

Neil G. Westesen
Uriah J. Price
Griffin B. Stevens
CROWLEY FLECK PLLP
P.O. Box 10969
Bozeman, MT 59719-0969
Telephone: (406) 556-1430
Fax: (406) 556-1433
Email: nwestesen@crowleyfleck.com
uprice@crowleyfleck.com
gstevens@crowleyfleck.com

Attorneys for Plaintiffs

**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 IN SUPPORT OF MOTION
FOR PRELIMINARY
INJUNCTION**

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EXHIBIT INDEX

Exhibits Attached to this Brief

<u>Exhibit</u>	<u>Description</u>
1	Plaintiffs' Petition for Pre-Judgment Attachment of Personal Removable Property, <i>Blackfeet Nation v. Eagle Bear, Inc.</i> , No. 2021-CA-055 (Blackfeet Tribal Ct. July 24, 2021)
2	William Brooke Aff. at ¶ 4 (Aug. 10, 2021)
3	Eagle Bear's Response to Blackfeet Tribe's Motion to Dismiss for Mootness, <i>Blackfeet Tribe v. Acting Rocky Mountain Regional Director</i> , IBIA 19-082 (Aug. 6, 2021)

Previously Filed Exhibits Referenced in this Brief

<u>Exhibit</u>	<u>Description</u>
1-2	Lease
1-3	Tribal Court Complaint
1-4	Letter from Barnes to Crowe (Aug. 7, 2017)
1-5	Letter from Westesen to Crowe (Aug. 15, 2017)
1-6	Letter from Crowe to Brooke & Barnes (Sept. 7, 2017)
1-7	Letter from Crowe to Brooke & Barnes (Oct. 17, 2017)
1-11	Letter from Camrud to Westesen (Apr. 4, 2019)
1-12	Blackfeet's Opening Brief to IBIA
1-13	Order Denying Motion for Expedited Consideration, <i>Blackfeet Tribe v. Acting Rocky Mountain Regional Director</i> , IBIA 19-082 (Feb. 23, 2021))
1-14	Letter from Crowe to Davis & Eagle Bear at p. 1 (Mar. 17, 2021)
1-15	Motion to Dismiss for Mootness, <i>Blackfeet Tribe v. Acting Rocky Mountain Regional Director</i> , IBIA 19-082 (July 26, 2021)

Plaintiffs Eagle Bear, Inc. (“Eagle Bear”) and William Brooke (collectively “Plaintiffs”) submit this brief in support of their Motion for Preliminary Injunction.

INTRODUCTION

By the complaint (“Complaint”) it filed in Blackfeet Tribal Court (“Tribal Court”), the Blackfeet Indian Nation (“Blackfeet Tribe”) seeks to circumvent and undo over three years of administrative proceedings before the Bureau of Indian Affairs (“BIA”), to evade its contractual obligation to arbitrate claims, and to evade its consent to this Court as the sole judicial forum for dispute resolution. Pursuant to the plain language of the Lease on which the Blackfeet Tribe’s claims are based and pursuant to the relevant regulations and statutes, the Tribal Court lacks authority over the claims and over Will Brooke. By this lawsuit, Plaintiffs ask the Court to prevent the Blackfeet Tribe and the Blackfeet Tribal Court from usurping the BIA’s, the arbitrators’, and this Court’s authority, to enjoin the Blackfeet Tribe from pursuing its Complaint, and to enjoin the Tribal Court from exercising jurisdiction over this case. By this motion, Plaintiffs ask the Court to preliminarily grant such relief in order to preserve the status quo until such time as this Court finally resolves the question of the Tribal Court’s authority over the subject matter of this dispute and over Will Brooke personally.

BACKGROUND

Eagle Bear is the operator of a KOA campground and recreational facility located on Indian trust lands within the boundaries of the Blackfoot Indian Reservation. (Dkt. 1 at ¶ 10). Eagle Bear operates the campground pursuant to a Recreation and Business Lease Agreement (“Lease”) with the Blackfoot Tribe. (*Id.* at ¶ 11; Dkt. 1-2, Lease). Eagle Bear and the Blackfoot Tribe entered into the Lease on April 1997 with the approval of the Secretary of the U.S. Department of the Interior, who is responsible for administering the Lease for and on behalf of the Blackfoot Tribe. (Dkt. 1, Complaint at ¶ 12; Dkt. 1-2, Lease; *see* 25 C.F.R. Part 162 Subparts A & D).¹

Of relevance to the present motion, the Lease includes the following dispute resolution terms:

**THIS AGREEMENT IS SUBJECT TO BINDING
ARBITRATION PURSUANT TO PARAGRAPH 24 AND
EXHIBIT 24**

. . .

