Joseph J. McKay
Attorney-at-Law
P.O. Box 1803
Browning, MT 59417
Phone/Fax: (406) 338-7262
Email: powerbuffalo@yahoo.com
Attorney for Defendants THE BLACKFEET INDIAN NATION and THE BLACKFEET TRIBAL COURT

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

EAGLE BEAR, INC. and WILLIAM BROOKE,	)
	) **Cause No. 4:21-cv-00088-BMM**
Plaintiffs,	
v.	) **DEFENDANTS' MEMORNDUM IN SUPPORT OF THEIR**
THE BLACKFEET INDIAN NATION and THE BLACKFEET TRIBAL COURT,	) **MOTION TO DISMISS FOR LACK OF JURISDICTION**
	) **AND FAILURE TO EXHAUST TRIBAL COURT REMEDIES**
Defendants.	)

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

INDEX OF EXHIBITS 6

INTRODUCTION 7

FACTUAL BACKGROUND 8

LAW AND ARGUMENT 10

A. Inherent Sovereignty of Indian Nations 11

B. Exhaustion of Tribal Court Remedies 16

C. The Former Lease Was Cancelled in 2008; that Cancellation is Final And Is no Longer Subject to Either Administrative or Judicial Review 19

1. Applicable Federal Regulations and Law 20

2. The 2008 Lease Cancellation and Eagle Bear, Inc.'s Appeal 21

3. The Cancelled Lease Could Not Be Reinstated by Oral Agreement Between the BIA and Eagle Bear, Inc. 26

4. Effect of the Withdrawal of the Eagle Bear, Inc. Appeal 28

5. The Pending Proceedings before the Interior Board of Indian Appeals are moot 30

D. The Issue of Finality of the 2008 Lease Cancellation Decision Is Properly before the Court 32

CONCLUSION 33

CERTIFICATE OF COMPLIANCE 35

TABLE OF AUTHORITIES

Cases:

Becker v. Ute Indian Tribe of the Uintah and Ouray Reservations, et al., Nos. 18-4030 & 18-4072 (10th Cir. 2021) 15

Bennett v. Spear, 520 U.S. 154, 177-178 (1997) 21, 29

Big Horn Electric Coop., Inc. v. Big Man, CV 17-65-BLG-SPW (Dist. Montana. 2021), Order dated Feb. 2, 2021 15

Big Lagoon Rancheria v. California, 789 F. 3d 947 (9th Cir. 2015) 21, 30

Crawford v. Genuine Parts Co. Inc., 947 F.2d 1405, 1415 (9th Cir. 1991) . . 16, 17

Elliot v. White Mountain Apache Tribal Court, 566 F.3d 842 (9th Cir. 2008) . . 16

Fisher v. District Court, 424 U.S. 382, 387-389 (1976) 13

Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated, 715 F.3d 1196 (9th Cir. 2013) 13, 15, 16, 17, 18

Iowa Mutual Ins. Co. v. LaPlant, 480 U.S. 9, 18 (1987) 13,16, 17

McDonald v. Means, 309 F.3d 530 (9th Cir. 2002) 18

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-145 (982) 13

Montana v. United States, 450 U.S. 544 (1981) 12, 13, 18

Moody(s) v. United States, 931 F.3d 1136 (D.C. Cir. 2019) 27

National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) 16, 17

Nevada v. Hicks, 533 U.S. 353 (2001) 18

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U. S. 316, 327–328 (2008) 12, 13

Strate v. A-1 Contractors, 520 U.S. 438, 454 (1997) 12, 13, 17, 18

Takeda Pharmaceuticals America, Inc., et al. v. Connelly,
CV 14-50-BMM (Dist. Mont. 2014) 15, 18, 19

United States v. Cooley, U.S. Supreme Court. No. 19-1414, decided
June 1, 2021 12

United States v. Wheeler, 435 U. S. 313, 323 (1978) 12

Water Wheel Camp Recreation Area v. LaRance, 642 F.3d 802
(9th Cir. 2011) 13, 14, 15, 16, 18, 19

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S.
134, 152-153 (1980) 13

Wind River Mining Corp. v. United States, 946 F.2d 710, 713
(9th Cir.1991) 21, 29

Worcester v. Georgia, 6 Pet. 515, 559 (1832) 12

Interior Board of Indian Appeals Decisions:

Alcantra v. Pacific Regional Director, 58 IBIA 252, 253 (2014) 31

Blackmore v. Billings Area Director, 30 IBIA 235, 239 (1997) 27, 28

Billco Energy v. Acting Albuquerque Area Director, 35 IBIA 1, 7 (2000) . . 27, 28

DuBray v. Acting Aberdeen Area Director, 30 IBIA 64, 68 (1996) 27

Emm v. Western Regional Director, 50 IBIA 311, 312 (2009) 27

Flynn v. Acting Rocky Mountain Regional Director, 42 IBIA 206,
213 (2006) 27, 28

G.H.G. v. Acting Rocky Mountain Regional Director, 39 IBIA 27 28

Picayune Rancheria v. Pacific Regional Director, 58 IBIA 255, 257 (2014) . . . 31

Pueblo of Tesuque v. Acting Southwest Regional Director, 40 IBIA 273, 274
(2005) 31

