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

EAGLE BEAR, INC. and WILLIAM BROOKE, Plaintiff, vs. THE BLACKFEET INDIAN NATION and THE BLACKFEET TRIBAL COURT, Defendants.	Cause No. 4:21-cv-00088-BMM-JTJ **BRIEF OPPOSING MOTION TO DISMISS**

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Plaintiffs Eagle Bear, Inc. ("Eagle Bear") and Will Brooke (collectively "Plaintiffs") submit the following brief in opposition to Defendants' Motion to Dismiss for Lack of Jurisdiction and Failure to Exhaust Tribal Court Remedies (Doc. 21) ("Motion").

INTRODUCTION

The Blackfeet Tribal Court cannot exercise jurisdiction over the Blackfeet Tribe's claims because Will Brooke is not a member of the Blackfeet Tribe, the Blackfeet Tribe agreed to arbitrate its claims, the Blackfeet Tribe agreed that this Court is the sole judicial forum for its claims, the claims involve federal questions that the Blackfeet Tribal Court cannot resolve, and the facts on which the claims are predicated—cancellation of the Lease in 2008—must be decided by the BIA.

The Blackfeet Tribe's arguments in support of its motion to dismiss fail to address all but the last of these limitations on tribal court jurisdiction. With respect to that last restriction, the Blackfeet Tribe relies on unsupported allegations of fact and an incorrect interpretation of the Lease and the relevant law. As the Blackfeet Tribe acknowledges "[o]nly the BIA could cancel the [L]ease," and only the BIA can determine whether the Lease was cancelled in 2008 as the Blackfeet Tribe claims. (Doc. 22, Defendants' Memorandum in Support of their Motion to Dismiss at 9 ("Blackfeet Tribe's Brief")).

BACKGROUND

The facts giving rise to this dispute have previously been set out in Plaintiffs' Complaint (Doc. 1), Brief in Support of Motion for Preliminary Injunction (Doc. 5), and Supplemental Brief Regarding Tax Litigation (Doc. 23). Plaintiffs will not repeat those facts in detail. In summary, the Blackfeet Tribe and Eagle Bear entered a lease agreement in 1997. (Doc. 1, Complaint at ¶¶ 11-12). In exchange for certain rental and royalty payments and construction of certain improvements, the Blackfeet Tribe leased approximately 54 acres of tribal trust land to Eagle Bear. (Doc. 1-2, Lease). Eagle Bear has operated a KOA campground on the leased land since 1997. (Doc. 1, Complaint at ¶¶ 11-12).

In 2017, the Blackfeet Tribe raised allegations that Eagle Bear defaulted on several obligations under the Lease. (Doc. 1, Complaint at ¶ 13; *see also* Doc. 23 at pp. 3-4; Doc. 23-1). Eagle Bear disagreed and the parties have been attempting to resolve those allegations and whether they are subject to arbitration in BIA and IBIA proceedings ever since. (*See* Doc. 1, Complaint at ¶ 13). The BIA and IBIA have not reached a final decision on the Blackfeet Tribe's allegations and whether they are subject to arbitration. (*E.g.*, Doc. 12-1, Order Denying Motion to Dismiss, Order Concerning BIA's Jurisdiction, and Order Staying Appeal Proceedings (Aug. 10, 2021)).

Seeking to circumvent the ongoing BIA and IBIA proceedings, the Blackfeet Tribe filed the Tribal Court Complaint at issue in this matter in July 2021. (Doc. 1, Complaint ¶¶ 14-15; Doc. 1-3). In that Tribal Court Complaint, and in the related motion to dismiss that the Blackfeet Tribe filed with the IBIA, the Blackfeet Tribe claims that the Lease was cancelled in 2008 and not as a result of the alleged 2017 defaults. (Doc. 1-3, Tribal Court Complaint). The Blackfeet Tribe claims that, as a result, Eagle Bear and Will Brooke are liable for trespass and for damages. (*Id*.)

Plaintiffs filed their Complaint in this matter to prevent the Blackfeet Tribe from proceeding with its claims in Tribal Court. (Doc. 1, Complaint at p. 15) Plaintiffs ask the Court to allow the BIA and IBIA to resolve the questions of the Lease's validity, to enforce the Blackfeet Tribe's arbitration agreement, and to order that the Blackfeet Tribal Court does not have jurisdiction over Will Brooke or Eagle Bear. (*See id*.)

Critically with respect to the Blackfeet Tribe's motion to dismiss, Plaintiffs do not ask this Court to decide whether the Lease was cancelled in 2008, 2017, or at any other time. (*See id*.) Nor do they "ask this Court to create and enforce a lease that does not exist," as the Blackfeet Tribe claims. (Doc. 22, Blackfeet Tribe's Brief at 7). Plaintiffs also do not ask this Court to determine whether Eagle Bear has been trespassing on the Leased premises, or whether Plaintiffs are liable on the Blackfeet Tribe's claims. (*See* Doc. 1, Complaint). Plaintiffs steadfastly

deny that the Lease has been cancelled and deny that they are liable on the Blackfeet Tribe's Tribal Court claims, but those issues are not properly before this Court. The only question Plaintiffs have presented to this Court is whether the Tribal Court plainly lacks jurisdiction over those issues and over the Blackfeet Tribe's claims. (*Id*.)