24. JURISDICTION AND VENUE.

(a) The parties agree and stipulate that venue and jurisdiction for enforcement of the terms of this agreement lie in the United States Federal District Court, Great Falls Division, Great Falls, Montana, or its successor court. In the event of any dispute, controversy, or claim between the parties arising out of the terms of this agreement, upon

¹ Will Brooke has verified the allegations in the Complaint. (Ex. 2, Brooke Aff. at ¶ 3 (Aug. 10, 2021)).

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 obligations hereunder to the extent of the dispute, controversy, or claim, and petition the United States Federal District Court for the District of Montana for relief as set forth in Exhibit “A” attached hereto and incorporated by reference.

. . .

EXHIBIT “A” REMEDIES

1. DISPUTE RESOLUTION/LIMITED WAIVER OF IMMUNITY.

In the event of any dispute, controversy or claim, including a breach by either party of any of the terms of the agreement between the parties hereto arising under and/or through the terms of the lease . . . the parties agree that such dispute shall be resolved exclusively in accordance with the dispute resolution provisions set forth herein. The Tribe hereby specifically and unequivocally waives its sovereign immunity for the limited purpose of participating in any proceeding provided for under the terms of this exhibit, as well as the enforcement of a final arbitration decision in the United States District Court, District of Montana, Great Falls Division or its successor court. . . .

2. EXCLUSIVE REMEDIES, STANDARDS, NOTICE, WAIVER OF IMMUNITY.

Lessee or the Lessor (a “Party”) may commence proceedings for the purpose of declaring, determining or enforcing the rights, duties or liabilities of a Party under the Lease Agreement (“Remedial Proceedings”) only in accordance with the provisions of this Exhibit. Remedial Proceedings shall consist exclusively of arbitration proceedings . . . enforceable by judicial proceedings as provided in Paragraph 19 of this Exhibit.

(Dkt. 1-2, Lease at pp. 1, 23 & Ex. A, pp. 1-2).

In August 2017, the Blackfeet Tribe asked the Blackfeet Agency Superintendent of the BIA (“Superintendent”) to cancel the Lease. (Dkt. 1, Complaint at ¶ 16; Dkt. 1-4, Letter from Barnes to Crowe (Aug. 7, 2017)). The Blackfeet Tribe alleged that Eagle Bear had failed to perform certain terms of the Lease, including terms related to payment, improvements, and accounting. (Dkt. 1-4). In response, Eagle Bear denied the Blackfeet Tribe’s allegations and demanded arbitration and mediation pursuant to the dispute resolution provisions of the Lease. (Dkt. 1, Complaint at ¶ 17; Dkt. 1-5, Letter from Westesen to Crowe (Aug. 15, 2017)).

The Superintendent initially agreed with Eagle Bear, rejecting the Blackfeet’s cancellation demand and ordering the parties to mediate and arbitrate the dispute. (Dkt. 1, Complaint at ¶ 19; Dkt. 1-6, Letter from Crowe to Brooke & Barnes (Sept. 7, 2017)). On October 17, 2017, however, the Superintendent retracted her decision and notified Eagle Bear that the Lease was “hereby cancelled.” (Dkt. 1, Complaint at ¶ 20; Dkt. 1-7, Letter from Crowe to Brooke & Barnes (Oct. 17, 2017)).

Eagle Bear appealed the Superintendent’s decision. (Dkt. 1, Complaint at ¶ 22). On April 4, 2019, the Regional Director for the BIA Rocky Mountain Regional Office (“Regional Director”) overturned the Superintendent’s decision cancelling the Lease. (*Id.* at ¶ 23). The Regional Director determined that

“mediation and arbitration must be pursued before the lease can be cancelled for breach of contract” and ordered the parties to undergo mediation and arbitration. (Dkt. 1-11, Letter from Camrud to Westesen (Apr. 4, 2019)).

The Blackfeet Tribe appealed the Regional Director’s decision to the Interior Board of Indian Appeals (“IBIA”). (Dkt. 1, Complaint at ¶ 24). That appeal is currently pending. (*Id.*) In their opening brief to the IBIA, the Blackfeet Tribe identified the Superintendent’s October 17, 2017 decision as “cancelling the Lease.” (Dkt. 1-12, Blackfeet’s Opening Brief to IBIA at pp. 8-10).