Scotts Valley Band of Pomo Indians v. Pacific Regional Director, 59 IBIA 56 (2014) 31

Strom, et al. v. Northwest Regional Director, 44 IBIA 153, 165-166 (2007) . . . 27

Van Mechelen v. Northwest Regional Director, 56 IBIA 111, 112 (2013) 31

Wind River Alliance v. Rocky Mountain Regional Director, 52 IBIA 224, 227 (2010) 23, 24

Federal Statutes and Federal Regulations:

Administrative Procedures Act, 5 U.S.C. Sec. 551 et seq. (Sec. 704-706) . . . 21, 29

Indian Reorganization Act of 1935, 25 U.S.C. Sec. 476 and 477 8

28 U.S.C. Sec. 2401(a) 11, 21, 29

25 CFR, Part 2 20

25 CFR 2.2 20

25 CFR 2.5 20

25 CFR 2.6(a) 20, 21

25 CFR 2.6(b) 20, 28, 29

25 CFR 2.7(a) 20, 26

25 CFR 2.9 . . . . 20, 29

25 CFR Sec. 162.104 . . . . 26, 27

25 CFR Sec. 162.604(a) 26

25 CFR Sec. 162.623 . . . . 25, 26

43 CFR Sec. 4.318 23

INDEX OF EXHIBITS

Defendants' Exhibit A.1. (Blackfeet Nation Letter dated
June 18, 2021 to the Bureau of Indian Affairs, Re: 2008 Lease Cancellation) . . 31

COMES NOW the Defendants Blackfeet Indian Nation and Blackfeet Tribal Court, by and through counsel, and hereby respectfully submit their Memorandum in Support of Their Motion To Dismiss for Lack of Jurisdiction and Failure to Exhaust Blackfeet Tribal Court remedies, as follows:

INTRODUCTION

This matter arises out of Plaintiffs' illegal trespass on and unauthorized use of Blackfeet Nation trust land for 13 years. A former lease between the Blackfeet Nation and the Plaintiffs was cancelled by the Bureau of Indian Affairs (BIA) in 2008. Plaintiffs have been in illegal trespass on Blackfeet Nation trust land and have been engaged in unauthorized use of that land since that time. Based upon the Plaintiff's conduct on Blackfeet Nation trust land, the Blackfeet Nation brought an action in the Blackfeet Tribal Court for trespass and eviction, unauthorized use of Blackfeet Nation land, an accounting, fraud, failure to comply with Blackfeet Nation laws and punitive damages based on the 13 years of illegal trespass.

Plaintiffs Eagle Bear, Inc. and Brooke filed their COMPLAINT in this Court seeking a declaratory judgment and a permanent injunction on the grounds that the Blackfeet Tribal Court lacks jurisdiction over Will Brooke because he is a non-Indian, and that the tribal court lacks subject matter jurisdiction over the Blackfeet Nation's claims in the Blackfeet Tribal court. Doc. 1. The Plaintiffs essentially ask this Court to create and enforce a lease that does not exist.

Because the lease was cancelled in 2008 and that cancellation was never reversed, modified, amended, set aside or withdrawn, the cancellation long ago became final. Based on established Federal Indian law principles, on the facts of this case, the Blackfeet Nation has actual and plausible jurisdiction over both Plaintiffs Eagle Bear, Inc. and William Brooke, and the Blackfeet Tribal Court has adjudicatory jurisdiction over the Blackfeet Nation's claims in the Tribal Court.

FACTUAL BACKGROUND

1. The Plaintiff Blackfeet Indian Nation is a government organized pursuant to the Indian Reorganization Act of 1935, 25 U.S.C. Sec. 476 and 477.

2 The Blackfeet Nation is the owner of trust land within the Blackfeet Indian Reservation.

3. Both Defendants William Brooke and Eagle Bear, Inc. are non-Indians and non-residents of the Blackfeet Indian Reservation.

4. In 1997 the parties entered into a lease of approximately 54 acres of Blackfeet Nation owned trust land on St. Mary Lake, Blackfeet Reservation, for the purpose of operating a for-profit recreational campground business. Doc. 1-2.

5. Pursuant to applicable Federal law and regulations, the lease was approved by the Bureau of Indian Affairs; the BIA was also responsible for enforcing the provisions of the lease regarding the collection of rental payments

from Defendant Eagle Bear, Inc.. Doc. 1-2. Only the BIA could cancel the lease. Id. Sec 5.C.

7. On June 10, 2008 the BIA Blackfeet Agency cancelled the lease for non-payment of the required 2007 annual rental payment due on November 30, 2007. Doc. 14-B.

8. Eagle Bear, Inc. initially made a timely appeal of the cancellation, but withdrew its appeal on January 5, 2009 before any decision was made on the appeal by the Bureau of Indian Affairs Rocky Mountain Regional Office or the Blackfeet Agency. Doc. 14-C, 14-F.

9. The BIA Blackfeet Agency's June 10, 2008 cancellation decision was never withdrawn, reversed, set aside, amended, modified, suspended or otherwise overturned by the Bureau of Indian Affairs.

10. The Blackfeet Agency's June 10, 2008 decision cancelling the Eagle Bear, Inc. lease became final 31 days after Eagle Bear, Inc. withdrew its appeal, and then became final for the agency (Department of the Interior).

