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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 OPPOSITION TO THE BLACKFEET INDIAN NATION'S MOTION FOR SUMMARY JUDGMENT (DOC. 27)**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

EXHIBIT INDEX

Exhibits Attached to this Brief

None

Exhibits Referenced in this Brief and the Associated Statement of Disputed Facts

Exhibit[1]	Description
1	Eagle Bear's Response to Blackfeet Tribe's Opening Brief, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (Dec. 11, 2019)
2	Order Granting Appellant's Motion for Leave to File Response to Regional Director's Motion to Dismiss, Order Denying Motions to Dismiss, and Order Setting Briefing Schedule, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (Sept. 27, 2019)
3	Letter from Crowe to Brooke (Aug. 7, 2017)
4	Letter from Westesen to Crowe (Aug. 18, 2017)

ECF DOC	Description
29-1	Lease
29-2	Dep. of Dawn Gray as 30(b)(6) Designee of Nation
29-3	Dep. of Mark Magee
29-4	Dep. of Will Brooke
29-5	Aff. of Will Brooke (Nov. 22, 2022)
29-10	Dep. of Thedis Crowe
29-11	Independent Accountants Report for 2011-2015
29-12	Independent Accountants Report for 2004-2010

[1] The exhibit numbers referenced are to the exhibits attached to Eagle Bear's Statement of Disputed Facts Regarding the Blackfeet Nation's Motion for Summary Judgment.

ECF DOC	Description
29-13	Letter from Brooke to Pollock (June 18, 2008)
29-16	BIA's Responses to Plaintiff's First Discovery Requests
29-17	BIA Ledger of Eagle Bear Payments from 1997-2014
29-20	Dep. of Tracy Tatsey
29-21	Letter from Wagner to Eagle Bear (Aug. 15, 2000)
29-22	Letter from Brooke to Wagner (Aug. 22, 2000)
29-23	Letter from Denny to Eagle Bear (Aug. 6, 2001)
29-24	Letter and Check from Eagle Bear to Denny (Aug. 13, 2001)
29-25	Letter from Denny to Eagle Bear (July 30, 2004)
30-1	Letter from Brooke to Denny (Aug. 9, 2004)
30-2	Letter from Denny to Eagle Bear (July 27, 2005)
30-3	Letter from Barnes to Brooke (Apr. 26, 2017)
30-4	Letter from Crowe to Brooke & Barnes (Sep. 7, 2017)
30-5	Letter from Crowe to Brooke & Barnes (Oct. 17, 2017)
30-6	Letter from Camrud to Westesen (Apr. 4, 2019)
30-7	Nations' Opening Brief to IBIA, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (Nov. 7, 2019)
30-16	Motion to Dismiss for Mootness, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (July 26, 2021)
30-21	Order Vacating Decision and Remanding, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (Mar. 3, 2022)
31-3	Dep. of Stephen Pollock
31-4	Dep. of Cliff Hall
31-5	Letter from Pollock to Eagle Bear (Jan. 15, 2008)
31-6	Letter from Pollock to Eagle Bear (Mar. 27, 2008)
31-7	Letter from Pollock to Eagle Bear (Apr. 4, 2008)
31-8	Letter from Pollock to Eagle Bear (June 10, 2008)

ECF DOC	Description
31-9	Check from Eagle Bear to BIA (June 16, 2008)
31-13	Letter from Brooke to Pollock (Jan. 5, 2009)
31-16	Letter from Pollock to Eagle Bear (Jan. 17, 2012)
31-17	Letter from Brooke to Pollock (Jan. 26, 2012)
31-18	Letter from Pollock to Eagle Bear (Feb. 7, 2012)
31-19	Letter from Brooke to Pollock (Aug. 8, 2012)
31-20	Email from Tatsey to Brooke (Dec. 1, 2015)

Plaintiff Eagle Bear, Inc. ("Eagle Bear") submits this brief in opposition to the Blackfeet Indian Nation's ("Nation") Motion for Summary Judgment (Doc. 27) ("Motion").

INTRODUCTION

Every available BIA official involved with the 2008 Lease cancellation proceedings is adamant that Eagle Bear's Lease remained in full force and effect following Eagle Bear's January 5, 2009 withdrawal of its appeal. Stephen Pollock, the BIA Browning Superintendent that issued the June 10, 2008 cancellation letter and then administered the Lease through his retirement in 2013, testified:

> Q. . . . Would you have typically allowed Eagle Bear to remain on the campground if their lease had been canceled?
> A. I believe not.
> Q. Was it your understanding somehow, from conversations with Mr. Parisian [the Regional Director] or anyone else, that this late payment issue had been resolved and parties were going forward with the lease in effect?
> A. You know, I'm thinking that Parisian had a hand in this and . . . I wonder if it was one of those situations where he had directed me via phone call perhaps or some, you know, not written correspondence, but to basically take this action.
> Q. Move forward?
> A. Move forward.
> Q. Move forward with the lease in effect?
> A. Yeah.

(Doc. 31-3, Pollock Dep. 7:23-8:4, 79:21-80: 21, 82:13-23).

Likewise, Thedis Crowe, the BIA Browning Deputy Superintendent from 2009 to 2013 and the BIA Browning Superintendent from 2013 to 2021, testified:

> Q. Was it your understanding during the time you were deputy superintendent and superintendent, that the lease with Eagle Bear was in full force and effect?
> A. Yes.
> Q. And that was based on your review of the file and talking to the Tribe, talking to Eagle Bear, the records that you had?
> A. Yes . . . .
>
> . . .
>
> Q. When you had the supposed conversation with the [Nation's Tribal Business] council about the 2008 cancellation, what was their response?
> A. . . . I think it was just a really brief question or dialogue there about, well, this was canceled back in 2009. I'm sitting there thinking, well, then why did you guys issue them business licenses. Why did you guys allow them to continue doing business. Why did you take their money.
>
> Why have you, you know, nobody ever raised this question when Eagle Bear was paying in their rentals and royalties every year, why was the Tribe not raising this question for ten years or six years or seven years, you know.
>
> . . .
>
> Q. . . . And just for clarification, you didn't move forward with enforcing the 2008 cancellation, why?
> A. Because the violation had been cured. The payment had been made.