On December 28, 2020, the Blackfeet Tribe moved the IBIA for expedited consideration of its appeal. (Dkt. 1, Complaint at ¶ 27). In its decision denying that motion, which was “predicated on the [IBIA] issuing a decision on the merits that the Lease ‘has been properly cancelled,’” the IBIA stated that “the Lease has not been cancelled in any decision that is final for BIA” and that no final, appealable decision had been issued. (Dkt. 1-13, Order Denying Motion for Expedited Consideration, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (Feb. 23, 2021)).

With the initial 25-year term of the Lease set to expire in April 2021, Eagle Bear exercised its option to extend the Lease for an additional 25-year term. (Dkt. 1-14, Letter from Crowe to Davis & Eagle Bear at p. 1 (Mar. 17, 2021)). In response, the Blackfeet Tribe belatedly purported to exercise an option under the

Lease to purchase the additional 25-year term. (*Id.* at p. 2). It then met with the Superintendent and asked her “about the possibility of extending the Lease for a 3 year period” while the Tribe “work[ed] through the issues at dispute” between Eagle Bear and the Blackfeet Tribe and waited for “a decision on the appeal from the IBIA.” (*Id.*)

In response to the Blackfeet Tribe’s request, the Superintendent issued a decision on March 17, 2021 extending the Lease for a 3-year period. The Superintendent explained: “An Administrative Modification to extend the Lease for an additional 3 years has been completed and approved by the Superintendent due to the unresolved conflict between the parties to the Lease.” (*Id.*) Eagle Bear and the Blackfeet Tribe both appealed the Superintendent’s decision to the Regional Director. (Dkt. 1, Complaint at ¶ 30). On August 9, 2021, the Regional Director ruled in favor of Eagle Bear and the Tribe and overturned the three-year extension holding “the Superintendent lacked the statutory and regulatory authority to unilaterally approve an Administrative Modification to extend the Lease for three years.” (*Id.*) The Regional Director’s decision referenced the pending administrative action noting “due to the pending litigation before IBIA (Docket No. IBIA 19-082), the Regional Director is limited to addressing only new claims presented [in Eagle Bear’s / the Tribe’s] appeal.” (*Id.*)

On or about July 19, 2021, seeking to circumvent the IBIA administrative process, undo the Lease, and obtain the campground as well as damages from Eagle Bear and Will Brooke, the Blackfeet filed a Complaint with the Blackfeet Tribal Court. The focus of that Complaint was the Blackfeet Tribe's allegations, which it had previously made to the IBIA, that Eagle Bear "failed to perform under the Lease" and that the Lease had been "cancelled" back in 2008. (Dkt. 1-3, Tribal Court Complaint at ¶¶ 27-38, 45-47). The primary difference between the Blackfeet Tribe's Tribal Court complaint and its arguments to the BIA and the IBIA was that, rather than arguing that the Lease was cancelled by the BIA's October 17, 2017 decision, the Blackfeet now argues that the lease was cancelled in 2008. (*Id.* at ¶ 47).

The Blackfeet Tribe also brought personal claims against Eagle Bear president William Brooke in addition to its claims against Eagle Bear. The claims against Mr. Brooke are, however, based exclusively on allegations that Eagle Bear is Mr. Brooke's "alter ego." (Dkt. 1-3, Tribal Court Complaint at ¶¶ 5, 7, 39, 49-51, 53-63, 65-72, 74-90, 92-97).

After filing its Tribal Court Complaint, the Blackfeet Tribe also raised the 2008 cancellation and trespass issues to the IBIA. Specifically, the Blackfeet Tribe moved to dismiss the IBIA appeal as "moot" in light of the 2008 cancellation. (Dkt. 1-15, Motion to Dismiss for Mootness, *Blackfeet Tribe v. Acting Rocky*

Mountain Regional Director, IBIA 19-082 (July 26, 2021)). Although the Blackfeet Tribe did not mention the Tribal Court Complaint in its motion to dismiss, the Blackfeet Tribe is effectively asking the IBIA to halt its proceedings and cede jurisdiction over this federally issued and administered Lease to the Blackfeet Tribal Court. Eagle Bear has opposed the Blackfeet Tribe's motion to dismiss. A copy of its brief opposing the motion is attached hereto as Exhibit 3.

