Charles E. Hansberry
Jenny M. Jourdonnais
HANSBERRY & JOURDONNAIS, PLLC
2315 McDonald Avenue, Suite 210
Missoula, MT 59801
Telephone (406) 203-1730
Telefax (406) 205-3170
Chuck@HJBusinessLaw.com
State Bar I.D. 4132
Jenny@HJBusinessLaw.com
State Bar I.D. 11906

Attorneys for Independence Bank

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

EAGLE BEAR, INC. and WILLIAM BROOKE, Plaintiffs, vs. THE BLACKFEET INDIAN NATION and THE BLACKFEET TRIBAL COURT, Defendants.	Case No. CV-22-93-GF-BMM **INDEPENDENCE BANK'S BRIEF IN SUPPORT OF PARTIAL SUMMARY JUDGMENT MOTION**

INDEPENDENCE BANK, Intervenor-Plaintiff, v. EAGLE BEAR, INC., BLACKFEET INDIAN NATION, and DARRYL LaCOUNTE in his capacity as the Director of the BUREAU OF INDIAN AFFAIRS, Intervention-Defendants.	

Independence Bank (the "Bank") respectfully submits its brief in support of its motion for partial summary judgment.

UNDISPUTED FACTS[1]

On or about April 11, 1997, Plaintiff Eagle Bear, Inc. ("Eagle Bear") and Defendant Blackfeet Indian Nation (the "Tribe") entered into a Recreation and Business Lease Agreement ("Lease"). (Bank's Statement of Undisputed Facts ("SUF") ¶¶ 2; *see also* Lease, April 11, 1997, App. 1-A.) This Lease was approved by the Bureau of Indian Affairs ("BIA"). (SUF ¶ 3.) Pursuant to this Lease, Eagle Bear operates a campground and recreational facility on trust land within the confines of Blackfeet Indian Reservation (the "Campground"). (*Id.* ¶ 5.)

[1] The following undisputed facts are derived from the Statement of Undisputed Facts filed separately by the Bank in support of its summary judgment motion, in accordance with Local Rule 56.1(a).

Eagle Bear provided the Bank a copy of the Lease and in 2007, pursuant to the Lease's provision regarding permissible encumbrances, Eagle Bear granted the Bank a twenty-year (20) mortgage interest in the Lease, in exchange for a $500,000 loan for capital improvements at the Campground, including a swimming pool. (*Id.* ¶¶ 13.) In faithful adherence to the Lease's requirements, approval of the Bank's encumbrance of the Lease was obtained from both the Tribe and the BIA. (*Id.* ¶¶ 7–10, 14.) The BIA conditioned its approval of the Bank's encumbrance of the Lease on the mortgage instrument's incorporation of the Lease terms and any applicable regulations governing the leasing of tribal trust lands. (*Id.* ¶ 15.)

At this time, Eagle Bear was apparently past due on its 2006 Lease payment, but neither the BIA nor the Tribe notified the Bank that Eagle Bear was past due and both readily approved the Bank's twenty-year (20) encumbrance despite Eagle Bear's alleged payment delinquency. (*Id.* ¶¶ 11–12.) Securing both the BIA's and the Tribe's approval, the Bank became an approved encumbrancer under the Lease. (*Id.* ¶ 16). All appeared well for some time, until April 7, 2008, when the Bank (and the Tribe) were both copied on a letter from the BIA addressed to Eagle Bear dated April 4, 2008. (*Id.* ¶ 19; *see also* Letter from BIA to Eagle Bear, April 4, 2008, App. 1-D.) In this letter, the BIA asserts the Lease is "delinquent" and that "[r]ent is owed," but, importantly, makes no mention of: (1) how much rent is

owed; (2) for what periods rent is delinquent; and (3) whether any associated fees or interest are also due and owing. (SUF ¶¶ 19–20; App. 1-D). Surprisingly, this April 4, 2008 letter, which was presumably received by the Bank on April 7, 2008, expressed an intent to cancel the Lease just *one* day later on April 8, 2008. (SUF ¶ 19; App. 1-D.)