STANDARD OF LAW

The Blackfeet Tribe expressly admits that "[n]on-Indians may bring a federal common law cause of action to challenge a tribal court's jurisdiction." Doc. 22, Blackfeet Tribe's Brief at 16 (citing *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 846 (9th Cir. 2009); *see also* Order Granting Defendant's Motion to Dismiss at 5-6, *Takeda Pharmaceuticals America, Inc. v. Connelly*, CV 14-50-GF-BMM (Apr. 24, 2015) ("*Takeda Order*"). The Blackfeet Tribe nevertheless claims that this Court lacks jurisdiction over Plaintiffs' Complaint because Plaintiffs have failed to exhaust the Tribal Court proceedings from which Plaintiffs seek relief.

Although non-Indians are typically required to "first exhaust remedies in tribal court before bringing suit in federal court," the "tribal court exhaustion requirement is not a jurisdictional bar" and the "Court may relieve a non-Indian from the duty to exhaust . . . where it determines that tribal court jurisdiction is 'plainly lacking.'" *Takeda Order* at 5-6 (citing *Grand Canyon Skywalk Dev., LLC*

v. 'SA' NYU WA Inc., 715 F.3d 1196, 1200 (9th Cir. 2013) and *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997)). At this stage "this Court is charged with determining only whether the Blackfeet Tribal Court 'plainly' lacks jurisdiction" over Plaintiffs. *Id*. at 6.

In resolving that question, the Court may "review evidence beyond the complaint" and consider "affidavits or other evidence properly brought before the Court." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). However, "a jurisdictional finding of genuinely disputed facts is inappropriate when the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action." *Id*. (internal quotation marks omitted). In such case of genuinely disputed facts, jurisdictional discovery may be appropriate. *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008).

DISCUSSION

1. Regardless of whether the Lease was cancelled in 2008, the Tribal Court plainly lacks jurisdiction over the Blackfeet Tribe's claims. [1]

a. The Tribal Court plainly lacks jurisdiction over Will Brooke.

Will Brooke is not a member of the Blackfeet Tribe and was acting as an

[1] Plaintiffs previously identified the several reasons that the Tribal Court plainly lacks jurisdiction over the Blackfeet Tribe's claims in their briefing on their Motion for Preliminary Injunction. (*See* Docs. 5 & 15). Because the Blackfeet Tribe has not offered any argument related to these reasons in its Motion to

agent of Eagle Bear at all times relevant to the actions alleged in the Blackfeet Tribe's Tribal Court Complaint. (Doc. 1-3, Tribal Court Complaint ¶¶ 5, 6, 39, 49-51, 53-63, 65-72). Will Brooke is not a party to the Lease. (*Id*.) He has not personally occupied or used Tribal trust land in a way relevant to the Blackfeet Tribe's claims. (*See id*.) There is no allegation that he has individually entered any "consensual relationships with the tribe or its members," whether through "commercial dealing, contracts, leases, or other arrangements," relevant to the Blackfeet Tribe's Tribal Court Complaint. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 329-30 (2008). Will Brooke, therefore, is not subject to the authority of the Tribal Court. *Id*. The Blackfeet Tribe did not offer any argument otherwise in its Brief, in its briefing on Plaintiffs' motion for preliminary injunction, or at the hearing on the motion for preliminary injunction. The Court should deny the Blackfeet Tribe's motion to dismiss because the Tribal Court plainly lacks jurisdiction over Will Brooke.

b. The Tribal Court claims must be arbitrated.

It is well-settled that tribal courts may not consider disputes that the parties have agreed to arbitrate. Where a tribe has unequivocally agreed to arbitrate a

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Dismiss, Eagle Bear summarizes the relevant arguments in this brief rather than repeating those arguments in full. Plaintiffs respectfully request that the Court cross-apply the arguments from those briefs to the Blackfeet Tribe's present motion.

dispute, courts are required to enforce the agreement to arbitrate according to its terms and to abstain from exercising jurisdiction over the dispute except to enforce the arbitration agreement and the arbitrators' decision. 9 U.S.C. § 2; *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418-23 (2001); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67-68 (2010); *see Plains Commerce Bank*, 554 U.S. at 346 (Ginsburg, J. dissenting).