STANDARD OF LAW

A preliminary injunction serves to “preserv[e] the status quo and prevent[] the irreparable loss of rights before judgment.” *Textile Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781, 786 (9th Cir. 2001). “A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter v. Nat’l Resource Defence Council, Inc.*, 555 U.S. 7, 20 (2008).

DISCUSSION

A preliminary injunction is appropriate in this matter because it is “plain” that the Tribal Court lacks jurisdiction over the claims and defendants in the Blackfeet Tribe's Complaint. If the Blackfeet Tribe is allowed to proceed with its claims in Tribal Court, and Plaintiffs are required to defend themselves in Tribal Court, Plaintiffs will suffer inequitable, irreparable injury.

1. Plaintiffs are likely to succeed on the merits of their claim for injunctive relief.

a. The Tribal Court lacks jurisdiction over the claims and defendants in the Blackfoot Tribe’s Complaint.

The Tribal Court lacks jurisdiction over the claims and defendants in the Blackfoot Tribe’s Complaint for the following reasons.

i. The Tribal Court cannot exercise jurisdiction over the Blackfoot Tribe’s Complaint because the Complaint raises issues of federal law.

“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]respas[s],” “[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 such 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 terms claims turn on federal law, federal regulation, and the BIA’s administrative decisions about those claims. (*See* Dkt. 1-3, Tribal Court Complaint ¶¶ 58-99).

The Tribal Court lacks adjudicative authority over such federal questions and over the Blackfeet Tribe’s claims. Unlike state courts, Tribal Courts are not courts of general jurisdiction that can “adjudicate cases invoking federal statutes.” *Nevada v. Hicks*, 533 U.S. 353, 366-67 (2001). “Where nonmembers are concerned, the exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent

status of the tribes, and so cannot survive without express congressional delegation.” *Id.* (internal quotation marks omitted) (emphasis in original).

Consequently, the Tribal Court has no “adjudicative authority” over the federal questions presented by the Lease and the Blackfeet Tribe’s claims about the Lease. Those claims are entirely controlled by federal law and regulations and may only be resolved by a federal court. *See Kodiak Oil & Gas (USA)*, 932 F.3d at 1136-37.

ii. The Tribal Court cannot exercise personal jurisdiction over William Brooke because he is not a member of the Blackfeet Tribe.

“Tribal jurisdiction is limited: For powers not expressly conferred upon them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty,” which is limited to the Indian tribes’ “members and their territory.” *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650-51 (2001).

Consequently, the United States Supreme Court has recognized the “general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Id.* at 651.

This general proposition is subject to two exceptions. *Id.*; *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 329-30 (2008). First, a tribe may exercise “civil jurisdiction over non-Indians on their reservation” with respect to such nonmembers who “enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other

arrangements.” *Plains Commerce Bank*, 554 U.S. at 329-30. Second, it may exercise authority over nonmembers whose “conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Plains Commerce Bank*, 554 U.S. at 329-30. These exceptions are “limited” and when attempting to exercise authority over nonmembers, “the burden rests on the tribe to establish one of the exceptions.” *Id.* at 330. The Blackfeet Tribe cannot meet this burden with respect to its Tribal Court Complaint.

In addition to suing Eagle Bear, the Blackfeet Tribe has brought claims against William Brooke individually. (Dkt. 1-3, Tribal Court Complaint ¶¶ 5, 7, 39, 49-51, 53-63, 65-72, 74-90, 92-97). Such claims against Will Brooke are predicated on the Blackfeet Tribe’s allegation that Eagle Bear is an “alter ego” of Mr. Brooke. (*Id.* at ¶ 5). The Blackfeet Tribe seeks to hold Will Brooke personally accountable for Eagle Bear’s actions and does not allege in the Complaint that any action of Will Brooke, separate and apart from the business of Eagle Bear, is independently actionable. (*Id.* at ¶¶ 5, 7, 39, 49-51, 53-63, 65-72, 74-90, 92-97 (all paragraphs mentioning Will Brooke)).

Will Brooke is not, however, a member of the Blackfeet tribe and 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.