Prior to receiving this letter, the Bank had not received any written communication from the Tribe or BIA regarding Eagle Bear's alleged failure to timely tender Lease payments. (SUF ¶ 21.) Understandably concerned, the Bank quickly contacted Eagle Bear who assured it the matter would be swiftly resolved. (*Id.* ¶¶ 22.) So, relying on Eagle Bear's statements and the Lease's written notice requirements, the Bank waited but neither the BIA nor the Tribe sent any additional communications regarding Eagle Bear's alleged failure to timely tender Lease payments, or the Lease's purported termination. (*Id.* ¶¶ 23–24.) Receiving no additional communication from the BIA or the Tribe, it appeared as Eagle Bear assured the Bank, that all was well and that the issue had been resolved.

For the next 13 years, Eagle Bear continued operating the Campground pursuant to the Lease without issue. (*Id.* ¶ 24.) During that time, Eagle Bear provided the Bank yearly financial statements evidencing its continued operation of the Campground, Eagle Bear continued servicing its debt with the Bank, the Bank continued loaning Eagle Bear money, and Eagle Bear continued making

substantial improvements to the Campground with the loan proceeds. (*Id.* ¶¶ 24–27.)

Importantly, and as explained in detail below, before such termination allegedly occurred, the Bank never received the requisite notice nor opportunity to cure it was entitled to as an approved encumbrancer under the Lease. (*Id.* ¶¶ 29–34.) Put another way, to this day, the Bank has never received written communication from the Tribe or the BIA, describing a default by Eagle Bear, and notifying it of an intention to terminate the Lease if such defect is not cured within 30 days. (*Id.*) Of course, if such a communication had been received, the Bank would have taken steps to protect its interest in the Lease and cure the default. (Decl. of Moomey ¶¶ 18, December 8, 2022, App. 1). More importantly, however, the Bank would not have continued loaning Eagle Bear money for ongoing capital improvements. (*Id.* ¶¶ 18–19).

The Bank also never received the requisite notice it was entitled to under applicable federal regulations. (*Id.* ¶¶ 35–36.) In other words, the Bank has never received notice, as required by 25 C.F.R. § 162.618(a), from the BIA that the Lease had been violated. Perhaps more importantly, the Bank never received notice, as required by 25 C.F.R. § 162.619(c), of a decision to terminate the Lease. It also never disclaimed the Tribe's or BIA's obligations to provide notices in accordance with the Lease and the applicable regulations. (*Id.* ¶ 37.) Application

of these undisputed facts to the law compels only one conclusion—the Lease was never properly terminated and summary judgment on Count I of the Bank's Complaint in Intervention is proper.

STANDARD

The Federal Rules of Civil Procedure authorizes a partial summary judgment motion as to the Bank's claims in this action. Fed. R. Civ. P. 56(a). The Bank is entitled to summary judgment if "there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law." *Id.* A fact is material when it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* In this case, there is no genuine dispute of material fact, and the Bank is entitled to judgment as a matter of law on Count I of its Complaint in Intervention ("Complaint").

ARGUMENT

Count I of the Bank's Complaint seeks a declaration that any purported Lease termination is null and void based on the Tribe's and BIA's failure to satisfy a condition precedent to termination. (Doc. 40 at 7–8.) Summary judgment on this claim is proper.

A. The Undisputed Material Facts Demonstrate Neither the Tribe nor BIA Provided the Bank with the Requisite Notice of Default and Intent to Terminate, As Required by the Lease

Pursuant to the regulations giving rise to the Lease, its terms are to be governed by "federal laws of general applicability," unless the Lease expressly provides, and the Tribe expressly agrees, to be governed by "state law." 25 C.F.R. § 162.109(a), (c) (2008). The Lease contains no such provision, and, therefore, federal law controls "interpretation of the contract." *See Klamath Water Users Prot. Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999). This requires the Court to apply "general principles for interpreting contracts," such as looking to the Lease's "plain language" and ascertaining "the intent of the parties" from the language of "the contract itself." *Id.* (adding "A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations.") When this is done, it is apparent the Lease was *never* properly terminated, not in 2008 or in 2017[2].