In this matter, the parties expressly agreed to arbitrate any proceeding "for the purpose of declaring, determining or enforcing the rights, duties or liabilities of a Party under the Lease" and agreed to arbitrate "any breach, dispute, controversy or claim between the Parties regarding the rights, adequacy of performance, breach, or liabilities of a Party under any provision" of the Lease. (Doc. 1-2, Lease at Ex. A, ¶¶ 2, 7). The parties specified that such disputes would be arbitrated by the American Arbitration Association pursuant to its rules. (*Id*.)

The claims raised in the Tribal Court Complaint are subject to this arbitration agreement. They involve "declaring, determining or enforcing the rights, duties or liabilities" the Blackfeet Tribe alleges to have under the Lease and are predicated on the Blackfeet Tribe's allegations regarding "rights, adequacy of performance, breach or liabilities" under the terms of the Lease. (*Id*.) More specifically, the Blackfeet Tribe's Trespass and "Unauthorized Use of Blackfeet Nation Land" claims involve a determination that the Lease was breached and

cancelled (Doc. 1-3, Tribal Court Complaint at ¶¶ 58-62, ¶¶ 68-71); its Accounting claim is predicated on an alleged right to an accounting under "Section 32 of the . . . RECREATION AND BUSINESS LEASE between Blackfeet Nation and Eagle Bear" (*id*. at ¶ 64); its "Fraudulent Misrepresentation" claim asks the Tribal Court to determine that the BIA "appropriately and properly cancelled" the Lease (*id*. at ¶ 73); and its "Failure to Follow Blackfeet Nation Laws" involves "operation of the campground and recreational facility" and the payments Eagle Bear was obligated to make under the Lease (*see id*. at ¶ 94; Doc. 1-2 at pp. 10, 24, 26). Notably, the BIA has already decided after reviewing these same, or similar claims, that the claims were all subject to arbitration. (Doc. 1-11, Letter from Camrud to Westesen (Apr. 4, 2019); *see also* Doc. 5-3, Eagle Bear's Response to Blackfeet Tribe's Motion to Dismiss for Mootness, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (Aug. 6, 2021)).

This obligation to arbitrate has not been affected by the purported 2008 Lease cancellation because the Lease has not been cancelled, as discussed in more detail below. Moreover, any cancellation of the Lease would not impact the obligation to arbitrate because the arbitration provisions of a lease are presumed to survive cancellation unless the lease "manifest[ed] an intent to have arbitration obligations cease with the agreement." *See Nolde Bros. v. Loc. No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 254 (1977) (discussing

collective bargaining agreement); *see also Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 208-11, 208 n.7 (1991) ("duty to arbitrate survives termination of lease" (citing *West Virginia v. Lilly*, 267 S.E.2d 435, 437-48 (W. Va. 1980))); *Buena Vista Homes, Inc. v. Acting Pacific Regional Director*, 36 IBIA 194, 200 n.4 (2001). No such intention to end the arbitration obligations upon termination of the Lease is expressed in the Lease. On the contrary, the Lease specifically calls for survival of the arbitration requirement. "Subsequent to any termination of the lease, this arbitration remedy shall remain available to the Parties with the respects to disputes arising under the lease prior or subsequent to the termination date." (Doc. 1-2, Lease at Ex. A, ¶ 18). The Blackfeet Tribe is obligated to arbitrate its claims without respect to whether the Lease has been cancelled.

c. This Court is the sole judicial forum for any claims related to the Lease.

Even if the Blackfeet Tribe's claims were not subject to arbitration—they are for the reasons identified above—the Blackfeet Tribe would be obligated to bring their claims in this Court and not in the Blackfeet Tribal Court. In the Lease, the Blackfeet Tribe "specifically and unequivocally waived its sovereign immunity for [arbitration]" and agreed that "venue and jurisdiction for enforcement of the terms of the [Lease and any arbitration] lie in the United States Federal District Court, Great Falls Division." (Doc. 1-2, Lease at p. 23 & Ex. A ¶ 1). Such a

forum selection clause is "presumptively valid" and should be enforced "absent some compelling and countervailing reason." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004) (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972)). Because there is no "compelling and countervailing reason," such as "fraud or over-reaching" in the creation of the Lease, or any other reason that "enforcement would be unjust," the forum selection clause must be enforced. *Id*.

The Blackfeet Tribe's claims must be brought in this Court, to the extent they are not arbitrable. The Blackfeet Tribal Court plainly lacks jurisdiction over the matter.

2. The Blackfeet Tribe's allegations regarding cancellation of the Lease in 2008 highlight the Blackfeet Tribal Court's plain lack of jurisdiction over the Blackfeet Tribe's claims.