11. There is no lease today and there has been no lease for 13 years.

12. After the effective date of the cancellation of the Eagle Bear, Inc. lease, Eagle Bear acting through William Brooke, illegally held over and continued operating the campground on Blackfeet Nation trust land.

13. Eagle Bear, Inc. and William Brooke have been in illegal trespass on Blackfeet Nation land since approximately February 5, 2009 and have been operating a campground on Blackfeet Nation land without authorization from the Blackfeet Nation.

LAW AND ARGUMENT

While no longer possessing the full attributes of a sovereign, Indian nations retain sovereignty over their members and their territory. Included in the inherent sovereign powers of Indian nations is the power to exclude individuals, including non-Indians, from land owned by the Indian nation. Pursuant to the inherent power to exclude, the Blackfeet Nation has both regulatory jurisdiction over the activities of non-Indians engaged in conduct on Indian nation trust lands within the Blackfeet Indian Reservation, and it has adjudicatory authority in the Blackfeet Nation courts over disputes involving non-Indians and the Blackfeet Nation arising out of non-Indian conduct on Indian nation trust land within the Reservation.

Leases of Indian trust land and rights arising from those leases are governed by Federal law and regulation. Upon the termination of a lease of Indian trust land, the lessee has appeal rights in accordance with the applicable federal regulations. Failure to pursue those rights results in the lease termination becoming final. Decisions of the Department of the Interior pursuant to the

Administrative Procedures Act are subject to the general 6-year statute of limitations for suits against the Federal government in 28 U.S.C. Sec. 2401(a).

The former lease by which Plaintiffs Eagle Bear, Inc. and William Brooke occupied the Blackfeet Nation trust land was cancelled by the Blackfeet Indian Agency of the Bureau of Indian Affairs on June 10, 2008. While Eagle Bear, Inc. initially appealed the lease cancellation, thereby staying the cancellation decision, Eagle Bear, Inc. withdrew its appeal before any action was taken by the Rocky Mountain Regional Office. On or about February 5, 2008, 31 days after Eagle Bear, Inc. withdrew its appeal, the cancellation decision became final for the agency. The six-year statute of limitations on challenges to the lease cancellation elapsed in 2015. The BIA’s 2008 lease cancellation decision is no longer subject to administrative or judicial review. There is no lease.

On the facts of this case, the Blackfeet Nation has both actual and plausible regulatory and adjudicatory jurisdiction over both Plaintiffs Eagle Bear, Inc. and William Brooke. Plaintiffs’ COMPLAINT must be dismissed because the Blackfeet Nation has actual jurisdiction and because the Plaintiffs have failed to exhaust their tribal court remedies.

A. Inherent Sovereignty of Indian Nations.

As was most recently recognized by the United States Supreme Court in

United States v. Cooley, U.S. Supreme Court. No. 19-1414, decided June 1, 2021, the Court has long:

> described Indian tribes as "distinct, independent political communities" exercising sovereign authority. *Worcester v. Georgia*, 6 Pet. 515, 559 (1832). Due to their incorporation into the United States, however, the "sovereignty that the Indian tribes retain is of a unique and limited character." *United States v. Wheeler*, 435 U. S. 313, 323 (1978). Indian tribes may, for example, determine tribal membership, regulate domestic affairs among tribal members, **and exclude others from entering tribal land**. See, e.g., *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U. S. 316, 327–328 (2008). On the other hand, owing to their "dependent status," tribes lack any "freedom independently to determine their external relations" and cannot, for instance, "enter into direct commercial or governmental relations with foreign nations." *Wheeler*, 435 U. S., at 326."

United States v. Cooley, U.S. Supreme Court. No. 19-1414, decided June 1, 2021. (Emphasis supplied).

In *Montana v. United States*, 450 U.S. 544 (1981), the Unites States Supreme Court announced the general rule that the inherent sovereign powers of an Indian Nation do not extend to the activities of non-Indians. *Montana* 450 U.S. at 565. However that rule does not apply where the non-Indian conduct occurs on Indian trust land owned by the Indian nation.

When the conduct of a non-Indian occurs on Indian trust land within a reservation and that land has not been "alienated" (that the Indian nation retains the right to exclude), then the Indian Nation retains considerable control over the activities of non-Indians on Indian Nation trust land. *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997). An Indian Nation's inherent power to exclude people

from its own land has consistently been held to be a basis of jurisdiction over the activities of non-Indians on Indian trust land within an Indian Reservation. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-145 (982); *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *Water Wheel Camp Recreation Area v. LaRance*, 642 F.3d 802 (9th Cir. 2011); *Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196 (9th Cir. 2013). When an Indian Nation retains inherent sovereign authority to regulate the conduct of non-Indians on Indian trust land within a reservation, civil jurisdiction presumptively lies in the Indian Nation courts unless affirmatively limited by a specific treaty or federal statute. *Strate*, 520 U.S. at 453; *Iowa Mutual Ins. Co. v. LaPlant,* 480 U.S. 9, 18 (1987).. "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. *See Montana v. United States* 450 U.S. 544, 565-566 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 152-153 (1980); *Fisher v. District Court,* 424 U.S. 382, 387-389 (1976).