(*See id.*) Although he signed the Lease on behalf of Eagle Bear as Eagle Bear’s president, he has not entered any relevant contracts or dealings with the Blackfeet or its members in the individual capacity in which he has been sued. (*See id.*)

Likewise, Will Brooke’s allegedly actionable conduct—which he vehemently denies—does not directly affect the “political integrity, the economic security, or the health or welfare of the tribe.” *Plains Commerce Bank*, 554 U.S. at 329-30. The United States Supreme Court has held that in order for conduct to affect politics, economics, health, or welfare in a way sufficient for a tribe to exercise authority over a nonmember, the conduct must “imperil the subsistence of the tribal community.” *Id.* at 341. It has further advised that “the elevated threshold for application of the second . . . exception suggests that tribal power must be necessary to avert catastrophic consequences.” (*Id.* (internal quotation marks and alterations omitted)).

Here, the Blackfeet Tribe’s claims all allegedly arise out of the Lease with Eagle Bear. The Blackfeet Tribe claims that, on behalf of Eagle Bear, Will Brooke breached the Lease, has wrongfully caused Eagle Bear to remain in possession of the Lease premises, and has made misrepresentations related to the Lease. (Dkt. 1-3, Tribal Court Complaint at ¶¶ 5, 7, 39, 49-51, 53-63, 65-72, 74-90, 92-97 (all paragraphs mentioning Mr. Brooke)). Even if true, such allegations do not rise to the level of conduct that can be said to “imperil the subsistence of the tribal

community.” *Plains Commerce Bank*, 554 U.S. at 341. The allegations do not suggest anything more than “injur[y] [to] the tribe” and do not “suggest that tribal power must be necessary to avert catastrophic consequences.” *Id.*

Because Will Brooke is not a member of the Blackfeet Tribe and because his allegedly actionable conduct on behalf of Eagle Bear does not support any exception to the “general proposition” that the Blackfeet Tribe cannot exercise authority over a non-Indian, the Blackfeet Tribal Court lacks jurisdiction over the Blackfeet Tribe’s claims against Will Brooke personally and any judgment against Will Brooke by the Tribal Court would be “null and void.” *Plains Commerce Bank*, 554 U.S. at 324.

iii. The Tribal Court cannot exercise jurisdiction over the Blackfeet Tribe’s claims, which arise out of the Lease and are, therefore, subject to BIA administrative proceedings.

In a decision that the Blackfeet Tribe is presently appealing to the IBIA, the BIA expressly decided that the Lease was not cancelled and that “mediation and arbitration must be pursued before the lease can be cancelled.” (Dkt. 1-6, Letter from Crowe to Brooke & Barnes (Sept. 7, 2017); Dkt. 1-15, Motion to Dismiss for Mootness, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (July 26, 2021)). Now, in its claims to the Tribal Court, all of which are predicated on the BIA’s alleged 2008 cancellation of the Lease, the Blackfeet Tribe effectively seeks judicial review in the Blackfeet Tribal Court of the BIA’s

decision before it has exhausted its administrative remedies with the IBIA and in circumvention of this Court’s designation as the sole forum for judicial review. (See Dkt. 1-3, Tribal Court Complaint).

The Blackfeet Tribe cannot seek to undo the BIA’s decision without first exhausting its administrative remedies with the federal agency. Critically, lease cancellation, lease disputes, and redress of lease violations are all subject to BIA administrative review and are subject to judicial review only upon exhaustion of administrative remedies. 5 U.S.C. § 704; 25 C.F.R. §§ 2.6, 162.466, .467, .470; *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1074 n. 4, 107-76 (9th Cir. 1983); *McNabb v. U.S.*, 54 Fed. Cl. 759, 772-73 (2002); *Saguaro Chevrolet, Inc. v. U.S.*, 77 Fed. Cl. 572, 581 n. 15 (2007) (“all allegations of lease violations are subject to an agency appeals procedure” and “after agency appeals have been exhausted and a final BIA decision is issued, judicial review is not to this court, but to federal district courts for an APA review”); see 25 U.S.C. §§ 177, 348, 415(a); *Brown v. U.S.*, 86 F.3d 1554, 1561-62 (Fed. Cir. 1996) (“an allottee cannot cancel a lease without the Secretary’s prior approval”). As the Tenth Circuit—the only appellate court that seems to have considered the precise issue of administrative exhaustion with respect to lease cancellation—has determined, failure to exhaust administrative review “prevents [parties] from asserting a breach of lease claim” to a court. *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006).

Critically, these principles were expressly incorporated into the Lease. The Lease specifically states: “In the event of a breach of the lease, the [BIA] shall issue a 10 day show cause letter pursuant to 25 CFR § 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.” (Dkt. 1-2, Lease at p. 23 (emphasis added)).

