Joseph J. McKay
Attorney at Law
P.O. Box 1803
Browning, MT 59417
Phone/Fax: (406) 338-7262
Email: powerbuffalo@yahoo.com

Derek E. Kline
Attorney at Law
P.O. Box 1577
Center Harbor, NH 03226
Phone: (603) 707-1721
Email: derekekline@gmail.com

Attorneys for Defendant Blackfeet Indian Nation

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

EAGLE BEAR, INC. Plaintiff, v. THE BLACKFEET INDIAN NATION, and DARRYL LaCOUNTE, DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS Defendant.	Cause No. 4:22-cv-00093-BMM **BLACKFEET NATION'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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A. WITH RESPECT TO BIA'S 2008 CANCELLATION OF THE FORMER LEASE BETWEEN THE BLACKFEET NATION AND EAGLE BEAR, INC., THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND THE BLACKFFET NATION IS ENTITLED TO JUDGMENT AS A MATTER OF LAW THAT THE LEASE WAS PROPERLY CANCELLED AND NEVER REINSTATED.

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). *Victor Processing LLC v. Fox*, 307 F.Supp.3rd 1109, 1112 (D. Mont. 2018), *rev'd on other grounds,* 937 F.3d 1218 (9th Cir. 2019). The movant bears the initial burden as to the elements of the causes of action about which there are no genuine issues of material fact. *Celotex Corp. v. Catrett* , 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). *Id.* The burden then shifts to the non-movant to establish the existence of a genuine issue of material fact. *Id.* The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts" by "com[ing] forward with 'specific facts showing that there is a *genuine* issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* , 475 U.S. 574, 586-87, *106 S.Ct. 1348, 89 L.Ed.2d 538* (1986) (quoting Fed.R.Civ.P. 56(e) (1963) (amended 2010). *Id.* However, bare assertions standing alone are insufficient to create material facts. *Liberty Lobby*, 477 U.S. at 247-48, 106 S.Ct. 2505. If the burden shifts, the non-moving party must produce "significant probative evidence," and "may not rely merely on the unsupported or conclusory allegations of [his]

pleadings." *Coverdell v. Dep't of Soc. & Health Servs.* , 834 F.2d 758, 769 (9th Cir. 1987). *Id.*

1. There is no genuine issue of material fact that the BIA Properly Cancelled the Former Lease in 2008 After Due Notice and An Opportunity to Cure or Show Cause

Pursuant to the applicable terms of the Lease and consistent with controlling Federal regulations at 25 CFR Part 2 and 25 CFR §§ 162.600 through 162.623, the Bureau of Indian Affairs Blackfeet Agency properly cancelled the former Lease between Eagle Bear, Inc. and the Blackfeet Indian Nation for non-payment of the required 2007 minimum annual payment which was due on November 30, 2007. Cancellation of the former Lease took place on June 10, 2008 after notice to Eagle Bear and its mortgage holder (an approved encumbrancer; Blackfeet Statement of Undisputed Facts (Blackfeet SUF), ¶9, Exhibit 6, former Lease, §§ 18, 21) and an opportunity to cure Eagle Bear's default. *Id*., ¶¶80-83, Exhibit 46, Show Cause Letter in Bank's files.

While Eagle Bear timely appealed the cancellation decision, it subsequently withdrew its appeal before any decision was issued by the BIA reversing, withdrawing, amending, overruling or otherwise setting aside the cancellation decision. Withdrawal of Eagle Bear's appeal started the running of the administrative clock and 30 days later the cancellation became final as a matter of law. When Eagle Bear withdrew its appeal, no final decision of the Regional

Director was necessary to affirm the Agency's cancellation decision. The 2008 lease cancellation is now beyond administrative or judicial review.

It is now beyond dispute that:

• On April 7, 2008, Will Brooke, President of Eagle Bear and Miles Hamilton, President of Independence Bank discussed the April 4, 2008 Show Cause Letter for Eagle Bear's non-payment of the required 2007 annual rent. Blackfeet SUF, ¶ 81, Exhibit 46, BIA Show Cause Letter in Bank's files.

• On June 10, 2008 BIA issued a letter cancelling the former business lease between the Blackfeet Nation and Eagle Bear, Inc. *Id.*, ¶84, Exhibit 47 BIA June 10, 2008 cancellation letter.

• On June 18, 2008, Eagle Bear, Inc. filed a Notice of Appeal and Statement of Reasons appealing the cancellation action and that the appeal stayed the cancellation. *Id.*, ¶¶90-92, Exhibit 53, Eagle Bear's June 18, 2008 Notice of Appeal.