There is no dispute in the present case that the conduct of the Plaintiffs, Eagle Bear, Inc. and William Brooke, over which the Blackfeet Nation has brought suit in the Blackfeet Tribal Court, is occurring and has occurred on Blackfeet Nation owned trust land within the Blackfeet Indian Reservation. The Blackfeet

Nation does not dispute that both Plaintiffs are non-Indians. Applying the jurisdictional rules set forth above, the Blackfeet Nation and its Court clearly have civil jurisdiction over the Plaintiffs and the Blackfeet Nation's claims brought in the Blackfeet Tribal Court.

On almost exactly the same facts, after first determining that the conduct of the non-Indian corporation and its principal owner occurred on Indian trust land within the reservation, the Ninth Circuit Court of Appeals, found that the Indian Nation had regulatory and adjudicatory jurisdiction over the non-Indians. In *Water Wheel Camp Recreation Ares v. LaRance,* 642 F.3d 802 (9th Cir. 2011), after first discussing U.S. Supreme Court precedent regarding Indian Nation jurisdiction over non-Indians, the Ninth Circuit found;

> In this instance, where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*. Finding otherwise would contradict Supreme Court precedent establishing that land ownership may sometimes be dispositve and would improperly limit tribal sovereignty without clear direction from Congress.

Water Wheel Camp Recreation Ares v. LaRance, 642 F.3d 802, 811-812 (9th Cir. 2011).

The Ninth Circuit closed its discussion of Indian Nation jurisdiction based on the inherent power to exclude by holding as follows:

> Here, the land is tribal land and the tribe has regulatory jurisdiction over Water Wheel and Johnson. While it is an open question as to whether a tribe's adjudicative jurisdiction is equal to its regulatory jurisdiction, the important sovereign interests at stake, the existence of regulatory jurisdiction, and long-standing Indian law principles recognizing tribal sovereignty all support finding adjudicative jurisdiction here. Any other conclusion would impermissibly interfere with the tribe's inherent sovereignty, contradict long-standing principles the Supreme Court has repeatedly recognized, and conflict with Congress's interest in promoting tribal self-government. Accordingly, we hold that in addition to regulatory jurisdiction, the CRIT has adjudicative jurisdiction over both Water Wheel and Johnson.

Water Wheel Camp Recreation Ares v. LaRance, Id. (9th Cir. 2011).; *accord Becker v. Ute Indian Tribe of the Uintah and Ouray Reservations, et al.*, Nos. 18-4030 & 18-4072 (10th Cir. 2021); *Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196 (9th Cir. 2013); *Big Horn Electric Coop., Inc. v. Big Man,* CV 17-65-BLG-SPW (Dist. Montana. 2021), Order dated Feb. 2, 2021; *Takeda Pharmaceuticals America, Inc., et al. v. Connelly*, CV 14-50-BMM (Dist. Mont. 2014).

But for the Plaintiffs' failed claim that the former lease was not cancelled in 2008, the present case is squarely controlled by the Ninth Circuit precedent in *Water Wheel Camp*. Applying United Supreme Court and Ninth Circuit Court of Appeals precedent compels the finding that the Blackfeet Nation and its Court has jurisdiction over the Blackfeet Nation's claims in the Nation's court. Any other finding would "would improperly limit tribal sovereignty without clear direction

from Congress", and "any other conclusion would impermissibly interfere with the tribe's inherent sovereignty, contradict long-standing principles the Supreme Court has repeatedly recognized, and conflict with Congress's interest in promoting tribal self-government." *Water Wheel Camp,* Id.

Pursuant to the controlling principles of Federal Indian law, considering the ownership status of the land as Blackfeet Nation trust land, based upon the Blackfeet Nation's inherent power to exclude, the Blackfeet Nation has jurisdiction over the parties and claims in the Blackfeet Nation court. The Plaintiffs' Complaint must therefore be dismissed.

B. Exhaustion of Tribal Court Remedies.

Non-Indians may bring a federal common law cause of action to challenge a tribal court's jurisdiction. *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). It is also well-established law that, with limited exceptions, the non-Indian must first exhaust tribal court remedies. *National Farmers Union v. Crow Tribe*, 471 U.S 845, 856 (1985); *Crawford v. Genuine Parts Co. Inc.*, 947 F.2d 1405, 1415 (9th Cir. 1991); *Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196 (9th Cir. 2013). The requirement of exhaustion of

tribal remedies is not discretionary, it is mandatory. *Crawford v. Genuine Parts Co. Inc*., 947 F.2d 1405 (9th Cir. 1991).

One of the recognized exceptions to this general rule, is that 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 (9th Cir. 1991); *Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196 (9th Cir. 2013).

Plaintiffs Eagle Bear and Brooke incorrectly assert that they should not be required to exhaust tribal court remedies because jurisdiction is plainly lacking. Plaintiffs do not assert that Blackfeet Tribal Court jurisdiction has been "affirmatively limited by a specific treaty or federal statute". *Strate*, 520 U.S. at 453; *Iowa Mutual Ins. Co. v. LaPlant,* 480 U.S. 9, 18 (1987). Rather the Plaintiffs erroneously assert that the moot proceedings before the IBIA preempt the jurisdiction of the Blackfeet Nation (and this Court, at least until those proceedings are completed). That argument ignores the undeniable fact that the former lease was cancelled on June 10, 2008 by the Blackfeet Indian Agency of the BIA for non-payment of an annual rental payment due on November 30, 2007, and that the 2008 cancellation is now final and beyond administrative or judicial review.

