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TRIBAL COURT

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION**

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**EAGLE BEAR, INC. and WILLIAM  
BROOKE,** )

**Plaintiffs,** )

**v.** )

**THE BLACKFEET INDIAN NATION  
and THE BLACKFEET TRIBAL  
COURT,** )

**Defendants.** )

) **Cause No. 4:21-cv-00088-BMM**

) **DEFENDANTS' MEMORNDUM  
IN OPPOSITION TO THE  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

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COMES NOW the Defendants the Blackfeet Indian Nation and Blackfeet Tribal Court, by and through counsel, and hereby respectfully submit their Memorandum in Opposition to the Plaintiffs' Motion for Preliminary Injunction, as follows:

### **INTRODUCTION**

This matter arises out of the Bureau of Indian Affairs Blackfeet Agency's 2008 cancellation of a Business and Recreation Lease of Blackfeet Nation trust land, between the Blackfeet Nation and Plaintiffs Eagle Bear, Inc. (Eagle Bear) and its principal and controlling owner William Brooke (Brooke), and 13 years of illegal trespass on and unauthorized use of Blackfeet Nation land by the Plaintiffs. Because this matter involves the exercise of Blackfeet Nation sovereign power to exclude, as the gate-keeper of its own land, the Blackfeet Nation has jurisdiction over the Blackfeet Nation's claims and over both Eagle Bear, Inc. and Brooke personally in the Blackfeet Tribal Court.

Contrary to the Plaintiffs' claims, there is no lease for the Bureau of Indian Affairs ("BIA") to administer, and there is no dispute to arbitrate or to bring before this court (assuming that this court would have had jurisdiction) as the lease was properly cancelled in 2008. While Plaintiff Brooke, on behalf of Defendant Eagle Bear, Inc., initially appealed of the cancellation based upon the demonstrably false

claim that it had paid the late payment for which the lease was cancelled prior to receiving the cancellation letter, the cancellation became final for the Bureau of Indian Affairs (the Department) 31 days after he withdrew his appeal. The cancellation decision then became final for the Agency (the Department of the Interior) and the six-year general statute of limitations on suits against the government has long since run. The 2008 lease cancellation became final in 2009 as a matter of law and is no longer subject to review.

Since the filing of the Plaintiffs' COMPLAINT and Motion for Preliminary Injunction in this Court, the Interior Board of Indian Appeals (IBIA) issued a preliminary decision on the Blackfeet Nation's Motion to Dismiss that entire proceeding for Mootness. See *Defendant's Exhibit "A", Order Denying Motion to Dismiss, Order Concerning BIA's jurisdiction and Order Staying Appeal Pending Proceedings*, IBIA 19-082. While the IBIA initially denied the Blackfeet Nation's Motion to Dismiss for failure to exhaust administrative remedies, the IBIA did not reach a decision on the merits of the mootness claim, rather it took three (3) actions: 1) stayed the administrative proceedings; 2) authorized the BIA to consider the Blackfeet Nation's June 18, 2021 letter; and, 3) directed the BIA to take action on or make a decision on the Blackfeet Nation's alternative demands in the June 18, 2021 letter, "that the [BIA] standby [sic]and honor the June 10, 2008 cancellation," and "join the [Tribe] in filing the appropriate pleadings in all

pending administrative proceedings to dismiss those proceedings as moot and meaningless”, or alternatively “that [BIA] produce any document, record, or other evidence that the June 10, 2008 cancellation . . . was reversed, set aside, withdrawn, or otherwise modified or amended.” IBIA, ORDER dated August 10, 2021.

Although the Blackfeet Nation Defendants appreciate the IBIA’s correct determination that the 2008 lease cancellation is a valid issue and has remanded the Motion for consideration by the BIA, as indicated herein the Blackfeet Nation believes that the 2008 lease cancellation is now beyond administrative review. Any administrative remedies were both exhausted and waived by Eagle Bear and Brooke. No further administrative review is necessary or required.

As set forth herein, the Plaintiffs’ Motion for Preliminary Injunction must be denied.

