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DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS

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

EAGLE BEAR, INC., Plaintiff. vs. BLACKFEET INDIAN NATION, and DARRYL LaCOUNTE, DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, Defendants.	CV 22–93–GF–BMM BRIEF IN SUPPORT OF DEFENDANT BUREAU OF INDIAN AFFAIRS'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The United States, through the Bureau of Indian Affairs, is not a party to the lease at the heart of this case, nor does the United States take a position on whether the lease was canceled in 2008. Plaintiff's Second Amended Complaint does not allege any claims against the United States and, more importantly, concedes a lack of subject matter jurisdiction with respect to the Bureau of Indian Affairs. There is no basis for the government to remain a party to this case, and the Court should grant the United States' motion for summary judgment as a result.

BACKGROUND

Plaintiff operates a campground on leased tribal land within the boundaries of the Blackfeet Indian Reservation. Statement of Undisputed Facts ("SUF"), ¶ 1. Plaintiff and Defendant Blackfeet Indian Nation entered into the lease in 1997. SUF, ¶ 2. The lease references the Bureau of Indian Affairs as "acting for and on behalf of the Blackfeet Indian Nation"—the Bureau is not a party to lease. SUF, ¶ 3. Plaintiff and the Blackfeet Indian Nation dispute whether the Bureau of Indian Affairs, on behalf of the Blackfeet Indian Nation, effectively cancelled the lease by letter dated June 10, 2008 due to Plaintiff's failure to pay rent. SUF, ¶ 4.

Plaintiff appealed the June 10 lease cancellation to the Bureau of Indian Affairs Rocky Mountain Regional Director on June 18, 2008. SUF, ¶ 5. Plaintiff then withdrew its appeal by letter dated January 5, 2009, citing "discussions with

Bureau of Indian Affairs realty staff" and advice that "all annual payments required under the lease had been made and cashed." SUF, ¶ 6. The Bureau of Indian Affairs has not rendered a decision regarding Plaintiff's appeal or the status of the 2008 cancellation. SUF, ¶ 7.

Plaintiff alleges two counts in this action and seeks declaratory relief establishing that: (1) the lease was not cancelled in 2008, (2) Plaintiff's June 18, 2008 lease rent payment cured any default, (3) Plaintiff "is current in all respects with its obligations to the Blackfeet Nation under the lease for all time periods prior to January 1, 2022"; and (4) the lease remains in effect and is an asset of Plaintiff's bankruptcy estate. SUF, ¶ 8. Neither of the claims in Plaintiff's Second Amended Complaint seek specific relief from the Bureau of Indian Affairs. SUF, ¶ 9. Plaintiff alleges the United States has waived sovereign immunity by virtue of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, and 11 U.S.C. § 106. SUF, ¶ 10.

LEGAL STANDARD

Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial," and summary judgment should be granted. *Ricci v.*

DeStefano, 557 U.S. 557, 586 (2009). "Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." *In re Oracle Corp. Securities Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)); Fed. R. Civ. P. 56(c)(1)(B). Summary judgment should be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

ARGUMENT

The United States is entitled to judgment as a matter of law because neither the APA nor the Bankruptcy Code—the two purported waivers of sovereign immunity cited in Plaintiff's Second Amended Complaint—are valid under the circumstances.

The United States is immune from suit unless it consents to being sued. *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941); *see FDIC v. Meyer*, 510 U.S. 471, 475 (1994). A waiver of the federal government's sovereign immunity "cannot be implied, but must be unequivocally expressed," *U.S. v. Mitchell*, 445 U.S. 535, 538 (1980), and such a waiver "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996). "The party who sues

the United States bears the burden of pointing to such an unequivocal waiver of immunity." *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983).

With respect to the APA, 5 U.S.C. § 704 limits judicial review to "final agency action," and "absent final agency action, there is no jurisdiction in the district court to review an APA claim." *Rattlesnake Coalition v. U.S. E.P.A.*, 509 F.3d 1095, 1104 (9th Cir. 2007) (cleaned up). An agency action is considered final only if the action: (1) "marks the consummation of the agency's decision-making process" and is not "merely tentative or interlocutory"; and (2) is one by which "rights or obligations have been determined," or from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997); *see also Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.").

Here, Plaintiff states in its Second Amended Complaint that "no final decision of the Regional Director affirmed the June 2008 cancellation letter." SUF, ¶ 7. Likewise, Plaintiff indicated in its response to the Blackfeet Indian Nation's motion to dismiss in CV 21-88-GF-BMM that as of October 7, 2021, there was no final decision regarding the 2008 lease cancellation. *Id.* This continues to be the case—the Bureau of Indian Affairs has not taken final action on the 2008 lease cancellation, meaning there is no "final agency action" reviewable

under the APA. The Court therefore lacks subject matter jurisdiction over Plaintiff's claims to the extent predicated on the APA, and the government is entitled to summary judgment on this ground.

With respect to Title 11, in withdrawing the reference and severing Count 1 in the adversary proceeding, *Eagle Bear, Inc. v. Blackfeet Indian Nation* (AP 22-04001), the Court expressly noted that it was "removing only the issue of non-bankruptcy code federal law." Doc. 1 at 12. Indeed, the basis for creating the instant cause of action was the Court's acknowledgement that "the lease cancellation dispute clearly presents open and unresolved issues regarding 25 C.F.R. § 162" and "the interpretation of federal law." *Id*. at 7. Thus, the waiver of immunity outlined in 11 U.S.C. § 106—which by its terms applies strictly to bankruptcy proceedings—cannot serve as the United States' consent to be named as a defendant in a declaratory judgment action involving a disputed lease. This is especially so given that in this case the Bureau of Indian Affairs is not a party to the lease, but merely acting within the approval and management authority granted to it by 25 C.F.R. Part 162. *See Wapato Heritage, L.L.C. v. U.S.*, 637 F.3d 1033, 1037–39 (9th Cir. 2011); *see also* Doc. 39, *Eagle Bear v. Blackfeet Indian Nation, et al.*, Adv. No. 22-04001-BPH. Thus, to the extent subject matter jurisdiction hinges on the bankruptcy-specific waiver of sovereign immunity in 11 U.S.C.

§ 106, the Court lacks jurisdiction over the claims in this action and the United States is entitled to judgment as a matter of law.

CONCLUSION

The United States takes no position on whether the lease was effectively cancelled in 2008. However, absent a valid waiver of sovereign immunity, the Court lacks subject matter jurisdiction with respect to any claims (assuming they exist) against the United States. The Court should therefore grant the government's motion for summary judgment and dismiss the United States from this case.

DATED this 23rd day of November, 2022.

JESSE A. LASLOVICH
United States Attorney

/s/ John M. Newman
Assistant U.S. Attorney
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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 1,308 words, excluding the caption and certificates of service and compliance.

DATED this 23rd day of November, 2022.

/s/ John M. Newman
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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of November, 2022, a copy of the foregoing document was served on the following person by the following means.

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