The Blackfeet Tribe claims that the Tribal Court has jurisdiction by virtue of the Blackfeet Tribe's power to exclude persons from the leased premises. (Doc. 22, Blackfeet Tribe's Brief at 13-19). However, the Tribe has no such power to exclude while the Lease is in effect. With the Lease, the Blackfeet Tribe expressly "waive[d] any right it might have to regulate the construction, operation, maintenance, and use" of the leased premises. (Doc. 1-2, Lease at p. 24, ¶ 27; *see also* Doc. 1-2, Lease at p. 26 at ¶ 31). It also delegated the power to cancel the Lease to the BIA. (*Id*. at ¶¶ 21, 24, 25, Ex. A ¶¶ 2, 4, 7, 15, 19). The Blackfeet

Tribe has no power to exclude persons from the Leased premises which makes *Takeda*, *Water Wheel*, and the other cases cited by the Blackfeet Tribe inapplicable. *See* Doc. 15, Reply Brief in Support of Motion for Preliminary Injunction at 6-12 (distinguishing *Takeda*, *Water Wheel*, and the other cases cited by the Blackfeet Tribe); Order Granting Defendant's Motion to Dismiss, *Takeda Pharmaceuticals Am., Inc. v. Connelly*, CV 14-50-GF-BMM (Apr. 24, 2015); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011).

Recognizing this problem, the Blackfeet Tribe argues that the Lease was cancelled in 2008 and that it therefore has a right to exclude Eagle Bear and others from the leased premises. (Doc. 22, Blackfeet Tribe's Brief at 15 ("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*." (Emphasis added)). The Tribe is not only factually incorrect for the reasons discussed below in Section 3 of this Discussion, issues of federal law and questions committed to the BIA's authority squarely prevent the Tribal Court from exercising jurisdiction.

a. The Tribal Court plainly lacks jurisdiction over the questions of federal law presented by the 2008 Lease cancellation allegations.

"Based on the extensive regulatory scheme involved in the administration of . . . leases on tribal lands," federal courts' "authority to adjudicate the instant

dispute" is "beyond question." *Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567, 573 (5th Cir. 2001) (discussing oil and gas leases). Unlike "routine contracts" that are "governed by general common law principles of contract" and that may be adjudicated by Tribal Courts, leases of tribal trust land are so comprehensively regulated by the federal government that their interpretation is a federal question that cannot be decided by Tribal Courts. *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1136-37 (8th Cir. 2019); *Comstock Oil & Gas Inc.*, 261 F.3d at 573-575; *see also Gaming World Intern., Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 847-48 (8th Cir. 2003).

With respect to business leases of tribal trust land, like the Lease at issue in the Blackfeet Tribe's Complaint to the Tribal Court, "[t]he Federal statutory scheme for Indian leasing is comprehensive. . . . Federal regulations cover all aspects of leasing," including "[w]hat laws apply to leases," "[t]respass," "[l]ease duration," "[a]mount, time, form, and recipient of rental payments," "[i]nvestigation of compliance with a lease," "[n]egotiated remedies," "delinquent payments," and "[s]ecretarial cancellation of a lease for violations." *Residential, Business, and Wind and Solar Resource Leases on Indian Land*, 77 Fed. Reg. 72,440, 72,447 (Dec. 5, 2012); *see also* 25 C.F.R. Part 162, Subpart D. In light of this comprehensive federal regulation of the Lease and other tribal trust land

leases, the Blackfeet Tribe's trespass, breach of Lease, Lease cancellation, and Lease accounting claims turn on federal law, federal regulation, and the BIA's administrative decisions concerning those claims. (*See* Dkt. 1-3, Tribal Court Complaint ¶¶ 58-99).

Indeed, the Blackfeet Tribe acknowledges that "[o]nly the BIA could cancel the [L]ease" and bases its arguments of the Tribal Court's jurisdiction on its claim that the BIA did so in 2008. (Doc. 22, Blackfeet Tribe's Brief at 9). The BIA has not cancelled the Lease and, instead, has repeatedly and recently decided that the Lease is in effect. More specifically, the BIA decided in April 2019 that "mediation and arbitration must be pursued before the [L]ease can be cancelled for breach of contract." (Doc. 1-11, Letter from Camrud to Westesen (Apr. 4, 2019)). The IBIA wrote in February 2021 that "the Lease has not been cancelled in any decision that is final for BIA." (Doc. 1-13, Order Denying Motion for Expedited Consideration, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (Feb. 23, 2021)). In April 2021, the BIA confirmed that "the terms outlined in the approved Lease are in effect." (Doc. 1-14, Letter from Crowe to Davis at 2 (Mar. 17, 2021)).

Both the Blackfeet Tribe's underlying claims to the Tribal Court and its arguments to this Court regarding the basis for the Tribal Court's jurisdiction directly contradict agency decisions and plainly involve federal questions about the

effect of BIA actions, regulations, and the Lease. The Tribal Court lacks adjudicative authority over such federal questions and over the Blackfeet Tribe's claims. *See Kodiak Oil & Gas (USA)*, 932 F.3d at 1136-37.

b. The Tribal Court plainly lacks jurisdiction because the BIA has authority over the 2008 Lease cancellation allegations.

