owed to them. The Court understands the difficult implications raised by permitting a suit against an insurance company when the insured is not joined in the suit. However, the tribal court below has subpoena and other authority over entities that may possess immunity if necessary to resolve a cause of action pending before it. In addition the Housing Authority has a duty to assist its insurer in defending suits against it and Amerind would have the authority to seek the Court's intervention below to enforce that obligation should the Housing Authority not assist.

WHEREFORE, based upon the foregoing analysis the decision of the lower court is hereby AFFIRMED.

Dated this 5th day of July 2007.

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[17] In no way does the Court intimidate, however, that this liability would supersede the primary responsibility of an insurance carrier insuring the tenant for losses sustained such as rental insurance.

CHIEF JUSTICE BJ JONES

ATTEST: _____
Clerk of Courts

APPENDIX F

25 U.S.C. § 476

United States Code

Title 25. Indians

§ 476. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when--

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Revocation

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings

(1) The Secretary shall call and hold an election as required by subsection (a) of this section--

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall--

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

(h) Tribal sovereignty

Notwithstanding any other provision of this Act--

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document

adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

* * *

APPENDIX G

25 U.S.C. § 477

United States Code

Title 25. Indians

§ 477. Incorporation of Indian tribes; charter; ratification by election

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 therefor interests in corporate property, and such further powers as may be 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.

* * *

APPENDIX H

25 U.S.C. § 4133

United States Code

Title 25. Indians

§ 4133. Program requirements

(a) Rents

(1) Establishment

Subject to paragraph (2), each recipient shall develop written policies governing rents and homebuyer payments charged for dwelling units assisted under this chapter, including the methods by which such rents and homebuyer payments are determined.

(2) Maximum rent

In the case of any low-income family residing in a dwelling unit assisted with grant amounts under this chapter, the monthly rent or homebuyer payment (as applicable) for such dwelling unit may not exceed 30 percent of the monthly adjusted income of such family.

(b) Maintenance and efficient operation

Each recipient who owns or operates (or is responsible for funding any entity that owns or operates) housing developed or operated pursuant to a contract between the Secretary and an Indian housing authority pursuant to the United States Housing Act of 1937 [42 U.S.C.A. § 1437 et seq.] shall, using amounts of any grants received under

this chapter, reserve and use for operating assistance under section 4132(1) of this title such amounts as may be necessary to provide for the continued maintenance and efficient operation of such housing. This subsection may not be construed to prevent any recipient (or entity funded by a recipient) from demolishing or disposing of Indian housing referred to in this subsection, pursuant to regulations established by the Secretary.

(c) Insurance coverage

Each recipient shall maintain adequate insurance coverage for housing units that are owned or operated or assisted with grant amounts provided under this chapter.

(d) Eligibility for admission

Each recipient shall develop written policies governing the eligibility, admission, and occupancy of families for housing assisted with grant amounts provided under this chapter.

(e) Management and maintenance

Each recipient shall develop policies governing the management and maintenance of housing assisted with grant amounts under this chapter.

(f) Use of grant amounts over extended periods

(1) In general

To the extent that the Indian housing plan for an Indian tribe provides for the use of amounts of a grant under section 4111 of this

title for a period of more than 1 fiscal year, or for affordable housing activities for which the amounts will be committed for use or expended during a subsequent fiscal year, the Secretary shall not require those amounts to be used or committed for use at any time earlier than otherwise provided for in the Indian housing plan.

(2) Carryover

Any amount of a grant provided to an Indian tribe under section 4111 of this title for a fiscal year that is not used by the Indian tribe during that fiscal year may be used by the Indian tribe during any subsequent fiscal year.

(g) De minimis exemption for procurement of goods and services

Notwithstanding any other provision of law, a recipient shall not be required to act in accordance with any otherwise applicable competitive procurement rule or procedure with respect to the procurement, using a grant provided under this chapter, of goods and services the value of which is less than $5,000.

* * *

APPENDIX I

24 C.F.R. § 1000.136

Title 24. Housing and Urban Development

§ 1000.136. What insurance requirements apply to housing units assisted with NAHASDA grants?

(a) The recipient shall provide adequate insurance either by purchasing insurance or by indemnification against casualty loss by providing insurance in adequate amounts to indemnify the recipient against loss from fire, weather, and liability claims for all housing units owned or operated by the recipient.

(b) The recipients shall not require insurance on units assisted by grants to families for privately owned housing if there is no risk of loss or exposure to the recipient or if the assistance is in an amount less than $5000, but will require insurance when repayment of all or part of the assistance is part of the assistance agreement.

(c) The recipient shall require contractors and subcontractors to either provide insurance covering their activities or negotiate adequate indemnification coverage to be provided by the recipient in the contract.

(d) These requirements are in addition to applicable flood insurance requirements under § 1000.38.

* * *

APPENDIX J

Charter of Incorporation of Amerind Risk Management Corporation

CHARTER OF INCORPORATION
of
AMERIND RISK MANAGEMENT CORPORATION
A Federally Chartered Corporation

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

ARTICLE 1. Name.

The name of the Corporation is AMERIND Risk Management Corporation.

ARTICLE 2. Principal Office and Registered Office.

Section 2.1. Principal Office. The initial principal office of the Corporation shall be located at 6201 Uptown Blvd, NE, Suite 100, Albuquerque, New Mexico or such other location selected by the Board of Directors. As soon as practicable in the best interests of the Corporation, the principal office of the Corporation shall be relocated on the Indian

Country (as defined by 18 U.S.C. § 1151) of the Pueblo of Santa Ana or to such other location within Indian Country selected by the Board of Directors. The Corporation may have such other offices, either within or without Indian Country, as the Board of Directors may designate or as the business of the Corporation may require from time to time.