• In its Notice of Appeal and Statement of Reasons, Eagle Bear's only reason for not cancelling the lease was the admittedly false claim that it paid the delinquent payment for which the lease was cancelled on June 6, 2008. *Id.*

• Eagle Bear did not raise in its Notice of Appeal and Statement of Reasons any claim of lack of proper notice by BIA to it or Independence Bank prior to cancellation of the lease. *Id.*

• On January 5, 2009 Eagle Bear, Inc. withdrew its appeal of BIA's June 10, 2008 cancellation decision. *Id.*, at ¶97, Exhibit 60 Eagle Bear's January 5, 2009 letter.

• When Eagle Bear, Inc. withdrew its appeal there was no official decision by the BIA Rocky Mountain Regional Director reversing, withdrawing, amending, overruling or otherwise setting aside the cancellation decision. *Id.*, ¶¶108-109, Exhibits 67 (Eagle Bear's Responses to Requests for Admission ("RFA") ##46 & 47); Exhibit 68 (RFA #49); Exhibit 61, *Brooke Depo*, *173:12-16*.

BIA has never issued a letter acknowledging Eagle Bear's January 5, 2009 letter or any purported agreement for Eagle Bear to conditionally withdraw its appeal. *See Eagle Bear Inc. et al v. Blackfeet Nation et al., Case No.* 4:21-cv-88-BMM, Doc. 82-3–82-8, Doc. 83–83-3, which is the Administrative Record, Supplemental Administrative Record and BIA FOIA responsive records to the former lease.

a. The Encumbrance and Independence Bank.

In 2007, Eagle Bear, Inc. sought permission pursuant to section 18 of the former lease to encumber the lease and issue a leasehold interest to Independence Bank as collateral for a $500,000 loan to build a swimming pool. Blackfeet SUF, ¶¶52-54, Exhibit 6, Lease §18, Exhibit 27, Blackfeet Tribal Council approval of leasehold interest for swimming pool. The BIA approved the loan on May 7, 2007.

Id., at ¶54, Exhibit 29, BIA approval notice. At the time that it took out the loan with Independence Bank, Eagle Bear was more than 30 days delinquent on the minimum annual rental payment which was due on November 30, 2006; it had not paid the required interest on all the late payments from 1997 through 2006; and it had underpaid the annual gross receipts royalty payment for 2004 and 2006. Blackfeet SUF, ¶¶55-56, Exhibit 20, *Brooke depo, 99:11-101:5*; Exhibit 21, *BIA accounting of rents from 1997-2014, USA-AR_1202*; Exhibit 30, *Brooke depo, 107:2-6;* Exhibit 31, *Brooke depo, 177:15-19*. Eagle Bear never advised Independence Bank of its delinquent status on the lease when it obtain the loan. *Id.* at ¶55, Exhibit 30 *Brooke depo.,* 107:16-25.

b. Eagle Bear Defaulted on the Required 2007 Minimum Annual Rental Payment and the BIA Initiated the Required Cancellation Procedures.

As has already been found with respect to the obligation to pay the minimum annual rental payment under the former Lease, Eagle Bear was more than 30 days past due on every payment from the outset of the former Lease up to and including 2007. *Eagle Bear, Inc., et al. v. Blackfeet Nation, et al.*, 4:21-cv-88-BMM, Doc. 27, p.4, (finding re: late rent payments). Eagle Bear had also failed to pay the interest on all of these late rental payments as required by the former Lease and the regulations. Blackfeet SUF, ¶56, Exhibit 6, former Lease § 6; 25 CFR § 162.14; Exhibit 20, *Brooke depo, 99:11-101-5*. On June 10, 2008 BIA Blackfeet Agency

cancelled the former Eagle Bear lease for non-payment of the required minimum annual rental payment which was due on November 30, 2007.

2. Eagle Bear Inc.'s Appeal Did Not Change the Lease Cancellation Decision and It Is Time-barred From Litigating Issues Which It Did Not Raise In Its 2008 Appeal.

Eagle Bear, Inc. asserts that it timely cured the default which was the basis of the June 10, 2008 lease cancellation. Eagle Bear further asserts that it timely appealed the June 10, 2008 action, which stayed the cancellation decision and that because no final decision of the Regional Director affirmed the June 10, 2008 cancellation letter, the lease was never cancelled and remains in effect. Eagle Bear's assertions are without factual or legal support and must be rejected. Any attempt to re-litigate BIA's 2008 lease cancellation decision is time-barred.

a. Eagle Bear's Untimely Payment of the Delinquent Rent.

On June 16, 2008, after it received BIA's June 10, 2008 letter cancelling the former lease for non-payment, Eagle Bear sent a check to BIA in the amount of $15,000 for the delinquent payment for which the lease was cancelled; the payment omitted the required intertest. Blackfeet SUF, ¶88, Exhibit 52, Eagle Bear check dated 6/16/2008. The BIA recorded the check on June 20, 2008. *Id.* at ¶89, Exhibit 21 BIA Eagle Bear, Inc. payment history. Eagle Bear, Inc. did not notify its lender and mortgage holder Independence Bank of the lease cancellation. *Id.*, at ¶93, Exhibit 55 *Brooke depo, 148:21-149:1.*

b. Eagle Bear, Inc.'s Appeal.

