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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' REPLY BRIEF 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.	)

COMES NOW the Defendants Blackfeet Indian Nation and Blackfeet Tribal Court, by and through counsel, respectfully submit their Reply Brief in Support of their Motion to Dismiss for lack of jurisdiction and failure to exhaust Blackfeet Tribal Court remedies, as follows:

BACKGROUND

The background for this case has been set forth in prior pleadings and will not be repeated here.

Plaintiffs filed this action seeking a declaratory judgment and permanent injunction preventing the Blackfeet Nation from pursuing claims against the Plaintiffs in the Blackfeet Tribal Court. Plaintiffs also filed a motion for preliminary injunction. That motion has been fully briefed, a hearing was held and it awaits a decision from the court.

The Blackfeet Nation Defendants filed their Motion to Dismiss for lack of jurisdiction and failure to exhaust tribal court remedies. Relying on established principles of Federal Indian law, the Blackfeet Defendants argue that this Court should dismiss the Plaintiffs' complaint because the Blackfeet Nation has actual jurisdiction over both Plaintiffs Eagle Bear, Inc. and William Brooke and the Blackfeet Nation claims brough in the Blackfeet Nation Court, and because the Plaintiffs have failed to exhaust their tribal court remedies.

A former lease between the parties was cancelled in 2008 by the Blackfeet Agency of the Bureau of Indian Affairs. The Blackfeet Defendants have provided both the factual and legal basis to support their argument regarding the finality of the 2008 lease cancellation.

Plaintiffs' response to the Blackfeet Defendants' Motion to Dismiss can best be characterized as one of denial and distortion. Relying on the same inapposite

and legally baseless arguments that it advanced in its motion for preliminary injunction, Plaintiffs falsely claim that the Defendants did not offer argument that Plaintiff Will Brooke was subject to Blackfeet Nation jurisdiction, that they are entitled to arbitration, that this court either has exclusive jurisdiction or no jurisdiction, that the lease was not cancelled in 2008, that the lease was brought "current" even though they failed to pay contractually required interest, and that the equitable doctrine of "course of conduct" confirmed that the lease was not cancelled. Plaintiffs also make the totally baseless assertion that this court lacks sufficient facts to determine that the lease was cancelled in 2008.

Each of Plaintiffs arguments is without merit and must be rejected. The Defendants' Motion to Dismiss must be granted.

1. The Blackfeet Nation and Blackfeet Tribal Court have Jurisdiction over Plaintiff William Brooke.

Plaintiffs falsely assert that the Blackfeet Nation Defendants have no jurisdiction over Plaintiff William Brooke, and they also falsely assert that the Defendants did not challenge their claim of lack of jurisdiction over William Brooke. See Doc. 22 (Defendants' Memorandum in Support of its Motion to Dismiss, pgs. 11-19).

For support of its argument, the Plaintiffs once again mistakenly rely on *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U. S. 316 (2008) and the

"consensual commercial relationship test", and on their continued denial of the fact that the former lease was cancelled in 2008.

There is no lease. Based on the allegations in the Blackfeet Nation's complaint in the Blackfeet Tribal Court, the Blackfeet Nation has jurisdiction over William Brooke. Whether he in fact has had sufficient contacts with the Blackfeet Reservation to maintain that jurisdiction is for the Blackfeet Tribal Court to determine.

2. As the "Breaching Party" the Plaintiffs' are Not Entitled to Arbitration Pursuant to the Former Lease.

Ignoring the plain language of the former lease upon which they mistakenly rely, the Plaintiffs falsely assert that they are now entitled to arbitrate the Bureau of Indian Affairs cancellation of the lease 13 years ago. The Plaintiffs also falsely assert that they asked this Court to require arbitration in their Complaint. Even if a claim to arbitration could be asserted 13 years after the lease was cancelled (which it could not), the Plaintiffs are not entitled to arbitration under the terms of the former lease.

The Plaintiffs arbitration argument fails for two separate reasons. First, the arbitration agreement by its terms applies only to disputes between the parties. The Secretary of the Interior/Bureau of Indian Affairs is not a party to the lease. The BIA cancelled the lease in 2008; not the Blackfeet Nation. Because the

cancellation was a BIA action and the BIA is not a party to the lease, the BIA's cancellation decision is not subject to arbitration.