Section 2.2. Registered Office. The registered office of the Corporation required to be maintained by any jurisdiction in which the Corporation shall transact business may be, but need not be, identical with the principal place of business of the Corporation within that jurisdiction, and the registered office may be changed from time to time by the Board of Directors.1

ARTICLE 3. Authority for Charter.

Section 3.1. The Corporation is organized, incorporated and chartered under the laws of the United States as a Federally Chartered Corporation under25 U.S.C. § 477, as amended, and shall have the powers, privileges and immunities granted by that statute and embodied in this Charter. The granting of this Charter does not abrogate, limit or in any respect alter the sovereign immunity of any of the Charter Tribes or of any Member of the Corporation entitled to assert sovereign immunity.

ARTICLE 4. Status of Corporation.

Section 4.1. The Corporation is a legal entity jointly owned by the Charter Tribes, each of which is a federally-recognized Indian tribe, but is distinct and separate from the Charter Tribes. The activities, transactions, obligations, liabilities and

property of the Corporation are not those of the Charter Tribes.

Section 4.2. The Corporation shall have the same tax status and immunities under federal law as each Charter Tribe enjoys.

ARTICLE 5. Non-Stock Corporation.

Section 5.1. The Corporation shall be a non-stock corporation, the income of which shall not inure to the benefit of private individuals or organizations or to the benefit of the Charter Tribes in their capacity as Charter Tribes. Notwithstanding the foregoing, the Corporation may distribute its income, whether or not from current or accumulated earnings and profits, to Members of the Corporation in the form of premium or periodic contribution credits or dividends in the sole discretion of the Corporations Board of Directors.

Section 5.2. The Corporation shall not accumulate earnings and profits beyond the Corporations reasonable business needs, as determined by the Board of Directors.

Section 5.3. The authority of each Charter Tribe to manage the business affairs of the Corporation is by ratification of this Charter delegated to the Members of the Corporation as provided in this Charter, subject to the authorities reserved to the Charter Tribes in Section 9.1.5, Section 15.3, Section 15.4, Article 19, and Article 20.

ARTICLE 6. Period of Duration.

Section 6.1. The period of the Corporation's duration is perpetual, or until this Charter is

revoked or surrendered by Act of Congress, pursuant to 25 U.S.C. § 477, as amended.

ARTICLE 7. Corporate Purposes.

The purposes for which the Corporation is organized are:

Section 7.1. To promote the social welfare of Native Americans and Alaskan Natives by providing a means for Members as defined by Section 11.1 of this Charter to indemnify and financially protect against any risk of loss as maybe agreed upon between any of them and the Corporation, including, but not limited to, physical property damage, liability to third persons, employer liability, directors and officers liability, and errors and omissions, together with other financial services required by its Members.

Section 7.2. To promote the social welfare of Native Americans and Alaskan Natives by providing a means for non-Member Affiliates as defined by Section 11.6 of this Charter to obtain insurance coverage and other financial services.

Section 7.3. To promote the social welfare of Native Americans and Alaskan Natives by providing other services to Member entities and non-Member Affiliates as the Board of Directors may deem appropriate consistent with the purposes identified in Sections 7.1 and 7.2.

Section 7.4. To promote the social welfare of Native Americans and Alaskan Natives by providing other services to governmental entities, individuals, and business entities as the Board of Directors may

deem appropriate consistent with the purposes identified in Sections 7.1 and 7.2.

ARTICLE 8. Corporate Powers.

The Corporation is authorized:

Section 8.1. To acquire the rights and assets and assume the obligations and liabilities of AMERIND Risk Management Corporation. a not-for-profit corporation formed under the laws of the Red Lake Band of Chippewa Indians pursuant to Tribal Ordinance No. 1-75, whose Articles of Incorporation were filed for record in the Office of the Secretary of the Tribal Council of the Red Lake Band of Chippewa Indians on October 31, 1986.

Section 8.2. To acquire the rights and assets and assume the Obligations and liabilities of AMERIND Financial Services, Inc., a for-profit corporation formed under the laws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

Section 8.3. To engage in any lawful business permitted to a corporation organized under 25 U.S.C. § 4.77, as amended.

Section 8.4. To fix and require its Members to pay initial and periodic contributions pursuant to contracts to the extent such contributions are deemed necessary or appropriate to facilitate the general purposes of the Corporation, which power and authority shall include the power and authority to adjust any contribution with respect to any individual Member to reflect the type or degree of indemnification and financial protection provided to, and the risk of exposure and loss experience of each

Member in accordance with contracts entered into between the Corporation and its Members.

Section 8.5. To establish such reserve funds as the Board of Directors deems necessary and appropriate.

Section 8.6. To enter into and arrange for insurance and reinsurance contracts for excess, catastrophic, stop loss or any other such coverage as the Board of Directors deems necessary and appropriate.

Section 8.7. To establish and operate by contract or otherwise, a program of risk management including but not limited to identifying, evaluating, reducing, transferring, and eliminating factors and circumstances which could, result in physical property damage, liability to third persons and employer liability; establishing safety procedures and educational programs; and utilizing elements of insurance law, technology and general business administration to effectively manage risks.

Section 8.8. To establish and operate, by contract or otherwise, a program of claims management, including but not limited to identifying, resolving and planning for the funding of eligible claims made by or against a Member of the Corporation.

Section 8.9. To have a corporate seal which may be altered at the discretion of the Board of Directors; but failure to have or affix a corporate seal shall not affect the validity of any instrument or any action taken in pursuance thereof or in reliance thereon.

Section 8.10. To buy, sell, lease and otherwise acquire and maintain buildings, offices. and other appurtenances proper and necessary tor the carrying on of said business.

Section 8.11. To carry on its business either within or without lndian Country.