As an initial matter, the Bank—as an intended third-party beneficiary of the Lease—has the right to sue for enforcement of its terms. *Id.* at 1210–11; *see also id.* at 1211 n.2 ("A promisor owes a duty of performance to any intended

[2] It appears the Tribe sent Eagle Bear a Notice of Default dated April 26, 2017. *See* Doc. 35-9. While the Bank makes no comment on the adequacy of that Notice of Default as it pertains to Eagle Bear, the Bank was not even copied on that letter. *Id.* As such, the April 26, 2017 letter to Eagle Bear could not have resulted in Lease termination in 2017 either.

beneficiary of the promise, and the intended beneficiary may enforce the duty") (citing Restatement of Contracts § 304). An intended third-party beneficiary is one who is "clearly intended by the parties to benefit from the contract," and is afforded rights under its terms. *Id.* at 1211; *see also Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1160 (9th Cir. 2016) (third-party beneficiary is one afforded enforceable rights under a government contract).

As outlined above and explained in more detail below, the Lease specifically contemplates the existence of approved encumbrancers and vests an approved encumbrancer with both rights and obligations under the Lease. (SUF ¶¶ 7–10, 13–16; Lease ¶ 21.) This language renders the Bank an intended third-party beneficiary capable of suing, as it has done here, to enforce the Lease. Indeed, it is the rights provided to the Bank under the Lease regarding notification and opportunity to cure any default by Eagle Bear and notice of intention to terminate the Lease that are at the heart of this case.

Important to this case, because the Lease vests the Bank with contractual rights and obligations, separate and apart from those enjoyed by and imposed on Eagle Bear— particularly as it relates to notices regarding default, opportunity to cure and intent to terminate—any defenses the Tribe may have against Eagle Bear are inapplicable to the Bank's declaratory judgment claim. *See Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 371 (1984) (citing Restatement Second of

Contracts § 309). Consequently, the dispositive question becomes, did the Tribe and BIA fulfill the Lease's notice and opportunity to cure requirements *owed to the Bank* prior the Lease's purported termination.

As to this question, the analysis is straight forward, and the answer is unequivocally "no". Indeed, one need look no further than ¶ 21 of the Lease, which outlines a precise and exclusive procedure by which the Tribe or BIA can terminate the Lease when an approved encumbrancer exists. Specifically, the Lease provides that if Eagle Bear defaults, either the Tribe or BIA must "give notice in writing to any encumbrancer expressing the [Tribe's] intention to terminate and describing said default to breach." (App. 1-A ¶ 21.) Such notice must be sent by "registered mail, return receipt requested and shall be directed to encumbrancer at its address." (*Id.*) In other words, proper notice is a condition precedent to termination. *See Linder v. Meadow Gold Dairies, Inc.*, 515 F. Supp. 2d 1166, 1173 (D. Haw. 2007) (holding that under the "plain language" of a contract containing similar language to the Lease, proper notice of default was "condition precedent" to termination). This condition was never satisfied and thus the Lease was never terminated.

As an initial matter, the Bank is exactly the sort of "encumbrancer" § 21 of the Lease protects. The Lease specifically contemplates Eagle Bear encumbering its interest under the Lease, subject to appropriate approval. (App. 1-A ¶¶ 18, 20)_

("An encumbrancer is defined to mean the owner and holder of an approved encumbrance which is an encumbrance approved by the [BIA].")) It is undisputed such approval was obtained here and the Bank became an approved encumbrancer within the meaning of the Lease. (SUF ¶¶ 7–10, 14.) As such, the Lease could only be properly terminated *if* the Bank was provided with the notice of default and intent to terminate outlined above. It was not.

Before the Lease was allegedly terminated on June 10, 2008, nobody disputes the Bank was never provided with the written notice required by § 21 of the Lease. Instead, the Tribe merely asserts that the Bank received sufficient notice through an April 4, 2008 letter, which the Tribe was copied on as well. (App. 1-D.) But this written communication was *insufficient* to satisfy the Lease's notice requirement for several reasons.