As this Court recognized in *Takeda v. Connelly*, at this very early stage of the proceedings, the court only need determine whether tribal court jurisdiction is plainly lacking, to require exhaustion of tribal court remedies. *Takeda v. Connelly*, Id., pgs. 6, 13. Applying the Federal Indian law principles set forth above (See Section A., supra.), where the non-Indian activity is occurring on Blackfeet Nation owned trust land, the Blackfeet Nation court has plausible jurisdiction, and the Blackfeet Nation court's jurisdiction is not plainly lacking.

The analysis employed by this Court in *Takeda v. Connelly* was the appropriate approach and results in the same outcome: a finding that Blackfeet Nation Court jurisdiction was not plainly lacking. In *Takeda* the Court found that the Blackfeet Tribal Court had plausible jurisdiction over Connelly's 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 (9th Cir. 2002), *Water Wheel Camp Recreation Area v. LaRance,* 642 F.3d 802 (9th Cir. 2011), and *Grand Canyon Skywalk Development, LLC v. SA NYU WA Inc.*, 715 F.3d 1196 (9th Cir.

2013), the Court found that the land upon which the alleged tort occurred was Blackfeet Nation trust land over which the Blackfeet Nation maintained a landowner's right to regulate entry and exclude, that there were no competing state interests and Blackfeet Nation court had plausible jurisdiction.

Here, notwithstanding the Plaintiffs' futile denial, there is no lease. The outcome should be the same as in *Takeda* and *Water Wheel Camp*. The Blackfeet Nation has an inherent right to exclude over the land now illegally occupied by the Plaintiffs. On these facts, the Blackfeet Nation's jurisdiction is not plainly lacking.

The Plaintiffs' complaint must be dismissed for failure to exhaust their tribal court remedies.

C. The Former Lease Was Cancelled in 2008; that Cancellation is Final And Is no Longer Subject to Either Administrative or Judicial Review.

As evidenced by the June 10, 2008 cancellation decision letter from the Blackfeet Indian Agency to Eagle Bear, Inc., and notwithstanding the Plaintiffs' questionable denial, the former lease between Eagle Bear, Inc. and the Blackfeet Nation was cancelled by the Bureau of Indian Affairs Blackfeet Agency. That cancellation decision was never reversed, withdrawn, modified, set aside or otherwise negated by the Bureau of Indian Affairs. In accordance with applicable regulations and federal law, the BIA's June 10, 2008 cancellation of the former

lease became final in February of 2009 and the statute of limitations on challenging the cancellation in federal court has long-since elapsed. That cancellation decision is now beyond administrative or judicial review.

1. Applicable Federal Regulations and 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 appliable 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.

Filing an appeal effectively stays the adverse decision. 25 CFR 2.6(a). Decisions of BIA officials 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).

“As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decision making process --it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow.”” *Bennett v. Spear,* 520 U.S. 154, 177-178 (1997) (citations omitted).

In *Big Lagoon Rancheria v. California*, 789 F. 3d 947 (9th Cir. 2015), the Ninth Circuit held that 28 U.S.C. § 2401(a) creates a general six-year statute of limitations for actions brought against the United States. See 28 U.S.C. § 2401(a) ("Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). The Ninth Circuit has held that this rule "applies to actions brought under the APA." *Wind River Mining Corp. v. United States,* 946 F.2d 710, 713 (9th Cir.1991) (footnote omitted).

Applying these rules to the 2008 BIA cancellation of the former Eagle Bear lease results in the conclusion that the lease was cancelled, that the BIA’s cancellation decision became final and is now no longer subject to administrative or judicial review.

2. The 2008 Lease Cancellation and Eagle Bear, Inc.’s Appeal.

On June 10, 2008 the Bureau of Indian Affairs Blackfeet Indian Agency cancelled the former lease between the Blackfeet Nation and Eagle Bear, Inc., after notice to Eagle Bear, for failure to pay the annual rental payment due on November 30, 2007. Eagle Bear, Inc. received the cancellation notice on June 12, 2008. On June 16, 2008, Eagle Bear, Inc. sent a check to the Bureau of Indian Affairs in the amount of $15,000.00; the payment did not include the interest required under section 6 of the former lease agreement. Doc. 14-D. Eagle Bear, Inc.'s payment was received and entered by the BIA on June 20, 2008. Doc. 14-E.

On June 18, 2008, Plaintiff Eagle Bear, Inc., through Plaintiff William Brooke, filed a Notice of Appeal and Statement of Reasons with the Blackfeet Agency whereby Eagle Bear appealed the June 10, 2008 cancellation decision. Doc. 14-C. The only issue raised by Eagle Bear, Inc. in support of its appeal was its false claim that it paid the delinquent payment on June 6, 2008 before receiving the cancellation decision. The Administrative Record is clear that the payment was not made until after Eagle Bear received the lease cancellation letter.

Eagle Bear's appeal stayed the cancellation decision. 25 CFR 2.6(a). Pursuant to the applicable rules, Eagle Bear was allowed to stay on the Blackfeet Nation's trust land pending the outcome of the appeal. Which meant that Eagle Bear operated the campground under the former lease for the entire 2008 tourist season. Consequently Eagle Bear owed the Blackfeet Nation a gross receipts

royalty payment for the 2008 lease year. Doc. 1-2 (Lease, Sec. 5.1(a)). That payment was due on November 30, 2008. Id.