Second, the terms of the former lease and the remedies addendum do not support the Plaintiffs' claims for arbitration. Consistent with their approach of denial and distortion, in support of their failed arbitration argument, the Plaintiffs cite to a single line in the former lease addendum referring to arbitration while failing to include the requirements for triggering arbitration. The applicable provisions of the former lease and the remedies addendum are as follows:

> . . .
> In the event of any dispute, controversy, or claim between the parties arising out of the terms of this agreement, **upon written notice to the breaching party** of the substance of the alleged dispute, controversy, or claim, and the remedies sought, **the nonbreaching party shall be entitled to suspend any of its obligation hereunder to the extent of the dispute, controversy, or claim,** and petition the United States Federal District Court . . . for relief as set forth in Exhibit "A" attached hereto and incorporated herein by reference.

Doc. 1-2. (Lease, Sec. 24) (Emphasis supplied).

The applicable provisions of the remedies addendum to the former lease read as follows:

> 4. NOTICE OF NONCOMPLIANCE.
>
> **If a party ("Complaining Party") concludes that the other Party ("Responding Party") has failed to comply with, or is proposing to take action which will breach, any term or condition of the lease agreement ("Noncompliance"), the Complaining Party may give written notice to the Responding Party ("Notice of**

> **Noncompliance"),** which specifies: (a) the Noncompliance; (b) the corrective action which must be taken to remove, or where appropriate, to commence removal of, the Noncompliance ("Corrective Action") and, (c) a reasonable time limit within which the Corrective Action must be commenced. No remedial proceedings for a claimed Noncompliance may be commenced by a Party unless prior Notice of Noncompliance and opportunity to take Corrective Action have been given as provided herein.

Doc. 1-2. (Lease, Ex. A. Sec. 4) (Emphasis supplied).

Read together, the two referenced provisions of the former lease clearly provide that only the nonbreaching party could have sought arbitration. Eagle Bear was the breaching party in the 2008 lease cancellation. It failed to make the November 2007 annual rental payment in a timely manner and has not made that payment in full to this day (Eagle Bear admitted in oral argument on their Motion for Preliminary Injunction that it had not paid the interest on that payment and that it was attempting to arbitrate that issue). Eagle Bear, Inc. was not entitled to arbitration when the lease was cancelled in 2008 and it is not entitled to arbitration now. The Plaintiffs are definitely not entitled to claim arbitration of the 2008 lease cancellation 13 years after the fact. Plaintiffs' claim to arbitration fails and must be rejected.

3. The Former Lease Was Cancelled in 2008; the Finality of that Cancellation Decision is Properly before the Court.

As set forth in the Defendants' opening Memorandum in Support of their Motion to Dismiss (Doc. 22 , pgs. 19-30), the former lease was cancelled on June

10, 2008. Doc. 14-B (Defendant's Memorandum in Opposition to Preliminary Injunction: BIA Cancellation letter). Eagle Bear, Inc. initially appealed that cancellation raising only one issue: the false assertion that it paid the delinquent payment for which the lease was cancelled before receiving the cancellation decision. Doc. 14-C (Eagle Bear's Notice of Appeal). Eagle Bear subsequently withdrew that appeal. Doc. 14-F (Eagle Bear's Appeal Withdrawal letter). In accordance with 25 CFR 2.6(b), once the appeal was withdrawn time began to run on the administrative finality of that decision. Doc. 22 (Memorandum in Support, pgs. 28-30). The six-year statute of limitations for challenging the administrative action has run and the matter is no longer subject to administrative review. Id.

a. Plaintiffs' Attempt to Re-open the 2008 Lease Cancellation and Raise new Arguments 13 After they Withdrew Their Appeal is Untimely.

In response to the established fact that the lease was cancelled in 2008 (Doc. 14-B), the Plaintiffs filed a Notice of Appeal and Statement of Reasons in which they falsely claimed that they paid the delinquent payment for which the lease was cancelled, but failed to make any claim that Eagle Bear did not receive a 10-day show cause letter or that Eagle Bear's surety was not notified. Doc. 14-C. The Plaintiffs now attempt to re-open the 2008 appeal 13 years later and argue that they did not receive the required 10-day show cause letter and opportunity to cure and that their surety did not receive notice of the cancellation as required by the lease.

Incorrectly asserting that the June 10, 2008 cancellation letter was Eagle Bear's 10-day show cause letter, the Plaintiffs continue to falsely assert that Eagle Bear's after-cancellation payment of the delinquent annual rental payment "cured" the default.

As a matter of law, the Plaintiffs cannot raise those arguments now, having failed to raise them in their initial appeal. *Wind River Alliance v. Rocky Mountain Regional Director*, 52 IBIA 224, 227 (2010); Doc. 22, pgs. 23-24. Eagle Bear never "cured" the delinquency for which the lease was cancelled because it never paid the interest owed on the late payment which was due without demand. Doc. 1-2 (Lease, sec. 6.).

b. Plaintiffs' Claim of an "Agreement" with the BIA to Withdraw Eagle Bear' Appeal of the 2008 Lease Cancellation is Unsupported by Any Law or Evidence.