In accordance with its admission that "only the BIA may cancel the Lease," the Blackfeet Tribe presented its 2008 Lease allegation claims to the BIA at approximately the same time it presented its claims predicated on the alleged 2008 cancellation to the Tribal Court. (Doc. 1-3, Tribal Court Complaint; Doc. 1-15, Motion to Dismiss for Mootness; *see* Doc. 22-1, Letter from Davis to Messerly (June 18, 2021) ("demand[ing] . . . that the Bureau of Indian Affairs honor its 2008 cancellation of [the Lease] and immediately take steps to remove Eagle Bear, Inc. and William Brooke from Blackfeet Nation land . . . ."). By doing so, the Blackfeet Tribe recognizes that the BIA is the entity that should be deciding whether the Lease was cancelled in 2008.

The IBIA agreed. (Doc. 12-1, Order Denying Motion to Dismiss (Aug. 10, 2021 at 1-2). Rather than considering whether the question before the BIA had developed a factual record, the IBIA directed the BIA to respond to the Blackfeet Tribe's 2008 Lease cancellation allegations. (*Id*.) This decision of the IBIA—that the BIA should initially review the 2008 Lease cancellation claims—is entitled to deference and subject to administrative exhaustion before it is reviewable by this

Court. *See Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 381-82 (1988) ("[G]iving deference to an administrative interpretation of its statutory jurisdiction is both necessary and appropriate."); *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297-98, 304-05 (2013).

Administrative exhaustion is especially appropriate here. One of the primary purposes for federal courts' rules regarding deference to administrative agencies and abstention from judicial review pending administrative exhaustion is to allow administrative agencies to properly develop a factual record. *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988); *Christopher S. v. Stanislaus Cnty Office of Ed.*, 384 F.3d 1205, 1209-10 (9th Cir. 2004). Neither Eagle Bear, nor the BIA, nor the Blackfeet Tribe have had the opportunity to adequately develop the evidentiary record related to the Blackfeet Tribe's 2008 Lease cancellation claims. Requiring administrative exhaustion of the 2008 Lease cancellation claim will allow the parties to do so.

The Blackfeet Tribe first raised its allegations that the Lease was cancelled in 2008 and that Eagle Bear is a trespasser in June 2021. (*See* Doc. 1-3, Tribal Court Complaint; Doc. 1-15, Motion to Dismiss for Mootness (July 26, 2021); Doc. 22-1, Letter from Davis to Messerly (June 18, 2021)). Since that time, Eagle Bear has begun reviewing what evidence it has related to the alleged 2008 Lease cancellation. Eagle Bear has produced the documents it found, most notably of

which is the January 5, 2009 letter resolving the 2008 cancellation appeal, in which Will Brooke wrote that he was withdrawing his appeal because the BIA notified him that the Lease was current and not cancelled. (Ex. 1, Letter from Brooke to Pollock (Jan. 5, 2009)). Eagle Bear also located certified mail receipts showing that the Blackfeet Tribe received Eagle Bear's appeal of the purported 2008 cancellation. (Ex. 6, Notice of Appeal Letter from Brooke to Pollock at 5 (June 18, 2008)).[2] Eagle Bear has not, however, had an opportunity to finish its search for relevant documents.

It is Eagle Bear's understanding that the BIA is also reviewing its records pertaining to the 2008 proceeding, and that the BIA's investigation is ongoing. Eagle Bear expects the BIA to issue a further response or decision on the 2008 Lease cancellation issue once BIA's review is complete.

So far, the only evidence related to the 2008 Lease cancellation arguments that is available to the parties are the June 10, 2008 "cancellation decision" and several other documents that the Blackfeet Tribe filed as document 14-1 and the letters attached to this brief as Exhibits 1–6. As discussed below, such documents are insufficient to support the Blackfeet Tribe's arguments. Indeed, the Blackfeet Tribe fails to cite any evidence in support of the majority of the allegations in its

[2] The certified mailing receipt was signed by Carl Old Person, a relative of then tribal chairman, Earl Old Person. (Ex. 6 at 5). Earl Old Person signed the original Lease on behalf of the Tribe. (Doc. 1-2, Lease at 32).

brief. The referenced documents are insufficient for this Court to determine as a matter of law that the Lease was cancelled in 2008 in a decision that was final for the BIA, as the Blackfeet Tribe alleges.[3]

BIA administrative proceedings, and not proceedings in the Tribal Court, are the appropriate avenue for the Blackfeet Tribe, Eagle Bear, and the BIA to develop a sufficient factual record. The Blackfeet Tribe must exhaust its BIA remedies related to the alleged 2008 Lease cancellation before seeking other relief. As the IBIA decided when the Blackfeet Tribe raised its 2008 Lease cancellation arguments: "Tribe has not exhausted its administrative remedies within BIA concerning the purported 2008 cancelation of the Lease." (Doc. 12-1, Order Denying Motion to Dismiss, Order Concerning BIA's Jurisdiction, and Order Staying Appeal Proceedings at 1, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (Aug. 10, 2021))

[3] To be clear, neither this Court nor the Tribal Court can resolve any question of fact created by the lack of evidence. Any question about the effect of proceedings related to the purported 2008 Lease cancellation must be resolved in the first instance by the BIA. The Blackfeet Tribe has failed to produce evidence sufficient to support its claim that the Lease was cancelled by the BIA in 2008 in a decision that is final for the BIA.