For one, the letter is dated April 4, 2008, and informs Eagle Bear of the intent to terminate the Lease <u>just four (4) days later</u> on April 8, 2008. But the Lease unequivocally requires thirty (30) days' notice. (App. 1-A ¶ 21.) And this thirty (30) day requirement is not a mere technicality. On the contrary, it is imperative to ensure the Bank is afforded sufficient time to cure the alleged default on its own to protect its interests. (*Id.*) The Bank never was never afforded that opportunity because, at best, the BIA provided it with just four (4) days' notice of

intent to terminate on the basis of default—instead of the thirty (30) days the Lease expressly requires.

For another, the April 4, 2008 letter insufficiently describes the alleged default, as required by the Lease. (App. 1-A ¶ 21.); *see also Frangos v. BoA*, 2014 WL 3699490, * 3 (D.N.H. 2014). Indeed, the notice and opportunity to cure requirement is to provide specification of what must be done to timely cure a default. *Id*. Thus, the real issue is not whether the Bank had actual knowledge of a default. Instead, the real issue is whether the April 4, 2008 letter itself is sufficient to provide notice and opportunity to cure. Standing alone, the April 4, 2008 letter is wholly insufficient.

The Northern District of California's opinion in *Stonebrae, LP v. Toll Bros, Inc.*, is instructive. 2009 WL 1082067 (N.D. Cal. 2009). There, the question was whether several letters sent back and forth between the parties satisfied a "notice and opportunity to cure" contractual provision similar to the one at issue here. *Id.* at *1. In interpreting the notice provision, the court held that to satisfy the notice provision, the furnished notice must: (A) provide fair notice "that there is a failure to perform and describes with sufficient specificity" what needs to occur to cure; and (B) "does not foreclose the opportunity to cure" (i.e. it is not a notice of termination). *Id.* at *5. *Stonebrae* establishes the principle that any notice of

default must state with specificity the nature of the default so that it can be successfully cured.

Here, there can be no reasonable dispute that the April 4, 2008 letter failed to state with specificity the precise scope of the alleged default such that the Bank could cure it. Indeed, the Lease obligates the Tribe and BIA to include in any notice of default a sufficient description of the default, so that the Bank can take the necessary steps to cure the default and prevent the Lease's termination. The April 4, 2008 communication cryptically asserts that the Lease is "delinquent" and that "[r]ent is owed." (SUF ¶¶ 19–20). Nothing in this letter sufficiently describes the nature of the default, including: (1) how much rent is owed; (2) for what periods such rent is delinquent; and (3) whether there are any associated fees or interest due and owing on such unpaid rent.

The Tribe appears to assert that the Bank should have done more after it received the April 4, 2008 letter, namely that it should have contacted the BIA. (*See* Doc. 27 at 27) ("Nor did Independence Bank contact the BIA after its conversation with Brooke to ensure that the Eagle Bear had made the required payment"). However, neither the Lease, nor the law obligate the Bank to seek out the additional information necessary to cure an alleged payment default and the Bank was wholly justified in relying on the written Lease terms. And it cannot be said the Bank did nothing in response to the April 4, 2008 letter. On the contrary,

the Bank diligently set out to address the matter with Eagle Bear and was assured the issue would be resolved. (App. 1 ¶ 11). Nor does the Bank's receipt of the April 4, 2008 letter and its subsequent conversation with Eagle Bear absolve the Tribe or BIA from complying with the Lease and applicable regulations. Because the April 4, 2008 letter did not precisely set out the nature of Eagle Bear's default and it was not readily apparent from the face of the letter what was required to cure the default (it did not specify what amount was required to cure), it did not satisfy the Lease's notice provision. Frankly, even if the April 4, 2008 letter had specified what was required to cure the default, which it did not, there is no reasonable way that the Bank could have been expected to effectuate a cure in one or two days.