### **JURISDICTIONAL FACTS**

In April of 1997, the Blackfeet Nation entered into a Business and Recreation Lease with the Plaintiff Eagle Bear, Inc. acting through its principal owner and managing agent Plaintiff William Brooke, for approximately 54 acres of the Blackfeet Nation’s trust land on St. Mary Lake on the Blackfeet Indian Reservation. Because the lease was for Indian nation trust land, approval of the lease by the Bureau of Indian Affairs was required as a matter of law.



While the lease contained numerous provisions, of importance here are the requirements that Eagle Bear, Inc., 1) post a performance bond, 2) pay an annual rental payment and an annual gross receipts royalty payment (the latter two referred to collectively as “rent” in the lease), and 3) that interest and penalty automatically accrued on any late rental payment. Failure to post the bond or make the rental payments on time were the only grounds for cancellation of the lease. Pursuant to the agreement, only the BIA could cancel the lease, after due notice and an opportunity to cure.

Eagle Bear, Inc. was in default under the lease from the moment the ink was dry on the signatures because it failed to post the required performance bond. The required performance bond had still not been posted when the lease was cancelled in 2008. Thereafter in 2001 and again in 2004 the BIA sent Eagle Bear, Inc. default notices for failure to pay the rental payments in a timely manner. While Eagle Bear ultimately paid both late payments, it failed to pay the interest on the 2004 late payment, which meant that the default had not been cured, the lease was not current and Eagle Bear was still in default. Interest on that payment continued to accrue up to the time of cancellation in 2008 (and thereafter).

Eagle Bear failed to pay the 2007 annual rental payment due on November 30, 2007. Following the procedure agreed to in the lease and required by the Federal regulations, the BIA sent Eagle Bear notices of default and an opportunity

to cure the default, and further advised Eagle Bear that failure to cure the default would result in the lease being cancelled.

After Eagle Bear's continued failure to pay the November 2007 annual rental payment, on June 10, 2008 the BIA Blackfeet Agency sent Eagle Bear, Inc. a certified letter advising it that the lease have been cancelled for non-payment of the November 2007 annual rental payment. *Defendants' Exhibit "B" (June 10, 2008 Cancellation Decision Letter)*. Eagle Bear was advised of its appeal rights and that it was required to send a copy of any Notice of Appeal to all interested parties and to certify to the BIA that it had done so. *Id.* Eagle Bear received the cancellation notice on June 12, 2008.

Plaintiff William Brooke, acting on behalf of Eagle Bear, Inc. filed a Notice of Appeal and Statement of Reasons with the BIA Blackfeet Agency and Rocky Mountain Regional Office on June 18, 2008, whereby Eagle Bear appealed the Blackfeet Agency's decision to cancel the lease. *Defendants' Exhibit "C"; (Eagle Bear Notice of Appeal and Statement of Reasons, dated June 18, 2008)*. The only claim made in its Appeal and Statement of Reasons by Eagle Bear, Inc. as to why the lease should not be cancelled was its demonstrably false claim that it had paid the past due annual rental payment on June 6, 2008, before it received the lease cancellation letter. *Id.* Eagle Bear made no claim in its appeal regarding lack of notice and it failed to make any claim that the cancellation was subject to

arbitration. Nor did Eagle Bear demand arbitration. However, under the applicable regulations, Eagle Bear's appeal stayed the cancellation.

According to BIA Records, Eagle Bear, Inc.'s check for the November 2007 payment was dated June 16, 2008 and was not received by the BIA until June 20, 2008, both of which were after Eagle Bear received the cancellation letter. *See Defendants' Exhibit "D" (Eagle Bear's check for 2007 Annual rental payment dated June 16, 2008), and Defendants' Exhibit "E" (BIA payment records for Eagle Bear/Blackfeet Nation Lease showing date of payments).* Both the BIA Blackfeet Agency and the Rocky Mountain Regional Office advised Eagle Bear that it had a duty to serve any interested parties and to file a certification with the BIA Regional Office that it had done so. Eagle Bear never fulfilled this regulatory requirement (certifying to the BIA that had served the interested parties).

There is no record of any action by the Rocky Mountain Regional Office on the Eagle Bear lease cancellation between July 25, 2008 (when the Regional office sent an acknowledgment letter to Eagle Bear) and January of 2009.