3. The Lease was not cancelled in 2008.[4]

a. The Blackfeet Tribe's 2008 Lease cancellation arguments are not supported by evidence.

The significant majority of the Blackfeet Tribe's allegations are wholly unsupported, either by citation to evidence or, on the occasion that the Blackfeet Tribe cites to evidence, by the evidence that the Blackfeet Tribe cites. Without such evidence, the Court could not resolve the questions of fact that the Blackfeet Tribe has presented regarding the 2008 Lease cancellation and dismiss the Plaintiffs' claims, even if the Lease cancellation question was properly before this Court or dispositive. *See Safe Air for Everyone*, 373 F.3d at 1039 (suggestion that a Court may review only "affidavits or other evidence properly brought before the Court" to resolve a "factual attack on jurisdiction"). The Blackfeet Tribe's motion should, therefore, be denied.

[4] The question of whether the Lease was cancelled in 2008 is not currently before the Court. It is before the BIA, and appropriately so. Plaintiffs ask this Court only to decide that the Tribal Court cannot resolve this exclusively federal question. (Doc. 1-3, Tribal Court Complaint; Doc. 1, Complaint). The question of whether the Lease was cancelled in 2008 also is not dispositive to the Blackfeet Tribe's Motion. Regardless of whether the Lease was cancelled in 2008, the Blackfeet Tribe's claims are subject to arbitration, subject to judicial review in only this Court, and cannot be brought in Tribal Court for the reasons discussed above. Nevertheless, Eagle Bear addresses the Blackfeet Tribe's 2008 Lease cancellation allegations because the Blackfeet Tribe's brief is devoted those allegations and because those allegations are factually incorrect.

b. The Lease was not cancelled in 2008 because Eagle Bear timely cured any alleged default.

The June 10, 2008 alleged "cancellation decision" was not, as the Blackfeet Tribe alleges, a final decision of the BIA and did not cancel the Lease. Under the BIA's 2008 regulations and the terms of the Lease, Eagle Bear was entitled to cure its alleged defaults within 10 days of receiving the June 10, 2008 "cancellation decision." 25 C.F.R. § 162.618 (2008); Doc. 1-2, Lease at p. 23, § 25. The June 10, 2008 letter was Eagle Bear's first notice of its alleged default.[5] It is undisputed that Eagle Bear paid the precise amount requested by the BIA on either June 6 or June 16, 2008, well-within the 10 day period by which Eagle Bear was entitled to cure the BIA's allegations. (Ex. 5, Check from Eagle Bear to BIA (June 16, 2008)). Therefore, Eagle Bear timely cured any alleged breach of the Lease and the Lease was never properly cancelled.

[5] Although the Blackfeet Tribe has not made the argument to this Court, it has suggested to the IBIA that Eagle Bear received notice of and opportunity to cure its alleged defaults by the January 15, 2008, March 27, 2008, and April 4, 2008 letters from the BIA that are attached hereto as Exhibits 2, 3, and 4. Eagle Bear never received those letters, likely because the letters were sent to the wrong address. (Exs. 2, 3 & 4). Notably, the BIA was required to send the letters by certified mail but no party has produced evidence of Eagle Bear's receipt of the letters. 25 CFR § 162.618(a) (2008). There is also no evidence that the notices were sent to Eagle Bear's surety, as required under the 2008 regulations.

c. The Lease was not cancelled in 2008 because Eagle Bear timely appealed the BIA's cancellation letter.

As the Blackfeet Tribe acknowledges, Eagle Bear's appeal stayed the June 10, 2008 decision. (Doc. 22, Blackfeet Tribe's Brief at 20-21). The 2008 leasing regulations were clear: a "cancellation decision will remain ineffective if the tenant files an appeal." 25 C.F.R. § 162.621 (2008). Consequently, even if Eagle Bear had not cured its alleged default and the BIA had properly cancelled the Lease, Eagle Bear's Notice of Appeal and Statement of Reasons would have rendered the cancellation decision ineffective unless and until the Regional Director issued a final decision cancelling the Lease. (Ex. 6, Notice of Appeal Letter from Brooke to Pollock (June 18, 2008)). To date, there is no final decision from the Regional Director cancelling the 2008 Lease. (*See* Doc. 1-13, Order Denying Motion for Expedited Consideration, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (Feb. 23, 2021) ("the Lease has not been cancelled in any decision that is final for BIA")).