Section 8.l2. To guarantee, purchase, hold, assign, mortgage, pledge or otherwise dispose of capital stock, or any bonds, securities or other evidences of indebtedness created by any other corporation or organization that is inexistence under the laws of the United States, any state, Indian Nation, nation, government or country, and to exercise all the rights, privileges and powers of ownership.

Section 8.13. To enter into and make contracts of every kind and nature with any person, firm, association, corporation, limited liability company, municipality, nation, lndian Nation, state or body politic.

Section 8.14. To purchase, take by gift or bequest, acquire, own, lease, manage, operate, deal in and dispose of real and personal property of all kinds and descriptions, wherever situated.

Section 8.15. Subject to the limitations imposed by Article 9 of this Charter, to incur debts and raise, borrow and secure the payment of any money in any lawful manner, including the issue and sale or other disposal of notes, bonds, indentures, obligations, negotiable and transferable instruments and evidence of indebtedness of all kinds, whether secured by mortgage, pledge, deed of trust or otherwise.

Section 8.16. To apply for, obtain, register, purchase, lease or otherwise acquire, own, hold, use, operate and introduce, and to sell, assign or otherwise dispose of any trademark, trade name, patent, invention, improvements and processes used in connection with or secured under letters patent, and to use, exercise, develop, grant and give licenses in respect thereto.

Section 8.17. To apply for, purchase or acquire by assignment, transferor otherwise, and to exercise, carry out and enjoy any license, power, authority, franchise, concession, right or privilege which any government or authority or any corporation or other public body may be empowered to enact, make, or grant, and to pay for and to appropriate any of the Corporations assets to defray the necessary costs, charges and expenses thereof.

Section 8.18. To sue and be sued in the Corporation's name in courts of competent jurisdiction within the United States, but only to the extent provided in and subject to the limitations stated in Article 16 of this Charter.

Section 8.19. To elect Directors and to employ or appoint officers, employees and agents of the Corporation and to define their duties and fix their compensation.

Section 8.20. To lend money for its corporate purposes, invest and reinvest its funds and take and hold real and personal property as security for the payment of funds so loaned and invested.

Section 8.21. To sell, convey, mortgage, pledge, lease, exchange, transfer or otherwise dispose

of its corporate property or assets, subject to the limitations of Section 9.1.6 of this Charter.

Section 8.22. To adopt, repeal, alter or amend bylaws for the regulation of the internal affairs of the Corporation consistent with this Charter and applicable federal law, without the approval of the governing bodies of the Charter Tribes or the Secretary of the Interior.

Section 8.23. To pay pensions and establish pension plans, pension trusts, profit-sharing plans, and other incentive plans for any or all of its directors, officers and employees.

Section 8.24. To be a promoter, partner, member, associate, trustee or manager of any partnership, joint venture, limited liability company, trust or other enterprise.

Section 8.25. To make donations for the public welfare or for charitable, scientific, educational or governmental purposes.

Section 8.26. To have and exercise all lawful powers incidental, necessary or convenient to effect any or all of the purposes for which the Corporation is organized.

ARTICLE 9. Limitations on Corporate Powers.

Section 9.1. The Corporation shall have no power:

9.1.1 To expressly or by implication enter into any agreement of any kind on behalf of any Charter Tribe.

9.1.2. To pledge the credit of any Chatter Tribe.

9.1.3. To dispose of, pledge, or otherwise encumber real or personal property of any Charter Tribe.

9.1.4. To waive any right, privilege or immunity of, or release any obligation owed to, any Charter Tribe.

9.1.5 To enter into any sublease or other encumbrance or instrument respecting lands that may be leased to the Corporation by any Charter Tribe without the express written approval of the governing body of the Tribe leasing such lands to the Corporation.

9.1.6 To sell, lease, exchange or otherwise dispose of all or substantially all of the Corporation's assets, other than in the usual and regular course of its business, without the prior approval of the Members of the Corporation. Approval of the Members shall be in the form of a resolution duly adopted by a two-thirds majority vote at a special meeting of the Members duly called for that purpose as provided in this Charter.

9.1.7 To engage in any activity prohibited by Section 17 of the Indian Reorganization Act of 1934.

9.1.8 To purchase restricted Indian lands, or to sell, mortgage or grant a lease for any trust or restricted lands of any Charter Tribe or Member.

Section 9.2. The Charter Tribes shall not be liable on any contract of the Corporation, or for any tort committed by the Corporation or by any director,

officer, employee or agent of the Corporation. No member shall be liable on any contract of the Corporation (except to the extent so provided in a contract between the Corporation and such Member), or for any tort committed by the Corporation or by any director, officer, employee or agent of the Corporation. No lien against property of the Corporation shall be enforceable against any property of a Charter Tribe or any Member of the Corporation.

ARTICLE 10. Bylaws.

Section 10.1. The Bylaws may contain any provisions for the regulation and management of the affairs of the Corporation not inconsistent with applicable Federal law or with this Charter. The initial Bylaws of the Corporation shall be adopted by its first Board of Directors. The power to alter, amend or repeal Bylaws or to adopt new Bylaws shall be vested in the Board of Directors.

ARTlCILE 11. Membership and Membership Meetings.

Section 11.1. Eligibility. Only the following entities shall be eligible to become Members of the Corporation:

11.1.1 Federally-recognized Indian Tribes, as defined by the Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §4103(12)(B), including but not limited to the Charter Tribes.

11.1.2 Political subdivisions and governmental instrumentalities of a Federally-recognized lndian Tribe that is eligible for membership under Section 11.1.1.

11.1.3 Tribally Designated Housing Entities, as defined by the Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § 4103(21).

Section 11.2. Contributions. Each Member shall contribute capital to the Corporation in an amount determined by the Board of Directors.