(Doc. 29-10, Crowe Dep. 11:15-12:6, 45:18-46:16, 85:1-13, 94:14-95:11, 97:3-20, 108:12-109:12).

Even Mark Magee, the Nation's Land Department Director responsible for administering the Lease testified:

> Q. Do you recall any discussions with Will Brooke back in January 2009 about this situation with the campground and—

> A. I'm sure that I had conversations with Will. Specifically, I don't recall this conversation, no.
> Q. You understand that Eagle Bear stayed on the property and continued operating the campground, right?
> A. Yes. . . .
> Q. Was it your understanding that the lease remained in full force and effect?
> A. That's my understanding, yes.

(Doc. 29-3, Magee Dep. 31:23-33:5). Since January 2009, Eagle Bear invested over $2 million into the Campground and paid the Nation over $1.4 million in royalties and rent in reliance on the continued validity of the Lease. Every relevant party—BIA, the Nation, and Eagle Bear—believed that the Lease remained in full force and effect for over a decade after the January 5, 2009 appeal withdrawal.

The Nation now attempts to rewrite history and take advantage of BIA's poor recordkeeping. Seizing upon the lack of a "written decision" from BIA expressly retracting the June 10, 2008 cancellation and ignoring the regulations that prevented that decision from taking effect, the Nation attempts to transform BIA's decision to "move forward with the lease in effect" into a Lease cancellation. (Doc. 31-3, Pollock Dep. 80:15-16). Both the record and the law make clear that BIA did not finally and forever cancel the Lease. The Lease remains in full force and effect. The Court should deny the Nation's Motion and grant Eagle Bear's cross-motion for summary judgment.

BACKGROUND

The facts giving rise to this dispute are recited in detail in Eagle Bear's Brief in Support of Motion for Summary Judgment (Doc. 23). That discussion is incorporated herein by reference. Those facts material to this Motion are discussed below.

DISCUSSION

1. The Lease was never cancelled. BIA resolved the 2008 appeal by deciding the Lease remained in effect.

As Eagle Bear explained in its Brief in Support of Motion for Summary Judgment (Doc. 23) and in its Statement of Undisputed Facts in Support of Motion for Summary Judgment (Doc. 29) ("EB-SUF"), BIA's decision with respect to the June 10, 2008 letter and Eagle Bear's associated appeal was to accept Eagle Bear's cure and "[m]ove forward with the lease in effect." (Doc. 23 at 22-24; Doc. 31-3, Pollock Dep. at 80:5-21).

This decision is clear from the context of the June letter, the June appeal, and BIA's "subsequent agency conduct, especially further orders" in which it demanded and accepted payments, enforced terms of the Lease, and threatened to cancel the Lease for subsequent alleged defaults. *S. Utah Wilderness All. v. Off. of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1238-39 (10th Cir. 2010); EB-SUF ¶¶33, 35, 69, 72-77, 80-82, 85, 87-102, 109; Doc. 23 at 24-27.

This decision is also clear from BIA's interpretation of its record, which is entitled to "significant deference." *Phillips Petroleum Co. v. FERC*, 902 F.2d 795, 805 (10th Cir. 1973); *Gutkowski v. U.S. Postal Serv.*, 505 F.3d 1324, 1328 (Fed. Cir. 2007); *S. Utah Wilderness All.*, 620 F.3d at 1241-42. Notably, BIA administered the Lease for the next 14 years, knowing and believing that the Lease was in effect, and all BIA personnel that have been questioned on the topic have resoundingly denied that the Lease was finally and forever cancelled. (Doc. 23 at 28-32; EB-SUF¶¶98-108).

Nevertheless, the Nation persists in its attempt to retake the Campground. Ignoring the years of performance and the balance of the record, the Nation seizes upon the lack of any written decision from the Regional Director. The Nation concludes, without legal support, that Eagle Bear's January 5, 2009 withdrawal of its appeal reinstated the June 10, 2008 cancellation and "no final decision of the Regional Director was necessary to affirm the . . . cancellation." (Doc. 28 at 14-15). For the reasons discussed below, the Nation is incorrect.

a. Eagle Bear's appeal from the June 10, 2008 letter prevented the cancellation from taking effect.

There is no dispute on this principle of law. The Nation and BIA both agree that Eagle Bear properly and timely appealed the June 10, 2008 cancellation letter to the Regional Director. (Doc. 25 at 2; Doc. 26 at ¶¶5-7; Doc. 28 at 21; Doc. 32 at ¶90). The parties further agree that, pursuant to 25 C.F.R. § 162.621 (2008), the

appeal rendered the cancellation "ineffective" and preserved the Lease. (*See id.*) The primary dispute between the parties concerns the way in which the appeal was resolved and the effect on the June 10, 2008 cancellation letter.

b. The June 10, 2008 cancellation letter was not automatically "reinstated" following Eagle Bear's withdrawal of the appeal.

The Nation argues that the June 10, 2008 cancellation was "reinstated" by Eagle Bear's January 5, 2009 appeal withdrawal. Both BIA and Eagle Bear disagree.