On January 5, 2009, Plaintiff William Brooke, acting on behalf of Eagle Bear, Inc. sent a letter to the Superintendent of the Blackfeet Agency withdrawing Eagle Bear's appeal. *See Defendants' Exhibit "F" (Eagle Bear letter dated January 5, 2009).* The letter falsely claims that the lease was current to the date of the letter, and then unilaterally declares that the lease is current. *Id.* At the time

that it withdrew its appeal, Eagle Bear, Inc. was NOT current on the lease: interest was still running on the 2004 late payment, it had failed to pay the required interest and penalties on the delinquent November 2007 annual rental payment and (assuming for the sake of argument that the lease was still in effect, which it was not) Eagle Bear had already defaulted on the annual gross receipts royalty payment that was due in November of 2008.

After Eagle Bear, Inc. withdrew its appeal, the June 10, 2008 decision of the Blackfeet Agency cancelling Eagle Bear lease was never reversed, rescinded, withdrawn, modified, amended, recalled or changed in any action by the BIA after the cancellation decision letter was issued. While William Brooke on behalf of Eagle Bear, Inc. claimed in its January 5, 2009 letter that he had discussion with BIA staff regarding the late payment and more recently Brooke has claimed that unnamed individuals at the BIA requested that he withdraw his appeal and that he had an agreement to do so, neither Eagle Bear, Brooke or the BIA have ever produced anything in writing evidencing this alleged agreement.

Because the lease was cancelled in 2008, Eagle Bear and Brook are now and have been for 13 years in illegal trespass on Blackfeet Nation land. They have also engaged in unauthorized use of Blackfeet Nation trust land for 13 years and are now trying to illegally remain on that land for another 25 years. Eagle Bear only acts through its owners, managers and agents: on these facts the conduct of both the

corporate entity (Eagle Bear, Inc.) and its managing owner William Brooke are actionable in the Blackfeet Tribal Court.

Considering the applicable law and the facts of this case, the Blackfeet Tribal Court has plausible and actual jurisdiction over the Blackfeet Nation's complaint filed in the Blackfeet Tribal Court against the Plaintiffs arising out of Eagle Bear and Brooke's illegal trespass and unauthorized use of Blackfeet Nation land for the past 13 years.

### **LAW AND ARGUMENT**

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. See *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). A preliminary injunction is an extraordinary remedy never awarded as a matter of right. *Winter, Id at 24.*

Applying this standard to the present case, the Plaintiffs' Motion for Preliminary Injunction must be denied. It is clear on the facts of this case, that the Blackfeet Nation Court plainly has jurisdiction over the claims and the parties in the proceeding before that court. Plaintiffs are not likely to succeed on the merits of their complaint (that the Blackfeet Tribal Court lacks jurisdiction). Nor will the Plaintiffs suffer irreparable injury if they are required to exhaust their remedies in

the Blackfeet Nation Court. Plaintiffs' assertion that they will suffer "inequitable . . . injury" must be rejected; the Plaintiffs are not entitled to equity as they do not have "clean hands".

Based on established jurisdictional principles, the Blackfeet Tribal Court has jurisdiction over the claims and the parties before that Court. Applying the *Winter* factors, the Plaintiffs' Motion for Preliminary Injunction must be denied. The Plaintiffs are not likely to succeed on the merits (whether the Blackfeet Tribal Court has jurisdiction over the underlying claims), they will not suffer irreparable injury if preliminary relief is not granted, and the balance of the equities and public interest weigh in favor of exhaustion of tribal court remedies and full development of a record before the Tribal judicial system.

### **ANALYSIS**

In support of their failed argument for the issuance of a Preliminary Injunction, Plaintiffs Eagle Bear and Brooke ignore both the applicable facts and the law. While the Plaintiffs appear to recognize that the land upon which their conduct occurred is Blackfeet Indian Nation trust land, they fail to recognize that the analytical frame-work for determining whether the Blackfeet Nation has jurisdiction does not start with path-marking case of *Montana v. United States*, 450 U.S. 544 (1981) and its progeny. The general rule of *Montana*, that the sovereign powers of an Indian Nation do not extend to the activities of non-Indians on non-

Indian land within a reservation, does not apply here. The activities here occurred on Blackfeet Nation owned land.

When viewed in the context of the relevant facts and applicable law, the Plaintiffs' arguments for Preliminary Injunction fail and must be rejected.