Section 11.3. Voting Rights. Each Member shall have the right to vote as provided in this Charter and in the Bylaws of the Corporation. Each Member shall designate a full time employee, officer or member of its governing body as the Member's Designated Representative for the purpose of casting the Members vote.

Section 11.4. Meetings. Actions to be taken by the Members under this Charter shall be taken only at a meeting duly called as provided in this Charter, or without a meeting as may be provided in the Bylaws.

11.4.1 Annual Meeting. An annual meeting of the Members shall be held in each calendar year on the date and at the location fixed by the Board of Directors as provided in the Bylaws, for the purpose of electing directors and the transaction of any business that may come before said meeting.

11.4.2 Regular and Special Meetings. Regular and special meetings of the Members may be held on such dates and at such locations as may be fixed by the Board of Directors as provided in the Bylaws.

11.4.3 Notice. Written notice stating the place, day and hour of the meeting, and in the case of a special meeting the purpose or purposes for which

the meeting is called, shall be delivered to each Member not less than ten nor more than fifty days before the date of the meeting, either personally or by mail, by the Secretary of the Corporation. If mailed, the notice shall be deemed to be delivered when deposited in the United States mall addressed to the Member at its address as it appears o the records of the Corporation, with postage thereon prepaid.

11.4.4 Quorum. Fifty-one percent (51%) of the Members, represented in the person of their Designated Representative or by written proxy or as may otherwise be provided in the Bylaws, shall constitute a quorum at any meeting of the Members. A quorum once attained at a meeting shall be deemed to continue until adjournment notwithstanding the voluntary withdrawal of enough Members to leave less than a quorum. Once a quorum is established, the affirmative vote of the majority of the Members voting shall be the act of the Members, unless the vote of a super-majority is required by this Charter or a Bylaw of the Corporation.

11.4.5 Voting. At any meeting of the Members, a Member may cast its vote in person by its Designated Representative or by written proxy designating the person who is thereby authorized to cast the Member's vote at the meeting. A proxy may grant general authority to vote for the Member on any matter properly coming before the meeting, or it may be limited to specific matters and positions stated therein. Any proxy granted shall expire upon adjournment of the meeting for which it was given.

Section 11.5. Amerind Regions. For purposes of the election of Directors and such other matters as may be specified in the Bylaws, the Corporation's Members shall be divided into nine geographical regions to be defined by the Bylaws of the Corporation.

Section 11.6. Affiliates. Only the following persons or entities shall be eligible to become non-Member Affiliates of the Corporation:

11.6.1 individual Native Americans and Alaskan Natives,

11.6.2 business enterprises owned by Native Americans and Alaskan Natives,

11.6.3 business enterprises owned by a Federally-recognized Indian Tribe that is eligible for membership under Section 11.1.1,

11.6.4 state-recognized tribes, as defined by the Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § 4103(12)(C), and Native Hawaiians,

11.6.5 entities eligible for Membership in the Corporation under Section11.1.

ARTICLE 12. Board of Directors.

Section 12.1. Authority. The business affairs of the Corporation shall be managed exclusively by or under the direction of its Board of Directors, and all powers of the Corporation shall be exercised by or under the authority of the Board of Directors.

Section 12.2 Number and Tenure of Directors. The number of Directors shall be ten (10), of whom nine (9) shall be elected by the Members in accordance with section 12.5, and one shall serve as Chair and shall be elected by the Members at the Annual Meeting in accordance with section 12.5. A Director's term shall be three years, except as specified in section 12.3 and this section. A Director shall hold office until the Annual Meeting of the Corporation in the year of expiration of his or her term, and further until his or her successor is selected or appointed and qualified (if otherwise eligible to continuing to serve in the position), or until his or her earlier resignation, removal from office or death. For purposes of this section 12.2, a Director shall be deemed to have resigned immediately upon the termination of his employment as an official, officer, director, or employee of a Member.

Section 12.3. Initial Board of Directors. The initial Board of Directors of the Corporation shall consist of the following persons, who shall serve for the terms stated, subject to Section 12.2:

Position	Name	Term Expires
Chair	Robert Gauthier Salish-Kootenei Housing Authority P.O. Box 38 Pablo, MT 89855	January 2005
Region 1	Joel M. Frank, Sr. Seminole Tribe of Florida 6300 Stirling Road Hollywood, FL 33024	January 2006

Region 2	Cheryl Parrish Executive Director Bay Mills Housing Authority 3095 S. Towering Pines Brimley, MI 49715	October 2004
Region 3	Wayne Duoheneaux Cheyenne River Housing Authority PO. Box 480 Eagle Butte, SD 57625	January 2006
Region 4	Wayne Scribner The Chickasaw Nation Division of Housing PO Box 788 Ada, OK 74-821-0788	July 2005
Region 5	Jack Sawyer Projects Coordinator Utah Paiute Housing Authority 665 North 100 East Cedar City, UT 84720	January 2006
Region 6	John Petrich Swinornish Housing Authority P.O. Box 677 LaConner, WA 98257	September 2005
Region 7	Ralph Rogers Yerington Paiute Housing Authority 31 W. Loop Rd Yerington, NV 89447	February 2007
Region 8	Joyce Eddie Gila River Indian	July 2005

	Housing Authority PO Box 528 Sacaton, AZ 85247	
Region 9	Olen Harris North Pacific Rim Regional Housing Authority 8300 King Street Anchorage, AK 99518	December 2006

Section 12.4. Successor Boards.

12.4.1 At each annual meeting of the Members of the Corporation following issuance and ratification of this Charter, Directors shall be elected to succeed the Directors whose terms are scheduled to expire at that annual the Chair) shall expire each year and, upon completion of the initial term so fixed, each Director shall serve tor a term of three years, subject to Section 12.2.