The terms of the stay imposed by 25 C.F.R. § 162.621 (2008) are critical to the Nation's argument, but the Nation's brief avoids quoting the regulation. 25 C.F.R. § 162.621 (2008) is clear: A "cancellation decision will remain ineffective if the tenant files an appeal."

This regulation does not say that the cancellation will be ineffective until the appeal is resolved, until the appeal is withdrawn, while the appeal is pending, or anything of the sort. 25 C.F.R. § 162.621 does not include any temporal qualifier. Instead, the regulation states that the decision "will remain ineffective if the tenant files an appeal." 25 C.F.R. § 162.621 (2008) (emphasis added). Eagle Bear filed an appeal. An appeal of a cancellation invalidates the cancellation and, if cancellation is appropriate following appeal, the Regional Director must issue a new letter finally cancelling the lease. *Id.*

This interpretation is consistent with how BIA officials that actually issued the June 10, 2008 letter applied the regulation. Those officials did not believe the June 10, 2008 letter cancelled the Lease. (EB-SUF ¶¶94-96). Consistent with 25 C.F.R. § 162.621 (2008), they understood that a subsequent letter would need to be issued to cancel the Lease following Eagle Bear's appeal. (EB-SUF ¶¶94-96). No such subsequent letter exists. Instead, BIA "move[d] forward with the lease in effect." (Doc. 31-3, Pollock Dep. 80:13-16).

This interpretation is also consistent with BIA's position in this lawsuit. BIA claims that it "has not taken final action on the 2008 lease cancellation." (Doc. 25 at 5; Doc. 26 at ¶¶5-7). Eagle Bear disagrees that BIA has not taken final action. By its conduct, subsequent written orders, and the context of its resolution to the 2008 cancellation and appeal, BIA left the Lease in full force and effect. (Doc. 23 at 22-32; *see* Discussion Section 1, *supra*). But, BIA is correct that the January 5, 2009 letter did not somehow reinstate the cancellation. *See* 25 C.F.R. § 162.621 (2008). Contrary to the Nation's argument, BIA recognizes that only BIA could cancel the Lease, and BIA took no final agency action doing so. (Doc. 23 at 22-32).

The Nation's conclusory argument to the contrary—that the June 10, 2008 letter, or Eagle Bear's January 5, 2009 letter, constitute final agency action in which BIA finally cancelled the Lease—is not supported by any legal citation

(Doc. 28 at 14-15, 21-22) and is contrary to 25 C.F.R. § 162.621 (2008), BIA's interpretation of that regulation, and all parties' subsequent decade of performance knowing that the lease remained in full force and effect. (EB-SUF ¶¶33, 35, 69, 72-77, 80-82, 85, 87-109).

c. Although there is no written decision from BIA expressly referencing and resolving the 2008 appeal, BIA did not cancel the Lease.

The last document in BIA's 2008 cancellation and appeal files is Eagle Bear's January 5, 2009 letter. (EB-SUF ¶89). The Nation claims that this letter is meaningless other than as evidence that Eagle Bear withdrew its appeal. (Doc. 28 at 21-22, 30-36). The Nation claims that the letter is not an agreement with BIA, does not condition the withdrawal on any particular outcome, and does not otherwise affect the record or the status of the Lease. (*Id*.)

The Nation cannot ignore the contents of the January 5, 2009 letter while simultaneously relying on the letter to argue that the cancellation was "reinstated." The Nation is, strictly speaking, correct that the January 2009 letter does not contain "[t]he words 'condition', 'conditional', or 'agreement.'" (Doc. 28 at 34-35). Nevertheless, the letter's plain language and context confirm that Eagle Bear sent the letter understanding and believing that BIA accepted Eagle Bear's $15,000 payment as cure of the default identified in the June 10 letter, that BIA decided to "move forward with the lease in effect," and that BIA directed Eagle Bear to withdraw its appeal. (Doc. 31-13, Letter from Brooke to Pollock (Jan. 5, 2009);

Doc. 31-3, Pollock Dep. 80:13-16; EB-SUF ¶¶81-88). Eagle Bear would never have withdrawn its appeal if it believed that the Lease would be cancelled as a result. (*Id.*).

As Will Brooke put it:

> Tracy Tatsey called me. I know her testimony was she didn't recall that, she wouldn't have done that. She had thousands of leases she was managing. I had one. It was the most important thing in my life.
>
> I would not have made up some cockamamie story about, oh, all of a sudden in January I'm going to draft a letter and say, hey, guess what, guys, this is all good, it's withdrawn. . . . I'm going to compromise the interest of my company, my family, all of the investment we had made at that point in time by withdrawing the appeal when that effectively could have killed my chances to go on. That wasn't the case at all. . . .
>
> Nobody responded to [my January 5, 2009 letter], not by a phone call, not by an e-mail, not by a letter. And, furthermore, the course of conduct of the parties strongly suggest that the parties were working together and this thing was resolved.
>
> I certainly believed that because now in 2009 we continue to invest money in the campground, in your campground, in the Tribe's property. And I did so on the basis that we were good to go. In fact, between then and now, we put 1.7 million into the campground. Does that sound like a guy that thinks he's got a canceled lease?

(Doc. 29-4, Brooke Dep. 154:10-155:13)

The January 5, 2009 letter also demonstrates BIA's understanding that the Lease would remain in full force and effect going forward. Internal BIA copies and the relevant BIA officials' testimony establish that the Regional Director received a copy of the letter and the BIA Superintendent and Deputy Superintendent both reviewed the letter. (EB-SUF ¶87). Following such receipt

and review, no one at BIA denied, disputed, or contested the January 5, 2009 letter or suggested the Lease was cancelled. (EB-SUF ¶88). Instead, they proceeded to administer the Lease and to "move forward with the lease in effect." (EB-SUF ¶82; Doc. 31-3, Pollock Dep. 80:13-16). Considering these officials' fully informed review of the January 5, 2009 letter, their silence is telling. (Doc. 28 at 36).