Although the Blackfeet Tribe does not expressly ask the Tribal Court to reverse the BIA’s decision and although it claims that the Lease was cancelled in 2008, instead of pursuant to the BIA’s 2017 decision from which it has appealed, the Blackfeet Tribe is asking the Tribal Court to rule on the validity of the Lease and to avoid administrative resolution of its claims and judicial review in this Court. As the Blackfeet Tribe has expressly acknowledged in filings to the IBIA, its request that the Tribal Court determine that the Lease was cancelled in 2008 and grant related relief would undo the BIA’s decision that the “Lease has not been cancelled.” (Dkt. 1-13, Order Denying Motion for Expedited Consideration, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (Feb. 23, 2021)). The Blackfeet Tribe is, therefore, effectively seeking judicial review or evasion of the ongoing administrative proceedings. Ultimately, however, the Lease can only be cancelled by the BIA and all allegations of lease violations are subject to the BIA’s administrative review followed by judicial review in this

Court. The Blackfeet Tribe cannot evade administrative or federal court review by pursuing its Tribal Court Complaint. The Tribal Court lacks jurisdiction to hear the Blackfeet Tribe's lease cancellation claims. 5 U.S.C. § 704; 25 C.F.R. §§ 2.6, 162.466, .467, .470.

iv. The Tribal Court cannot adjudicate this controversy because the BIA is an indispensable party to the controversy and cannot be sued in Tribal Court.

Because the BIA administers, monitors, and enforces the Lease pursuant to the “comprehensive” federal regulatory and statutory scheme controlling tribal trust land leases, and because the Blackfeet Tribe is effectively seeking the judicial review of the BIA's decisions in its Complaint, the BIA is an indispensable party to the Blackfeet Tribe's claims. Joinder of the BIA or the United States is required under the APA and, absent the BIA's joinder, no court will be able to affect the BIA's decision that the Lease is in effect. 5 U.S.C. § 703. Additionally, proceeding without the BIA will impair the BIA's ability to protect its interests in administering the Lease.

Therefore, the BIA is an indispensable party to the Blackfeet Tribe's claims pursuant to both Fed. R. Civ. P. 19(a)(1) and Rule 25 of the Blackfeet Tribal Rules of Civil Procedure, which is identical to the federal rule. The BIA, however, is not subject to suit in Tribal Court. *U.S. v. White Mountain Apache Tribe*, 784 F.2d

917, 919-920 (9th Cir. 1986); *U.S. v. Blackfeet Tribe*, 364 F.Supp. 192, 194 (D. Mont. 1973).

Because the BIA cannot be joined to the Tribal Court suit, the BIA's and Eagle Bear's interests would be prejudiced absent the BIA's joinder, and no judgment rendered absent BIA's joinder would be effective, the Tribal Court cannot proceed with adjudication of the Blackfeet Tribe's Complaint. Fed. R. Civ. P. 19(b); Blackfeet Tribal R. Civ. P. 25(b). The only judicial forum in which this matter may be completely and effectively adjudicated is this Court and the Tribal Court lacks authority over the matter.

v. The Tribal Court cannot exercise jurisdiction because the parties have agreed to arbitrate the claims the Blackfeet Tribe is pursuing in its Tribal Court Complaint.

It is well-settled that tribal courts may not consider disputes that the relevant parties have agreed to arbitrate. Where a tribe has unequivocally agreed to arbitrate a 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. (Dkt. 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. More specifically, the Blackfeet Tribe’s Trespass and “Unauthorized Use of Blackfeet Nation Land” claims involve a determination that the Lease was breached and effectively cancelled (Dkt. 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; Dkt. 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. (Dkt. 1-11, Letter from Camrud to Westesen (Apr. 4, 2019); *see also* Ex. 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)).

By the Blackfeet Tribe’s express agreement, the Tribe is obligated to arbitrate the very claims it has asserted in its Tribal Court Complaint. The Tribal Court lacks jurisdiction over the parties and Complaint.

vi. The Tribal Court cannot exercise jurisdiction because the parties have agreed that this Court is the exclusive jurisdiction and venue for the Blackfeet Tribe’s claims.