The substance of Plaintiffs' erroneous claim that the former lease was not cancelled in 2008 rests on Eagle Bear's January 5, 2009 letter in which it withdrew its appeal of the cancellation and makes the unilateral declaration that the lease was current. The unilateral declaration by Eagle Bear that "the lease is current", has now ripened into an oral agreement and acknowledgement by the BIA that the default had been cured and the lease was still in effect. Plaintiffs offer no evidence to support this fabrication.

According to the January 5, 2009 letter, Eagle Bear was not in discussion with the Superintendent of the Blackfeet Agency, but rather his staff. No staff person was ever named by the Plaintiffs as having been part of this supposed discussion. William Brooke has never provided an affidavit in support of his claims which are far beyond the plain language of the January 5, 2009 letter. Importantly, Brooke has never provided a written statement from any BIA staff person or official containing and confirming the substance of the claimed agreement. Again, as was already argued (Doc. 22, pgs. 24-26), the unilateral declaration in the Eagle Bear appeal withdrawal letter that the lease was current is false in any event. Id.

It makes no sense that the BIA would allow a staff person to override or set aside the decision of the Agency Superintendent (the Agency Decision Maker) to cancel a lease for non-payment, where the lease was in fact not current. The IBIA cases and federal regulations upon which the Plaintiffs rely to support this unique and novel proposition simply do not apply to facts where a lease has been cancelled. No IBIA case or federal regulation supports such an outcome.

The BIA has never issued a written decision withdrawing, reversing, rescinding, modifying, amending or otherwise changing the 2008 lease termination decision.

c. With Respect to the 2008 Lease Cancellation, Plaintiffs' Administrative Remedies Were Either Exhausted or Waived.

Plaintiffs long ago both exhausted and then waived their administrative remedies arising out of the 2008 lease cancellation. There are no administrative remedies left to exhaust. Ignoring and distorting the facts and the law, the Plaintiffs continue to baselessly assert that are administrative remedies left to exhaust which prevent this court form exercising jurisdiction over the finality of the 2008 lease cancellation.

As has been discussed at length, the lease was cancelled in 2008, Eagle Bear appealed that cancellation on the false assertion that it paid the delinquent annual rental payment before receiving the cancellation letter, Eagle Bear's payment of the delinquent annual rental payment did not include the required accrued interest, Eagle Bear withdrew its' appeal on January 5, 2009, and at the time that Eagle Bear withdrew its' appeal it was not current on the lease as it had not paid the interest on the delinquent payment and it was delinquent at that time on the 20008 gross receipts royalty payment.

When Eagle Bear withdrew its' appeal, it had the same effect as if there had never been an appeal filed. By withdrawing the appeal, Eagle Bear had first attempted to exhaust their appeal rights and then waived any further appeal rights. According to the regulations, 31 days after Eagle Bear withdrew the appeal, the cancellation decision became a final agency action. See Doc. 22, pgs. 28-30. The

Plaintiffs have no right to an administrative appeal of the 2008 lease cancellation today – 13 years later.

d. The Issue of the Finality of the 2008 Cancellation is Properly Before the Court.

Pursuant to the law (as set forth above) and the terms of the former lease agreement, the issue of the finality of the 2008 lease cancellation is properly before the Court today. And while this Court's general jurisdiction over any dispute arising out of the former lease agreements is doubtful, this Court's jurisdiction over the finality of the 2008 lease cancellation is beyond question.

Jurisdiction of federal courts is limited to: a) all civil actions arising under the Constitution, laws, or treaties of the United States, 28 U.S.C. Sec. 1331; and, b) when the amount in controversy exceeds $ 75,000 and the parties have diversity of citizenship in different states or in a state and foreign country. 28 U.S.C. Sec. 1332. While general disputes arising out of the former lease agreement would not meet the federal question requirement as none of those disputes would arise under the Constitution, laws or treaties of the United States, the question of the finality of the federal agency action cancelling the 2008 lease does arise under the laws of the United States.

According to the former lease agreement:

> In the event of a breach of the lease, the Bureau of Indian Affairs shall issue a 10-day show cause letter pursuant to 25 CFR Sec. 162.14. Appeal rights of any decision thereto

> are provided for by 25 CFR Part 2. The parties shall exhaust all administrative appeals before filing with the United States District Court, Great Falls Division.

Doc. 1-2 (Lease, Sec. 25).