The January 5, 2009 letter was the product of Eagle Bear's discussions with BIA. (EB-SUF ¶81). Tracy Tatsey, the BIA realty specialist, spoke with Eagle Bear, confirmed the violation had been cured, confirmed the Lease was current, confirmed Eagle Bear could proceed under the Lease, and directed Eagle Bear to withdraw the appeal. (*Id*.) The Superintendent agreed. Contrary to the Nation's arguments, Eagle Bear has not alleged otherwise during this matter. (Doc. 28 at 33; Eagle Bear's Statement of Disputed Facts Regarding Nation's Motion for Summary Judgment at ¶110 ("EB-SDF")). Critically, these facts and BIA's directions are confirmed by BIA's records, BIA's testimony, and the note Eagle Bear sent to Ms. Tatsey along with the letter. (EB-SDF ¶¶110-113; EB-SUF ¶¶81-87; Doc. 31-13 at 2 (Note accompanying Jan. 5, 2009 letter)).

The Nation contends that BIA officials deny ever discussing the 2008 cancellation, appeal, or withdrawal with Will Brooke. (Doc. 28 at 33; EB-SDF ¶¶111-113). The Nation is incorrect. Although some of the BIA officials denied a

specific recollection of such conversations, they believed that the conversations occurred. (EB-SDF ¶¶111-113; Doc. 29-20, Tatsey Dep. 42:2-43:6 ("Q. Do you think it is possible you had communications with Mr. Brooke and you just don't remember them? A. That's possible, yes. . . . Q. You don't think Mr. Brooke played this up when he said, Tracy, thanks for your help on this matter? A. No, I don't. Because he was a nice person. He would come in and visit with me. But I don't recall any specific conversations with him.") In fact, Superintendent Pollock believes not only that the conversations with Eagle Bear occurred, but also that Eagle Bear's withdrawal was directed by Regional Director Parisian, who decided that the parties should all "move forward with the lease in effect."[2] (EB-SDF ¶¶111-113; Doc. 31-3, Pollock Dep. 78:11-80:21, 91:23-92:3, 104:16-105:8).

Ultimately, the parties did so. They moved forward and continued to perform under the Lease for the next decade until, in its evolving effort to retake

[2] The BIA Regional Director's oral direction to the Superintendent to resolve the appeal and allow the Lease to "move forward in effect" is remarkably similar to what occurred in 2017. After the Superintendent refused to cancel the Lease absent arbitration in 2017, the Nation appealed to the Regional Director. While the appeal was pending, the Regional Director verbally told the Superintendent to retract its decision requiring arbitration, and cancel the Lease. (EB-SDF ¶ 126). The Superintendent's retraction occurred at the verbal direction of the Regional Director's office, without the Nation's consent, was treated as binding on the parties, and is not mentioned in the administrative record. (*Id.*) The Regional Director later held that the Lease was not cancelled in 2017. This decision was not a reinstatement or new lease. It was a decision that the Lease was never validly canceled and the Nation's consent was not required.

the Campground, the Nation began arguing the Lease was really cancelled in 2008. (EB-SUF ¶¶97-109). Although there was no written decision from BIA resolving the appeal, there was a decision. (*Id.*; Doc. 23 at 22-31; *see* Discussion § 1, *supra*). As demonstrated by the January 5, 2009 letter, BIA's testimony, the subsequent decade of performance under the Lease, and the record in this matter, BIA reached a final decision not to cancel the Lease. *Id*.

d. The Lease was not improperly "revived" or "reinstated," as the Nation claims. The Lease was never cancelled.

The Nation argues that under no circumstances could BIA have "revived" or "reinstated" the Lease without the Nation's consent. (Doc. 28 at 30-39). The Nation cites *Moody v. United States* for the idea that "a cancelled lease cannot be revived by oral agreement with the BIA." (Doc. 28 at 32 (citing *Moody v. United States*, 931 F.3d 1136 (Fed. Cir. 2019)). Likewise, it cites several IBIA decisions confirming that any Lease must be in writing, a lease cannot arise through oral agreement, and unauthorized occupation or holding over does not create a lease. (Doc. 28 at 31-32, 36-39).

These arguments all miss the mark and the cases the Nation cites have no bearing on the present dispute. Eagle Bear does not argue that BIA entered a "new" Lease with Eagle Bear. (*Compare* Doc. 28 at 31-39 *with* Discussion, *supra*; *see also* Doc. 23 at 22-33). On the contrary, BIA's position, BIA's record, the parties' conduct, and all material evidence confirm that BIA never cancelled the

original Lease in any final decision. (EB-SUF ¶¶81-109). Eagle Bear cured the violation and BIA proceeded to administer the original Lease for the next dozen years.

Even if the Nation's arguments about *Moody* were on-point, the Nation's misinterprets *Moody*. In *Moody*, the Federal Circuit held that BIA was not a party to a lease and, therefore, could not be sued for breach of contract. Contrary to the Nation's characterization, the Federal Circuit expressly left open, and did not resolve, the possibility that "originally written leases that were terminated" could be "orally revived on the same terms as in the previous written leases." *Moody*, 931 F.3d 1136 at 1142.

e. The Nation knew about and acquiesced in BIA's decision not to finally cancel the Lease.