The appeal and statement of reasons filed by Plaintiff William Brooke, an attorney, on behalf of Eagle Bear, Inc. did not raise any issues related to lack of notice of default and opportunity to cure, nor was there any assertion that the cancellation decision was subject to arbitration. The cancellation decision was made by the Blackfeet Agency of the Bureau of Indian Affairs without any request or input from or consultation with the Blackfeet Nation. The BIA was not a party to the former lease and, pursuant to the lease terms, was the only entity with authority to cancel the lease. The BIA exercised that authority on June 10, 2008.

The well-established general rule of the Interior Board of Indian Appeals is "that it won't consider arguments or issues raised for the first time on appeal to the Board. This rule is based on the regulatory provision limiting the Board's scope of review to those issues that were before the Regional Director, See 43 CFR Sec. 4.318, and on the principle that a party who did not afford BIA an opportunity to respond to an issue should not be allowed on appeal, to challenge BIA's decision as defective for failing to address that issue." *Wind River Alliance v. Rocky Mountain Regional Director*, 52 IBIA 224, 227 (2010) (Citations omitted).

When Eagle Bear, Inc. appealed the June 10, 2008 cancellation of the former lease, the sole basis of the appeal was the demonstrably false claim that it had paid

the delinquent annual rental payment which was due on November 30, 2008 on June 6, 2008, before it received the cancellation letter. The cancelled check by which Eagle Bear, Inc. made the delinquent payment was dated June 16, 2008 and was not received by the BIA until June 20, 2008; after the date of the BIA cancellation decision letter and after the date that Eagle Bear, Inc. received that letter.

Eagle Bear made no claim that it had not received the required 10-day show cause notice prior to cancellation. Nor did it claim that the cancellation was subject to arbitration; no demand for arbitration was made by Eagle Bear, Inc. or by Plaintiff Brooke on Eagle Bear's behalf. Pursuant to the rulings of the IBIA, Eagle Bear could not and cannot raise those issues today, 13 years later. *Wind River Alliance v. Rocky Mountain Regional Director*, 52 IBIA 224, 227 (2010),

Between June 18, 2008 and January 5, 2009, the Rocky Mountain Regional Office, the entity before whom Eagle Bear's appeal was pending, took no action on the appeal. As a matter of law, had the BIA Rocky Mountain Regional Office acted on Eagle Bear's June 18, 2008 appeal, it would have had no choice but to uphold the cancellation decision as Eagle Bear had not paid the delinquent payment on time and Eagle Bear was not current on the lease – it had failed to pay the interest due on the late payment. Eagle Bear made no assertion that it was in

talks with the Blackfeet Nation to re-instate the cancelled lease. 25 CFR Sec. 162.623.

The Plaintiffs have never provided a sworn affidavit setting forth the matters claimed in Eagle Bear's January 5, 2009 letter withdrawing its appeal and naming any BIA official with whom it supposedly had an agreement or discussions. Importantly with regard to Eagle Bear's self-serving proclamation that "the lease is current", they were factually incorrect. Pursuant to the terms of the lease (Section 5. Compensation), "annual rental" included both the minimum annual rent for which the lease was actually cancelled and the annual gross registration royalty. Doc. 1-2. According to Section 6 of the lease, annual rent not paid within 30 days of the due date accrued interest at 3% plus prime, as set forth therein. Id. At the time it paid its required late minimum annual rental (June 20, 2008) Eagle Bear still owed the required interest.

A cancelled lease cannot be brought "current" by late payment of the amount which caused the cancellation. At that point, there was no lease to be brought current.

More importantly, assuming for the sake of discussion that some agreement did exist, the claim is that the agreement was to "withdraw" the appeal. Withdrawing the appeal could not and does not automatically result in reversal of the cancellation decision or reinstatement of the cancelled lease. Once cancelled,

the lease could only be reinstated or a new lease put in place by the agreement of the lessor, the Blackfeet Nation.

If the Bureau of Indian Affairs took any action to reverse, set aside, withdraw, modify or amend the June 10, 2008 cancellation decision and reinstate the lease, then it had a duty to notify the Blackfeet Nation as an interested party of any such action. 25 CFR 2.7(a). There is no record of any action by the BIA to reverse or withdraw the cancellation decision, and no record of any notification to the Blackfeet Nation of any action by the BIA in this regard.

There is no dispute that on January 5, 2009 Eagle Bear withdrew its appeal.

3. The Cancelled Lease Could Not Be Reinstated by Oral Agreement Between the BIA and Eagle Bear, Inc..

Plaintiffs argue that they withdrew their appeal of the June 10, 2008 lease cancellation as the result of discussions with unnamed Blackfeet Agency staff, and pursuant to some unwritten, unspecified agreement. That argument is not supported by any legal authority and is contrary to prevailing law.

Pursuant to the Federal Regulations in effect in 2008, at 25 CFR Sec. 162.104 a written lease is required before taking possession of Indian trust land. All leases under these regulations had to be in writing and approved by the Secretary. 25 CFR Sec. 162.604(a). A tenant acquires no rights for holding over after a lease is cancelled; the tenant is considered a trespasser. 25 CFR Sec. 162.623; Doc. 1-2 (Lease Sec. 43).