**A. The Plaintiffs are not likely to succeed on the merits of their claim that the Blackfeet Tribal Court lacks jurisdiction.**

While Plaintiffs Eagle Bear and Brooke address all four of the preliminary injunction factors set out in *Winter*, they make only conclusory arguments on the factors of irreparable injury, the equities and public interest. Plaintiffs' primary argument for a Preliminary Injunction is their flawed assertion that the Blackfeet Tribal Court plainly lacks jurisdiction over the parties and claims before the Tribal Court.

It is now an axiom of Federal Indian Law that Indian Tribes are unique aggregates retaining some aspects of their inherent sovereignty over their land and their territory. While Indian tribes no longer possess absolute sovereignty over non-Indians or non-Indian land within their reservations, in certain instances Tribes still retain inherent jurisdiction where non-Indian activity occurs on Indian land. Where the activities of non-Indians occurs on tribally owned land within an Indian reservation and there are no competing or overriding state interests, the authority of a tribe to regulate this conduct by adjudication, regulation or otherwise is at its high point.

Because the conduct of Plaintiffs Eagle Bear and Brooke which is the subject of this lawsuit occurred within the Reservation on trust land owned by the Blackfeet Indian Nation, the Blackfeet Nation's inherent power to exclude and set conditions upon entry onto its land is a plausible or colorable basis for regulation of the Plaintiffs' conduct though a tort claim in the Blackfeet Tribal Court. Plaintiffs Eagle Bear and Brooke must therefore fully exhaust its remedies in the Blackfeet tribal court. Tribal court jurisdiction is not plainly lacking.

### **1. Exhaustion of Tribal Remedies.**

While non-Indians may bring a federal common law cause of action to challenge a tribal court's jurisdiction, the non-Indian must first exhaust tribal court remedies. *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir. 2008); *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Iowa Mutual Ins. Co. v. LaPlant*, 480 U.S. 9, 15-16 (1987).

The exhaustion requirement is not a jurisdictional bar, but rather a prerequisite to a federal court's exercise of its jurisdiction. *Burlington Northern Railroad Company v. Crow Tribal Council, et al.*, 940 F.2d 1239, 1245 n.3. "Therefore under *National Farmers*, the federal court should not even make a ruling on tribal court jurisdiction until tribal remedies are exhausted." *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F2d 1221, 1228 (9<sup>th</sup> Cir. 1989). That includes full review by the tribe's appellate court if one exists.



*Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) (holding that until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene). *Iowa Mutual*, 480 U.S. at 16-17.

The requirement of exhaustion of tribal remedies is not discretionary, it is mandatory. *Crawford v. Genuine Parts Co. Inc.*, 947 F.2d 1405 (9<sup>th</sup> Cir. 1991). There are recognized exceptions to this general rule. Exhaustion of tribal court remedies is not mandatory where tribal court jurisdiction is plainly lacking. *National Farmers Union v. Crow Tribe*, 471 U.S. 845, 856 (1985); *Crawford v. Genuine Parts Co. Inc.*, 947 F.2d 1405, 1415 (9<sup>th</sup> Cir. 1991); *Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196 (9<sup>th</sup> Cir. 2013).

Because tribal courts are competent law-applying bodies, the tribal court's determination of its own jurisdiction is entitled to some deference. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978)). When considering questions of tribal jurisdiction, the Court should be mindful of the "federal policy of deference to tribal courts" and that "[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts". *Water Wheel Camp Recreation Area v. LaRance*, 642 F.3d 802 (9<sup>th</sup> Cir.

2011), citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987); *United States v. Wheeler*, 435 U.S. 313, 332 (1978) (recognizing that tribal courts are important mechanisms for protecting significant tribal interests).

Eagle Bear and Brooke incorrectly assert that they should not be required to exhaust tribal court remedies because jurisdiction is plainly lacking. In making their argument, the Plaintiffs incorrectly apply the jurisdictional test first articulated in *Montana v. U.S.*, 450 U.S. 544 (1981), which applies only where the non-Indian conduct occurs on non-Indian fee land. *Water Wheel Camp Recreation Area v. LaRance*, 642 F.3d 802 (9<sup>th</sup> Cir. 2011); *Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196 (9<sup>th</sup> Cir. 2013); *Takeda v. Connelly*, CV 14-50-BMM; and *Big Horn Electric Coop., Inc. v. Big Man*, CV 17-65-BLG-SPW, Order dated Feb. 2, 2021.