The Nation claims it did not know about the June 10, 2008 cancellation letter, the subsequent appeal, or BIA's decision not to cancel the Lease. (*E.g.*, EB-SDF ¶¶123, 130). In truth, a copy of the June 10, 2008 cancellation letter and Eagle Bear's June 18, 2008 appeal were sent to the Nation by certified mail. (EB-SUF ¶¶72-74; Doc. 29-13, Letter from Brooke to Pollock at USA-AR-Supp_2142 (Jun. 18, 2008); Doc. 29-2, Dep. of Dawn Gray as 30(b)(6) Designee of the Nation at 40:2-41:16). The documents were received and signed for by the Nation employee responsible for receiving mail. (EB-SUF ¶74; Doc. 29-13, Letter from Brooke to Pollock at USA-AR-Supp_2142 (Jun. 18, 2008); Doc. 29-2, Dep. of

Dawn Gray as 30(b)(6) Designee of the Nation at 40:2-41:16). The signed receipt constitutes both actual and "constructive notice" to the Tribe. *Curtis Laducer v. Acting Great Plains Regional Director*, 48 IBIA 294, 302 (2009).

Additionally, Eagle Bear discussed the proceedings with the Nation's Land Department Director, who acknowledged Eagle Bear's payment and represented that neither the payment nor the appeal presented any issue for the Nation. (EB-SUF ¶80; Doc. 29-4, Brooke Dep. 134:19-24, 139:22-25, 147:22-25; Doc. 29-3, Magee Dep. 31:23-32:3, 34:3-5; Doc. 29-5, Brooke Aff. at ¶ 15). The Land Department Director testified to these discussions and his knowledge that Eagle Bear continued under the Lease after the 2008 BIA proceedings were resolved. (EB-SUF ¶80; Doc. 29-3, Magee Dep. 31:23-32:3, 34:3-5). As the Nation's Land Department Director put it, Eagle Bear was "a good tenant." (EB-SUF ¶30; Doc. 29-3, Magee Dep. 35:22-25).

2. The errors in the June 10, 2008 letter confirm that the only decision the Regional Director could have made was to reverse the cancellation.

Mistakenly assuming that BIA reached a final decision cancelling the Lease in June 10, 2008, the Nation argues that the statute of limitations prevents judicial review of an agency decision for correctness 6 years from the date of the final decision. (Doc. 28 at 22-23 (citing 28 U.S.C. § 2401(a)). That assumption and argument are incorrect for the reasons identified above and set forth below. (*See* Discussion § 1.b, *supra*).

Additionally, the statute of limitations does not prevent the Court from deciding *what* decision BIA reached and declaring the present state of the parties' rights with respect to the Lease. 28 U.S.C. § 2401(a); *Wind River Min. Corp. v. U.S.*, 946 F.2d 710, 713 (9th Cir. 1991) (relied upon by the Nation) (stating that 28 U.S.C. § 2401(a) applies "to actions brought under the APA which challenge a regulation on the basis of procedural irregularity").

With respect to the correctness of the June 10, 2008 cancellation, 28 U.S.C. § 2401(a) would not prevent the Court from reversing the cancellation even if the Nation were correct that a final decision cancelling the Lease existed. Because every party believed that the Lease was in full force and effect between January 5, 2009 and October 2019, no claim would accrue and the statute of limitations would be tolled at least until a court determined otherwise. EB-SDF ¶130. Based on the discovery rule and equitable tolling, the statute of limitations for reviewing a decision for correctness should not run until the parties discovered that an incorrect decision was made and should not run while the parties reasonably believe a correct, non-cancellation decision was in place. *Andersen v. U.S. Dep't of Housing and Urban Dev.*, 678 F.3d 626, 628-29 (8th Cir. 2012) ("For purposes of § 2410(a) a claim accrues when the plaintiff either knew, or in the exercise of reasonable diligence should have known, that he or she had a claim." (internal quotation marks omitted)); *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1184-85, 1193-96 (9th

Cir. 2001) (equitably tolling § 2410(a) based on INS officer's incorrect advice about the status of proceeding) *overruled on other grounds by Smith v. Davis*, 953 F.3d 582, 599 (9th Cir. 2020).

For these reasons, 28 U.S.C. § 2401(a) does not prevent the Court from considering the errors in BIA's June 10, 2008 cancellation decision. As explained below, those errors confirm that the Regional Director correctly resolved Eagle Bear's appeal by deciding to "move forward with the Lease in effect." (Doc. 31-3, Pollock Dep. 79:21-80:21, 91:23-92:3).

a. The June 10, 2008 cancellation was in error because BIA failed to follow the Lease's and regulation's notice procedures.

The parties agree BIA was required to give Eagle Bear written notice of its alleged defaults and an opportunity to cure those defaults before it could cancel the Lease. (25 C.F.R. § 162.618 (2008); Doc. 29-1, Lease at 19-21; *see* Doc. 28-30). The Lease and regulations required that such notice be given by certified mail. (25 C.F.R. § 162.618 (2008); Doc. 29-1, Lease at 19-21). The regulations required that notice be given at least 10 days prior to cancellation, and the Lease extended that time period to 30 days. (Doc. 29-1, Lease at 19-21; 25 C.F.R. §§ 162.618 & .619(b) (2008); *e.g. Long Turkey v. Great Plains Regional Director*, 35 IBIA 259, *3-4 (2000)).

Although the Nation argues otherwise, BIA cannot fulfill this notice and opportunity to cure requirement with a failed and deficient attempt to send notice

to Eagle Bear. If there is no delivery, no notice, and no opportunity to cure, BIA cannot terminate a Lease. 25 C.F.R. §§ 2.7, 162.615, .618 (2008); *see also Whiting v. United States*, 231 F.3d 70, 76 (1st Cir. 2000) (due process requires "notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action"); *United States v. Real Prop.*, 135 F.3d 1312, 1316 (9th Cir. 1998). The burden of proving adequate notice and opportunity to cure is on BIA. *Knecht Enterprises, Inc. v. Great Plains Regional Director*, 37 IBIA 258, 262-63 (2002); *see also United States v. One Toshiba Color Television*, 213 F.3d 147, 155 (3d Cir. 2000) (If the government "chooses to rely on less than actual notice [in proving due process was given], it bears the burden of demonstrating the existence of procedures that are reasonably calculated to ensure that such notice will be given"). The government must retain and produce signed certified mailing receipts in order to prove adequate notice. *See Knecht Enterprises, Inc.*, 37 IBIA at 262-63. Absent evidence of actual receipt, BIA cannot cancel a lease.