With limited exceptions, pursuant to 25 CFR Sec. 162.104, a written lease is required before taking possession of Indian trust land. *Emm v. Western Regional Director*, 50 IBIA 311, 312 (2009) (citations omitted). Citing *Flynn v. Acting Rocky Mountain Regional Director*, 42 IBIA 206, 213 (2006), the IBIA has held that verbal representations or advice by the BIA do not create a lease or legal rights, and such advice and representations do not override applicable laws and regulations. *Strom, et al. v. Northwest Regional Director*, 44 IBIA 153, 165-166 (2007). Individuals dealing with the government are presumed to have knowledge of duly promulgated federal regulations. *Id. citing Flynn* at 212.

In *Flynn v. Acting Rocky Mountain Regional Director*, 42 IBIA 206, 213 (2006), the Interior Board of Appeals stated that the Board has repeatedly held that

> "individuals dealing with the government are presumed to have knowledge of duly promulgated regulations. See *Billco Energy v. Acting Albuquerque Area Director*, 35 IBIA 1, 7 (2000); *Blackmore v. Billings Area Director*, 30 IBIA 235, 239 (1997); *DuBray v. Acting Aberdeen Area Director*, 30 IBIA 64, 68 (1996). As a person seeking to purchase trust property on a deferred payment basis, **Appellant was responsible for complying with the applicable regulations and was not relieved of that responsibility by representations made by the Superintendent.** See *Blackmore*, 30 IBIA at 239. **If the Superintendent in fact gave erroneous advice, that still could not operate to grant Appellant rights not authorized by law or inconsistent with the regulations.** *Billco Energy*, 35 IBIA at 7; see also *G.H.G. v. Acting Rocky Mountain Regional Director*, 39 IBIA 27, 30 (Superintendent's authority limited by the regulations).

Flynn, 42 IBIA at 212-213. (emphasis supplied).

In *Moody(s) v. United States*, 931 F.3d 1136 (D.C. Cir. 2019), the D.C. Circuit held that a cancelled lease cannot be revived by oral agreement with the BIA, and a new lease could not be created by oral agreement with BIA, especially where the Indian Nation landowner did not consent.

The Plaintiffs should have known the requirements of the Federal regulations and that they had to have either a written document from the BIA reversing the prior lease cancellation or a new lease to legally occupy Blackfeet Nation land after January 5, 2009. They had neither.

4. Effect of the Withdrawal of the Eagle Bear, Inc. Appeal.

When Eagle Bear, Inc. withdrew its appeal on January 5, 2009, the administrative clock began to run on the finality of its appeal. The BIA had not made a record retraction of the cancellation decision, and that decision was never reversed or otherwise set aside – the Blackfeet Agency's June 10, 2008 cancellation was still in effect when Eagle Bear withdrew its appeal.

Decisions of BIA officials 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). If an appeal was not filed, then the cancellation became effective on the 31st day after the cancellation letter was received.

The BIA Blackfeet Agency's June 10, 2008 decision cancelling the former Blackfeet Nation/Eagle Bear, Inc. lease became effective and final on or about

February 5, 2009. 25 CFR 2.9. Decisions of BIA officials 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). At that point, the Blackfeet Agency's cancellation decision was ripe for judicial review under the Administrative Procedures Act, 5 U.S.C. Sec. 704-706.

The Blackfeet Agency's June 10, 2008 cancellation decision marked the "consummation" of the agency's decision making process; it was not a decision of a merely tentative or interlocutory nature. And it was an action by which "rights or obligations [were] determined," and from which "legal consequences" flowed. *Bennett v. Spear,* 520 U.S. 154, 177-178 (1997). Once Eagle Bear withdrew its questionable appeal and 31 days thereafter elapsed, the Blackfeet Agency's June 10, 2008 cancellation decision, marked the "consummation" of the agency's decision making process, and it was an action by which "rights or obligations" were determined and from which "legal consequences" flowed. *Bennett,* Id. On or about February 5, 2009, 31 days after it withdrew its appeal and the cancellation decision of the BIA Blackfeet Agency became final and Eagle Bear's right to file a judicial challenge of that action pursuant to the Administrative Procedures Act began to run.

Controlling law from the Ninth Circuit Court of Appeals holds that the general six-year statute of limitations found at 28 U.S.C. Sec. 2401(a) "applies to

actions brought under the APA." *Wind River Mining Corp. v. United States,* 946 F.2d 710, 713 (9th Cir.1991) (footnote omitted); *Big Lagoon Rancheria v. California*, 789 F. 3d 947 (9th Cir. 2015). Based on controlling law, the statute of limitations ran on Eagle Bear's right to seek judicial review of the Blackfeet Agency's June 10, 2008 cancellation decision on or about February 5, 2015. Eagle Bear's attempts to have both administrative and judicial review of that cancellation decision 13 years later are without any legal authority whatsoever and must be rejected.

The Blackfeet Agency's June 10, 2008 cancellation decision of the former Blackfeet Nation/Eagle Bear lease became final for agency purposes 31 days after Eagle Bear withdrew its questionable appeal. There was never a record decision by the Bureau of Indian Affairs reversing, withdrawing, setting aside, overturning or modifying the 2008 lease cancellation decision.