On June 18, 2008 Eagle Bear filed a Notice of Appeal and Statement of Reasons whereby it appealed BIA's June 10, 2008 lease cancellation. Eagle Bear's appeal effectively stayed the cancellation decision so long as the appeal was pending. 25 CFR § 2.6, 25 CFR § 162.621.

Eagle Bear offered only one reason in its Statement of Reasons for the appeal. A claim which it now admits was false; that it paid the past due payment on June 6, 2008 before receiving BIA's lease cancellation letter. Blackfeet SUF, ¶91, Exhibit 54 (RFA #24). Eagle Bear made no claim in its Notice of Appeal and Statement of Reasons of lack of proper notice by the BIA to it or on Independence Bank prior to the cancellation decision. *Id.,* ¶92. By failing to raise lack of proper notice by the BIA on either it (Eagle Bear) or Independence Bank prior to cancellation of the lease in its Notice of Appeal and Statement of Reasons, Eagle Bear waived those claims. *Benally v. Acting Navajo Regional Director, BIA,* 57 IBIA 91, 97 (2013).

The well-established general rule of the Interior Board of Indian Appeals is that it will not consider arguments or issues raised for the first time on appeal to the Board.

> "This rule is based on the regulatory provision limiting the Board's scope of review to those issues that were before the Regional Director, See 43 CFR Sec. 4.318, and on the principle that a party who did not afford BIA an

> opportunity to respond to an issue should not be allowed on appeal, to challenge BIA's decision as defective for failing to address that issue." *Wind River Alliance v. Rocky Mountain Regional Director*, 52 IBIA 224, 227 (2010) (Citations omitted).

Eagle Bear made no claim in its Notice of Appeal and Statement of Reasons that it had not received the required 10-day show cause notice prior to cancellation. Nor did it claim that Independence Bank was not properly served by the BIA. Notwithstanding that both Eagle Bear and Independence Bank were served with the proper notices in ample time to exercise their rights under the former lease, neither attempted to do so. Pursuant to the rulings of the IBIA, neither Eagle Bear nor the Bank could raise those issues today, 14 years later. *Wind River Alliance v. Rocky Mountain Regional Director*, 52 IBIA 224, 227 (2010); s*ee also Bunney v. Pacific Regional Director*, 49 IBIA 26, 33 (2009), *and cases cited therein*; *Benally v. Acting Navajo Regional Director, BIA,* 57 IBIA at 97.

Eagle Bear, Inc. failed to serve its lender and mortgage holder Independence Bank with a copy of its notice of appeal and statement of reasons. *See* 25 CFR § 2.12(a). While Eagle Bear has a certified mailing receipt of service of the Notice of Appeal on the Blackfeet Nation, the Blackfeet Nation had no record of receiving the Notice of Appeal and the apparently accompanying documents.

More importantly, the Blackfeet Nation did not request, took no part in, and had no knowledge of BIA's decision to cancel the lease. Pursuant to the applicable

Federal Regulations at 25 CFR Part 2, as incorporated into the lease (former Lease §25), the Blackfeet Nation was an interested party, but it had no duty to participate in Eagle Bear's appeal or to defend BIA's lease cancellation decision. *See* 25 CFR. § 2.11(a); *French v. Aberdeen Area Director, BIA,* 22 IBIA 211, 214 (1992)(participation of interested party discretionary, not mandatory).

On January 5, 2009, Eagle Bear withdrew its appeal of the Blackfeet Agency's June 10, 2008 decision cancelling the former lease.

c. Effect of the Withdrawal of the Eagle Bear, Inc. Appeal.

When Eagle Bear, Inc. withdrew its appeal on January 5, 2009, the administrative clock began to run on the finality of its appeal. The BIA had not made a record retraction of the cancellation decision, and that decision was never reversed or otherwise set aside – the Blackfeet Agency's June 10, 2008 cancellation was still in effect when Eagle Bear withdrew its appeal. BIA never sent a letter to Eagle Bear, Inc. acknowledging receipt of the January 5, 2009 letter or confirming some unwritten agreement.

Decisions of BIA officials become effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed. 25 CFR 2.6(b). If an appeal was not filed, then the cancellation became effective on the 31st day after the cancellation letter was received. 25 CFR § 162.621.