Contrary to Plaintiffs' assertions, on the limited facts of this case, the Blackfeet Tribal Court does not plainly lack jurisdiction. Based upon the Tribe's ownership of the land and Eagle Bear and Brooke's admission that their conduct is taking place on Blackfeet Nation trust land, the Blackfeet Tribal Court has a plausible or colorable claim to jurisdiction over the Blackfeet Nation's tort claims in the Blackfeet Tribal Court.

Both the Great Falls Division and Billings Division of the Federal District Court in Montana have applied the principles set forth herein to require exhaustion

of tribal court remedies. In *Takeda Pharmaceuticals America, Inc., et al. v. Connelly*, CV 14-50-BMM, in an action brought challenging tribal court jurisdiction, the Court found that Takeda was required to exhaust tribal court remedies for a tort by a tribal member alleging distribution of a “bad drug” (Actos) to the tribal member on Blackfeet Nation land leased to the Indian Health Service.

The Court found that the Blackfeet Tribal Court had plausible jurisdiction over the tribal court action based on the non-Indian corporation’s alleged conduct on tribal trust land within the Blackfeet Indian Reservation. Relying on United States Supreme Court precedent (*Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); and *Montana v. United States*, 450 U.S. 544 (1981)), the Court determined that ownership status of the land was an important factor in determining tribal jurisdiction. *Id.* Applying the decisions of the Ninth Circuit Court of Appeals in *McDonald v. Means*, 309 F.3d 530 (9<sup>th</sup> Cir. 2002), *Water Wheel Camp Recreation Area v. LaRance*, 642 F.3d 802 (9<sup>th</sup> Cir. 2011), and *Grand Canyon Skywalk Development, LLC v. SA NYU WA Inc.*, 715 F.3d 1196 (9<sup>th</sup> Cir. 2013), the Court found that the land upon which the Indian Health Service hospital is located on the Blackfeet Indian Reservation (and where the Indian was prescribed the alleged bad drug), was land over which the Blackfeet Tribe maintained a landowner’s right to regulate entry and exclude. *Id.* In so doing the Court found that there were no competing state interests and rejected the

non-Indian corporation's claim that because the land was leased by the Tribe to the Indian Health Service, the land was the equivalent of non-Indian fee land.

More recently in *Big Horn County Electric Cooperative, Inc. v. Alden Big Man*, CV 17-65-BLG-SPW, Order dated February 26, 2021, the Montana Federal District Court for the Billings Division upheld the findings of the Federal Magistrate that the Crow Tribe had jurisdiction to regulate and adjudicate Big Horn County Electric Cooperative's conduct on Indian trust land (as that conduct related to Big Man) and over the issue of the enforceability of a choice of law provision in the Big Horn County Electric Cooperative membership agreement. *Id.*

Similarly, the Tenth Circuit has recently required exhaustion of tribal court remedies notwithstanding the existence of ongoing litigation in the Utah State Court. *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservations, et al.*, Nos. 18-4030 & 18-4072. In so doing the 10<sup>th</sup> Circuit reversed the district court's entry of a preliminary injunction which had prevented the Ute Tribe from pursuing its tribal court action. The Ute Tribe in *Becker* had filed an action in the tribal court challenging both the validity of an underlying contract and a choice of law provision. The 10<sup>th</sup> Circuit held that "[o]ut of respect for tribal self-government and self-determination, we conclude that the questions the Tribe has raised regarding the validity of the Agreement, as well as the threshold question of whether the Tribal Court has jurisdiction over the parties' dispute, must be

resolved in the first instance in the tribal court itself.” *Becker*, slip opinion at 18-20.

The foregoing precedents compel the conclusion that the Blackfeet Nation court has plausible jurisdiction over the claims of the Blackfeet Nation and personal jurisdiction over both Plaintiffs Eagle Bear, Inc. and William Brooke. Eagle Bear and Brooke are engaged in activity on Blackfeet Nation owed land; they are holdovers under a cancelled lease, and they have been operating a campground on Blackfeet Nation land for 13 years without legal authority to do so. The Blackfeet Nation has alleged trespass and unauthorized use of Blackfeet Nation land, among other claims in the Blackfeet Nation court. The Blackfeet Nation has jurisdiction under its inherent right to exclude.