Finally, even if the foregoing were incorrect, the April 4, 2008 letter failed to properly satisfy the Lease's notice requirement because it was directed to Eagle Bear, not the Bank. The Lease specifically requires any notice of default and intent to terminate to be "directed to" the relevant "encumbrancer at its address last shown on the records of" the Tribe or BIA. (Lease ¶ 21, p. 21.) The April 4, 2008 communication was directed to Eagle Bear, not the Bank. As such, under the Lease's plain language, it was insufficient to satisfy the condition precedent to any valid termination.

In short, the undisputed material facts demonstrate that neither the BIA nor the Tribe provided the Bank with adequate written notice of default or intent to

terminate the lease, as required by § 21. The only possible notice in this case, the April 4, 2008 letter, flouted the 30-day opportunity to cure requirement, failed to sufficiently describe the alleged default, failed to specify what needed to happen to cure the default, and was not directed to the Bank. Notably, the Tribe was also copied on the April 4, 2008 letter, but apparently took no action until over a decade later[3].

B. The Undisputed Material Facts Demonstrate that the BIA Failed to Provide the Notice Required by Applicable Federal Regulations to Validly Terminate the Lease

The regulations governing the Lease similarly impose certain notice requirements necessary to properly effectuate a termination. For example, when the BIA believes a "lease has been violated," it must "send the tenant and its sureties a notice of violation within five business days of that determination." 25 C.F.R. § 162.618(a). It must also provide "the tenant and its sureties a cancellation letter within five business days of" its decision to "cancel the lease." 25 C.F.R. § 162.619(c). The term "sureties" is undefined but can be assigned its ordinary meaning of "[s]omeone who is primarily liable for paying another's debts or performing another's obligation." *Surety*, Black's Law Dictionary (11th ed. 2019).

[3] The Tribe disputes that it received the April 4, 2008 letter that the BIA copied it on, however whether or not the Tribe received the April 4, 2008 letter is immaterial to a determination that the Bank was not given proper notice.

As discussed above, where, as here, there is an alleged "default" that can be cured by payment of money, the encumbrancer becomes entitled to notice and enjoys a right to cure such default. (Lease ¶ 21 at 20.) Important to the analysis here, however, in this situation the Bank becomes "bound to comply with all of the obligations and conditions," Eagle Bear owes under the Lease. (*Id.*) This language renders the Bank a surety within the meaning of 25 C.F.R § 162.618(c) and entitles the Bank to the requisite notice that the regulations mandate. Here, it is undisputed the BIA never provided the Bank with such notice.

The BIA also never provided the Bank with any notice of cancellation under 25 C.F.R. § 162.619(c). As such, separate and apart from the argument regarding notice under the Lease discussed above, any purported termination of the Lease is null and void for failure to comply with the appliable federal regulations. *Cf Tuttle v. Jewell*, 168 F. Supp. 3d 299, 310 (D.D.C. 2016) (holding that tribal lease was properly terminated when BIA "followed the default and cancellation procedures set forth in the Lease and regulations"). Based on the foregoing, the Bank is entitled to a declaration that the Lease was never properly terminated, due to a lack of sufficient notice and opportunity to cure.

C. Any Default and Alleged Lease Termination Was Waived

Even if this Court determines that the April 4, 2008 letter satisfied the condition precedent to Lease termination, which it did not, the default and

termination was waived when the BIA continued accepting Lease payments from Eagle Bear for the better part of the next decade. Consistent with general contract law principles, the BIA's acceptance of Eagle Bear's lease payments in 2008 and beyond constitutes a waiver of any default. *See Sessions, Inc. v. Morton*, 491 F.2d 854, 858 (9th Cir. 1974) (adopting the concept of waiver in the context of tribal land leases and stating "it is a generally stated rule that the lessor's acceptance of rent after the lessee's breach implies a waiver of that breach"); *see also IBIA in Strebe v. Deputy Asst. Sec*., 16 IBIA 62 (1988):

> Following *Sessions, Inc. v. Morton, 348 F. Supp. 694* (C.D. Cal. 1972*), aff'd*, 491 F.2d 854 (9th Cir. 1974), the Board has held that the question of waiver by acceptance of rent after default is a question of lessor's intent, which is to be determined from the facts of the case. *Franks v. Acting Deputy Assistant Secretary* -- Indian Affairs (Operations), 13 IBIA 231 (1985); *Downtown Properties v. Deputy Assistant Secretary* -- Indian Affairs (Operations), 13 IBIA 62 (1984).