The BIA Blackfeet Agency's June 10, 2008 decision cancelling the former lease became effective and final on or about February 5, 2009, 31 days after Eagle Bear withdrew its appeal. 25 CFR 2.9. On that date, the time for filing a Notice of Appeal had expired and no Notice of Appeal had been filed. 25 CFR 2.6(b). Eagle Bear had exercised and exhausted its administrative remedies. At that point, the Blackfeet Agency's cancellation decision was ripe for judicial review under the Administrative Procedures Act, 5 U.S.C. §§704-706.

The Blackfeet Agency's June 10, 2008 cancellation decision marked the "consummation" of the agency's decision making process; it was not a decision of a merely tentative or interlocutory nature. And it was an action by which "rights or obligations [were] determined," and from which "legal consequences" flowed. *Bennett v. Spear,* 520 U.S. 154, 177-178 (1997). Once Eagle Bear withdrew its questionable appeal and 31 days thereafter elapsed, the Blackfeet Agency's June 10, 2008 cancellation decision was the "consummation" of the agency's decision making process, and it was an action by which "rights or obligations" were determined and from which "legal consequences" flowed. *Bennett*, *Id.*

Precedent from the Ninth Circuit Court of Appeals holds that the general six-year statute of limitations found at 28 U.S.C. §2401(a) "applies to actions brought under the APA." *Wind River Mining Corp. v. United States,* 946 F.2d 710, 713 (9th Cir.1991) (footnote omitted); *Big Lagoon Rancheria v. California*, 789 F.

3d 947 (9th Cir. 2015). Based on applicable law, the statute of limitations ran on Eagle Bear's right to seek judicial review on or about February 5, 2015. Eagle Bear's attempts to have both administrative and judicial review of that cancellation decision 13 years later are without any legal authority whatsoever and must be rejected.

3. Assuming *arguendo* That BIA's 2008 Lease Cancellation Was Still Subject to Review, BIA Followed Appropriate Procedures Including Giving Notice, and an Opportunity to Cure.

Even if Eagle Bear could still challenge BIA's 2008 lease cancellation (which it cannot), BIA followed appropriate procedures in cancelling the lease including giving both Eagle Bear and the encumbrancer Independence Bank notice and an opportunity to cure.

a. BIA's Cancellation Process.

While the BIA had clearly been lax in its duty to administer and enforce the lease up to that point in time, in January of 2007, it took an approach more in keeping with the terms of the former Lease and the regulations. *See* Blackfeet SUF, ¶¶59, 67, 80, Exhibits 33, 41, & 46 (BIA letters to Eagle Bear re: non-compliance with lease requirements).

It is beyond dispute that on January 15, 2008, the BIA sent a certified letter to Eagle Bear, Inc. at 106 West Shore, St. Mary, Mt. 59417. *Id.*, ¶¶59-60, Exhibit 33, BIA letter dated January 15, 2008. The letter advised Eagle Bear that it was

delinquent on the November 30, 2007 minimum annual rental payment and that it had to pay the required payment or show cause why the lease should not be cancelled. *Id.*

The letter was sent to Eagle Bear's St. Mary address via certified mail. *Id.* The letter was returned. The return envelope shows postal zip codes of: 59417$9999 G000 which is the zip code for Browning, Montana and 59715@9262 which is the zip code for Eagle Bear's address in Bozeman, Montana. *Id., compare with* Exhibit 34, *Brooke depo, 112:13-113:19* and Exhibit 35, *Brooke depo, 70:10-72:25*. It would thus seem clear that the January 15, 2008 letter was forwarded to Bozeman, Montana. According to Section 41 of the former Lease the certified letter was deemed served 10 days after mailing. Blackfeeet SUF, ¶63, Exhibit 6, Lease §41, USA-AR_0149-0150.

It is further beyond dispute that on March 27, 2008 the BIA Blackfeet Agency sent Eagle Bear, Inc. a second certified letter advising Eagle Bear that it had 10 days to pay the past due rent for November 30, 2007 or show cause why the lease should not be cancelled. *Id.,* at ¶67, Exhibit 41, Show Cause letter dated March 27, 2008. The letter was sent to Eagle Bear, Inc. at 106 West Shore, St. Mary, Mt. 59411 (59411 is the zip code for Babb, Mt. which is the local post office for the St. Mary/Babb area). *Id.*