That decision was final for the agency, and the 6 year general statute of limitations has now run. The Blackfeet Agency's June 10, 2008 decision cancelling the former Blackfeet Nation/Eagle Bear lease is now beyond either administrative or judicial review.

5. The Pending Proceedings before the Interior Board of Indian Appeals are moot.

The principal basis for the Plaintiffs' assertion that the Blackfeet Tribal Court lacks jurisdiction over the claims filed in that court, is that Tribal Court

jurisdiction has been preempted by the administrative proceedings pending before the Interior Board of Indian Appeals. As set forth before the IBIA, those proceedings are moot.

The IBIA adheres to the doctrine of mootness as a matter of prudence and in the interest of administrative economy. *Scotts Valley Band of Pomo Indians v. Pacific Regional Director,* 59 IBIA 56 (2014); *Picayune Rancheria v. Pacific Regional Director*, 58 IBIA 255, 257 (2014); *Alcantra v. Pacific Regional Director*, 58 IBIA 252, 253 (2014); *Van Mechelen v. Northwest Regional Director*, 56 IBIA 111, 112 (2013); *Pueblo of Tesuque v. Acting Southwest Regional Director*, 40 IBIA 273, 274 (2005). An appeal becomes moot when nothing turns on the outcome. *See Pueblo of Tesuque*, 40 IBIA at 274.

The current appeal before the IBIA is based on a 2017 action of the Blackfeet Agency cancelling the former Blackfeet Nation/Eagle Bear lease under the erroneous theory that there was still a lease in 2017. Eagle Bear appealed this decision to the Rocky Mountain Regional Director who reversed the Agency. The Blackfeet Nation then appealed the Regional Director's decision.

That appeal is moot. Because the former lease was in fact cancelled in 2008, nothing turns on the outcome of the appeal now pending before the IBIA. A cancelled lease cannot be revived by oral action of the BIA or by oral agreement between the BIA and the lessee. There was no lease to cancel in 2017.

It is worth noting that the IBIA has stayed all proceedings in the appeal pending before that Board in response to the Blackfeet Nation's Motion to Dismiss for Mootness. Doc. 14-A In so doing, the IBIA asked the BIA to respond to a June 18, 2021 letter from the Blackfeet Nation asking the BIA to either: 1) join the Blackfeet Nation in moving to dismiss the pending IBIA proceedings as moot based on the 2008 lease cancellation, or 2) provide the Blackfeet Nation with a document demonstrating that the 2008 lease cancellation decision of the Blackfeet Agency was reversed, set aside, withdrawn or otherwise modified. See *Defendant's Exhibit A1*, attached (Blackfeet Nation letter of June 18, 2021 to BIA Rocky Mountain Regional Office and Blackfeet Agency Office). As of the date of this Memorandum, the BIA has yet to respond to either Blackfeet Nation's June 18, 2021 letter or the IBIA's August 10, 2021 ORDER staying the proceedings and asking the BIA for a response.

D. The Issue of Finality of the 2008 Lease Cancellation Decision Is Properly before the Court.

As set forth above, the Blackfeet Nation's 2008 lease cancellation decision was a final action of the agency. There are no administrative remedies to be exhausted. The Bureau of Indian Affairs Blackfeet Agency took action to cancel the lease in 2008; it never withdrew of reversed that action. The Bureau of Indian Affairs Rocky Mountain Regional Office had from August of 2008 to January 5, 2009 to act on the Blackfeet Agency's cancellation decision and Eagle Bear's

appeal. That office did nothing; their time for acting has long-since passed. When Eagle Bear withdrew its appeal, there was no longer a basis for action by the Rocky Mountain Regional office except to carry out the federal law and regulations and take steps to evict Eagle Bear, Inc. from Blackfeet Nation land as a trespasser. 25 CFR Sec. 162.623; Doc. 1-2.Lease at Para. 43 (tenant acquires no rights as a holdover).

There is no basis for further delay by waiting for the BIA and then the IBIA to act. The present IBIA proceeding (including time before the BIA) has been going on for almost 5 years. Waiting for another decision by the BIA, and then an appeal through the IBIA could take another 5 years. There is no legal basis for further delay. The Court should decide the issue of the finality of the 2008 lease cancellation now.

CONCLUSION

Based on controlling United States Supreme Court and Ninth Circuit Court of Appeals law and the jurisdictional facts of this case, the Blackfeet Nation and Blackfeet Nation court has actual and plausible jurisdiction over both Plaintiffs Eagle Bear, Inc. and William Brooke. The former lease upon which the Plaintiffs rely to deny Blackfeet Nation jurisdiction was cancelled in 2008 and that cancellation is now beyond administrative and judicial review.

The administrative proceedings pending before the IBIA are moot; nothing turns on the outcome of those proceedings. There are no administrative remedies to be exhausted. Plaintiffs' right to seek administrative and judicial review of that action has elapsed.

Plaintiffs' COMPLAINT must be dismissed.

DATED this ___ day of September, 2021.

___/s/__Joseph J. McKay_____
Joseph J. McKay, Attorney-at-Law
Attorney for the Blackfeet Defendants

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 6,465 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