The Bank acknowledges that under *Sessions* acceptance of late payment alone will not constitute waiver and that waiver "is a matter of intent which necessarily depends on the factual circumstances of each case." 491 F.2d at 858. But the circumstances of this case only confirm the BIA's and Tribe's waiver.

Here, not only did the BIA continue accepting Eagle Bear's payments for years, Eagle Bear consistently made substantial capital improvements to the campground (many of which were funded by loans from the Bank) that the Tribe had full knowledge of or at the very least were open and obvious. (SUF ¶¶ 24–26).

All of the evidence points to Eagle Bear, the Tribe and the BIA operating as if the Lease were in full force and effect. In fact, it cannot be disputed that from April 8, 2008 onward, the parties treated the Lease as if it were in full force and effect. Even the Tribe continued issuing Eagle Bear business licenses year after year to operate the Campground, which is evidence of the Tribe treating the Lease as if it were in effect.

The Bank anticipates the Tribe will argue the Bank's claims are barred by sovereign immunity and failure to exhaust tribal remedies. Such arguments were raised and briefed in the Bank's intervention motion (Docs. 18 at 22–29; 21 at 10–14). Those arguments are incorporated herein by reference in their entirety.

CONCLUSION

The Tribe's efforts to "shoehorn" the April 4, 2008 letter into a legally sufficient notice as required by the Lease and applicable regulations to terminate the Lease in either 2008 or 2017 fall flat. Based on the foregoing, the Bank respectfully requests that this Court grant its motion for partial summary judgment and enter judgment in its favor on Count I of the Bank's Complaint.

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DATED this 9th day of December, 2022.

Attorneys for Independence Bank

HANSBERRY & JOURDONNAIS, PLLC
2315 McDonald Ave, Suite 210
Missoula, MT 59801
Telephone (406) 203-1730

By _____

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 3,906 words long, excluding the Caption and Certificates of Service and Compliance. Pursuant to L.R. 7.1(d)(2)(C), given the brief is less than 4,000 words, no Table of Contents and Authorities or Exhibit Index are required.

Dated this 9th day of December, 2022.

HANSBERRY & JOURDONNAIS, PLLC

/s/ Jenny M. Jourdonnais
Jenny M. Jourdonnais

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2022, a true and correct copy of the foregoing was delivered by the following means to the following:

[ ] U.S. Mail
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[ ] Hand-Delivery
[ ] E-Mail
[x] ECF

Joseph J. McKay
P.O. Box 1803
Browning, MT 59417
powerbuffalo@yahoo.com

Derek E. Kline
P.O. Box 1577
Center Harbor, NH 03226
derekekline@gmail.com
Attorneys for Defendant Blackfeet Indian Nation

[ ] U.S. Mail
[ ] FedEx
[ ] Hand-Delivery
[ ] E-Mail
[x] ECF

Lynsey Ross
Assistant U.S. Attorney
U.S. Attorney's Office
2601 Second Avenue N, Suite 3200
Billings, MT 59101
lynsey.ross@usdoj.gov

John M. Newman
Assistant U.S. Attorney
U.S. Attorney's Office
101 E Front Street, Suite 401
P.O. Box 8329
Missoula MT 59801
John.newman@usdoj.gov
Attorneys for Darryl LaCounte, Director of the Bureau of Indian Affairs

[ ] U.S. Mail
[ ] FedEx
[ ] Hand-Delivery
[ ] E-Mail
[x] ECF

Neil G. Westesen
Uriah J. Price
Griffin B. Stevens
CROWLEY FLECK PLLP
P.O. Box 10969
Bozeman, MT 59719-0969
nwestesen@crowleyfleck.com
uprice@crowlyfleck.com
gstevens@crowleyfleck.com
Attorneys for Eagle Bear, Inc.

/s/ Jenny M. Jourdonnais
Jenny M. Jourdonnais