The March 27, 2008 letter was sent by certified mail; it was returned as unclaimed. The mailing envelope shows two (2) certified mailing receipts. *Id.* at *USA-AR_2297 (envelope)*. One receipt is from the Browning, Montana post office and is dated March 27, 2008. That receipt is addressed to Eagle Bear, Inc., 106 West Shore, St. Mary, Mt. 59411. The Browning Post Office Certified Mail receipt has an item number: 7006 0810 0003 9930 5917. There is a second certified mailing receipt on the returned envelope. That second certified mail receipt shows that the letter was sent to: St. Mary Glacier Park KOA, 208 JAMES AVE., Bozeman, Mt. 59715-9262. It should be noted that this is the exact same zip code for Bozeman as on the January 15, 2008 returned envelope. *Id.* at ¶71, Exhibit 43, *Brooke depo 117:7-119:12*. The second certified mail receipt on the March 27, 2008 letter to Eagle Bear also contains the same postal item number as the Browning certified mail receipt: 7006 0810 0003 9930 5917. *Id.,* at ¶67, Exhibit 41, *Show Cause letter envelope, USA-AR_2297 (envelope)*. The March 27, 2008 10-day show cause letter was clearly forwarded to Eagle Bear at a Bozeman, Montana address which is the address for William Brooke as the registered agent of Eagle Bear, Inc. *Id.,* at ¶¶73-74, Exhibit 43, *Brooke depo, 119:6-12; 123:10-14*; Exhibit 2, *Articles of Incorporation for Eagle Bear Inc., (Registered Agent § V)*. Pursuant to Section 41 of the former Lease this certified notice was deemed complete 10 days after it was mailed. *Id.,* at ¶63, Exhibit 6, Lease §41, USA-

AR_0149-0150.

It is also beyond dispute that on April 4, 2008, BIA Blackfeet Agency sent Eagle Bear, Inc. a third letter. *Id.,* at ¶77, Exhibit 46, Show Cause letter dated April 4, 2008. This letter advised Eagle Bear that it was delinquent on the lease, that a 10 day show cause letter had been sent to it on a previous occasion and that no response was received. Eagle Bear was further advised that a final cancellation of the lease would be issued on April 8, 2008 if no payment was received. This April 4, 2008 letter was copied to the Independence Bank, 435 3rd Street, Box 2070, Havre, Mt. 59501.

It is indisputable that Independence Bank received the April 4, 2008 letter and on April 7, 2008 a representative of Independence Bank called William Brooke of Eagle Bear, Inc. *Id.,* at ¶¶80-83, Exhibit 46, *Bank note on April 4, 2008 Show Cause letter*. Independence Bank's Representative documented that call in the Bank's files with a note attached to the Bank's copy of the letter, as follows:

> "Discussed with Will Brooke on 4-7-2008. Brooke indicates that the BIA does this almost every year. He says that payments have been made but the BIA always has trouble applying them appropriately. His in communication with them and expects to have resolved in the near future."

Id.

Independence Bank's note on the April 4, 2008 letter is evidence that the Bank had received the letter and had notice of the BIA's intention to cancel the lease for nonpayment of rent for more than 30 days prior to the cancellation action. And, based language of the Bank's note, the April 4, 2008 letter was discussed with Will Brooke. Which means that Eagle Bear also had actual notice of the BIA's intention to cancel the lease for nonpayment of rent more than 30 days prior to the cancellation. Independence Bank did not contact the BIA, the agency which sent the letter or approved the loan. It relied on the false statements of the borrower/lessee and waived its right to cure the default by paying the past due payments. Nor did Independence Bank contact the BIA after its conversation with Brooke to ensure that Eagle Bear had made the required payment.

Contrary to his representations to the Bank, Brooke was not in contact with the BIA and he did not resolve the matter. On June 10, 2008, more than 60 days after the April 4, 2008 letter, BIA Blackfeet Agency sent Eagle Bear, Inc. a letter cancelling the lease for nonpayment of the 2007 minimum annual rental payment of $15,000 (plus required interest). *Id.*, at ¶84, Exhibit 47, BIA cancellation decision. There is no dispute that this letter was received by Eagle Bear, Inc. *Id.*, at ¶85, Exhibit 48, *Brooke depo, 131:16-132:4*. There is no record of service of BIA's lease cancellation on the Blackfeet Nation.

At the point that it cancelled the lease, BIA Blackfeet Agency had complied with the requirements of the lease by giving Eagle Bear 30 days written notice of the delinquent payments and a chance to pay the payment. *Id.*, at ¶9, Exhibit 6, Lease, § 21, USA-AR_0139. BIA's first notice was given on January 15, 2008. BIA then gave Eagle Bear a second notice which was a 10 day show cause notice, but as the BIA delayed cancellation that letter too amounted to a second 30-day notice to Eagle Bear. *Id.,* ¶9, Lease §§21, 25, USA-AR_0139, 0143. According to BIA Blackfeet Agency officials, they also sent these letters to Eagle Bear by U.S. First Class regular mail. *Id.*, at ¶¶64-65, Exhibit 38, *Tatsey depo, 18:21-19:9*; Exhibit 39, *Pollock depo, 101:8 – 102:1*; Exhibit 40, *Crowe depo, 34:5-18*. Pursuant to Section 41 of the Lease, service of those letters was deemed complete 10 days after mailing. It should be noted that there are no U.S. First Class returned envelopes in the Certified Record.