12.4.2 Each Director, except the Chair, will be elected by majority vote of the Members located in the Region which that Director represents. The Bylaws of the Corporation shall provide for voting in person, by proxy. by mail or by other procedures deemed proper by the Board. Unless otherwise provided in the Bylaws, an election for Director shall be valid only if at least fifty-one percent (51%) of the eligible Members in the Region cast ballots tor the position.

12.4.3 The Members from each Region may also select an Alternate Director in the same manner as they elect a Director. Such Alternate Directors may attend meetings of the Board and participate in

its deliberations in the absence of the Director from such Region, provided however, that such Alternate Director shall be entitled to vote only when he or she holds the written proxy from the Director from his or her Region as provided in section 12.5.3.1.

12.4.4 The Chair of the Board of Directors will be elected by the Members at the Annual Meeting of the Members, and may serve for no more than two consecutive terms of three years per term, commencing from the date of the first annual meeting of Members following issuance and ratification of this Charter. In the event of resignation, removal, or death of the Chair, the Vice Chair shall fill the office of Chair until the next Annual Meeting, at which time the Members will elect a Chair for a three-year term.

Section 15.5. Election Procedures.

12.5.1 The Board is authorized to adopt Bylaws establishing rules for the conduct of elections which are not inconsistent with this Charter.

12.5.2 The Board shall, before each Annual Meeting, assign the responsibility of the election of the Chair to one of the Directors who is not a candidate for election.

12.5.3 In the election for the Chair at the Annual Meeting:

12.5.3.1 Each Member may vote for one candidate. A proxy which directs the holder to vote for a particular candidate may be filed with the Secretary of the Corporation or the Regional Secretary, as the case may be, who will cast the vote as directed in the proxy. After the votes have been

cast the total number of votes will be ascertained. The votes for the candidates will then be tallied and the results announced as provided in this section.

12.5.3.2 If one candidate has received a majority of votes, he or she will be declared elected.

12.5.3.3 If no candidate has received a majority of the votes, then the candidate with the least number of votes shall be dropped and voting will continue among the remaining candidates according to the provisions of this subparagraph. If there is a tie for the bottom place, the candidate to be dropped will be determined by lot, unless those tied decide to withdraw.

12.5.3.4 If any controversy should arise during the balloting which is not subject to resolution as provided in this section, the presiding officer shall rule as to the procedures taken. Such ruling shall be subject to appeal in accordance with Robert's Rules of Order, but no more than two Members may speak in support of or in opposition to any appeal.

Section 12.6. Qualifications.

12.6.1 Each of the nine Regional Directors and the nine Alternate Directors selected from the nine AMERIND regions shall be an official, officer, director or employee of a Member from the Region electing him or her at the time of election and shall so remain under standards determined by the Bylaws.

12.6.2 The Chair shall be an official, officer, director or employee of a Member, and shall be an enrolled member of a federally recognized Indian Tribe.

12.6.3 A Director may be engaged by the Corporation in any other capacity and shall not become disqualified as a Director by reason of serving the Corporation in such other capacity.

12.6.4 To be a candidate for Chair, a candidate must file his or her intent to be a candidate with the Secretary of the Corporation not less than 120 days before the date the election is to be held.

Section 12.7. Duties of Directors. The Board of Directors shall manage the general affairs and business of the Corporation. A Director shall perform his duties as a Director in good faith, in a manner the Director believes to be in or not opposed to the best interests of the Corporation, and with such care as an ordinarily prudent person would use under similar circumstances in a like position. In performing such duties a Director shall be entitled to rely on factual information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:

12.7.1 one or more officers or employees of the Corporation whom the Director reasonably believes to be reliable and competent in the matters presented;

12.7.2 legal counsel, public accountants or other persons as to matters which the Director reasonably believes to be within such person's professional or expert competence; or

12.7.3 a committee of the Board upon which the Director does not serve, duly designated in accordance with a provision of the Bylaws, as to matters within its designated authority, which committee the Director reasonably believes to merit

confidence, but the Director shall not be considered to be acting in good faith if the Director has knowledge concerning the matter in question that would cause such reliance to be unwarranted.

Section 12.8. Directors' Meeting. The annual meeting of the Board of Directors shall be held immediately following the annual meeting of the Members. Special meetings of the Board of Directors may be called by the Chair or by a majority of Directors, as specified in the Bylaws. Meetings of the Board of Directors and any committee of the Board may be held at any place designated in accordance with the Bylaws.

Section 12.9. Notice of Meetings. Written notice stating the place, day and hour of the meeting, and in the case of a special meeting the purpose or purposes for which the meeting is called, shall be delivered to each Director and Alternate Director not less than five nor more than thirty days before the date of the meeting, either personally, by fax, by email or overnight mail or regular mail, by the Secretary of the Corporation at the direction of the Chair or Directors calling the meeting. The notice shall be deemed to be delivered when deposited in the United States mail addressed to the Director at the address appearing on the records of the Corporation, with postage thereon prepaid, or otherwise transmitted to the fax number or email address as it appears on the records of the Corporation. No business other than that specified in such notice shall be transacted at any special meeting. At any meeting at which every member of the Board of Directors shall be present, although held without notice, any business may be transacted

which might have been transacted if the meeting had been duly called.

Section 12.10. Waiver of Notice. A Director may waive any notice required to be given either before or after the meeting. The attendance of a Director at a meeting shall constitute waiver of notice of such meeting, except where the Director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting was not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the Board need be specified in the waiver of notice of such meeting.

Section 12.11. Quorum. A majority of Directors then holding office, shall constitute a quorum at a meeting of the Board. A quorum, once attained at a meeting, shall be deemed to continue until adjournment notwithstanding the voluntary withdrawal of enough Directors to leave less than a quorum.