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 agreed that “venue and jurisdiction for enforcement of the terms of the [Lease] lie in the United States Federal District Court, Great Falls Division.” (Dkt. 1-2 at p. 23). 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 in this case. *Id.*

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

b. Exhaustion of Tribal Court remedies is not a prerequisite to relief from this Court.

“[W]hether a tribal court has adjudicative authority over nonmembers is a federal question” and non-Indians may challenge tribal court jurisdiction under 28 U.S.C. § 1331. *Plains Commerce Bank*, 554 U.S. at 324; *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 846 (9th Cir. 2009). Although federal courts will typically require non-Indians to exhaust remedies in tribal court before determining tribal court jurisdiction, exhaustion is not required and federal courts may intervene in tribal court disputes where tribal court jurisdiction is “plain[ly]” lacking, and “would serve no purpose other than delay.” *Nevada v. Hicks*, 533 U.S. 353, 369 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n. 14 (1997); *Maceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920 (9th Cir. 2008); *Atwood v. Fort Peck Tribal Ct. Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008). Although the Ninth Circuit does not appear to have applied these principles to forum selection

clauses, arbitration clauses, or administrative exhaustion arguments, the Eight Circuit has held that “the tribal exhaustion doctrine does not apply when the contracting parties have included a forum selection clause in their agreement.” *Enerplus Resources (USA) Corp. v. Wilkinson*, 865 F.3d 1094, 1097 (8th Cir. 2017).

Tribal Court jurisdiction is not colorable and is plainly lacking in this case for all of the reasons discussed above. The Blackfeet Tribe’s Tribal Court Complaint is a transparent attempt to circumvent and evade the ongoing BIA administrative proceedings. The Blackfeet Tribe has failed to exhaust those administrative proceedings and cannot ask the Tribal Court to usurp the BIA’s decision-making authority. Moreover, this dispute is subject to arbitration and forum selection clauses that, on their face, prevent the Blackfeet Tribal Court from exercising jurisdiction. Finally, William Brooke is not a Blackfeet member and is, therefore, not subject to Tribal Court authority.

In light of these facts, which are apparent on the face of the Blackfeet Tribe’s Complaint, the BIA’s leasing regulations, and the terms of the Lease, it is “plain” that the Tribal Court lacks jurisdiction and that exhaustion of Tribal Court remedies would “serve no purpose other than delay. *Strate*, 520 U.S. at 459 n. 14; *see Enerplus Resources (USA) Corp.*, 865 F.3d at 1097.

2. Plaintiffs will likely suffer irreparable harm without a preliminary injunction.

Because the Tribal Court plainly lacks jurisdiction, subjecting the Plaintiffs to the Tribal Court's authority would result in irreparable harm to Plaintiffs. Being required to litigate in a forum without jurisdiction may constitute irreparable harm especially where, as here, parallel litigation is pending in a different forum. *E.g.*, *Chiwewe v. Burlington N. & Santa Fe Ry. Co.*, 2002 WL 31924768 at *2 (D.N.M. 2002) (finding that parties would suffer irreparable harm if forced to litigate in a tribal forum without jurisdiction and face the possibility of inconsistent judgments); *Enerplus Resources (USA) Corp. v. Wilkinson*, 2016 WL 8737869 at *4 (D.N.D. 2016).

More critically, if the Tribal Court is allowed to exercise jurisdiction, even temporarily, the BIA, the arbitrators that this matter should be before, and this Court may be deprived of the power to render a meaningful decision. Notably, the Blackfeet Tribe is seeking prejudgment attachment of the cabins on Eagle Bear's campground, even before Eagle Bear has appeared in the Tribal Court matter. (Ex. 1, Plaintiffs' Petition for Pre-Judgment Attachment of Personal Removable Property, *Blackfeet Nation v. Eagle Bear, Inc.*, No. 2021-CA-055 (Blackfeet Tribal Ct. July 24, 2021)). The Eagle Bear campground is in the height of the summer tourist season. (Ex. 2, William Brooke Aff. at ¶ 4 (Aug. 10, 2021)). There are over 10,000 nights of reservations booked for the remainder of the summer season.

(*Id.* at ¶ 4). The Blackfeet Tribe seeks to evict Eagle Bear from the property and to obtain prejudgment seizure of the cabins Eagle Bear rents as accommodations, effectively cancelling all of this business activity. (Ex. 1, Plaintiffs’ Petition for Pre-Judgment Attachment). There is significant risk that the Tribal Court proceedings may result in serious damage and irreparable harm to Eagle Bear’s ongoing business operations if the Tribal Court is not enjoined from exercising authority over this matter. (Ex. 2, Brooke Aff. at ¶ 4).