It is clear from the envelopes that notwithstanding that the January 15, 2008 letter and March 27, 2008 letter were sent to Eagle Bear during the business' off-season, the letters were forwarded to Bozeman, Montana where Eagle Bear maintained its winter office. Moreover, pursuant to the Lease which Eagle Bear principle William Brooke drafted, service of those certified letters was deemed complete 10 days after mailing. Eagle Bear was served the required notices.

Independence Bank has admitted that it received the April 4, 2008 letter which is also evidenced by the note attached to the Bank's copy of the letter in the Bank's files. *See* Doc. 11-1, *Declaration of Chandra Moomey, ¶ 8, dated June 29, 2022;* Blackfeet SUF, ¶80, Exhibit 46, copy of Letter in Bank files with note. That note indicates that the Bank received the April 4, 2008 letter between April 4 and April 7, 2008. It further indicates that on April 7, 2008 a Bank representative called Will Brooke/Eagle Bear regarding the letter. In accordance with IBIA notice law, service is effective if it is actually received by the person on whom service is intended in sufficient time to exercise their rights. *See Curtis Laducer v. Acting Great Plans Regional Director*, BIA, 48 IBIA 294, 302 (2009)("Since he had actual notice, he cannot show prejudice from any failure to receive that letter via certified mail."); *Administrative Appeal of Mark Small v. Commission of Indian Affairs*, 8 IBIA 18, 18 (1980)("notice requirements of 25 CFR Part 2 were substantially met, since appellant had actual notice"). According to the former Lease, service was deemed complete "on the date actually received". *Cf. Laducer, Id.*

When it actually received the BIA's April 4, 2008 letter, the Bank was on notice, had an opportunity to exercise its rights (it had more than 60-days to cure the default) and it chose to do nothing.

Neither Eagle Bear, Inc. nor Independence Bank cured the default for which the lease was cancelled prior to BIA's cancellation decision within 30-days of April 4, 2008.

4. The Cancelled Lease Could Not Be Reinstated by Oral Agreement Between the BIA and Eagle Bear, Inc..

Eagle Bear argues that they withdrew their appeal of the June 10, 2008 lease cancellation as the result of discussions with Blackfeet Agency staff, and pursuant to some unwritten, unspecified agreement. That argument is not supported by any legal authority, is contrary to prevailing law and is not supported by any substantial evidence.

Eagle Bear's argument is foreclosed by the applicable law and regulations and fails from the outset. Once an appeal is filed from a decision of an Agency Superintendent, only the Regional Director had authority over the appeal. 25 CFR 2.4(a). Applying this provision to Eagle Bear's claim, even if true, the Blackfeet Agency officials who Eagle Bear claims made an agreement with them, had no authority to do so. Eagle Bear's remedy for the Regional Director's delay in making a decision on its appeal, was to file an "inaction" appeal to the IBIA pursuant to 25 CFR §2.8 (Appeal from inaction of official). *See Grenier v. Great Plains Regional Director,* 66 IBIA 7, 20 (2018).

Section 415 of Title 25 of the United States Code requires a written lease to legally occupy Indian trust land for long term leasing purposes. Pursuant to the Federal Regulations in effect in 2008, at 25 CFR §162.104, a written lease is required before taking possession of Indian trust land. All leases under these regulations had to be in writing and approved by the Secretary. 25 CFR §162.604(a). A tenant acquires no rights for holding over after a lease is cancelled; the tenant is considered a trespasser. 25 CFR §162.623; Blackfeet SUF, ¶38 Exhibit 6, Lease ¶43, USA-AR_0150.

Federal law is clear that a written lease is required before taking possession of Indian trust land. *Emm v. Western Regional Director*, 50 IBIA 311, 312 (2009) (citations omitted); *Moody(s) v. United States*, 931 F.3d 1136 (D.C. Cir. 2019). The IBIA has consistently held that verbal representations or advice by the BIA do not create a lease or legal rights, and such advice and representations do not override applicable laws and regulations. *Strom, et al. v. Northwest Regional Director*, 44 IBIA 153, 165-166 (2007); *citing Flynn v. Acting Rocky Mountain Regional Director*, 42 IBIA 206, 213 (2006). Individuals dealing with the government are presumed to have knowledge of duly promulgated federal regulations. *Id. citing Flynn* at 212; *Jackson, M & M Farms*, 35 IBIA 197 (2000); *Grenier v. Great Plains Regional Director, BIA,* 66 IBIA 7, 16 (2018).