Similarly, the Regional Director did not issue a decision dismissing the case after Eagle Bear withdrew its appeal. Instead, after receiving Eagle Bear's appeal, the BIA informed Eagle Bear that its Lease payments were current and, in turn, Eagle Bear agreed to withdraw its appeal per BIA's agreement that the Lease was current and in full force and effect. (Ex. 1, Letter from Brooke to Pollock (Jan. 5, 2009)).

The Blackfeet Tribe fails to offer any legal support for its argument that withdrawal of the appeal results in automatic cancellation. None exists. Eagle Bear withdrew its appeal after being informed that the Lease was valid. There simply was nothing more to appeal and never a final and effective Lease cancellation decision.

d. The Lease was not improperly "revived," as the Blackfeet Tribe claims. The Lease was never cancelled.

Citing *Moody v. United States*, 931 F.3d 1136 (Fed. Cir. 2019), the Blackfeet Tribe claims that the oral acknowledgement by the BIA that the Lease was not cancelled and that Eagle Bear had cured any default could not "revive" the Lease after Eagle Bear withdrew its appeal. Critically, however, the Lease was not cancelled prior to the BIA's acknowledgment because the cancellation decision was suspended pending Eagle Bear's appeal. 25 C.F.R. § 162.621 (2008). The BIA's representation and its agreement with Eagle Bear did not, therefore, *create* or *revive* a Lease, as the Blackfeet Tribe contends. Rather, it merely acknowledged that the alleged default had been cured and the existing Lease remained in full force and effect. (*See* Ex. 1, Letter from Brooke to Pollock (Jan. 5, 2009)).

To the extent the Blackfeet Tribe argues, as it did during the hearing on Eagle Bear's motion for preliminary injunction, that Eagle Bear has not produced any evidence that the BIA accepted Eagle Bear's cure, agreed that the Lease was in

effect, and agreed that Eagle Bear could withdraw its appeal and continue operating under the Lease, that argument is incorrect. The January 5, 2009 letter from Will Brooke to the BIA is evidence that such an agreement was made. (Ex. 1, Letter from Brooke to Pollock (Jan. 5, 2009). The letter was sent to the BIA and to the Tribe. (*Id*.) The letter was Eagle Bear's contemporaneous confirmation of the agreement with the BIA and the BIA's acceptance of Eagle Bear's cure. The Blackfeet Tribe's and BIA's silence in response to the letter and, as discussed below, the parties' course of conduct over the next 12 years further confirmed that the letter was an accurate recitation of the parties' agreement and that the Lease was in effect following the BIA's acceptance of Eagle Bear's cure and Eagle Bear's withdrawal of its appeal.

The BIA was empowered to accept Eagle Bear's cure, to exercise its discretion to determine that cancellation was not warranted, and to allow Eagle Bear to continue operating under the Lease. 25 C.F.R. §§ 162.618 & .619 (2008); *see Dobins v. Acting Eastern Oklahoma Regional Director*, 59 IBIA 79, 93-94 (2014); *Gourneau v. Acting Rocky Mountain Regional Director*, 50 IBIA 33, 43 (2009); *Delgado v. Acting Anadarko Area Director*, 27 IBIA 65, 80 (1994); *see also* 25 C.F. R. §§ 162.466 & .467. In fact, the Lease specifically authorized the BIA to decide whether to terminate the Lease in the event of default or, alternatively, to "[r]e-let the premises without terminating the lease" in the event of

a default by Eagle Bear. (Doc. 1-2, Lease at p. 19, § 21.B(1); *see also* 25 C.F.R. §§ 162.618 & .619 (2008) (allowing but not requiring the BIA to cancel a lease in the event of a default and failure to cure)). Contrary to the Blackfeet Tribe's arguments, the BIA was authorized to accept Eagle Bear's cure, withdraw its cancellation, and allow Eagle Bear to continue under the terms of the Lease.

Moody does not indicate otherwise. *Moody* involved agricultural leases of tribal trust land. 931 F.3d at 1137-38. After the BIA sent letters cancelling the leases for nonpayment of rent and other alleged breaches of the lease, the lessor delivered a check to the BIA. *Id*. at 1138. The BIA accepted the check and "informed the [lessors] that they did not need to appeal [the cancellation decisions], could continue farming the land according to the leases, and did not require written confirmation." *Id*. at 1139. Nevertheless, the BIA subsequently sent trespass notices to the lessors who were eventually instructed to vacate the leased premises. *Id*. The lessors voluntarily left the premises and, although the Federal Circuit noted that they likely had grounds to do so, they did not appeal to "the BIA for cancellation of any of the leases." *Id*.

Instead, the lessors "filed a complaint against the United States" for damages. *Id*. at 1139-40. They claimed that the BIA had breached the leases, had "revive[d] the leases thereby creating implied-in-fact contracts" and breached such implied contracts, and committed "uncompensated takings." *Id*. When the Court

of Federal Claims dismissed the claims because the United States "was not a party to the leases" and, therefore, the claims were not cognizable at law, the Federal Circuit affirmed. *Id*. at 1140. The Federal Circuit reasoned that the United States was not a party to the lease and could not, therefore, be liable for breach of contract. *Id* at 1141.