This case is squarely controlled by the Ninth Circuit’s decision in *Water Wheel Camp v. LaRance*. In *Water Wheel Camp*, the non-Indian corporation and its non-Indian owner held over after a lease expired, having no legal right to do so. The Ninth Circuit found that the tribal court had jurisdiction over the Indian Nation’s trespass claims in the Tribal Court against both the non-Indian corporation and its principal owner and manager. The only factual difference between the instant case and *Water Wheel Camp* is that in *Water Wheel* the lease expired, and in this case the lease was cancelled and that cancellation became final. Blackfeet Nation jurisdiction is not plainly lacking, and Plaintiffs are not likely to

prevail on the merits of their claim that the Blackfeet Nation lacks jurisdiction over them and the tribal court action.

**2. The Blackfeet Nation/Eagle Bear Business and Recreation Lease was Effectively and Properly Cancelled in 2008 and is No Longer Subject to Review or Challenge.**

Notwithstanding the Plaintiffs' refusal to accept reality and their misplaced reliance on the Interior Board of Administrative Appeals most recent decision, the lease between the Blackfeet Nation and the Plaintiffs was cancelled in 2008. That cancellation became final for the Bureau of Indian Affairs, and for the agency (Department of the Interior) and is no longer subject to review as a matter of law.

Appeals from adverse decisions by officials of the Bureau of Indian Affairs in 2008 were governed by the regulations found at 25 Code of Federal Regulations (CFR), Part 2. The provisions of 25 CFR, Part 2, were applicable to all appeals from decisions made by officials of the BIA by persons who may have been adversely affected by such decisions. 25 CFR 2.5. An "appeal" is a written request for review of an action of the BIA that is claimed to have adversely affected the interested party making the request. 25 CFR 2.2.

A BIA official making a decision is required to give written notice of the decision to all interested parties known to the decision maker by personal delivery or by mail. 25 CFR 2.7(a). A person wanting to challenge an adverse action of a BIA official, must file a written notice of appeal in the office of the official who

made the adverse decision within 30 days of receipt by the appellant of the notice of administrative action. 25 CFR 2.9. A statement of reasons must be filed by the appellant in every appeal and must be accompanied by or otherwise incorporate all supporting documents. 25 CFR 2.10(a). Both the notice of appeal and statement of reasons must be served on all interested parties known to the appellant, and a statement certifying such service had to be filed with the BIA official who made the decision and the BIA official who would decide the appeal. 25 CFR 2.9(a)(c)(6) & 2.12(a).

Filing an appeal effectively stays the adverse decision. 25 CFR 2.6(a). Decisions of BIA officials shall become effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed. 25 CFR 2.6(b). Applying these rules to the 2008 BIA cancellation of the Eagle Bear lease, it is clear that the lease was finally cancelled and is no longer subject to review.

BIA Blackfeet Agency cancelled the Eagle Bear lease on June 10, 2008 for non-payment of the 2007 annual rental payment of \$15,000 which was due November 30, 2007. Eagle Bear filed a timely Notice of Appeal and Statement of reasons on June 18, 2008, thereby staying the cancellation decision. The sole issue raised in Eagle Bear's appeal and statement of reasons was the false claim that it had paid the past due payment on June 6, 2008 before it received the cancellation notice. Eagle Bear could have provided a copy of the check that it

sent with its Notice of Appeal, but it failed to do so. 25 CFR 2.10(a). In fact the check by which Eagle Bear made that past due payment was dated June 16, 2008 and not received by the BIA until June 20, 2008.

Between June 18, 2008 and January 5, 2009, no formal action was taken by the BIA Rocky Mountain Regional Office on Eagle Bear's appeal. It is important to note that the Blackfeet Nation had no duty to defend the BIA Blackfeet Agency's cancellation decision, and that the Blackfeet Nation did not seek the cancellation decision or even know that it was taking place.