In *Flynn v. Acting Rocky Mountain Regional Director*, 42 IBIA 206, 213 (2006), the Interior Board of Appeals stated that the Board has repeatedly held that

> "**individuals dealing with the government are presumed to have knowledge of duly promulgated regulations**. See *Billco Energy v. Acting Albuquerque Area Director*, 35 IBIA 1, 7 (2000); *Blackmore v. Billings Area Director*, 30 IBIA 235, 239 (1997); *DuBray v. Acting Aberdeen Area Director*, 30 IBIA 64, 68 (1996). . . . **If the Superintendent in fact gave erroneous advice, that still could not operate to grant Appellant rights not authorized by law or inconsistent with the regulations.** *Billco Energy*, 35 IBIA at 7; see also *G.H.G. v. Acting Rocky Mountain Regional Director*, 39 IBIA 27, 30 (Superintendent's authority limited by the regulations).

Flynn, 42 IBIA at 212-213. (emphasis supplied).

In *Moody(s) v. United States*, 931 F.3d 1136 (D.C. Cir. 2019), the D.C. Circuit held that a cancelled lease cannot be revived by oral agreement with the BIA, and a new lease could not be created by oral agreement with BIA, especially where the Indian Nation landowner did not consent. It is beyond dispute that the former lease was cancelled by BIA.

As a lawyer, and a lessee of Indian land, Eagle Bear's president William Brooke should have known the requirements of the Federal regulations and that Eagle Bear had to have either a written document from the BIA reversing the prior lease cancellation or a new lease with the Blackfeet Nation to legally occupy Blackfeet Nation land after January 5, 2009. They had neither.

Eagle Bear's argument also suffers from evidentiary problems. The purported material facts upon which Eagle Bear's argument is based are highly disputed. First, Eagle Bear's story as to who supposedly told them their late payment without the required interest brought the leases current and that they could withdraw their appeal, has changed over time. Initially Eagle Bear claimed that unspecified staff members at the BIA Blackfeet Agency told them that they were current and could withdraw their appeal. Then in their discovery responses, Eagle Bear specifically named BIA Blackfeet Agency employee Tracy Tatsey as the person with whom he had the supposed agreement. Then in its Second Amended Complaint, Eagle Bear asserts that the "Agency Superintendent or one of its officers" told them that they were current and that they would withdraw their appeal. Doc. 4, ¶18,

However, under oath, both Tracy Tatsey and Blackfeet Agency Superintendent at the time Stephen Pollock denied having any such discussion with Eagle Bear representative William Brooke regarding the 2008 lease cancellation and Eagle Bear's appeal. Blackfeet SUF, ¶¶112-115, Exhibit 73, *Tatsey depo, 42:11-25;* Exhibit 74, *Pollock depo 62:12-25;* Exhibit 75, *Hall depo 24:16 – 25:16*. Tatsey specifically denied telling Brooke that he could withdraw his appeal; she indicated that she had no authority to do so and would not have told him that. *Id.,* at ¶112, Exhibit 73, *Tatsey depo, 42:11-25*. Former Superintendent

Pollock denied having any discussions with Brooke after issuing the cancellation letter on June 10, 2008. *Id.,* at ¶113, Exhibit 74, *Pollock depo 62:12-25*.

Additionally, the facts do not support Eagle Bear's claims regarding its January 5, 2009 letter withdrawing their appeal. Most importantly the letter does not say what Eagle Bear/Brooke claims it says, and the factual claim in the letter that Eagle Bear was current with its payments is false.

Eagle Bear's January 5, 2009 letter reads in full:

> Pursuant to my discussions with your realty staff, I hereby withdraw the Notice of Appeal and Statement of Reasons which appealed your decision of June 10, 2008. A copy of that Notice as well as a copy of the appealed decision is attached for your convenience.
>
> I am withdrawing the Notice of Appeal because 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.
>
> Thank you and your staff for working with our company as we have worked through these difficult times.
>
> Respectfully,
>
> Will Brooke, President, St. Mary Glacier Park KOA

Eagle Bear now claims that this letter is an agreement between Eagle Bear and BIA Blackfeet Agency to conditionally withdraw their appeal on the supposed basis that the delinquent payment brought the lease current. The words

"condition", "conditional" or "agreement" do not appear in the letter. The letter does not recite an agreement.

Will Brooke is a lawyer who played a role in drafting the original 32-page lease agreement. Surely, he should have known that he needed to recite whatever agreement he claims existed in the letter itself. Now, 14 years later, Eagle Bear wants the Court to re-write the letter for it, to recite an agreement which never existed. As Eagle Bear repeated in its responses to the Blackfeet Nation's discovery requests with regard to the January 5, 2009 letter: "The letter must be read as a whole and speaks for itself." Blackfeet SUF, ¶105, Exhibit 65, RFA ##41-43.

Eagle Bear's claim in the letter that it was current is also false. At the time that Eagle Bear withdrew its appeal on January 5, 2009, Eagle Bear was delinquent on the required 2008 annual gross receipts royalty payment; it was delinquent on the interest required interest on the 2007 late minimum annual rental payment; and, it was delinquent on the required interest payments on all the late minimum annual rental payments from 1997 through 2006. Additionally, Eagle Bear had underpaid royalties for 2004 and 2006. On January 5, 2009 Eagle Bear was far from current on the required payments under the former lease.