Here, the record demonstrates that the required notice was not given before BIA issued its June 10, 2008 letter. (EB-SUF ¶¶52-65). Although BIA attempted to send some notices to Eagle Bear by certified mail, it sent them to the wrong address, in winter, and it knew they were never received. (EB-SDF ¶¶59, 67-79; EB-SUF ¶¶54-65; Doc. 31-3, Pollock Dep. 49:3-8, 51:1-6).

The Nation's reliance on Paragraph 41 of the Lease to justify cancellation without notice to Eagle Bear is misplaced. That provision applies to notice between the *parties*, not to required notice by *BIA*. (Doc. 29-1 at 29). Why else would the clause require that "copies of all notices and demands shall be sent to the Secretary in care of the BIA at the Blackfeet Agency?" (*Id*. at 29-30). BIA would not be copying itself with notice. Most importantly, BIA cannot give the required notice by mailing a letter to the wrong address with no proof of receipt. *See Knecht Enterprises, Inc.*, 37 IBIA at 262-63; *One Toshiba Color Television*, 213 F.3d at 155.

i. BIA's January 15, 2008 letter was defective and did not give Eagle Bear notice or opportunity to cure the alleged defaults.

BIA's records include an unsigned letter dated January 15, 2008 that was directed to Eagle Bear and stated the Lease would be cancelled if Eagle Bear did not pay $15,000 of rent. (EB-SDF ¶59; Doc. 31-5). The letter never reached Eagle Bear. (EB-SDF ¶59; EB-SUF ¶¶54-55). Eagle Bear did not receive a copy of the letter until 2017 when BIA shared its administrative record. (*Id*.)

The letter was sent by certified mail to the Campground's physical address. (EB-SUF ¶53; Doc. 31-5). The certified mailing label for the letter confirms that the letter was returned to sender. (EB-SUF ¶54; Doc. 31-5). It was not received by Eagle Bear because the letter was sent to the Campground at a time when the Campground was closed for the winter and unoccupied. (EB-SUF ¶¶53-55).

The Nation speculates that the letter was forwarded to Eagle Bear in Bozeman. (Doc. 28 at 24; EB-SDF ¶¶60-61). But there is no evidence to support this speculation. To the contrary, the only evidence establishes that the letter was marked "Return to Sender. . . Unable to Forward." (EB-SDF ¶60; Doc. 31-5).

Regardless of whether the letter was forwarded to Bozeman, it was not received by Eagle Bear. (EB-SDF ¶59; EB-SUF ¶¶54-55). There are no certified mailing receipts showing Eagle Bear's signed receipt. The BIA Superintendent that issued the January 15, 2008 letter acknowledges that he knew that Eagle Bear did not receive it. (Doc. 31-3, Pollock Dep. 49:3-8, 51:4-6). Thus, the January 15, 2008 letter did not give Eagle Bear adequate notice and opportunity to cure its alleged default. (25 C.F.R. § 162.618 (2008); Doc. 29-1, Lease at 19-21).

ii. BIA's March 27, 2008 letter was defective and did not give Eagle Bear notice or opportunity to cure the alleged defaults.

BIA records include an unsigned letter dated March 27, 2008 that was directed to Eagle Bear and that stated the Lease would be cancelled if Eagle Bear did not pay $15,000 of rent. (EB-SDF ¶¶67-68; Doc. 31-6). The letter never reached Eagle Bear, and Eagle Bear did not receive a copy of the letter until 2017 when BIA shared its administrative record. (EB-SDF ¶¶67-76; EB-SUF ¶¶57-60).

BIA again directed the March 27, 2008 letter to the Campground's physical address while the Campground remained closed and unoccupied. (EB-SUF ¶¶57-59). However, the letter was also sent to the wrong zip code. (EB-SDF ¶70; EB-

SUF ¶57). It appears that the letter may have been rerouted and forwarded to Bozeman. (EB-SDF ¶¶73-74; Doc. 31-6). However, like the January 15 letter, the March 27, 2008 letter was never delivered to Eagle Bear and was returned to sender. (EB-SUF ¶¶57-60; Doc. 31-6). It was marked "Return to Sender. Unknown Reason. Unable to Forward." (EB-SUF ¶58; Doc. 31-6).

The BIA Superintendent that issued the March 27, 2008 letter acknowledged that he knew that Eagle Bear did not receive the letter. (Doc. 31-3, Pollock Dep. 51:1-6 ("Q. [The March 27, 2008 letter] was return to sender, unknown reason, unable to forward, right? A. Correct. Q. So you knew in March that Eagle Bear had not received this letter, didn't you? A. Yes."). BIA's March 27, 2008 letter did not give Eagle Bear adequate notice and opportunity to cure its alleged default. (25 C.F.R. § 162.618 (2008); Doc. 29-1, Lease at 19-21; Doc. 29-4, Brooke Dep. 133:3-15, 183:19-22).

iii. BIA's April 4, 2008 letter was defective and did not give Eagle Bear notice or opportunity to cure the alleged defaults.