With respect to the lessor's argument that the BIA's acceptance of lease payments and representations that no appeal was necessary, the Federal Circuit did not hold that a party may not settle an appeal by "oral agreement with the BIA," as the Blackfeet Tribe suggests. *Id*. at 1142. It also did not hold that an oral agreement with the BIA cannot revive or create a new lease, as the Blackfeet Tribe claims. *Id*. Instead, the Federal Circuit held only that such an oral agreement would not support a breach of lease claim against the United States because the United States would not be a party to such a revived lease. *Id*. It reasoned that any oral agreement reviving a lease would be on the "same terms as the previous lease," that the United States would not, therefore, be a party to the agreement, and the lease would not support a breach of contract claim against the United States. *Id*.

Thus, *Moody* does not indicate, as the Blackfeet Tribe suggests, that the BIA could not accept Eagle Bear's cure, withdraw its cancellation, and allow Eagle Bear to continue under the terms of the Lease. *Moody* was not about the validity of

Leases, the effect of purported cancellations, the effect of BIA oral agreements or acceptance of cure at all. *Id*. at 1139-40, 1142. It only concerned the validity of a breach of contract claim against the BIA for cancellation of a lease. *Id*.

Here, the BIA was authorized under its regulations and the terms of the Lease accept Eagle Bear's cure and exercise its discretion not to terminate the Lease.

e. The parties' course of conduct confirmed that the Lease was not cancelled in 2008.

The parties operated in accordance with the Lease and the BIA's agreement that the Lease was current and in full force and effect for over 12 years after Eagle Bear withdrew its appeal. (Ex. 1, Letter from Brooke to Pollock (Jan. 5, 2009)). It is telling that the Tribe did not make its 2008 cancellation arguments until after the Tribe waived its right to purchase the second 25-year Lease term, belatedly attempted to purchase that second 25-year Lease term, and the IBIA denied expedited consideration of the Blackfeet Tribe's appeal in light of the renewal of the Lease. (Doc. 1-13, Order Denying Motion for Expedited Consideration, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (Feb. 23, 2021); Doc. 19-1, Letter from Brooke to Davis (Oct. 1, 2020); Doc. 19-3, Letter from Davis to Brooke (Dec. 9, 2020); Doc. 19-4, Letter from Brooke to Davis (Dec. 11, 2020); Doc. 19-5, Letter from Davis to Brooke (Dec. 21, 2020);

Doc. 1-16, Letter from Messerly to Westesen (Aug. 9, 2021)). For the 12 years prior, the Tribe had never suggested or acted as if the Lease was cancelled.

The Tribe was undeniably aware of and involved with the 2008 appeal. The Tribe received a copy of the BIA's 2008 cancellation decision. (*See* Ex. 6, Notice of Appeal Letter from Brooke to Pollock (June 18, 2008)). Eagle Bear provided the Tribe a copy of Eagle Bear's 2008 Notice of Appeal and Statement of Reasons, which the Tribe received on or around June 23, 2008. (*Id*.). Most notably, the Tribe received a copy of Eagle Bear's January 5, 2009 withdrawal letter in which Eagle Bear wrote:

> Pursuant to my discussions with your realty staff, I hereby withdraw the Notice of Appeal dated June 18, 2008 . . . . 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. Accordingly, the lease is current.

(Ex. 1, Letter from Brooke to Pollock (Jan. 5, 2009)).

The Tribe was well aware of the 2008 proceedings and that the 2008 cancellation decision was withdrawn because Eagle Bear believed that the Lease was not cancelled since any breach had been cured. The Tribe never claimed that the 2008 cancellation was improperly withdrawn or operated to cancel the Lease. Indeed, when attempting to purchase the Lease, the Blackfeet Tribe argued in December 2020 that the Lease would terminate in April 2021. (Doc. 1-16, Letter

from Messerly to Westesen (Aug. 9, 2021) ("[T]he Tribe asserts that the Lease expires by its own terms on April 4, 2021, unless extended.").

Thus, the Blackfeet Tribe's, BIA's, and Eagle Bear's conduct confirmed that the Lease was not cancelled in 2008 and that the parties did not believe that the Lease was cancelled in 2008.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny the Blackfeet Tribe's Motion to Dismiss.

Dated this 7th day of October, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word, is 6,498 words long, excluding the Caption, the Certificates of Service and Compliance, Tables of Contents and Authorities, and Exhibit Index.

Dated this 7th day of October, 2021.

CROWLEY FLECK PLLP

By /s/ Neil G. Westesen
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2021, a true and correct copy of the foregoing was delivered by the following means to the following:

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