Section 12.12. Voting. At a meeting of the Board of Directors, each Director has one vote. Once a quorum is established, the affirmative vote of a majority of the Directors voting on a matter shall be the act of the Board, unless the vote of a super-majority is required by this Charter or by a Bylaw.

Section 12.13. Board Action. Except as otherwise provided in this section, the Board shall act only by vote of the Board at a duly convened meeting, and individual Directors shall have no power to act for or on behalf of the Corporation without a meeting of the Board or of a duly

established committee of the Board. Any action required or permitted to be taken at a meeting of the Board of Directors may be taken without a meeting by written consent setting forth the action taken, signed by all the Directors and such written consent shall have the same effect as a unanimous vote taken at a duly called meeting. The Board may adopt such rules and regulations for the conduct of their meetings and the management of the Corporation as they may deem proper, not inconsistent with this Charter, the Bylaws of the Corporation and applicable federal law.

Section 12.14. Meeting Options. Except as otherwise restricted by the Bylaws of the Corporation, members of the Board of Directors or any committee designated by the Board may participate in a meeting of the Board or committee by means of a conference telephone call or similar communications equipment by which all persons participating in the meeting can hear each other at the same time and participation by such means shall constitute presence in person at the meeting.

Section 12.15. Committees.

1215.1 An Executive Committee of the Corporation, which shall be a standing committee comprised of three Directors and the Chair, shall be elected by the Board each year. The purpose of this Committee is to conduct essential business (not in conflict with policies of the Board) of the Corporation between regularly scheduled Board Meetings. The Executive Committee shall be empowered to conduct all of the business of the Corporation, except that it is empowered to conduct all of the business of the Corporation, except that it is prohibited from

amending the Bylaws or the Charter, from petitioning Congress to surrender or revoke the Charter, or from removing any Directors.

12.15.2 The Corporation shall have such other standing and special committees as maybe established by the Bylaws or action of the Board of Directors.

12.15.3 Each additional committee, if formed, shall have such purposes and authority as the Bylaws or Board of Directors may provide, except that these committees shall not have authority to: (a) remove any Directors from office; (b) distribute or otherwise dispose of any property of the Corporation; (c) create any debt of the Corporation or grant any security interest or collateral therefore; (d) alter, amend, or repeal any Bylaw or any resolution of the Board; or (e) petition Congress to approve the surrender or revocation of the Charter. All committees will he chaired by a Director and will include at least two additional Directors among its membership.

Section 12.16. Removal of Directors. A Director or Alternate Director maybe removed as provided in the Bylaws.

Section 12.17. Vacancies. Whenever any vacancy shall occur in the Board of Directors by death, resignation, removal or otherwise, the same shall be filled without undue delay as provided in the Bylaws. The person so chosen shall hold office until the next annual meeting.

Section 12.18. Presumption of Assent. A Director who is present at a meeting of the Board of Directors at which action on any corporate matter is

taken shall be presumed to have assented to the action taken, unless such dissent shall be entered in the minutes of the meeting or unless the Director shall file a written dissent to such action with the person acting as the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the Secretary of the Corporation immediately after the adjournment of the meeting. Such right to dissent shall not apply to a Director who voted in favor of such action.

Section 12.19. Liability of Directors. A Director shall not be personally liable to the Corporation or its shareholder for monetary damages for breach of fiduciary duty as a director unless

12.19.1 the Director has breached or failed to perform the duties of the directors office as provided in section 12.7 of this Charter, and

12.19.2 the breach or failure to perform constitutes willful misconduct or recklessness.

Section 12.20. Compensation. Each Director shall be paid a reasonable fee for attending meetings of the Board of Directors or a committee of the Board, in and amount to be set by resolution of the Board of Directors, plus reimbursement for actual travel and lodging expenses necessitated by attendance at the meeting.

ARTICLE 13. Officers of the Corporation.

Section 13.1. Number and Positions. The officers of the Corporation shall be the Chair of the Board, one or more Vice Chairs of the Board as may be set forth in the Bylaws, the President, one or more vice presidents as may be set forth in the Bylaws.

the Secretary, and the Treasurer, and such Assistant Secretaries and Assistant Treasurers as the Board shall from time to time determine.

Section 13.2. Election. All officers of the Corporation except the Chair shall be elected by the Board of Directors at its annual meeting, and shall hold office for the term of one year or until their successors are duly elected. The Chair shall be elected by the Members as provided in this Charter and the Bylaws.

Section 13.3. Initial Officers. The initial officers of the Corporation shall be appointed by the initial Board of Directors and shall serve until the first annual meeting of the Board following the issuance and ratification of this Charter, or until their successors are elected and shall qualify.

Section 13.4. Duties of Officers. The duties and powers of the officers of the Corporation shall be as provided in the Bylaws of the Corporation.

Section 13.5. Compensation. The officers shall receive such expense reimbursement, salary and/or compensation as may he determined by the Board of Directors.

Section 13.6. Resignation and Removal of Officers. Any officer may resign at any time by giving written notice to the Chair of the Board of Directors, and such resignation shall be effective on the date specified in the notice. Any officer or agent of the Corporation, except for the Chair, may he removed by the Board of Directors whenever in its judgment the best interests of the Corporation will be served thereby, but such removal shall be without prejudice to the rights, if any, of the person removed.

Election or appointment of an officer or agent shall not itself create contract rights. The Chair may be removed by the Board only for cause by a vote of two-thirds of the remaining Directors in office or by the Members. as provided in the Bylaws.

Section 13.7. Vacancies. All vacancies in any office, except for the Chair, shall be filled by the Board of Directors without undue delay, at its regular meeting or at a meeting specially called for that purpose for the unexpired portion of the term.