BIA records include an unsigned letter dated April 4, 2008 that was directed to Eagle Bear (EB-SDF ¶77; Doc. 31-7). The letter did not state what amount of rent was due, for what period the rent was due, or any other detail about the alleged default. (*Id.*). Instead, it stated only that letters were previously mailed to Eagle Bear because "[r]ent is owed." (*Id.*) Thus, on its face, the letter provides insufficient notice to allow Eagle Bear to cure the alleged default. (*Id.*)

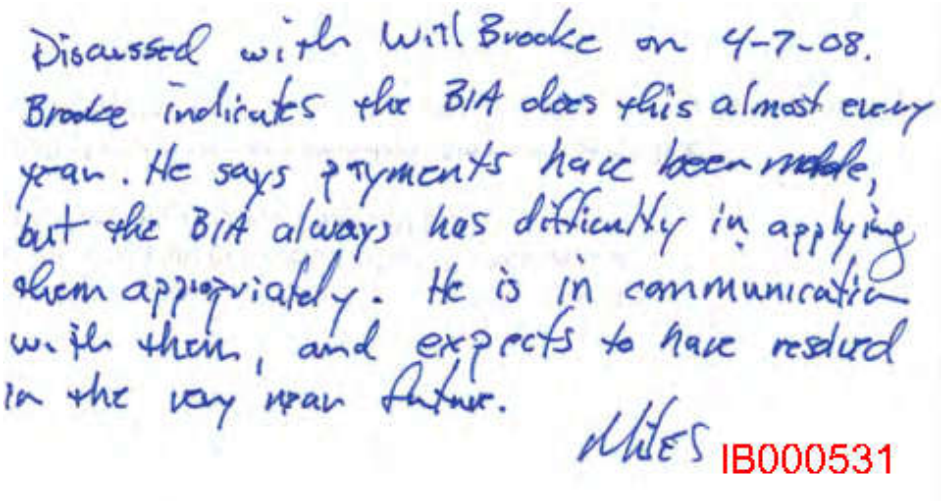
This failure ultimately made no difference, because, again, the April 4, 2008 never reached Eagle Bear. (EB-SDF ¶¶77-79; EB-SUF ¶¶62-65). Like the January 15 and March 27 letters, Eagle Bear never received a copy of the April 4, 2008 letter until 2017 when BIA shared its administrative record. (EB-SUF ¶65). Unlike the January 15 and March 27, 2008 letters, however, there is no evidence that BIA even attempted to send the April 4, 2008 letter to Eagle Bear by certified mail. (EB-SUF ¶64; Doc. 29-16, BIA's Responses to Plaintiff's First Discovery Requests at 23-25).

There are no copies of any envelopes BIA used to send the letter to Eagle Bear. (*Id*.). As BIA has admitted, there also are no certified mailing receipts or other mailing records for the letter. (Doc. 29-16, BIA's Responses to Plaintiff's First Discovery Requests at 22-23). BIA knows that Eagle Bear never received the letter. (*Id*.; Doc. 29-16, Pollock Dep. 51:4-6, 52:13-20). BIA's April 4, 2008 letter did not give Eagle Bear adequate notice and opportunity to cure any alleged default. (25 C.F.R. § 162.618 (2008); Doc. 29-1, Lease at 19-21).

iv. Independence Bank's alleged April 7, 2008 phone call did not give Eagle Bear notice or opportunity to cure the alleged defaults.

Although there is no evidence that the April 4, 2008 letter was mailed to Eagle Bear by certified mail or otherwise, it does seem that at least one copy of the letter was mailed. Independence Bank's files contain a copy of the April 4, 2008 letter. (EB-SDF ¶¶80-81; Doc. 33-25).

Independence Bank's copy includes handwritten notes that appear to be from the Bank's president, Miles Hamilton. (EB-SDF ¶80). That note, which is misquoted in the Nation's brief, reads:


Discussed with Will Brooke on 4-7-08. Brooke indicates the BIA does this almost every year. He says payments have been made, but the BIA always has difficulty in applying them appropriately. He is in communication with them, and expects to have resolved in the very near future.

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(Doc. 33-25).

The Nation takes this note to mean that Independence Bank shared a copy of the letter with Eagle Bear, read the letter to Eagle Bear, or otherwise informed Eagle Bear that BIA was threatening to cancel the Lease if Eagle Bear did not pay $15,000 by a particular date. (Doc. 28 at 26-27; EB-SDF ¶¶81-83). That is not the case. The note does not indicate that any such conversation occurred, and Will Brooke has testified that the conversation was much more general. (EB-SDF ¶¶81-83; Doc. 29-4, Brooke Dep. 126:2-127:8, 128:11-22, 129:4-25, 131:2-15). Indeed, the April 4, 2008 letter includes none of the detail that the Nation attributes to the conversation. (*Compare* Doc. 28 at 26-27 *with* Doc. 33-25).

Miles Hamilton told Will Brooke that there was an issue with BIA regarding rent payment. (Doc. 33-25; Doc. 29-4, Brooke Dep. 126:2-127:8, 128:11-22, 129:4-25, 131:2-15). Consistent with the past 10 years of demands and performance, Will Brooke expected formal demands to be delivered to Eagle Bear in the summer and expected to promptly pay those demands once Eagle Bear began making money. (EB-SUF ¶¶21-27, 51; Doc. 29-4, Brooke Dep. 127:4-8, 131:7-15). Brooke told Miles Hamilton that Eagle Bear would deal with it as such, which Eagle Bear did. (Doc. 29-4, Brooke Dep. 127:4-8, 131:7-15).