3. Equity favors a preliminary injunction.

In issuing an injunction, the District Court must “balance the interests of all parties and weigh the damage to each.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (internal quotations omitted). Here, the Plaintiffs are exposed to a greater potential for harm from having to litigate in the Tribal Court than the Blackfeet Tribe would be from cessation of Tribal Court litigation until its authority can be decided. While Plaintiffs may suffer irreparable damage at the hands of the Blackfeet Tribe and the Blackfeet Tribal Court if the Tribal Court improperly exercises authority over this matter, the Blackfeet Tribe will, at most, suffer a slight delay in receipt of their alleged damages if the Tribal Court matter is stayed until the Tribal Court’s authority is resolved.

Notably, the Blackfeet Tribe seeks eviction of Eagle Bear and monetary damages in their Tribal Court complaint. There is no significant risk that the

monetary damages Blackfeet Tribe seeks will be inadequate following a preliminary injunction. By the terms of the Lease, Eagle Bear is required to account for all campground revenue and pay a royalty on the same, which it has done for the past 25 years. There is no indication that the Blackfeet Tribe will suffer irreparable or even any damage if eviction of Eagle Bear, which the Blackfeet claims is 12 years overdue, is delayed by the preliminary injunction.

Thus, weighing the risks to the Blackfeet Tribe and to the Plaintiffs, the balance of harms and considerations of equity support a preliminary injunction.

4. A preliminary injunction is in the public interest.

Public policy favors a preliminary injunction. A preliminary injunction in this case will, by recognizing the BIA's authority over this dispute and the necessity of administrative exhaustion, promote the "twin purpose of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992); *see also Woodford v. Ngo*, 548 U.S. 81, 89 (2006). It will also promote the public interest by enforcing the parties' forum selection and arbitration agreements, thereby protecting the parties' "legitimate expectations" and furthering "vital interests of the justice system." (*Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 62-63 (2013); *see M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 11-12, 15 (1972); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (the

Federal Arbitration Act expresses “a liberal federal policy favoring arbitration agreements”).

Only the principals of comity underlying tribal court exhaustion might be said to weigh against a preliminary injunction. *See Strate*, 520 U.S. at 451-52; *Atwood*, 513 F.3d at 948. However, the United States Supreme Court has clearly held that such principals are outweighed by the interests of efficient judicial resolution when, as here, the tribal court “plain[ly]” lacks jurisdiction of the dispute. *Strate*, 520 U.S. at 459 n.14; *Nevada*, 533 U.S. at 369.

Thus, the public interest is best served by a preliminary injunction enjoining the Tribal Court from exercising authority while the question of its authority is resolved.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant Plaintiffs’ motion for a preliminary injunction enjoining the Blackfeet Tribe from pursuing the claims and relief sought in their Tribal Court Complaint and enjoining the Tribal Court from considering or resolving the Blackfeet Tribe’s claims.

Dated this 10th day of August, 2021.

CROWLEY FLECK PLLP

By /s/ Neil G. Westesen

Neil G. Westesen
Uriah J. Price
Griffin B. Stevens
P.O. Box 10969
Bozeman, MT 59719-0969

Attorneys for Plaintiffs

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 6,026 words long, excluding the Caption, the Certificates of Service and Compliance, Tables of Contents and Authorities, and Exhibit Index.

Dated this 10th day of August, 2021.

CROWLEY FLECK PLLP

By /s/ Neil G. Westesen
Neil G. Westesen

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2021, a true and correct copy of the foregoing was delivered by the following means to the following:

<input checked="" type="checkbox"/> U.S. Mail	Joe McKay
<input type="checkbox"/> FedEx	P.O. Box 1803
<input type="checkbox"/> Hand-Delivery	Browning, MT 59417
<input checked="" type="checkbox"/> E-Mail	powerbuffalo@yahoo.com
<input type="checkbox"/> ECF	<i>Attorney for Blackfeet Tribe</i>

I further state that Eagle Bear, Inc. intends to serve a true and correct copy of the foregoing on Defendants Blackfeet Tribe and Blackfeet Tribal Court at the same time it serves them with copies of the summons and complaint in this matter. Eagle Bear, Inc. intends to file affidavits of service upon such service.

/s/ Neil G. Westesen
Neil G. Westesen