On January 5, 2009 Plaintiff Eagle Bear withdrew its appeal. In his letter (captioned, "Re: Withdrawal of Notice of Appeal for Lease 5B03389621", Plaintiff Brooke states: "I hereby withdraw the Notice of Appeal dated June 18, 2008 which appealed your decision of June 10, 2008." Plaintiff Brooke goes on to state: "I am withdrawing the Notice of Appeal since I have been advised by the Bureau that all of our annual payments required under the lease have been made to the Bureau and cashed by the Bureau." Brooke fails to name the individuals with whom he had any conversations. Plaintiffs then make the unilateral declaration: "Accordingly, the lease is current."

As a matter of fact, the lease was not current. Eagle Bear had failed to pay the required interest on the late 2007 payment, it had already defaulted on the 2008 gross receipts royalty payment due in November of 2008 and it had never paid the



interest on the 2004 late annual rental payment. Eagle Bear had also failed to post the required performance bond – which was an independent basis for cancelling the lease.

As a matter of law, the lease cancellation became final 31 days after January 5, 2009 or about February 5, 2009. The Plaintiffs' notice of appeal stayed the lease cancellation. So long as the Plaintiffs' appeal of the 2008 lease cancellation was pending, the cancellation decision remained in abeyance. However, once the Plaintiffs withdrew their appeal, the clock started running on the finality of the Blackfeet Agency's lease cancellation decision. While the Plaintiffs' may have withdrawn their appeal, the BIA never withdrew the lease cancellation decision. Nor did the BIA ever modify, amend, overrule, reverse or in any manner set aside the 2008 lease cancellation decision.

The 2008 lease cancellation became final pursuant to 25 CFR 2.6(b) 31 days after the Plaintiffs withdrew their appeal. At that point there was no appeal pending to stay the administrative action, and there was no action before the BIA Rocky Mountain Regional Director to review. The Rocky Mountain Regional Office had its opportunity (and duty) to review the Plaintiffs' appeal from August of 2008 to January 5, 2009. Both the Region's opportunity to review the lease cancellation action and the duty to do so were gone when the Plaintiffs withdrew

their appeal. At that point the Plaintiffs had waived their right to appeal. They have no right to appeal that decision now.

In accord with 25 CFR 2.6(a)(b), the June 10, 2008 decision by the Blackfeet Agency BIA cancelling the Eagle Bear lease became final for the Department and the Agency 31 days after the Plaintiffs withdrew their appeal or on or about February 5, 2008. The June 10, 2008 cancellation decision became final for the Agency under 5 U.S.C. Sec. 704. The general six-year statute of limitations on suing the federal government has also long since passed. The lease was cancelled and there is no lease today.

**3. Because the Underlying Lease was Cancelled in 2008, the Remainder of the Plaintiffs' Arguments that The Blackfeet Tribal Court Plainly Lacks Jurisdiction are Inapposite.**

As further support for its flawed assertion that the Blackfeet Nation court plainly lacks jurisdiction over the claims filed therein by the Blackfeet Nation, the Plaintiffs offer five (5) other reasons that the jurisdiction of the Blackfeet Tribal Court is plainly lacking (the Blackfeet Nation Defendants have addressed the issue of personal jurisdiction over the Plaintiffs above). Each of those arguments ignore the fact that the lease was cancelled in 2008 and that the 2008 cancellation is final for the Agency. Plaintiffs' additional challenges must also be rejected.

As set forth above, the former lease upon which Plaintiffs mistakenly base their remaining claims of lack of Blackfeet Nation court jurisdiction was cancelled on June 10, 2008. That cancellation is now final and beyond challenge.

Because there is no lease, Eagle Bear's assertions that the Blackfeet Tribal Court lacks jurisdiction because the Blackfeet Nation's complaint raises issues of Federal law, that the BIA is an indispensable party, that the Complaint raises issues arising out of the lease over which only the BIA has jurisdiction, that the issues raised in the Complaint are subject to arbitration and that the parties agreed to a choice of law provision giving this court jurisdiction, are all meritless. In light of the fact that there is no lease, those arguments have no application here.

**B. Plaintiffs' Will Not Likely Suffer Irreparable Harm Without a Preliminary Injunction.**

Plaintiffs' arguments that it will likely suffer irreparable injury if a preliminary injunction is not granted, are without merit. As discussed above, the Blackfeet Tribal Court is not plainly lacking jurisdiction, therefore the Plaintiffs will not suffer irreparable injury if they are required to litigate in the Blackfeet forum. Because there is no lease, the Tribal Court's exercise of jurisdiction will not deprive this court, the IBIA or the arbitrators of the power to render a meaningful decision.