ARTICLE 14. Indemnification.

Section 14.1. The Corporation may, in the discretion of the Board of Directors, indemnity any current or former director, officer or employee against reasonable expenses actually and necessarily incurred by him or her in connection with the defense of any action, suit, or proceeding in which he or she is made a party by reason of being, or having been, such director, officer or employee of the Corporation, and the reasonable costs of settlement of any such action or proceeding, it a majority of Board members not seeking indemnification or otherwise involved in the controversy shall determine in good faith:

14.1.1 That such person acted in good faith; and

14.1.2 That the person reasonably believed:

14.1.2.1. in the case of conduct in the person's official capacity with the Corporation, that the persons conduct was in the Corporations best interest; and

14.1.2.2. in all other cases, that the person's conduct was at least not opposed to the Corporations best interests; and

14.1.3 in the case of any criminal proceeding, the person had no reasonable cause to believe the persons conduct was unlawful; and

14.1.4 That any legal fees paid or any settlements made are reasonable; and

14.1.5 That the person seeking indemnification did not act beyond the scope of his or her employment or office; and

14.1.6 That it is in the best interests of the Corporation that indemnification be made.

Section 14.2. If the Board is unable to act on a request for indemnification due to lack of a disinterested quorum, the decision whether to indemnity shall be submitted to the Members.

ARTICLE 15. Books and Records

Section 15.1. The Corporation shall maintain its financial records inconformity with generally accepted accounting principles.

Section 15.2. The Corporation shall keep correct and complete books and records of accounts and shall keep minutes of the proceedings of its Members and Board of Directors. All books, records and minutes may be in written form or in any other form capable of being converted into written form within a reasonable time.

Section 15.3. The financial and operating records of the Corporation shall at all reasonable times be open to inspection by the authorized representatives of each Member of the Corporation and by those agents of each Charter Tribe as may be designated by resolution of the governing body of that Tribe.

Section 15.4. The Corporation shall, within 120 clays following the close of the Corporation's fiscal year, submit to the governing body of each Charter Tribe and to each Member of the Corporation an annual report including an audited financial statement.

ARTICLE 16. Claims against the Corporation.

Section 16.1. The Corporation is an instrumentality of the Charter Tribes and is entitled to all of the privileges and immunities of the Charter Tribes, individually and jointly, except at provided in this Article 16.

Section 16.2. The Corporation is hereby authorized to waive, as provided in this Article 16, any defense of sovereign immunity from suit the Corporation, its Directors, officers, employees or agents may otherwise enjoy under applicable federal, state or tribal law, arising from any particular agreement, matter or transaction as may be entered into to further the purposes of the Corporation, and to consent to alternative dispute resolution mechanisms such as arbitration or mediation or to suit in tribal, state and/or federal court.

Section 16.3. The Corporation is hereby authorized to waive, as provided in this Article 16, any defense the Corporation, its Directors, officers,

employees or agents may otherwise assert that federal, state or tribal law requires exhaustion of tribal court remedies prior to suit against the Corporation in a state or federal court otherwise having jurisdiction over the subject matter and the parties.

Section 16.4. Any waiver by the Corporation authorized by section 16.2 or section 16.3 shall be in the form of a resolution duly adopted by the Board of Directors, which resolution shall not require the approval of the Charter Tribes or the Secretary of the Interior. The resolution shall identify the-party or parties for whose benefit the waiver is granted, the transaction or transactions and the claims or classes of claim for which the waiver is granted, the property of the Corporation which may be subject to execution to satisfy any judgment which may entered in the claim, and shall identity the court or courts in which suit against the Corporation may be brought Any waiver shall be limited to claims arising from the acts or omissions of the Corporation, its Directors. officers, employees or agents, and shall be construed only to effect the property and income of the Corporation.

Section 16.5. Nothing in this Charter and no waiver of the Corporation's sovereign immunity pursuant to this Article shall be construed as a waiver of the sovereign immunity of any of the Charter Tribes or any other instrumentality of any of the Charter Tribes, and no such waiver by the Corporation shall create any liability on the part of any of the Charter Tribes or any other instrumentality of any of the Charter Tribes for the debts and obligations of the Corporation, or shall be construed as a consent to the encumbrance or

attachment of any property of any of the Charter Tribes or any other instrumentality of any of the Charter Tribes based on any action, adjudication or other determination of liability of any nature incurred by the Corporation.

Section 16.6. Nothing in this Charter, and no action taken by the Corporation pursuant to this Charter, shall be construed as permitting, recognizing. or granting any state any regulatory jurisdiction or taxing jurisdiction over the property or activities of the Corporation or its employees located within the boundaries of the Indian Country of any Charter Tribe or any Member Tribe.

ARTICLE 17. Seal.

The seal of the Corporation shall be as follows:

AMERIND RISK MANAGEMENT
CORPORATION
United States of America

ARTICLE 18. Merger.

Section 18.1. This Corporation is authorized to merge with Amerind Risk Management Corporation, a non-profit corporation incorporated under the laws of the Red Lake Band of Chippewa Indians, and with Amerind Financial Services, Inc., a for-profit corporation incorporated under the laws of the Confederated Tribes of the Salish and Kootenai Reservation, on the terms provided in this Article. The other corporation shall comply with all applicable provisions of its Articles of Incorporation and any other requirements of the tribe under whose laws the other corporation was created. This Corporation shall follow the procedures established

by this Article or as may otherwise be established by federal law. A merger conducted in conformity with this Article shall not require the approval of the Secretary of the Interior.

Section 18.2. The Board of Directors of this Corporation shall by resolution approve a plan of merger setting forth the details of the proposed merger. The plan of merger shall provide that this Corporation is to be the surviving corporation following the proposed merger, and shall not include or be deemed to require any amendment of this Charter.