Eagle Bear's claims regarding the January 5, 2009 letter withdrawing their Notice of Appeal and Statement of Reasons are unsupported by the evidence and

are foreclosed by the law. No BIA official confirmed Eagle Bear's claim of an agreement or even a conversation regarding an agreement to withdraw their appeal. No BIA decision withdrawing, reversing, overruling, amending, or otherwise changing the cancellation has ever been issued. The BIA officials upon whom Eagle Bear makes it claim of an agreement had no legal authority to make the agreement which he claims existed. 25 CFR § 2.4(a). Once Eagle Bear withdrew its appeal, it was not necessary or required for the Regional Director (or the Agency Superintendent) to issue a decision confirming the lease cancellation.

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

Eagle Bear, Inc. argues that the parties' course of conduct is evidence of the unwritten agreement between Eagle Bear and BIA Blackfeet Agency staffers for them to withdraw their administrative appeal. Eagle Bear further asserts that the BIA's action in accepting their lease payments is a course of conduct which somehow creates a new lease or revived the cancelled lease. Because the subject of the former lease was Indian trust land and the lease was cancelled, BIA's actions could not result in a new lease for Eagle Bear.

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. Blackfeet SUF, ¶9, Exhibit 6, Lease, §43, USA-AR_0150. "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.

As already argued, 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 not only would that purported agreement been beyond the authority of the staffer, 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). Under the applicable law, the Blackfeet Nation was a required party to any new agreement.

As the IBIA held in *David M. Jackson, M & M Farms v. Portland Area Director, Bureau of Indian Affairs*, 35 IBIA 197 (9/25/2000), "an unapproved lease of Indian land is void and grants no right to any party. *Brooks v. Muskogee Area Director*, 25 IBIA 31, 34 (1993) *and cases cited therein*." In the *Jackson* case, the lessee Jackson had a two (2) year business lease of Indian trust land beginning

January 1, 1991 and ending on December 31, 1992. On July 17, 1992 Jackson applied for a 10 year lease. The BIA took no action on Jackson's application for a new lease.

Jackson's lease expired on December 31, 1992. However, BIA Agency staff had erroneously labeled the lease as having an expiration date of 1997, rather than 1992. Instead of giving Jackson notice that his lease had expired, the BIA Agency sent Jackson a bill every year from 1993 through 1997 for the annual lease payment. Jackson paid the bills as they came and remained on the land. When the issue of Jackson's lack of a lease was brought to the attention of the Agency Superintendent, he gave Jackson notice of eviction for trespass and assessed damages. Jackson appealed.

On appeal Jackson argued that the BIA's course of conduct in failing to enforce the trespass regulations in 1992 and sending him bills and accepting his money from 1992 through 1997 constituted a series of one-year leases and that he was not liable for any damages. The IBIA rejected Jackson's argument, holding that 25 U.S.C. § 415 specifically required the purported lease(s) be approved by the Secretary and had to be on a form approved by the Secretary. The IBIA found that neither existed in the Jackson case and that the purported leases were void. *Jackson,* 35 IBIA at 200.

The same is true in the instant case. BIA's negligent failure to enforce the trespass regulations in 2009 and its continued acceptance of Eagle Bear's payments did not constitute a "course of conduct" which created a new lease or revived the cancelled lease. Eagle Bear's payments since 2017 have been under the process of the second lease cancellation in 2017. While Eagle Bear has been on the leased premises since that time it has been under the protest of the Blackfeet Nation.

CONCLUSION

There are no genuine issues of material fact with respect to BIA's 2008 cancellation of the former lease between the Blackfeet Nation and Eagle Bear, Inc. The former lease was properly cancelled by the BIA on June 10, 2008, after non-payment of the 2007 required minimum annual rental payment. While Eagle Bear, Inc. initially appealed the cancellation, it subsequently withdrew its appeal and the cancellation became final as a matter of administrative law. The applicable statute of limitations has long since run and the 2008 lease cancellation is no longer subject to either administrative or judicial review.

DATED this 23rd day of November, 2022.

Respectfully Submitted,

_____/s/_Joseph J. McKay_____

_____/s/_Derek E. Kline_____

Attorneys for the Defendant
Blackfeet Indian Nation

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 6,495 words, excluding the Caption, Table of Contents, Table of Authorities, Exhibit Index and the Certificate of Compliance.

/s/ Joseph J. McKay

/s/ Derek E. Kline

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the penalty of perjury that on the 23rd day of November, 2022, a copy of the foregoing was served by electronic means to the parties noted in the Court's ECF transmission facilities.

/s/ Derek E. Kline