The tourist season for 2021 is all but over. The Blackfeet Tribal Court matter is still in its initial stages. No action on the Blackfeet Nation Defendant's

motion for prejudgment attachment will take place in the Tribal court until after the 2021 summer tourist season. Plaintiffs' "sky is falling" assertions that the Tribal Court is going to attach the Kamping Kabins and prevent their occupancy this summer are borderline ridiculous. The real purpose of the Blackfeet Nation's Petition for Pre-judgment attachment is to prevent Eagle Bear and Brooke from attempting to remove the cabins from the site.

**C. Plaintiffs Do Not Have "Clean Hands" and Are Not Entitled to Any Equitable Consideration.**

The fundamental maxims of equity are that equity will not suffer an injustice, and he who comes into equity must come with clean hands.

Eagle Bear and Brooke do not come to this court seeking equity with clean hands. As already noted, Eagle Bear was in violation of the underlying lease from the outset because it failed to post the required performance bond. The lease was cancelled because Eagle Bear failed to make the required payments. Assuming *arguendo* that there was a lease after 2008 (which there was not), Eagle Bear failed to make the required annual gross royalty payment for 2008, 2009, 2010 and 2011. It only made the partial payment of the principal amount (but not the interest) after the Blackfeet Nation and the BIA forced it to do so. Eagle Bear and Brooke do not have clean hands and are not entitled to equitable consideration

The Plaintiffs' assertion that they will suffer irreparable injury if they are required to exhaust their remedies in the Blackfeet Nation judicial system are

simply false. Assuming this court denies the preliminary injunction and requires the Plaintiffs to exhaust their Blackfeet Nation remedies, at the end of that process, they will be entitled to a final review of jurisdiction by this Court.

**D. The Public Interest Favors Exhaustion of Blackfeet Nation Court Remedies.**

The substantial public and federal interest in promoting Indian Nation self-government, including the full development of judicial systems, as set forth above, weighs against a preliminary injunction.

The exhaustion requirement is rooted in a respect for the principle of comity “and deference to the tribal court as the appropriate court of first impression to determine its jurisdiction.” *Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196, 1199 (9<sup>th</sup> Cir. 2013), citing *National Farmers Union v. Crow Tribe*, 471 U.S. 845, 856-857 (1985); *Iowa Mutual Ins. Co. v. LaPlant*, 480 U.S. 9, 15-16 (1987), *Burlington Northern R.R. Co. v. Crow Tribal Council*, 949 F.2d 1239, 1244-1247 (9<sup>th</sup> Cir. 1993). Support for this premise was articulated by the United States Supreme Court as: (1) Congress’s commitment to “a policy of supporting tribal self-government and tribal self-determination”; (2) a policy that allows” the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal basis for the challenge”; and (3) judicial economy, which will best be served “by allowing a full record to be developed in the Tribal Court”. *National Farmers*, 471 U.S. at 856.

Plaintiffs have offered nothing that outweighs the application of these strong federal policies in this case. The public interest would clearly be served by requiring exhaustion of Blackfeet Nation court remedies. There are no administrative remedies to exhaust and the Blackfeet Nation Court's jurisdiction is not plainly lacking.

### CONCLUSION

Applying the test of *Winter v. Natural Resources Defense Council, Inc.*, the Plaintiffs have failed to meet their burden to show that they are likely to prevail on the merits, that they will likely suffer irreparable harm before a preliminary injunction is issued, that the balance of the equities favor them and that a preliminary injunction is in the public interest.

Their Motion for Preliminary Injunction must be denied.

DATED this 24<sup>th</sup> day of August, 2021.

By /s/ Joseph J. McKay  
Joseph J. McKay

## **CERTIFICATE OF COMPLIANCE**

Pursuant to L.R. 7.1(d)(2), I hereby certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 point; is double-spaced; and the word count, calculated by Microsoft Office Word, is 5,939 words, excluding the Caption, Table of Contents, Table of Authorities, Exhibit Index and the Certificate of Compliance.

/s/ Joseph J. McKay  
Joseph J. McKay, Attorney-at-Law