Section 18.3. Upon approval of the plan of merger by the Board of Directors of this Corporation as provided in this Article and by the other corporation as provided by tribal laws governing that corporation, articles of merger shall be executed by each corporation by its chairman of the board, president or vice-president and by its secretary. The executed articles of merger shall be filed with the Secretary of the Interior and as required by the tribal laws governing that corporation. The merger shall become effective as to this Corporation upon delivery of the articles of merger to the Secretary of the Interior and shall be effective as to the other corporation as provided by the tribal laws governing that corporation. The Board of Directors of this Corporation shall provide the Secretary of the Interior written certification by the Red Lake Band of Chippewa Indians or by the Confederated Tribes of the Salish and Kootenai Reservation, as applicable, that the merger of the other corporation has become effective under the laws of that tribe.

Section 18.4. When the merger has become effective as to both corporations, this Corporation and the other corporation shall become a single corporation, which shall be this Corporation and which shall be governed by this Charter.

Section 18.5. The surviving corporation shall have all the rights, privileges, immunities and powers of a corporation organized under 25 U.S.C. § 477 as specified in this Charter. This Corporation shall acquire all the rights and

Section 19.1. After issuance of this Charter by the Secretary of the Interior and ratification by the governing body of each Charter Tribe, the Corporation may be dissolved only as provided in this Article.

Section 19.2. The Corporation may be dissolved by the act of the Corporation as follows:

19.2.1 The Board of Directors shall adopt a resolution recommending that the Corporation be dissolved and directing that the question of dissolution be submitted to a vote of the Members, which may be either an annual or special meeting.

19.2.2 Written notice shall be given to the Members in the manner provided in this Charter for giving notice of Membership meetings, and shall state that the purpose, or one of the purposes, of the meeting is to consider the advisability of dissolving the Corporation.

19.2.3 At the Membership meeting, a vote shall be taken on a resolution to dissolve the Corporation .

19.2.4 A copy of any resolution stating the Members' intent to dissolve, verified by one of the officers of the Corporation, shall be delivered to the governing body of each Charter Tribe. The governing body of each Charter Tribe shall by duly enacted and verified resolution inform the Secretary of the Interior whether that Charter Tribe consents to dissolution of the Corporation.

19.2.5 If one or more of the Charter Tribes does not consent to dissolution of the Corporation, the Corporation shall continue to carry on its business pursuant to the Charter issued to the Charter Tribe(s) not consenting to dissolution. The Charter issued to a Charter Tribe consenting to dissolution shall continue in effect until revoked by Congress.

19.2.6 If all of the Charter Tribes consent to dissolution of the Corporation, the Corporation shall cease to carry on its business, except insofar as necessary for the winding up thereof, but its corporate existence shall continue until this Charter is revoked by act of Congress. The Corporation shall cause notice of dissolution to be mailed to each known creditor of the Corporation; shall proceed to collect Its assets, pay, satisfy and discharge its liabilities and obligations and do all other acts required to liquidate its business and affairs.

19.2.7 After paying or adequately providing for the payment of all its obligations, the Corporation shall distribute the remainder of its assets, either in cash or in kind, to entities organized and operated exclusively for tribal governmental, charitable or educational purposes that shall at the time qualify as entities not subject to the federal income tax because

of their status as Indian tribal governments or political subdivisions of Indian tribal governments or that qualify as tax exempt organizations under Section 501(c) of the Internal Revenue Code.

19.2.8 By resolution of the Board of Directors or by resolution adopted by the governing body of all the Charter Tribes that had previously consented to dissolution of the Corporation at any time prior to revocation of this Charter by act of Congress, the Corporation may revoke voluntary dissolution proceedings. Written notice of the revocation shall be filed with the Secretary of the Interior. Upon filing the notice of revocation of voluntary dissolution proceedings, the revocation shall be effective and the Corporation may again carry on its business.

19.2.9 If voluntary dissolution proceedings have not been revoked, when all debts, liabilities and obligations of the Corporation have been paid and discharged, or adequate provision has been made therefore, and all of the remaining property and assets of the Corporation have been distributed as provided in this Charter, the Charter Tribes and the Secretary of the Interior shall take all actions necessary to obtain an act of Congress revoking this Charter and dissolving the Corporation.

ARTICLE 20. Amendments.

Section 20.1. The authority to petition for amendments to this Charter is vested in the governing bodies of the Charter Tribes, but such amendments shall have no legal effect until approved by the Secretary of the Interior and ratified by the governing body of each Charter Tribe in

accordance with 25 U.S,C. § 477, as amended, and in accordance with applicable tribal law.

Section 20.2. The Board of Directors may request the governing bodies of the Charter Tribes to petition the Secretary of the Interior for amendments to this Charter, but the final decision on submitting any such petition shall be made by the governing bodies of the Charter Tribes.

CERTIFICATE OF APPROVAL

I, David W. Anderson /s/), Assistant Secretary - Indian Affairs, By virtue of the authority granted to the Secretary of the Interior by the Act of June 18, 1934 (48 Stat. 984, 25 U.S.C. § 466), as amended, and delegated to me by 209 D.M. 8.1, do hereby approve this Federal Charter of incorporation for use by the Red Lake Band of Chippewa Indians, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Pueblo of Santa Ana and the enterprise Amerind Risk Management Corporation. It shall become effective upon ratification by the Red Lake Band of Chippewa Indians, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Pueblo of Santa Ana, PROVIDED, that nothing in this approval shall be construed as authorizing any action under this document that would be contrary to federal law.

/s/
Assistant Secretary – Indian Affairs

Washington D.C.

Date:

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