This conversation cannot cure BIA's failure to deliver the April 4, 2008 letter—or any other notice—to Eagle Bear. BIA was required to give Eagle Bear written notice and an opportunity to cure any alleged default. (25 C.F.R. § 162.618 (2008); Doc. 29-1, Lease at 19-21). BIA was required to give such notice by certified mail. (25 C.F.R. § 162.618 (2008); Doc. 29-1, Lease at 19-21). Had it done so, Eagle Bear would have promptly paid the demanded rent, just as in years past and just as it did in June of 2008. (EB-SUF ¶¶21-27, 51). BIA failed to give adequate notice and, therefore, was unable to cancel the Lease. (25 C.F.R. § 162.618 (2008); Doc. 29-1, Lease at 19-21).

b. The Lease was not cancelled in 2008 because Eagle Bear timely cured the alleged default.

The first notice Eagle Bear received of BIA's $15,000 payment demand was the June 10, 2008 letter, which Eagle Bear received on June 12, 2008. (EB-SDF

¶86; EB-SUF ¶¶67-68). Eagle Bear believed this June letter was consistent with BIA's past practices of sending a demand letter during Eagle Bear's summer season followed by Eagle Bear promptly paying the demand. (EB-SUF ¶¶21-27, 51, 67-69). Eagle Bear paid the $15,000 on June 16, 2008, and BIA cashed the payment on June 20, 2008, well within both the shorter 10-day cure period Eagle Bear was entitled to under BIA's regulations and the longer 30-day cure period that the Lease allowed. (EB-SDF ¶¶88-89; EB-SUF ¶69).

Eagle Bear also notified BIA in writing of this $15,000 payment. (EB-SDF ¶¶89-91; EB-SUF ¶71; Doc. 29-13). As the Nation notes, Eagle Bear mistakenly wrote that the payment was made on June 6th when the check was actually written on June 16th. (EB-SDF ¶91). The Nation ascribes some nefarious intent to this mistake, but it was just that: a mistake. (*Id.*; Doc. 29-4, Brooke Dep. 137:21-139:15). Critically, the mistake had no substantive impact on the Lease or the parties' rights. Regardless of whether the payment was made on June 6 or June 16, the payment was made well-before any deadline to cure the alleged default. (25 C.F.R. § 162.618 (2008); Doc. 29-1, Lease at 19-21).

The Nation also suggests that the cure was insufficient because Eagle Bear failed to pay interest and penalties that accrued between November 30, 2007, when the rent was due, and June 16, 2008 when the rent was paid. (EB-SDF ¶¶103-104). The Nation is incorrect.

When Eagle Bear paid $15,000 to BIA, it paid everything BIA demanded. (*Id.*; Doc. 31-5; Doc. 31-6; Doc. 31-7; Doc. 31-8). If BIA believed that Eagle Bear remained in default for failing to pay any additional amount, interest or otherwise, BIA was obligated to notify Eagle Bear of that position. (25 C.F.R. § 162.618 (2008); Doc. 29-1, Lease at 19-21). BIA never demanded any such interest from Eagle Bear. (Doc. 31-5; Doc. 31-6; Doc. 31-7; Doc. 31-8).

Moreover, to the extent it decides to demand interest or penalties, BIA's practice is to accept the overdue payment demanded as cure of any related default and then to subsequently calculate and demand the interest or penalty. (Doc. 30-4 at 2-3; EB-SDF ¶125). This is, for example, the practice BIA followed after the Nation claimed that payments were overdue in 2017, after Eagle Bear made the demanded payments, and after BIA concluded that the Nation's allegations were cured. (*Id.*) This practice makes sense considering that interest cannot be calculated until the overdue payment is made. (Doc. 29-1, Lease at § 6, p. 6). Eagle Bear paid the precise amount BIA demanded and cured its alleged default.

c. The Lease was not cancelled in 2008 because BIA failed to follow the Lease's dispute resolution provisions.

As BIA decided when it rejected the Nation's request to cancel the Lease in 2017, and as Eagle Bear explained in its Brief in Support of Motion for Summary Judgment (Doc. 23 at 33-34), the parties contractually agreed that "mediation and arbitration must be pursued before the lease can be cancelled for breach of

contract." (EB-SUF ¶33; Doc. 29-1, Lease at 1, 23, 35-38). The Nation does not dispute this point, and this arbitration requirement is further evidence that BIA's June 10, 2008 letter was issued in error. (*See* Doc. 28). BIA could not cancel the Lease in 2008 before the parties arbitrated the alleged late payment issue. (EB-SUF ¶33; *Patencio v. Deputy Assistance Secretary*, 14 IBIA 92, 98 (1986)). The only correct decision the Regional Director could have made on appeal was to reverse the cancellation.

CONCLUSION

BIA never finally cancelled the Lease, and the Lease remains in full force and effect. This is clear from the context, the parties' conduct, and the testimony of the relevant BIA officials regarding their beliefs about the Lease's continuing validity. The only argument the Nation offers otherwise is its unsupported statement that Eagle Bear's January 5, 2009 withdrawal "reinstated" BIA's June 10, 2008 letter. But that conclusion is contrary to BIA regulations and to the decade of subsequent performance by the parties. Regardless of whether BIA was initially correct to issue the June 10, 2008 cancellation, BIA ultimately decided to "move forward with the lease in effect." (Doc. 31-3, Pollock Dep. 80:13-16). The Court should, therefore, deny the Nation's motion for summary judgment and either decide that the Lease remains in full force and effect or that the current status of the Lease presents a genuine issue of material fact.

Dated this 14th day of December, 2022.

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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 6,468 words long, excluding the Caption, the Certificates of Service and Compliance, Tables of Contents and Authorities, and Exhibit Index.

Dated this 14th day of December, 2022.

CROWLEY FLECK PLLP

By /s/ Neil G. Westesen
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 2022, a true and correct copy of the foregoing was delivered by the following means to the following:

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