Based on Eagle Bear's failure to pay the 2007 annual rental payment, the BIA first sent Eagle Bear 10-day show cause letters including a letter copied to its surety, and then cancelled the lease on June 10, 2008. Eagle Bear initially pursued its' appeal rights pursuant to 25 CFR part 2. Eagle Bear then withdrew its appeal thereby exhausting and waiving any appeal rights which it may have had. Therefore the issue of the finality of the 2008 lease cancellation is properly before the Court as a matter of law and the former lease agreement.

e. Plaintiffs' Claim of Insufficient Evidence is Meritless.

Based on the pleadings and exhibits of the parties, the Court has before it sufficient evidence to decide all the issues presented by the Defendants' Motion to Dismiss. No further evidentiary hearing is required. Plaintiffs' baseless claims to the contrary must rejected.

Evidence before the Court establishes that the Plaintiffs, non-Indians, are operating a campground on Blackfeet Nation trust land within the Blackfeet Indian Reservation. Documentary evidence establishes that fact that the former lease by which the Plaintiffs operated the campground was cancelled by the BIA on June 10, 2008 (Doc. 14-B, BIA Cancellation letter), that Plaintiff Eagle Bear (acting

through Plaintiff William Brooke) initially appealed that cancellation (Doc. 14-C, Eagle Bear Notice of Appeal and Statement of Reasons); that the only issue raised by Eagle Bear in its appeal was the false claim that it paid the delinquent annual rental payment for which the lease was cancelled before receiving the cancellation letter (Id.), and that Eagle Bear (acting through Plaintiff Brooke) withdrew the appeal on January 5, 2009. Doc. 14-F (letter signed by Plaintiff Brooke withdrawing Eagle Bear appeal).

There is no record, document or evidence that after Eagle Bear withdrew the appeal on January 5, 2009, the Bureau of Indian Affairs withdrew the cancellation letter, or that the BIA reversed, overturned, modified, amended, suspended or otherwise set aside the lease cancellation.

That is the only evidence necessary for the Court to decide the issues before the Court. Plaintiffs' claim that both they and the BIA are searching their records for the "smoking gun" document that will show that the Plaintiffs' story about a mysterious agreement to withdraw the appeal because the lease was current is not a story spun-from-whole-cloth, is as unbelievable as the story itself. Importantly, the Plaintiffs' claim that there is some document supporting the baseless claim of an agreement to withdraw the appeal is also inconsistent with their failed "course of conduct" argument which relies entirely on the January 5, 2009 letter as the documentary evidence of that agreement.

4. The Parties' "Course of Conduct" Could Not Revive or Re-Create a Cancelled Lease.

Without citation to any authority (as none exists for the proposition), the Plaintiffs argue that the parties' course of conduct is evidence of the unwritten agreement between Eagle Bear/Brooke and unnamed BIA Blackfeet Agency staffers for them to withdraw their administrative appeal. Not only is that claim inconsistent with Plaintiffs' claim that a document exists from the BIA representing or confirming that agreement, it is totally unsupported by the law or the facts.

Under Interior Board of Indian Appeals law, the equitable claim of course of conduct only applies to contract interpretation when there are ambiguous terms in a contract. *Citizen Potawatomi Nation v. Director, Office of Self-Governance*, 42 IBIA 160, 172 (2006). In this case there is no contract/lease to interpret. The Blackfeet Nation did not acquiesce in or knowingly accept the Plaintiffs' illegal trespass and occupation of Blackfeet Nation land. Once the lease was cancelled, Eagle Bear could not obtain any rights by holding over. Doc 1-2 (Lease, Sec. 43. "Holding over after the termination . . . of this lease shall not constitute a renewal or extension thereof or give the Lessee any other rights."). It was the duty of the Bureau of Indian Affairs to remove Eagle Bear and enforce the cancellation. Once cancelled no new lease could be created without the consent of the Blackfeet Nation – that consent was never given.

Finally, even assuming for the sake of discussion that some staffer at the Blackfeet Agency of the BIA had a verbal agreement with Eagle Bear/Brooke to withdraw the appeal and re-instate the cancelled lease, the Blackfeet Nation was not a party to that agreement. Cf. *Moody v. United States*, 931 F.3d 1136 (D.C. Cir. 2019) (Slip op. pg. 10).

CONCLUSION

For the reasons set forth in the Blackfeet Nation Defendants' opening Memorandum in Support of their Motion to Dismiss and as set forth here, the Defendants' Motion to Dismiss must be granted.

DATED this 14th day of October, 2021.

___/s/__Joseph J. McKay_____
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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 3,239 words, excluding the Caption, Table of Contents, Table of Authorities, Exhibit Index and the Certificate of Compliance.

/s/ Joseph J. McKay
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