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

EAGLE BEAR, INC.,

Plaintiff,

vs.

THE BLACKFEET INDIAN NATION
and DARRYL LaCOUNTE,
DIRECTOR OF THE BUREAU OF
INDIAN AFFAIRS,

Defendants.

Cause No. 4:22-cv-00093-BMM

**PLAINTIFF’S BRIEF IN
SUPPORT OF MOTION FOR
ADDITIONAL TIME TO
COMPLETE SUPPLEMENTAL
DISCOVERY AND BRIEFING**

INTRODUCTION

On April 4, 2023, following a March 31, 2023 production of documents by the BIA, Eagle Bear, Inc. (“Eagle Bear”) filed a Notice of Supplemental Authority (Doc. 91). That same day, Eagle Bear filed a Motion for Leave to Conduct

Additional Discovery, to File Supplemental Briefing on Motions for Summary Judgment, and to Defer Rulings on Summary Judgment. (Doc. 92). Eagle Bear explained to the Court how the supplemental authority impacted the pending motions. The Blackfeet Nation opposed Eagle Bear's request. (Doc. 97). On April 19, 2023, the Court granted Eagle Bear's motion. (Doc. 98). After reviewing the email exchanges between BIA employees Tracy Tatsey, Bernadine Pease, and Jodi Wagner, the Court noted that Eagle Bear had requested the documents in its December 20, 2021 FOIA request and its September 2022 discovery requests. The Blackfeet Nation had subpoenaed the same documents on August 5, 2022. The Court found that "in order to mitigate the effect of the BIA's belated disclosure of this information, the Court grants Eagle Bear's request for leave to conduct additional discovery related to the documents." (Doc. 98 at 4.) The Court then ordered the parties to "complete additional discovery and file supplemental briefing with new statements of undisputed facts and statements of disputed fact no later than June 2, 2023." (Doc. 98 at 5.)

Since the Court's Order, the parties have been working to schedule the relevant depositions. In addition, upon reviewing the documents the BIA produced on March 31, 2023 and the explanation of the search protocols employed, Eagle Bear became concerned that the BIA had still not adequately searched its records for all relevant and discoverable documents. Counsel for Eagle Bear raised this concern

with the US Attorney's office on April 4, 2023 and explained, "Thank you for the BIA's March 31 supplemental production and for filing the Second Declaration of Jonae C. Farmer. Having reviewed those documents, we have some continuing concerns about the BIA's searches and its efforts to identify all documents responsive to Eagle Bear's discovery request. These are largely the same concerns we identified on January 31, and they do not seem to have been completely resolved." Eagle Bear went on to explain the type of search protocol that would seem likely to capture all relevant documents once and for all. The US Attorney's office responded on April 10, 2023 to advise that they had sent Eagle Bear's request to "agency counsel" and asked for an expedited search. Eagle Bear followed up the next day, April 11, 2023, to further specify the names of potential email participants to be searched. That complete email exchange is attached as Ex. 1.

In addition to seeking a complete and final document production, Eagle Bear has tried to schedule the relevant depositions. Counsel for Eagle Bear reached out to all parties on April 19, 2023 and advised, "In light of the Court's order, I would like to first have the government confirm they have completed any additional searches for additional documents. Upon that confirmation, I would like to find dates for the depositions of Tracy presumably in Browning and then Pease and Wagner presumably in Billings. We need to get them completed in sufficient time to be able to conduct the briefing the Court has ordered before June [2]. Please let

me know your availability and we will get these noticed.” The complete email exchange, including those portions referenced below, is attached as Ex. 2.

The US Attorney responded on April 20 to advise that they were getting assistance from “higher-ups” at BIA regarding the search terms, and they hoped to have the production “completed by the mid to end of next week.” *Id.* Counsel for Eagle Bear responded that same day. “Will wait to hear from you but we are all going to need to move fast to adhere to the judge’s schedule.” *Id.* On April 21, the US Attorney responded that now the documents would not be available until May 8. *Id.* Counsel for Eagle Bear responded on April 23, “I don’t think we can do anything until we have the results of the latest searches. Hopefully that happens soon. I think Judge Morris expects as much.” *Id.*

On May 3, 2023, Counsel for Eagle Bear again raised the potential problem of conducting the depositions before the document production was complete.

I wanted to check in and follow up on getting these depositions scheduled. I would obviously like to get these done as soon as possible. The June 2 date in the Judge’s order will be here soon and we need to have the depositions done in time to have the transcripts in time to prepare any supplemental pleadings. The concern I have is that we go take the depositions and then the BIA produces even more documents and we have to talk to these people a third time. It was for that reason that it made sense to wait for any final production. Lynsey can you please update us on the status of that production?

Id.

The US Attorney responded on May 3 and advised that approximately 60 additional and responsive emails had been located. “Those are currently being converted (downloaded?) into actual email files. As soon as the agency reviews for privilege, we will send those to you.” *Id.* BIA counsel promised to review the additional search results for additional responsive documents. Counsel for Eagle Bear followed up on the production schedule and asked, “Just trying to figure out whether it makes sense to go back to the Court and explain what’s going on. As noted, I don’t want to do this a third or fourth time but I also understand everyone’s desire to get to resolution.” *Id.* The US Attorney responded, “I understand your concerns about getting information to the Court and not having repeated depositions.” *Id.*

On May 4, 2023, counsel for the Blackfeet Nation indicated that they would oppose any further extensions of the schedule in the case because the delay was not the fault of the Blackfeet Nation. Eagle Bear counsel agreed that the delay was the fault of neither the Nation nor Eagle Bear, but that proceeding based on an incomplete record was not in anyone’s best interests. *Id.*

On May 8, 2023, no documents were produced. Instead, the remaining files were apparently encrypted in such a way that only BIA agency counsel can review them but not the US Attorney’s office. *Id.*

As of Wednesday, May 10, 2023, no additional documents have been produced. The documents remain inexplicably encrypted and nothing has been provided, despite the fact that the documents are responsive and potentially relevant to the remaining issues in this case. The US Attorney has suggested that some documents might be produced on May 11, 2023, but there has been no assurance that this production will be complete. See May 10, 2023 email attached as Ex. 3.

DISCUSSION

Eagle Bear and the Blackfeet Nation have been trying to get the BIA to produce all relevant documents in this case for years. Despite representations that the production has been complete, the BIA continues to produce documents. Eagle Bear remains committed to expediting the deposition and briefing process and to seeing the issues in this case briefed and then decided, but Eagle Bear does not want to have to come back to the Court for further relief, or to incur the time and expense of repeating depositions if yet more relevant documents are belatedly produced. For that reason, Eagle Bear requests an extension of the deadline set by the Court until July 14, 2023. This extension should be more than enough time for the BIA to complete their search, for the US Attorney to review any documents located, and then to produce the files. The parties will complete any additional depositions, obtain the transcripts, and file one set of supplemental briefing with the Court.

Dated this 10th day of May, 2023.

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By /s/ Neil G. Westesen

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2023, a true and correct copy of the foregoing was delivered by the following means to the following:

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